



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC MISC. APPLICATION NO. 42 OF 2020

(FORMERLY COMMERCIAL & ADMIRALTY DIVISION

MISC. APPLICATION NO. E630 OF 2020)

VIRUNGA LIMITED

VIRUNGA APARTMENTS

MANAGEMENT LIMITED.....APPLICANTS

VERSUS

NAVIN PREMJI KERAI

(Sued in his own name & in

his capacity as a Co-administrator of the

Estate of SAPNA KANJI PATEL

HIRBAI PREMJI KERAI

(Sued in her capacity as a

Co-administrator of the Estate

of SAPNA KANJI PATEL (Deceased).....RESPONDENTS

RULING

1. What is at the heart of this dispute is the ownership of six apartments erected on land reference number (L.R No.) 1870/IV/182 Nairobi known as Apartment numbers 1A, 1B, 2A, 2B, 3A and 3B together with their respective stores (“the Apartments”). The Applicants filed the Originating Summons dated 28/2/2020 seeking various orders relating to the arbitration in respect of the dispute over the Apartments. It sought a declaration that the arbitrator, the Honourable Njeri Kariuki appointed to adjudicate over the dispute between the Applicants and the Respondents over the ownership of the Apartments pursuant to clause 4.4 of the leases dated 15/6/2015, did not have jurisdiction to entertain or determine questions relating to firstly, whether the Apartments belonged to or were registered in the names of a third party known as Kanji Kunverji Patel at the time of transfer to the 1st Respondent and the late Sapna Kanji Patel; secondly, whether the Apartments were transferred to the 1st Respondent and the late Sapna Patel; and thirdly, whether the transfer of the Apartments was in the form of a gift.

2. In addition, the Applicants sought a declaration that the arbitrator lacked jurisdiction to receive, admit, entertain or act on any evidence submitted by the parties for purposes of proving questions which fell outside her jurisdiction or whose admissibility was barred by law. Lastly, it sought a declaration that the arbitrator lacked jurisdiction to grant orders compelling Kanji Kunverji Patel to gift the Apartments to the 1st Respondent or to honour an alleged promise to give the Apartments to the 1st Respondent, this being the substance of the Respondents’ counterclaim in the arbitration.

3. The Originating Summons had several other prayers but Mr. Arwa who appeared for the Applicants informed the court on 12/11/2020 that the Applicants would only be pursuing the issue of the jurisdiction of the arbitrator to entertain the issues outlined in the Originating Summons. The Applicants were therefore pursuing prayers numbers 7, 8 and 9 of the Originating Summons.

4. Karsan Harji Raghvani swore the affidavit in support of the Originating Summons and averred that on 15/6/2015, the Applicants

transferred the Apartments vide separate leases to the 1st Respondent and the late Sapna Patel. He produced copies of the leases. Mr. Raghwani signed the leases as one of the directors of the 1st Applicant. According to him, it was covenanted that the 1st Applicant was the indefeasible owner of the Apartments having erected them on the land and it agreed to transfer the leasehold interest to the 1st Respondent and the late Sapna Patel in consideration of Kshs. 14,150,000/= being the purchase price for each Apartment and not by way of gift. He stated that consequent upon the transfer, the 1st Respondent and the late Sapna Patel became tenants in common of the Apartments while the 1st Applicant remained the lessor of the Apartments.

5. He averred that that was the factual background upon which the leases were entered into and the parties who signed the contracts could not resile from those agreements. He contended that none of the parties to the contract could subsequently dispute these facts and therefore no dispute was contemplated as between the parties to the contracts relating to the correctness of these facts. He emphasised that clause 4.4 of the leases did not relate to the facts admitted and that it only related to any other matter which was not settled by the terms of the contract. Clause 4.4 provided that all disputes touching on the contract or their interpretation or application or on the rights and liabilities of the parties would be referred to a single arbitrator to be appointed as stipulated in the leases.

6. He urged that even though the leasehold interest in the Apartments was transferred to the 1st Respondent and the late Sapna Patel, the purchase price was never paid following which the Applicants instituted arbitration proceedings against the 1st Respondent pursuant to clause 4.4 of the leases seeking *inter alia* rescission of the contracts for failure of consideration and reconveyance of the Apartments to the 1st Applicant. He adverted to the defence and counterclaim filed by the Respondents and insisted that the Respondents admitted that the 1st Applicant was the lawful proprietor of the Apartments and could lawfully transfer the interest in the Apartments; and further that the 1st Respondent and the late Sapna Patel acquired their proprietary rights over the Apartments pursuant to the lease and not in any other way and that the lessees were legally bound to pay the purchase price for each Apartment.

