



**Republic v President, Law Society of Kenya & another; Match Electricals Limited (Exparte)  
(Application E120 of 2022) [2024] KEHC 7225 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7225 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**APPLICATION E120 OF 2022**

**J NGAAH, J**

**JUNE 20, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**PRESIDENT, LAW SOCIETY OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**LIBYAN ARAB AFRICAN INVESTMENTS COMPANY KENYA LIMITED,  
AHMED MOHAMED AMEAR, MOHAMED MAAWAL SHTWEI - T/A  
LEDGER PLAZA HOTEL FORMERLY LAICO REGENCY HOTEL NAIROBI  
KENYA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**MATCH ELECTRICALS LIMITED ..... EXPARTE**

**JUDGMENT**

1. By a motion dated 10 July 2023, the applicant seeks the judicial review order of mandamus against the 1<sup>st</sup> respondent. The prayer for this order has been couched in the following terms:

“ a. An order in the nature of mandamus do (sic) issue to compel the 1<sup>st</sup> respondent to appoint an arbitrator to hear and determine the dispute between the ex parte applicant and the 2<sup>nd</sup> respondents herein arising from a contract for the facelift of Laico Regency Hotel Nairobi Kenya dated 12<sup>th</sup> December 2012.”

The applicant has also asked for an order on costs.

2. The application is expressed to be brought under, Articles 10, 48 and 50 of *the Constitution*; sections 8 and 9 of the *Law Reform Act*, cap. 26; and, Order 53 rule 3(1) of the Civil Procedure Rules. It is based on a statutory statement dated 28 July 2022 and an affidavit verifying the facts relied upon sworn on



- even date by Mr. Christopher Maina Theuri. Mr. Theuri has sworn that he is the managing director of the applicant company.
3. According to Mr. Theuri, the applicant entered into a contract with Laico Regency Hotel Kenya (hereinafter also referred to as “the hotel”) on 19 December 2012. The contract was for the facelift of the hotel and it provided for arbitration in the event of a dispute between the parties. Such a dispute arose and by a letter dated 4 June 2020, the president of the Law Society of Kenya appointed Mr. Anthony Milimu Lubulellah as the sole arbitrator to hear and determine the dispute.
  4. The applicant filed a statement of claim dated 12 August 2020. Libyan Arab African Investments Company Limited filed a notice of preliminary objection dated 14 September 2020 against the claim. The objection was based on the ground that Libyan Arab African Investments Company Limited was not a signatory to the arbitration agreement which was the basis of the dispute before the arbitral tribunal and that the applicant’s statement of claim was in violation of clauses 44 and 45 of the contract.
  5. The preliminary objection was upheld and the arbitrator held that Libyan Arab African Investments Company Limited was not a party to the contract between Laico-Regency Hotel-Nairobi and the applicant. Consequently, the arbitrator determined that he did not have jurisdiction to hear and determine the dispute before him.
  6. The applicant then served Libyan Arab African Investments Company Limited with a statutory demand under the [Insolvency Act](#), 2015 seeking to liquidate it for failure to pay a debt of USD 803,133. The applicant also filed a notice of motion application dated 5 February 2021 in Milimani High Court Miscellaneous Application ARB. No. E003 of 2021 seeking to set aside the arbitrator’s award on costs. At the same time, an application, apparently by Libyan Arab African Investments Company Limited to set aside the statutory demand was filed in Milimani High Court Miscellaneous Application No. E007 of 2021.
  7. All these applications were heard by Majanja, J. who allowed the application to enforce the arbitral award and the application to set aside the statutory demand but dismissed the application to set aside the arbitral award. The learned judge is said to have observed in his ruling that there still existed a dispute between the applicant and the 2<sup>nd</sup> respondent since it had not been substantively resolved by an arbitral process in accordance with the contract between them.
  8. Apparently, buoyed by the learned judge’s decision, the applicant issued a notice of dispute dated 8 November 2021 to the 2<sup>nd</sup> respondent. This notice is said to have indicated the right parties who ought to have been sued in the first place; the applicant has named them as Libyan Arab African Investments Company Ltd, Ahmed Mohamed Amaer and Mohamed Maawal Shtewi all of whom are trading as Ledger Plaza Hotel-Nairobi (Formerly Laico-Regency Hotel Nairobi-Kenya).
  9. When the applicant did not receive any response from the 2<sup>nd</sup> respondent, it invoked clause 45 of the contract and notified the 2<sup>nd</sup> respondent in writing that it was submitting the dispute for arbitration and required of the 2<sup>nd</sup> respondent to appoint an arbitrator failure of which one would be appointed by the 1<sup>st</sup> respondent. Consequently, the applicant wrote to the 1<sup>st</sup> respondent on 4 May 2022 asking for appointment of an arbitrator to determine the dispute between it and the 2<sup>nd</sup> respondent. A copy of the letter to the 1<sup>st</sup> respondent was sent to the 2<sup>nd</sup> respondent.
  10. On 9 May 2022, Libyan Arab African Investments Company Limited wrote to the 1<sup>st</sup> respondent objecting to the appointment of an arbitrator on the grounds that an arbitrator had not only been appointed before but had also determined the dispute to which the applicant was making reference. As a matter of fact, this Honourable Court had adopted the arbitral award.



