Masai & another v Masai (Miscellaneous Civil Case E191 of 2023 & Miscellaneous Civil Application E232 of 2023 (Consolidated)) [2024] KEHC 3711 (KLR) (16 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3711 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CIVIL CASE E191 OF 2023 & MISCELLANEOUS CIVIL APPLICATION E232 OF 2023 (CONSOLIDATED)

RN NYAKUNDI, J

APRIL 16, 2024

BETWEEN

MOSES NDIEMA MASAI ..... 1ST APPLICANT

HILLQUEENS HOLDINGS LIMITED ..... 2ND APPLICANT

AND

LINET CHEPKEMOI MASAI ..... RESPONDENT

RULING

1. Before me are two applications for determination. The first application dated 7/09/2023 seeks to set aside an arbitral award and the second one dated 24/10/2023 seeks an adoption and enforcement of the arbitrator's award issued on 8/6/2023.

2. The application dated 7/09/2023 sought orders that the arbitral award made and published on 8th June, 2023 by Ms. Eunice Lumallas, the sole arbitrator in the matter of an arbitration between Linet Chepkemoi Masa vs Moses Ndiema Masai & M/s Hill queens Holdings Limited, be set aside in its entirety. The application was supported by the grounds on the face thereof and the sworn affidavit of Moses Ndiema Masai, the 1st applicant. He averred that the respondent referred a dispute to arbitration where she alleged that she had been excluded from the management of the 2nd applicant vide a letter dated 1st March, 2021.

3. On 13th May, 2021 the Chartered Institute of Arbitrators appointed one Ms. Eunice Lumallas as the sole arbitrator. The requisite pleadings were filed and the parties were heard. The applicant put it that upon close of the hearings, the arbitrator suggested to the Respondent's counsels that she has to file an application for appointment of experts in order to close the gaps in the Claimant's case. That the arbitrator further advised the Claimant to file an application for the appointment of an auditor to carry out a forensic audit.

4. He deponed that despite reluctance by the Claimant to file, the arbitrator in subsequent meetings insisted that the application had to be filed and which was subsequently filed on 1st July, 2023. Vide a ruling delivered on 24th August, 2022 but which was dated 10th August, 2022, the Arbitral Tribunal allowed the application.

5. The 1st Applicant moved to court to challenge the Ruling vide Eldoret High Court Miscellaneous Application No. E159 of 2022 between Moses Ndiema Masai & Ano. Vs Linet Masai, which application is yet to be heard and determined. He averred that the arbitrator subsequently appointed her own auditor M/s Mcjoel & Associates who did not carry out the intended audit but filed a report based on assumptions which report is undated and forwarded to the parties by the arbitrator on 20th December, 2022.

6. The arbitrator thereafter delivered her award, which the applicant was dissatisfied and opted to challenge the same on the following grounds:

    a. That the arbitral award deals with a dispute not contemplated by and not falling within the terms of the reference to arbitration.

    b. That the arbitral award contains decisions on matters beyond the scope of the reference to arbitration.

    c. That the making of the award was induced or affected by fraud, bribery, undue influence or corruption.

7. According to the applicants, Article 21 of the Memorandum and Articles of Association does not give the arbitrator power to liquidate the company through an award and thereby make an unjustified order for refund of purported contributions of capital, payment of purported value of the company as a going concern and declaration on payment of exorbitant interest rates.

8. Clause 21 of the Memorandum and Articles of Association provides an arbitral clause on the following terms:

> "Whenever any difference arises between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction of the incidents, or consequences of these Articles, or of statues, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these article, or any claim on account of any such breach or alleged breach, otherwise relating to the premises, or these articles or to any statues affecting the company, or to any of the affairs of the company, every difference shall be referred to the decision of the arbitrator, to be appointed by the Association of Arbitration Kenya Chapter, or if they cannot agree on a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by the parties in difference."

9. The 1st applicant averred that the award is in conflict with the public policy. That the same has made reliefs for refund of the same thing and against the principle of unjust enrichment. That the award also flies on the face of company law and throws the known principle of Company under the bus.

10. The 1st applicant further averred that the making of the award was induced or affected by fraud, undue influence exerted by the sole arbitrator. That the sole arbitrator allowed the Claimant to produce documents including an extract of an alleged bank statement which had not been supplied to the Applicants herein prior to the hearing.