7. Mr. Raghwani faulted the arbitrator for assuming jurisdiction over a dispute which he contended was not and could not reasonably have been contemplated by the parties at the time the arbitral clause was included in the leases and for assuming jurisdiction over matters which had been determined by the terms of the said contract. According to him those were excluded from the scope of the arbitrator's jurisdiction and were in contravention of Section 29 (5) of the Arbitration Act which enjoins the arbitral tribunal to act strictly in accordance with the terms of the contract pertaining to the arbitral clause. He maintained that the issues as to whether the Apartments belonged to the 1st Applicant or Mr. Kanji Patel; whether the Apartments were transferred by Mr. Kanji Patel; and whether the Apartments were transferred by way of sale or gift fell outside the jurisdiction of the arbitral tribunal.

8. Further, he faulted the arbitrator for admitting and considering evidence in proof of matters that fell outside the jurisdiction of the arbitral tribunal in violation of Sections 20 (3) and 29 (4) of the Arbitration Act. These related to several propositions including: that a limited liability company was not a separate legal entity from its shareholders and directors; that properties owned by a limited liability company could be alienated by its directors or shareholders which would lead to the conclusion that a person who does not have a proprietary interest in a property could competently transfer that property to a third party; that a person who executed an instrument of conveyance registered in the lands registry could be permitted to deny that that property belonged to the vendor at the time when the instrument was executed or that a tenant could legally challenge or deny the title of the lessor. In addition, he contended that this would support the proposition that extrinsic evidence could be received for purposes of contradicting or barring the written terms of contract.

9. Mr. Raghwani averred that the Applicants filed the application dated 9/4/2019 seeking a preliminary declaration that the arbitrator lacked jurisdiction to consider or act on evidence in proof of matters which fell outside her jurisdiction or whose admissibility was barred by law. They also sought an order directing the preservation of the rental income derived from the Apartments until the arbitral proceedings were concluded. The arbitrator heard the application and dismissed it vide a preliminary award referred to as Award Number 1 dated 4/2/2020. He attached a copy of the preliminary award vide which the arbitrator found that she had the jurisdiction to determine the questions objected to by the Applicants and to consider the evidence submitted in proof of those questions. He faulted the arbitrator for not making any determination on the Applicants' prayer for an interim measure of protection to preserve the rental income from the Apartments until the arbitral proceedings were concluded. He maintained that that refusal constituted a violation of the right to equal treatment of the parties in the arbitration which is entrenched in Section 19 of the Arbitration Act. He maintained that it was not legally or logically possible for parties to a contract to have matters which were already settled in the contract signed between them referred to arbitration. He added that a party cannot declare in a written contract that he had purchased property and then refer to arbitration a dispute as to whether or not he purchased that property.

10. Navin Premji Kerai swore the affidavit in opposition to the Originating Summons. He averred that he together with his late wife Sapna Kanji Patel were the registered owners of the Apartments. He maintained that the instant suit was *res judicata* in that the Applicants sought the same orders in **ELC Suit No. 667 of 2017** which this court determined vide the ruling dated 26/7/2018. He annexed a copy of the decision together with the pleadings in that suit.

11. He maintained that under clause 4.4 of the leases the arbitrator was clothed with jurisdiction to determine all disputes that would arise between the parties touching on the lease or its construction. He urged that that clause gave the arbitrator jurisdiction not only to consider the terms of the leases but also to consider the circumstances surrounding the execution of the leases so as to give the arbitrator a clear picture so she could reach a just determination of the dispute.

12. He added that the wording of clause 4.4 of the leases meant that all matters pertaining to the leases including the circumstances surrounding their execution formed part of the lease agreements and had to be taken into consideration when determining any dispute arising from the leases. He urged that clause 4.4 made it clear that the leases were not intended to be the entire agreement between the parties and the arbitrator could look into the circumstances surrounding the execution of the leases.

13. He further relied on the consent recorded by the parties before the Court of Appeal in **Civil Application No. 208 of 2018 (UR230/2018)** vide which the parties referred the dispute to arbitration and indicated that they would refer all issues relating to the ownership of the Suit property and the income arising from it for hearing and determination by the arbitrator. He urged that an interpretation of the order from the

Court of Appeal which was entered into by consent of the parties clothed the arbitrator with the jurisdiction to determine all disputes relating to the ownership of the Apartments. He maintained that the gift thesis formed part of the circumstances surrounding the acquisition of the Apartments by the Respondents and had to be considered by the arbitrator in order to arrive at a just determination of the dispute. He relied on Section 20 (4) of the Arbitration Act which enjoins arbitral tribunals to decide on the substance of the dispute according to consideration of justice and fairness without being bound by the rules of law if the parties expressly authorised it to do so.