11. By a letter dated 23 May 2022, the 1<sup>st</sup> respondent informed the applicant that his predecessor in office had appointed an arbitrator who heard and determined the same dispute for which the applicant was seeking an arbitrator. In the circumstances, he could not again appoint another arbitrator over the same dispute that had been resolved.
12. Not satisfied with the 1<sup>st</sup> respondent's explanation, the applicant wrote again to the 1<sup>st</sup> respondent by letters dated 15 June 2022 and 28 June 2022 asking him to reconsider his position and appoint an arbitrator. But the 1<sup>st</sup> respondent maintained his stance and, in his letter, dated 13 July 2022, declined to appoint an arbitrator.
13. According to the applicant, the dispute presented before the initial arbitrator was not determined on merits and the arbitral proceedings which it intends to initiate are different from those that were terminated or concluded. The fresh claim, as against the 2<sup>nd</sup> respondent, ought to be determined on merits in accordance with clause 45 of the contract and also in compliance with the ruling of Majanja, J.
14. It is the applicant's case that since the persons that have now been identified as the proper respondents to its claim were not parties to the earlier aborted claim, it cannot be argued that the claim against them has been determined on merits. Accordingly, the applicant wants an arbitrator appointed so that the dispute between the proper parties to the contract can heard and determined on merits.
15. The 1<sup>st</sup> respondent opposed the application and Mr. Eric Theuri, the President of the Law Society of Kenya at the time material to this suit swore a replying affidavit to that end. According to Mr. Theuri, the request for appointment of an arbitrator to hear and determine the alleged dispute is spent as a similar request was acted upon by his predecessor and an arbitrator appointed. The arbitrator is said to have determined the matter and, subsequently, his award was adopted by this Honourable Court (Mojanja, J.). Considering that the arbitral award was not set aside, Mr. Theuri is of the view that he had no jurisdiction to appoint another arbitrator, apparently over the same dispute.
16. He has also sworn that he is aware that an attempt was made to revive the arbitral proceedings by a firm of advocates called Messrs. Nyamweya Mamboleo Advocates. His predecessor appointed Mr. Kamau Karori as a sole arbitrator in the new matter but withdrew the appointment when he learnt that the matter had been disposed of.
17. Mr. Jamal Ahmed swore a replying affidavit also opposing the motion. He has sworn that he is the caretaker manager of Libyan Arab African investment company Ltd which operates a hotel known as Laico Regency and that he is authorised to swear the affidavit on behalf of all the parties who have been named in the applicant's application as "the 2<sup>nd</sup> respondents".
18. According to Mr. Ahmed, neither Ahmed Mohamed Ahear nor Mohamed Maawal Shtwei trade as Laico Regency Hotel Nairobi and wonders why they have been named as parties in this suit. He has also sworn that he swore an affidavit in insolvency case no. E007 of 2021 between Libyan Arab African Investments Company Ltd versus Match Electricals Company Ltd. While responding to Ahmed's affidavit, Christopher Maina Theuri stated in his replying affidavit, inter alia, that the contract dated 19 December 2012 was between the applicant and Libyan Arab African Investments Company Ltd but that the dispute referred to the arbitrator was between the applicant and a party other than Libyan Arab African Investments Company Ltd.
19. Mr. Ahmed then reproduced excerpts of the decision of the arbitrator in his affidavit. Regrettably, page 4 of the affidavit is not legible and, therefore, I cannot make out what the 2<sup>nd</sup> respondent's position is on the quotes from the arbitrator's decision.