11. The Respondent on the other hand filed an application dated 24th October, 2023 seeking an order that the arbitral award dated, delivered and published at Nairobi on 8th June, 2023 by M/s Eunice Lumallas (sole arbitrator) be recognized, adopted, enforced as a decree of the court.

12. The application was premised on grounds that a dispute emerged between the parties herein concerning a memorandum and articles of association in respect of the 2nd Respondent signed on 20th March, 2012 and registered on 18th April, 2012. The parties failed to amicably resolve the dispute among themselves. Consequently, a sole arbitrator was appointed by the Chartered Institute of Arbitrators on 13th May, 2021 to arbitrate on the matter. The award was delivered on 8th June, 2023 and the same was never challenged.

13. In responding to the applicants' application dated 7/09/2023, the Respondent filed a supplementary affidavit and argued that the application is vexatious and marred with lies and ought to be summarily dismissed with costs to the Respondent.

14. Counsel argued that the decision made was well within the mandate of the tribunal and not once did the arbitrator make a decision out of the arbitral clause. That the applicant did not provide the excerpt of the said terms of reference of the dispute and pointed out the objects that had been intended to be determined by the tribunal and those ought not to have been determined by the tribunal.

15. The Respondent averred that prior to the referral of the present matter to the tribunal, the Respondent, Linet Masai had preferred a suit against the Respondents in the High court but the 1st applicant raised a preliminary objection seeking that the disputes between the Respondent and the applicant herein ought to be resolved through arbitration pursuant to Clause 21 of the Memorandum of Articles of Associations of the 2nd applicant.

16. The Respondent deponed that the high court upon hearing the preliminary objection, gave its ruling that the dispute be resolved through arbitration. Consequently, an arbitrator was appointed which saw the parties submit to the exercise, where all the parties were represented and actively participated in the process.

17. The respondent denied the averment by the 1st Applicant that the application seeking appointment of an auditor dated 7th July, 2022 was filed on advice of the arbitrator. That in any event no evidence of such advice has been provided by the Applicants. She argued that the application for appointment of an auditor was part of the prayers set out in the pleadings, and the arbitrator had the mandate to determine the issue. The Respondent added that the honourable arbitrator delivered an elaborate ruling on the matter indicating that the audit report was necessary for her to be able to render a final award resolving all the matters in dispute.

18. The Respondent distanced herself from the application alluded to by the 1st applicant i.e. Eldoret High Court Miscellaneous Application No. E159 of 2022 between Moses Ndiema Masai & Anor versus Linet Masai having never been served with any pleadings.

19. The matter came up for hearing and the parties were directed to canvass the two applications by way of submissions.

Applicants' submissions.

20. The Applicants raised the issue of whether the arbitral award deals with a dispute not contemplated by and not falling within the terms of the reference to arbitration. It was the Applicants' submission that the memorandum and articles of association of the 2nd applicant are very clear that the dispute in question ought to be between the company and a member. It was submitted that on the contrary

the Arbitral Award dealt with an alleged dispute between a member and a member, which happened outside the auspices of the company in every material aspect.

21. It was submitted for the applicants that the arbitrator ordered a refund of Kshs. 10,574,000/= together with interest at the rate of 14% from March, 2015 until payment in full. He however did not quote any provision in the Articles of Association that gave her the powers to do so.

22. The applicants maintained that the tribunal accepted evidence and made declarations that there was a joint venture agreement between the parties herein which had not been reduced into writing. That the tribunal did not have such luxury since there was the articles of association of the company which constituted the agreement between the parties. It was not open for the arbitrator to look outside the Articles of Association.

23. The applicants submitted that the arbitrator appears to have been interested at awarding a certain figure then work it out to arrive at a desired amount. That in ideal situations, the awards should be made for the profit of the company. It cannot be that the awards are made to benefit a member of the company to the detriment of the company and another member.

24. Counsel maintained that a member of a company can only benefits from the company by way of receiving dividends from the company. Where the company is dissolved then there are elaborate procedures of settling of liabilities and sharing the resultant equity after all liabilities have been met.

25. According to counsel, the law does not envisage a situation such as in the present case where one shareholder is ordered to pay monies to another shareholder which have not been explained to have a proper connection with the company. If indeed the Applicant has expended monies for the company, then the proper thing is to refund the company and not the individual shareholder. Shareholders can only gain through declaration of dividends.