14. He maintained that his father in law, Mr. Kanji Kunverji Patel was not a third party or stranger to the leases over the Apartments, and that he was a director and major shareholder of the 1st Applicant. He reiterated that Mr. Patel had authority to transfer the Apartments to the Respondents through a gift.

15. Mr. Kerai averred that the Applicants were bound by the averments and the pleadings they filed in **Nairobi ELC No. 667 of 2017**. He pointed out that the averment that the Respondents did not pay the purchase price was not contained in the leases and he believed it would certainly require extrinsic evidence to explain the circumstances of the gift thesis in order to demonstrate how and when the Apartments were transferred to the current owners and the circumstances surrounding the transaction to enable the court or the arbitral tribunal get a clear picture of all the issues involved to aid in reaching a just decision.

16. Mr. Kerai averred that the Applicants had not demonstrated how the arbitral tribunal exceeded its mandate nor had they furnished reasons as to why evidence which would help in the determination of the dispute should not be placed before the tribunal. He referred to the gist of the preliminary award in which the arbitrator found that the scope of her jurisdiction was not curtailed in any way and that clause 4.4 was very wide and allowed her to delve into the construction of or application of the clauses in the leases and the rights and liabilities of the parties under the leases. The arbitrator found that a hearing on the merits would have to be held and evidence adduced in order to settle the matters between the parties. He urged the court to dismiss the Applicants' claim.

17. Parties filed the submissions which the court has considered. The Applicants submitted that the questions which this court was called upon to determine was whether the arbitration clause gave the tribunal jurisdiction to entertain issues relating to whether the Apartments did not belong to the Applicants, or whether they belonged to Kanji Kunverji Patel, and whether they were given to the Respondents as a gift. They argued that the arbitrator could not lawfully have made the determinations that a person duly registered as proprietor of a property was not its owner and that a third party could pass a good title of immovable property or that shareholders could dispose of properties of a company. The Applicants submitted that the arbitrator had no jurisdiction to entertain any matter which would contradict the express provisions of the contract pursuant to which she was appointed.

18. The Applicants relied on the case of **Cape Holdings Limited v Synergy Industrial Credit Limited [2016] eKLR** where the court found that the arbitrators had ignored the terms of the contract pursuant to which they had been appointed and effectively rewrote the contract between the parties. The Applicants submitted that the 1st Respondent and his late wife were to pay the purchase price for the Apartments of Kshs. 14,150,000/= per Apartment together with the other payments referred to in the leases while the Applicants were to convey the Apartments to the 1st Respondent with his deceased wife. The Applicants maintained that the only dispute that the arbitral tribunal could entertain was the allegation that either party failed to discharge its obligations under the leases. They therefore urged that the arbitrator could determine whether the purchase price for the Apartments was paid but lacked jurisdiction to entertain the question as to whether a third party being Kanji Kunverji Patel and his son Deepak Patel honoured the obligations to gift the Apartments to the 1st Respondents and his late wife. They maintained that the leases executed did not contain an obligation on the part of Kanji Kunverji Patel to give the Apartments to the 1st Respondent and his late wife.

19. The Applicants relied on the case of **Kenya Tea Development Agency Limited and others v Savings Tea Brokers Limited [2015] eKLR** in which the court held that the jurisdiction of the arbitrator was tethered by the arbitration agreement, reference and the law and that the express words used in the arbitration agreement or as interpreted with reference to the subject matter of the contract would determine whether a claim based on tort was contemplated by the agreement or whether the claim fell within the scope of the reference for arbitration. Further, the court held that even where general or broad words were used in the arbitration agreements the courts would still interpret them by reference to the subject matter of the contract. The Applicants submitted that the arbitrator lacked jurisdiction to entertain the contentions she entertained which were contradicted by the provisions of the contract pursuant to which she was appointed.