20. In its written submissions, the applicant has identified three issues for determination and these are, first, whether the dispute between the applicant and the 2<sup>nd</sup> respondent was determined; second, whether the remedy of mandamus against the 1<sup>st</sup> respondent is the appropriate remedy and, finally, who should bear the costs of the application.
21. On the first question, it has been submitted that the arbitral proceedings were struck out for misjoinder and that, by itself, is not a bar to the contemplated arbitral proceedings. On this submission, the applicant relied on *Local Building and Construction Limited versus Institute of the Blessed Virgin Marty Loreto Msongari & 2 Others* (2019) eKLR where it was held that a misjoinder or a non-joinder cannot be a ground to defeat a suit. And on the argument that doctrine of res judicata does not apply to the applicant's case, the applicant cited the case of *Kundan Singh Construction Limited & Another versus Tanzania National Roads Agency* (2019) eKLR where it was held that according to this doctrine, a final judgment rendered by a court of competent jurisdiction on merits is conclusive as to the rights of the parties and their privies and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. The respondent's argument that the dispute has been resolved, therefore, has no basis in law.
22. As to whether the order of mandamus is available to the applicant, it has been urged that the applicant has a specific legal remedy to have an arbitrator appointed. Citing the case of *Hydro Waterwell (K) Limited versus National Water Conservation & Pipeline Corporation* (2019) eKLR, the applicant's learned counsel has urged that the remedy of mandamus is broad enough to accommodate cases where there is no specific legal remedy for enforcing that right. It is also urged that the 1<sup>st</sup> respondent is a creature of the statute which is the [Law Society of Kenya Act](#) No. 21 of 2014 and that section 4 thereof makes provision for an array of public duties including assisting members of the public in all matters relating to the administration of justice. Accordingly, the 1<sup>st</sup> respondent is required to perform a public duty.
23. The arbitral proceedings on the other hand, are anchored on the [Arbitration Act](#), cap. 49. Section 12 thereof allows parties to agree on a procedure for the appointment of an arbitrator in the event of a dispute. It has, therefore, been urged that appointing an arbitrator is the 1<sup>st</sup> Respondent's statutory duty and, in the event he fails to perform this duty, he can be compelled to perform it by an order of mandamus. The applicant has, therefore, urged that its application should be allowed and that it be awarded costs.
24. The 1<sup>st</sup> respondent maintained in his submissions that he discharged his duty and appointed an arbitrator who made a decision that has been adopted by this Honourable Court. On this question of finality of the dispute, the learned counsel for the 1<sup>st</sup> respondent relied on section 32A of the [Arbitration Act](#) which reads as follows:
- “Except as otherwise agreed by the parties, an arbitral award is final and binding upon parties to it, and no recourse is available against the award otherwise than in the manner provided in this Act”.
25. Counsel relied on *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR, in which the Supreme Court cited with approval *Fitzleet Estates v. Cherry* [1971] 1 WLR 1345. In this latter case, Lord Wilberforce is said to have remarked at p. 1349 of the judgment that nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by the House of Lords with all appearance of finality, to return to the same court in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected.