26. The applicants concluded that the Arbitral tribunal allowed itself to be carried away by the personal differences between the parties herein without regard to the constituting instrument and the law and thereby arrived at a decision that was wholly bereft of jurisdiction to entertain. Counsel prayed that the award be set aside in its entirety and relied on the case of Dishad Sadrudin Mohammed as the Legal Representatives of the Estate of Sadrdin H. Mohammed (Deceased) v K&A Self Selection Stores Limited & 3 others (2014).

27. On the issue as to whether the arbitral award is in conflict with the public policy of Kenya, it was submitted for the applicants that for one to succeed in such a case of setting aside an arbitral award on grounds of public policy, one must demonstrate that the award was made contrary to *the constitution* of Kenya, the laws of Kenya whether written or unwritten, inimical to national interest of Kenya and contrary to justice and Morality.

28. The applicants identified grounds that qualify the instant arbitral award as one that is against public policy and submitted on them extensively. The grounds are:

    a. The award has granted both the main and alternative reliefs in the Respondent's Memorandum of Claim.

    b. The award amounts to double compensation and thus results in unjust enrichment of the Respondent against the Applicant.

    c. The award is contrary to the principles of company law under the *Companies Act*, 2015.

    d. The award breached Article 50 of *the constitution* of Kenya since the Applicant denied the right to be heard.

29. It was submitted for the applicants that in arbitration proceedings, an arbitrator should not act as an advocate for one of the parties. The arbitrator must always be fair and impartial in the proceedings. Counsel maintained that the arbitrator was not impartial as she demonstrated biasness against the applicants throughout the proceedings. The applicants urged the court to allow the application dated 7th September, 2023 by setting aside the award with costs to the applicants.

30. As to the application dated 24th October, 2023 for enforcement of the award, the applicants argued that the same has been overtaken by events and it ought to be dismissed with costs. That the applicant in the said application did not attach the contract and thus violates section 36(3)(b) of the *Arbitration Act* which states that the party relying on the award must attach the original copy of the contract.

Respondent's submissions.

31. The Respondent filed submissions dated 28th November, 2023 in support and opposition of the two applications. The Respondent identified the following issues for determination:

    a. Whether the award should be adopted

    b. Whether the award should be set aside.

    c. Whether the award is against public policy

    d. Whether the award was affected by fraud and undue influence.

32. To start with, it was the Respondent's application that the arbitral award in question should be adopted. She submitted that she has met the pre-requisites for the enforcement of the award, having attached it to her supporting affidavit. Counsel cited section 36 of the *Arbitration Act*, setting out the legal parameters governing enforcement and adoption of an arbitral award. She equally relied on the case of Samura Engineering Limited vs Don-Wood Co Ltd (2014) eKLR.

33. As to whether the award should be set aside, the Respondent submitted in the negative and stated that the issues raised by the applicants are mere allegations short of any proof and that such an application should be dismissed with costs. On this she relied on the case of Kenya Oil Company Limited & Another vs Kenya Pipeline Company Limited NRB CA Civil Appeal No. 102 of 2012 (2014) eKLR.

34. It was submitted for the Respondent that the arbitration process is a consensus, voluntary procedure through which parties choose to resolve their dispute. That through the Applicant's own preliminary objection, the matter was referred to arbitration, a process which they fully participated in. On this counsel cited section 32A of the *Arbitration Act*.

35. According to the Respondent, the arbitrator took her time, clearly identified issues raised by parties and considered elaborately and extensively analysed the material placed before her by both parties in reaching her decision. The respondent argues that the applicants did not object to the conduct of the arbitrator during the proceedings, did not object to the terms of reference set out during the proceedings, were privy to all material before the tribunal and never raised an issue up until the award was delivered. Based on this, counsel submitted that there is no basis at all for setting aside the arbitral award.

36. The next issue was whether the award was against public policy. Counsel submitted that it is trite law that for an arbitral award to be against public policy of Kenya, it must be shown that it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or value in the Kenyan society the applicants have not proved that the award fitted that description being

immoral/illegal and against public policy. That in any event no such issue was ever raised before the tribunal and is only being raised now to avoid the consequences of the award.

37. It is the Respondent's case that the company having been in operation from 2014, with the hotel business running to date, the forensic audit was able to ascertain the assets and from the report, it has been able to separate the assets by the company from the income it is our submissions that the conclusion was not drawn from imagination but from the expert opinion. That the 1st applicant has been in charge and has been running the affairs of the 2nd applicant and was therefore in conduct of availing the information drawn from the audit report to the expert and is now appearing to distance himself from the same.