20. The Applicants relied on Section 29 (4) of the Arbitration Act and urged that the arbitrator was not expressly authorised by the parties to ignore the rules of law and was therefore bound by the rules of law. The Applicants contended that the arbitrator had no jurisdiction to entertain a claim which was barred by law or by a specific provision of a contract and gave some examples of the contentions prohibited by law which relate to the doctrine of separate corporate personality which prohibits shareholders from claiming proprietorship of the assets of the company; the doctrine of estoppel and the no extrinsic evidence doctrine. The Applicants contended that the separate corporate personality doctrine prohibited the arbitrator from entertaining the claim that properties belonging to the 1st Applicant which is a company could be disposed of legally by an alleged shareholder. Further, they contended that a person who did not have a title to a property could not confer title over that property on another person. They maintained that it was the Applicants who transferred the title over the Apartments to the 1st Respondent and his late wife.

21. The Applicants relied on Section 121 of the Evidence Act on the point that a tenant was prohibited from denouncing the title of his landlord during the subsistence of his tenancy and urged that the Respondents should not be permitted to deny the Applicants' title in the Apartments. Further, that they should not be permitted to advance the argument that the Apartments were gifted to them by a third Party, Mr. Kanji Patel rather than the Applicants. They urged that the arbitrator did not have jurisdiction to entertain the claim that the suit premises were gifted to the 1st Respondent and his late wife.

22. The Applicants urged that the doctrine of contractual estoppel precluded a party who had concluded a contract with another person on the basis of a certain state of agreed facts from subsequently denying that the facts were otherwise rather than what was captured in the contract. The Applicants relied on the case of **Spring Well Navigation Corporation v J. P Morgan Chase Bank and 8 others [2010] EWCA Civ 121/2010 2CLC 705**. The Applicants contended that the leases executed between the Applicants and the Respondents covenanted that the Apartments belonged to the Applicants and were transferred by them by way of sale and not gift to the 1st Respondent and his late wife.

23. The Applicants contended that the executed leases settled the terms of the transaction pursuant to which the Apartments were transferred to the 1st Respondents and his late wife. They urged that Section 98 of the Evidence's Act prohibited the arbitrator from receiving extraneous evidence in contradiction of the terms of the leases and that the Respondent's argument that there was an oral agreement to transfer the Apartments by way of a gift was inadmissible. The Applicants relied on the case of **Peter Mujunga Gathuru v Harun Osoro Nyambogi & Another [2015] eKLR** on the admissibility of extraneous evidence in proof of the terms of a written contract for the disposition of an interest in property. They also relied on Section 98 of the Evidence Act in urging that the alleged oral agreement was excluded by law. The Applicants concluded that the arbitrator had no power to adjudicate on the contested matters or to receive evidence relating to those matters. The Applicants submitted that they were aggrieved by the arbitrator's failure to consider or determine their application for interim measures of protection and contended that *res judicata* did not apply to these proceedings.

24. The Respondents submitted that the orders sought by the Applicants had already been canvassed before a court of competent jurisdiction and settled by judicial decision. They relied on Section 7 of the Civil Procedure Act and the case of **Accredo AG & 3 others v Steffano Uccelli and another [2019] eKLR**. The Respondent submitted that clause 4.4 of the lease agreement gave the arbitrator the jurisdiction to determine all disputes and questions that would arise between the parties touching on the leases or their construction or application. They submitted that the arbitrator's jurisdiction under that clause could not be restricted. They relied on the case of **Joma Investments Limited v NK. Brothers Limited [2018] eKLR** where the court held that the scope of an arbitrator's jurisdiction was determined by the terms of arbitration agreement and the subject matter of the dispute as contained in the pleadings filed before the arbitral tribunal. They submitted that clause 4.4 of the leases empowered the arbitrator to consider the circumstance surrounding the execution of the agreements by the parties to ensure the arbitrator got a clear picture of the dispute and to aid her in arriving at a just determination. They urged that it was not the intention of the parties to be bound only by the lease agreement but also by the circumstances surrounding the execution of the leases.

25. They urged the court to pay heed to the terms of the consent recorded by the parties in the Court of Appeal when they referred the dispute to arbitration and agreed to refer all issues relating to the ownership of the Apartments and the income from it for hearing and determination by the arbitration. They urged that the Applicants had consented to the arbitrator considering all issues relating to the ownership of the Apartments which would include the circumstances surrounding or leading up to the acquisition of the Apartments by the Respondents. They contended that the gift theory formed part and parcel of the agreement and should be considered in arriving at a just decision.