26. He also relied on *Nyutu Agrovet Limited -v- Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR, where the Supreme Court noted that the *Arbitration Act* was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the court process. Accordingly, it has been urged, that a court of equal and competent jurisdiction has already dispensed with the issues in controversy and, therefore, this court must decline the invitation by the applicant to have the dispute regurgitated.
27. On the part of the 2<sup>nd</sup> respondent, it has been urged that the power exercised by the 1<sup>st</sup> respondent in appointing an arbitrator is not subject to judicial review as it is not a public duty. The 1<sup>st</sup> respondent was empowered by the contract to appoint an arbitrator and that the appointment of an arbitrator in these circumstances gave effect to a contractual provision rather than performance of a public function required under the law.
28. The 2<sup>nd</sup> respondent relied on *Judicial Review Handbook 6<sup>th</sup> Edition* at paragraph 5.2.1 which states that judicial review means, inter alia, a claim to review the lawfulness of a decision, action or failure to act in relation to the exercise of a public function. It has been urged that even if the 1<sup>st</sup> respondent's exercise of power was found to be subject to judicial review, the decision of the 1<sup>st</sup> respondent was legal and procedural and that the court should not interfere with it unless the applicant demonstrates that the 1<sup>st</sup> respondent's decision-making process was tainted with illegality, irrationality and procedural impropriety.
29. This has not been established since the 1<sup>st</sup> respondent had appointed an arbitrator earlier. The 2<sup>nd</sup> respondent has relied on *Republic v District Land Adjudication and Settlement Officer Maara Sub-County & 3 others; Ex parte Applicant: M'nyiri Ragwa; Njeru Kiririka (Interested Party)* [2021] eKLR in which Yano, J. invoked *Republic Vs Kenya National Examination Council Ex parte Gathenji and others Civil Appeal No.266 of 1996*, where the Court of Appeal stated, inter alia: "It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal. "
30. It is urged that the applicant has failed to demonstrate how the 1<sup>st</sup> respondent's decision-making process fell below the legal standard. It was urged that the 1<sup>st</sup> respondent having appointed an arbitrator he had discharged his obligation. *Mandamus* compels the performance of a duty imposed by a statute where the person or body on whom the duty is imposed fails or refuses to perform the same. The 2<sup>nd</sup> respondent relied on *De Smith's Judicial Review 8<sup>th</sup> Edition* at paragraph 18-025 where it has been stated that before applying for judicial review, a claimant should address a distinct and specific demand or request to the respondent that he performs the duty imposed on him. The 1<sup>st</sup> respondent acted lawfully and procedurally in declining the request by the applicant to appoint a second arbitrator on the basis that the first arbitrator discharged his duties.
31. Like the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent also relied on section 32A of the *Arbitration Act* and the Supreme Court decision in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* (supra). While commenting on the finality of arbitral awards, the Court held that an arbitral award was final and binding on the parties. It was, therefore, urged that allowing the application would offend the principle of finality in arbitration and the principle that litigation has to come to an end. It was also submitted that compelling the 1<sup>st</sup> respondent to appoint another arbitrator would be unlawful.



32. Finally, it was urged that Ahmed Mohammed and Mohamed Maawai Shtwel do not trade as Laico Regency Hotel and, therefore, they need not have been joined to this suit as respondents. In any event, the two have nothing to do with the 1<sup>st</sup> respondent's decision and no order is sought against them. The 2<sup>nd</sup> respondent relied on De Smith's Judicial Review 8th Edition at paragraph 18-025 where it is stated: "A claimant, before applying for judicial review should address a distinct and specific demand or request to the respondent that he perform the duty imposed on him."
33. It was submitted that there is no duty imposed on the 2<sup>nd</sup> respondent under the law which they have failed to perform, warranting the intervention of this Honourable Court to compel them to perform the duty.
34. The facts in this case are, by and large, uncontested. In summary they are that, following an arbitration clause in a contract between the applicant and Laico Regency Hotel-Nairobi Kenya, the applicant initiated arbitration proceedings against what turned out to a wrong party. To be precise, the applicant named Libyan Arab African Investments Company Limited as the respondent instead of Laico Regency Hotel-Nairobi Kenya which, as noted, is the party with the which the applicant had contracted and, therefore, the party that would be bound by the arbitration clause in the event of a dispute.
35. In his ruling dated 8 October 2020, the arbitrator who was seized of the arbitration proceedings captured this fact, inter alia, as follows:

“67. I note, however, that in the statement of claim, “the respondent” and “Laico” are used interchangeably, any reference (sic)Laico shall be deemed to also mean the respondent. It is, therefore, clear to me who the claimant intended to sue. I have perused and scrutinized the “contract of the facelift of Regency Hotel-Nairobi Kenya Ltd” made between Laico Regency hotel”-Nairobi, Kenya (Laico) and Match Electricals Ltd (the claimant).

68. There is nothing in that agreement which identifies the respondent as “the employer” under the contract signed by the stated parties on 19<sup>th</sup> December 2012. It is less than frank and candid for the claimant to indicate in the salient details of the contract at page 4 of its statement of claim, that Libyan Arab African Investments Company Kenya Ltd was the employer under that contract. That averment is at variance with the contract submitted by the claimant in its bundle of evidence. I cannot determine that matter at this stage of the proceedings, neither have I been urged to do so.

69. I am not satisfied on the facts and, therefore, determine that a contractual relationship of an employer and a contractor exists as between the respondent herein (Libyan Arab African Investments Company Ltd.) and the contractor and neither can one be created by implication. A contract should identify the parties thereto. In the case of a construction contract, it must identify not only the contractor but also the employer. In this case there is nothing to show that Libyan Arab African Investments Company Ltd was an employer under that contract. Further, as stated earlier, according to the complainant, the terms “the respondent” and Laico mean one and the same thing. By that reason, the claimant did not consider the Libyan Arab African Investments Company Ltd as the respondent. It would be improper to make Libyan Arab African Investments Company Ltd as the respondent in these proceedings



through extensions of legal reasoning or craftsmanship outside the claimant's own pleadings.