38. Finally, counsel made submissions on the question as to whether the arbitral was affected by fraud and undue influence. The respondent submitted that in any proceedings where a party claims such serious allegations, the party claiming is duty bound to plead particulars of fraud and undue influence in the pleadings. The respondent maintained that no tangible or cogent details of any suggestion of bribery and/or corruption by any party before or during the arbitral proceedings was tendered. The respondent urged the court to reject the application seeking to set aside the arbitral award and allow the application for adoption of the award.

Analysis And Determination.

39. I have carefully considered both applications and the attendant submissions. The applications are in a sense twinned and as such the determination on the application to set aside the arbitral award would give a bearing to the application seeking enforcement of the award. For this reason, the main issue I am called to determine is whether the arbitral award in question has met the required threshold under section 35(3) of the *Arbitration Act*. Section 35 of the Act sets out the grounds for setting aside of an award as follows: -

(a) The party making the application furnishes proof;

i. That a party to the arbitration agreement was under some incapacity; or

ii. The arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication of that law, the laws of Kenya; or

iii. The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

v. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with provisions of this Act from which the parties cannot derogate; or failing such agreement was not in accordance with this Act; or

vi) The making of the award was induced or affected by fraud, bribery, undue influence or corruption

(b) The High court finds that;

i) The subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

ii) The Award is in conflict with the public policy of Kenya.

40. Having highlighted the grounds of setting aside, I shall proceed to examine whether the present application has met the said grounds. Again, the application is premised on three chief grounds; that the arbitral award dealt with an issue not contemplated by or not falling within the terms of the reference; the arbitral award was induced or affected by fraud, bribery, undue influence or corruption; that the arbitral award is in conflict with the public policy of Kenya.

Did the award deal with an issue not contemplated within the terms of reference?

41. The 2nd Applicant was incorporated on 18th April, 2012 pursuant to a memorandum and articles of Association dated 20th March, 2012.

Clause 21 of the Memorandum and Articles of Association provides an arbitral clause on the following terms:

> "Whenever any difference arises between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction of the incidents, or consequences of these Articles, or of statues, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these article, or any claim on account of any such breach or alleged breach, otherwise relating to the premises, or these articles or to any statues affecting the company, or to any of the affairs of the company, every difference shall be referred to the decision of the arbitrator, to be appointed by the Association of Arbitration Kenya Chapter, or if they cannot agree on a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by the parties in difference."

42. Putting it into perspective, a dispute emerged between the parties concerning the above-mentioned clause. Prior to referring the matter to arbitration, the respondent, Linet Masai preferred a suit against the applicants in the high court but the 1st applicant raised a preliminary objection seeking a resolution of the dispute through arbitration pursuant to clause 21 of the Memorandum and articles of association of the 2nd Applicant, Hill queens Holdings Limited.

43. The preliminary objection was allowed and the matter was referred to arbitration. Consequently, a sole arbitrator was appointed by the chartered institute of arbitrators on 13th May, 2021 to arbitrate on the matter, resulting to an award being rendered in the following terms:

i. That there was an oral agreement relating to the incorporation of a company, Hill queens Hotel Limited and the construction and operation of hotel business between the Claimant, Linet Masai and the 1st Respondent, Moses Ndiema Masai.

ii. That there shall be no sale or transfer of any of the properties with title numbers Iten/Irong 609, Iten/Irong 610, Iten/irong 613 and Iten/Irong 614 situate within Iten Town in Elgeyo Marakwet without the express consent of the Claimant.

iii. That the hotel constructed on the property numbers Iten/Irong 609, Iten/Irong 610, Iten/irong 613 and Iten/Irong 614 situate within Iten Town in Elgeyo Marakwet and known as Elgon Valley Resort shall not be sold, alienated or transferred without the express consent of the Claimant.

iv. That the 1st Respondent pays the Claimant the amount of Kenya Shillings Ten Million Five Hundred and Seventy-Four Thousand (Kshs. 10,574,000/=) together with simple interest accruing at the rate of 14% from March 2015 until repayment in full.

v. That the 1st Respondent pays the Claimant the amount of Kenya Shillings Sixteen Million Four Hundred fifty-five thousand, six hundred and eighty-nine (Kshs. 16,455,689/=) which is 50% the value of the company as a going concern together with simple interest accruing at the rate of 14% from the date of publication of the Award until repayment in full.

vi. That the 1st Respondent pays the Claimant the legal fees with respect to the arbitration proceedings. No interest is awarded on the legal fees.

vii. That both the claimant and the 1st respondent equally pay for the charges relating to the expert's report.

viii. That the 1st respondent refunds the amount paid by the Claimant to the Arbitral Tribunal amounting to Kenya Shillings Seven Hundred and Ninety-Seven Thousand, One Hundred and Twenty-Seven (Kshs. 797,127/=). Interest will accrue on this amount from the date of publication of this award until repayment in full at the current commercial rates.

ix. VAT, being a government tax on professional services, is applicable by default.