26. On the contention that a consent order was binding unless it was challenged on grounds of fraud, they relied on the case of **Board of Trustees of National Social Security Fund v Michael Mwalo [2015] eKLR**. They added that the gift theory was essential in demonstrating how and when the Apartments were transferred to the Respondents and the circumstances surrounding the transactions so as to give a court a clear picture of all the issues involved and aid it in reaching a just decision. They contended that Kanji Kunverji Patel was not a stranger to the lease agreement and that it was not incumbent upon the Respondents to inquire whether Kanji Kunverji Patel had authority to transfer the Apartments to the Respondents by a way of a gift. They pointed out that the leases presented before the court were executed by Kanji Kunverji Patel as the director of the Applicants and his participation in the transaction relating to the Apartments could not be wished away.

27. The Respondents contended that the Applicants had failed to demonstrate how the arbitrator overstepped her mandate or why evidence which would help the arbitrator in determining the issue at hand should not be placed before the arbitrator. They relied on the case of **Equity Bank Limited v Adopt a Light Limited [2014] eKLR** where the court held that an arbitrator sitting as a tribunal had authority to interpret contractual documents and that the law gave the arbitrator enough latitude to interpret those documents in a manner which made them more effective without rewriting the contract. The court added that it would accept a genuine attempt by a tribunal to bring efficiency into a contract without purporting to rewrite it. The court further stated that in order to succeed in showing that the matters objected to were outside the scope of the reference to arbitration it must be shown that the arbitrator had gone on a frolic of his own to deal with the matters that were not related to the subject matter of the dispute.

28. On the extrinsic evidence doctrine the Respondents relied on the decision in **Fidelity Commercial Bank Limited v Kenya Grange Vehicles Industry Limited [2017] eKLR** where the court held that evidence surrounding circumstances would be admissible to assist in the interpretation of the contract if the language was ambiguous or capable of more than one meaning but not to contradict the language of the contract when it had a plain meaning. Extrinsic evidence of terms additional to those in the written document would be admitted if it was shown that the document was not intended to express the entire agreement between the parties. The court further stated that when parties arrived at a definite written contract the presumption was that such a contract was intended to contain all the terms of their bargain but it was open to either of the parties to allege that in addition to what appeared in the written agreement, there was an antecedent stipulation intended by the parties to continue in force with the express written agreement. The court stated that the mere production of a written agreement however, complete it may look would not as a matter of law render other terms not expressly included in the document inadmissible as evidence. The court stated it must be determined that the terms of the parties' agreement were wholly contained in the written document and whether the parties had so agreed or intended was a matter to be decided upon consideration of all the relevant evidence.

29. The Respondents submitted that clause 4.4 of the leases and the circumstances surrounding the execution of the leases excluded the strict application of the parole evidence rule and the arbitrator was free to consider all that was relevant to the dispute. They added that that was the approach parties took in the course of the proceedings being guided by direction 4.6 in the order for Directions 1 issued by the arbitrator.

30. The Respondents submitted that they were not required to inquire whether Kanji Kunverji Patel had authority to transact with and transfer the Apartments to the Respondents by a way of a gift and relied on the decision in **Samuel Mureithi Muriuki & Another v Kamahuha Limited [2018] eKLR and Chai Housing Co-operative Society Limited v Marie Wambui Thande [2019] eKLR**.

31. The Respondents contended that the authorities the Applicants relied on were not relevant to the issues at hand. They urged that in **Cape Holding Limited v Synergy Industrial Credit Limited** there was an express clause on the conclusiveness of the contract unlike the circumstances of this case. Further, that the award had been challenged on the grounds that it was contrary to the policy of Kenya.

32. On the issue of estoppel, the Respondents contended that it was only a rule of evidence and denied that the Applicants had demonstrated that they relied on a promise to their detriment. They contended that the gift theory was not barred by proprietary estoppel. They contended that Section 121 of the Evidence Act was not applicable and distinguished a lease from a tenancy. The Respondents added that at the time the preliminary award was made by the arbitrator no issues for determination had been framed or agreed upon by the parties. They urged that the

issues could be discerned from the Statement of Claim and the Defence and Counterclaim. They referred to Directive 2 of the order for directions 1 given by the arbitrator and stated that they complied with the directions and filed the requisite documents.

33. The Respondents contended that the Applicants waived their right under Sections 97 and 98 of the Evidence Act when they brought a claim under paragraph 6 (k) of the Amended Reply to Defence and Defence to Counterclaim dated 8/4/2019 which stated that the Applicants gave the Respondents 2 and ½ years to pay the purchase price for the Apartments which they bought but they failed to do so. They submitted that the in agreement for sale between the 1st Respondent and the Applicants, the period for completion of the payments could be ascertained from the documents. They added that clause 1 of the leases expressly stated that the consideration had been paid at the time of executing the lease.