44. The 1st Applicant, Moses Ndiema Masai argued that the arbitrator purports to entertain issues relating to the personal relationship between the parties, which issues have no relationship with the company in question.

45. Interestingly, when the 1st Applicant raised a preliminary objection at the high court prior to having the matter arbitrated, he argued that under Article 21 of the Articles of Association, any differences which arise between the members of the 2nd Applicant, Hill Queens Hotel Limited should be first referred to arbitration as the first resolution mechanism. It was argued that the company's articles of association constitute a contract between the members inter se, as well as between the members and the company. To support his argument, he cited the decision in the case of Abdirahaman Affi Abdalla v Osupuko Service Station Limited & Another (2012) eKLR where the court while interpreting a clause similar to clause 21 herein stated;

> " .... One fundamental principle of company law. That principle ordains that a company's articles of association give rise to a contract not only between every member and the company, but also among members of the company inter-se, the logical conclusion to be drawn from that principle is that the members of the 1st Plaintiff company are bound by that company's articles of association among themselves, and therefore article 31 becomes an arbitrating agreement among all the members'

46. What changed? I find the present dispute to be revolving around management issues of the 2nd applicant, Hill Queens Hotel and a resolution of such issues was well covered under clause 21. This court appreciates the fact that an arbitral process is a consensus, voluntary procedure through which parties choose to resolve their dispute. However, this court can only intervene in that process as set out under Section 10 of the *Arbitration Act* which provides that:

> " Extent of court intervention
>
> Except as provided in this Act, no court shall intervene in matters governed by this Act."

Section 32A of *Arbitration Act* states:

> " Except as otherwise agreed by the parties, an arbitral award is final and upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act."

47. In discussing the limited intervention of courts in arbitral processes, the court of appeal in the case of Nyutu Agrovet Limited v Airtel Network Limited [2015] eKLR stated as follows:

> " The rationale behind the limited intervention of Court in Arbitral proceedings and awards lies in what is referred to as the principle of party autonomy. At the heart of that principle is the proposition that it is for the parties to choose how best to resolve a dispute between them. Where the parties therefore have consciously opted to resolve their dispute through Arbitration, intervention by the Courts in the dispute is the exception rather than the rule..."

48. A reading of Clause 21 and the decision in Abdirahaman Affi Abdalla v Osupuko Service Station Limited & Another (2012) eKLR as cited by the applicants at the high court reveal that the issue in contention was contemplated in the terms of reference. It appears to me that the dispute revolves around issued of management of the 2nd Applicant, Hill Queens Hotel Limited and the applicants cannot run away from their argument at the high court that the dispute in question ought to be resolved through arbitration.

49. I therefore reject the argument advanced by the Applicant on this limb for reasons that parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process. Thus, the sole intention of arbitration is to solve disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Indeed, our Constitution in article 159(2)(c) acknowledges the place of arbitration in dispute settlement and urges all courts to promote it. However, the arbitration process is not absolutely immune from the court process.

Was there any fraud, bribery undue influence or corruption?

Regarding this issue, the Respondent argued that the same is a mere allegation and it was never proved. In National Cereals & Produce Board vs Erad Supplies & General Contracts Ltd (2014) eKLR Court of Appeal took the view that in order to arrive at the decision that the Arbitral award was induced or affected by fraud, bribery, undue influence or corruption, the Court must be guided by evidence. The court held as follows:

> " In the year 2009, under Act 11 of that year, the grounds for applying to set aside an award were expanded to include circumstances where the making of the Arbitral award was induced or affected by fraud, bribery, undue influence or corruption. That amendment was done for a good reason; to enhance the credibility of the Arbitration process. In order to arrive at a decision whether an arbitral award was induced or affected by fraud, bribery, undue influence or corruption; the High Court must, in our view, be guided by evidence. For that purpose, it is open for the parties to present the evidence before the High Court and for the High Court to take and consider such evidence ....and exercise original jurisdiction.

50. Further, in PesaPrint Ltd vs Atticon Ltd & Anor Symphony Technologies Ltd & 2 Others; Baron Estates Ltd (2019) eKLR, this Court observed;

> "The original jurisdiction to hear and determine allegations of fraud, bribery and/or corruption is not invoked as pleadings do not/did not disclose reasonable basis/grounds for such an inquiry."

51. The long and short of it is that a perusal of the record reveals the pleadings have not disclosed any reasonable grounds to support such allegations. The evidence of establishing that the Arbitral award was induced or affected by fraud, bribery, undue influence or corruption should be presented by the Applicant to this Court to consider it under the original jurisdiction.

52. In any event and as it was captured by the court in Kampala International University v Housing Finance Company Limited (Miscellaneous Cause E564 of 2019) [2021] KEHC 105 (KLR), if Arbitrator's conduct is in question and this was not raised during Arbitration proceedings but under the claim prescribed under Section 35 (2) (a) (vi) of *Arbitration Act*, then the Application to set aside the Arbitral Award & to Recognize and Enforce the Arbitral Award ought to have been served to the Arbitrator and/or the Arbitrator joined as Respondent to these proceedings so as to comply with tenets of fair hearing and natural justice, that no party is condemned unheard. It is for the above-mentioned reasons that the application fails on this front.

Is the arbitral award against public policy?

53. The applicants argued that the award is in conflict with the public policy of Kenya as it contains a decision in contravention of *the constitution* and the Laws of the Republic of Kenya. That the arbitrator made orders which essentially grants both the main and alternative prayers.

54. The Balck's Law Dictionary Tenth Edition defines Public Policy as follows: -

> "The Collective rules, principles or approaches to problems that affect the commonwealth or (esp.) promote the general good; ... principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole society.

55. In Alex Wainaina T/A John Commercial Agencies versus Janson Mwangi Wanjihia Civil Appeal No. NA 297 of 2014 (UR), the court held inter alia as follows:

> "On the first issue, we think it is trite law that where relief is prayed for in the alternative, a court of law has to choose on the facts, whether to grant the main relief or the alternative and give reasons either way. Both ought not to be granted in a blanket form. On this the trial court was in error."

56. The above position was reiterated by the Court in the case of Olive Mwihaki Mugenda & Another versus Okiya Omtata Okoiti & 4 others [2016] eKLR. At paragraph 41 observations were made as follows:

> "The 1st appellant submitted that the trial court erred in granting both the main and alternative orders sought in the 1st respondent's Notice of Motion dated 7th December, 2015; that a reading of the Motion shows that the 1st respondent sought prayers 4 and 5 in the alternative to prayers 1,2 and 3; that the trial court erred in granting both the main and alternative prayers; that in Alex Wainaina t/a John Commercial Agencies- VS- Janson Mwangi Wanjihia [2015] eKLR, this Court held that "where relief is prayed for in the

alternative, a court of law has to choose whether to grant the main or alternative reliefs and state the reasons for doing so." Both cannot be granted in blanket form."

At paragraph 68 the court concluded as follows:

"The next issue for our determination is whether the trial court erred in granting both the main and alternative reliefs sought in the Notice of Motion dated 7th December, 2015. It is not in dispute that the trial court granted the main and alternative prayers in the Motion. The decision of this Court in Alex Wainaina t/a John Commercial Agencies Vs. Janson Mwangi Wanjihia [2015] eKLR, is good in law. This Court held there that "where relief is prayed for in the alternative, a court of law has to choose whether to grant the main or alternative relief and state the reasons for doing so. Both cannot be granted in blanket form." The 1st respondent has not demonstrated to our satisfaction or at all that the principle in Alex Wainaina (supra) is bad in law. We are inclined to follow the same and we hereby make a finding that in Ruling delivered on 18th December, 2015, the trial court erred in granting both the main and alternative prayers in the Motion."

57. The above cited decisions are the correct position in law. I have considered the said ground by the applicant under this limb and I am of the considered view that such a ground cannot vitiate a substantial part of the award. To me, that is a mistake and an error apparent on the face of the record. It is my considered view that the cited reasons in support of the applicant's argument that the award is against public policy cannot hold water.