34. The Applicants filed a Reply to the Respondent's Written Submissions and asserted that the arbitrator must be guided by the entire contract and should not confine herself solely to the arbitral clause in the contract. They added that the arbitrator must act in accordance with the law unless the parties expressly authorised her to ignore the law as stipulated in Section 29 (4) of the Arbitration Act. They reiterated that where a contract described the transaction as a sale and fixed the purchase price it could not contemplate that a dispute would arise in future as to whether it was a sale or a gift. They emphasised that matters expressly settled by law could not be determined by an arbitrator.

35. Looking at the order dated 20/12/2018 which was extracted from the consent that the parties recorded before the Court of Appeal, they agreed to refer all issues relating to the ownership of the suit property and all income arising from the suit property for hearing and determination by the arbitrator. The order is couched in very general terms and would therefore give the arbitrator jurisdiction to determine all issues relating to the ownership of the Apartments which could include the circumstances in which the leases were entered into; whether the purchase price was to be paid by the lessees or if the consideration was by way of a gift; who were the parties involved in the transaction and other factors relating to the rights and obligations of the parties to the contracts. Evidence as to how the 1st Respondent and the late Sapna Patel came to be registered as the lessees of the Apartments would have to be adduced and analysed for the dispute to be conclusively determined.

36. The contentious clause in the leases dated 15/6/2015, which is clause 4.4 on referring disputes to arbitration reads thus:

“All disputes and questions whatsoever that shall arise between the parties touching this Lease or the construction or application thereof or any clause or thing herein contained or the rights and liabilities of any party under this Lease shall be referred to the decision of a single arbitrator to be appointed in accordance with the provisions of the Arbitration Act 1995 (Laws of Kenya) or any other law replacing the same. The decision of such arbitrator shall be final conclusive and binding on the parties.”

37. The leases were between Virunga Limited as lessor and Virunga Apartments Management Limited as manager of the Apartments on the one hand, and Sapna Kanji Patel and Navin Premji Kerai as lessees on the other hand. The Applicants' main contention in this dispute is that the 1st Respondent failed to pay the consideration for the leases yet the wording of the lease at page 4 of the lease under the heading “Now this lease witnesseth as follows” states that the lessor acknowledged receipt of the consideration. On their part, the Respondents insist that the Apartments were given as a gift to the late Sapna Patel and the 1st Respondent.

38. If indeed the executed leases settled the terms of the leases as the Applicants contended, then the issue of nonpayment of the purchase price for the Apartments would not arise as the Applicants argue because on the face of it the leases state that the consideration had been paid and was acknowledged. Extrinsic evidence would not be admissible to prove that the consideration was never paid if one were to strictly construe the terms of the lease as drawn. In the court's view the Applicants are attempting to only have extrinsic evidence given of the leases which would favour their claim while requiring a strict interpretation where the Respondents are concerned. Such selective admission of additional evidence would not in this court's view assist the arbitrator or the court for that matter to arrive at a fair and just determination of the dispute over the ownership of the Apartments.

39. The Apartments could only have been transferred to the 1st Respondent and his late wife by the directors and shareholders of the Applicants, since the Applicants are limited liability companies. It is important for the arbitrator to consider all the circumstances surrounding the execution of the leases over the Apartments in order to determine the dispute between the parties. The Applicants have not demonstrated that the arbitrator attempted to rewrite the contract or that she dealt with matters which were not related to the subject matter of the dispute.

40. In the court's view the arbitration clause in the leases over the Apartments and the order recorded by the parties in the Court of Appeal clothed the arbitrator with the jurisdiction to hear and determine all disputes and questions arising between the Applicants and the Respondents touching on the construction and application of the clauses of the leases including the rights and liabilities of the parties to the lease.

41. The court finds that the arbitrator appointed to arbitrate on the dispute between the Applicants and the Respondents relating to the Apartments has jurisdiction to determine the questions framed by the Applicants in the Originating Summons dated 28/2/2020; and to receive, admit or act on evidence submitted by the parties for purposes of proving the questions framed by the Applicants in the Originating Summons.

42. The court declines to grant the orders sought in the Originating Summons dated 28/2/2020. The Applicants will pay the Respondents the costs of the suit.

Delivered virtually at Nairobi this 15th day of February 2021.

K. BOR

JUDGE

In the presence of: -

Mr. E. Ochieng holding brief for Mr. J. Arwa for the Applicants

Ms. H. Onyiego for the Respondents

Mr. V. Owuor- Court Assistant