58. I have agonized over the factual matrix of this case and the legal framework set out in the *Arbitration Act* and Art. 159 2 (c) of *the constitution*. The court is being asked by the parties to exercise discretion amongst different perspectives as conceived, understood, appraised, and on the better atmosphere of the case from initiation to reference before an Arbitrator. This is an issue of discretion applying the law to the facts. Baxster defines the exercise of discretion as follows:

> " To exercise a discretion describes a psychological process which commences with the separation or distinguishing of subject by the exercise discernment and judgement upon which is based a choice from amongst alternative courses of action which choice expected to be made in a judicious or sagacious manner. See Woof and Jowel Principles of Judicial Review 152.

Courts treasure the principles deeply embedded in the Kenyan arbitration system. However, it is application must be undertaken in a rational way and in line with the established and sound principles governing Arbitral proceedings. It is a feature of justice of forum of conveniens that attaches certain weight to each relevant factor that informs the decision like speed, efficiency, flexibility and finality of the arbitration process and being the reasons that the parties opt to select their own dispute resolution method. However, the rules of natural justice remain applicable. During the affidavit evidence, adduced by the respondent's learned counsel Mr.Sambu in addition what I have discussed elsewhere in this ruling I am not able to nail down pieces of evidence that any member of the arbitration tribunal misconducted himself in relation to his duties as an arbitrator or umpire as ordained in Art.50 (1) of *the Constitution*. In the same proceedings, learned counsel has made attempts to impeach the entire arbitral process but fell short of pointing to this court the nature of any gross irregularity in the conduct of the arbitration proceedings or any one of them exceeded the powers expressly stated in the *arbitration Act*. The court in Telecordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA) defined gross misconduct as a "process standard which is to all intend and purposes identical to a ground of review" available in relation to proceedings in judicial proceedings. The ultimate test of

whether an arbitrator's conduct constituted gross irregularity is whether the conduct of the arbitrator or arbitral tribunal prevented affair trial of the issues. The common low grounds of review are excluded.

59. As pointed out in many cases, due process is a fundamental aspect of the rule of law. Due process as a constitutional imperative is a right to a fair hearing in Art. 50 of *the constitution*. Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue. Its irreducible minimum is now well settled. In granting that right the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. (See the guidelines in County Assembly of Kisumu & 2 Others v Kisumu County Assembly Services Board & 6 others (2015) eKLR. The high court is expected to take into account the facts and circumstances of which particular case arising out of an arbitral award in consonant with Art. 50 of *the constitution*. An aspect of that is to carry out an inquiry from the record as to whether the party against whom the award is invoked in this case being the respondent to learned counsel Tororei's application whether he was given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. The other catalogue of issues will revolve around the substantial differences of the award not falling within the terms of the evidence or submissions made to the arbitrator or it contains matters beyond the scope and jurisdiction of the tribunal.

60. On the other hand, by agreeing to have their dispute adjudicated by an arbitrator the parties limit interference by the courts to the ground of procedural irregularities set out in the Act. By necessary implication they waive the right to rely on any further grounds of review as known in judicial review remedies founded on common law or otherwise. In short, when it comes to this forum of conveniens there exist little scope for a review going to the merits as a private arbitrator has a right to be wrong so long as it does not affect the root of the jurisdiction imposed upon the arbitrator. My reading of the *arbitration Act* is that the power given to the arbitrator is to interpret the impugned agreement or contract rightly or wrong, to determine the applicable law and to determine what evidence is admissible. As a consequence, the errors of the kind pleaded by the respondent in her application have nothing to do with arbitrator exceeding his jurisdiction or powers. They are errors committed within the scope of his mandate which did not amount to the transgression of his powers subject for review by this court. It is trite law that a bona fide mistake of law of fact has never been construed to be misconduct on the part of the arbitrator.

61. In view of the above, the court concurs with the arbitrator's decision save for the orders issued, particularly the grant of both alternative and main prayer. From the foregoing reasons, I find that the applicants have failed to demonstrate that there exist sufficient grounds to warrant the setting aside of the Arbitral Award. The threshold set out under section 35 of the *Arbitration Act* has not been met. The application dated 7th September, 2023 therefore lacks merit and is hereby dismissed with costs. Consequently, the application dated 24th October, 2023 to have the award adopted as a judgment of this court succeeds with costs.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 16TH DAY OF APRIL 2024.

In the Presence of

Mr. Tororei Advocate

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R. NYAKUNDI

JUDGE