72. The upshot of the above is that Libyan Arab African Investments Company Ltd was not a party to the contract for the facelift of Laico Regency Hotel-Nairobi, Kenya between Laico Regency Hotel-Nairobi (Laico) and Match Electricals Ltd. Consequently, Libyan Arab African Investments Company Ltd was not a signatory or a party to the arbitration agreement contained in paragraph 45 of the said contract.”

The arbitrator then came to the conclusion that:

- “73. I have, therefore come to the determination that I do not have jurisdiction to hear and determine the dispute between Match Electricals Ltd and Libyan Arab African Investments Company Limited. I, therefore, uphold the respondent's preliminary objection dated 14 September 2020.”

36. It is common ground that the decision was adopted this Honourable Court as its decree. In a ruling rendered on 5 July 2021, Majanja J. allowed the application to adopted the award in the following terms:

“(c)the application dated 18<sup>th</sup> December 2020 in HC MISC. E017 of 2021 be and is hereby allowed on terms that the award dated 8<sup>th</sup> October 2020 published by Anthony Milimu Lubulellah be and is hereby recognised and adopted as the judgment of this court and leave is granted to the 1<sup>st</sup> respondent to enforce it is a decree of this court.”

37. Buoyed by this outcome, the applicant sought to set in motion a fresh claim against the respondents whom, in its view, are the correct respondents in the arbitral proceedings. As it is apparent on the face of the application, the respondents have all been collectively named as “the second respondent”. Why they should have been so described instead of being sued individually is not clear, particularly when it has been sworn on behalf of the applicant at paragraph 29 (n) and (o) of the affidavit verifying the facts relied upon that:

- “(n) that the ex parte applicant has now done its due diligence and has established the correct parties to the contract who can be sued.
- (o) the ex parte applicant contends that since LAICO Regency Hotel Nairobi is a business and not a company it can only be sued through its partners.”

38. This being the case, each of the partners ought to have been named as a respondent in their own right rather banding them together as “the second respondent.” The phrase “the second respondent”, in plain language, connotes a single respondent. If the applicant was keen on the business name under which they trade, that information could appropriately be given in the statutory statement which ordinarily makes a provision for description of the parties.

39. But that is beside the point; how the applicant decided to position the respondents in his application will have very little to do with the fate of its application. The applicant's concern is that its quest for a fresh round of arbitral proceedings against the respondents was thwarted by the 1<sup>st</sup> respondent. Having declared a dispute which could not be resolved amicably by the disputants and having failed to agree on an arbitrator, the applicant asked the 1<sup>st</sup> respondent to appoint an arbitrator to determine the dispute. The 1<sup>st</sup> respondent declined.



40. The applicant's depositions in this regard and which, in my humble view, are pivotal to the determination of its application are as follows:

“21. That as a result, the Ex-parte Applicant wrote to the President of the 1st Respondent on 4th May 2022 for the appointment of an arbitrator to determine the dispute between it and the 2<sup>nd</sup> Respondents and copied the said letter to the 2<sup>nd</sup> Respondents herein. (Annexed herewith is a copy of the letter marked Exhibit CMT 8).

23. That in his response of 23<sup>rd</sup> May 2022, the 1<sup>st</sup> Respondent one M/s Eric Theuri stated that his predecessors having appointed an arbitrator and the arbitrator having delivered a decision, he could not again exercise his powers to appoint. (Annexed herewith is a copy of the letter marked Exhibit CMT 10).

24. That on 15<sup>th</sup> June 2022 and 28<sup>th</sup> June 2022, the Ex-parte Applicant upon receipt of the 1st Respondent's decision not to appoint an arbitrator wrote back to him requesting for his reconsideration providing him with various grounds thereto. (Annexed herewith is a copy of the Letter marked Exhibit CMT 11 (a) and (b) respectively).

25. That the 1<sup>st</sup> Respondent on 13<sup>th</sup> July 2022 maintained his decision of not appointing an arbitrator despite the material placed before him by the Ex-parte Applicant hence this application for orders of Mandamus. (Annexed herewith is a copy of the Ruling marked Exhibit CMT 1)”.

41. To begin with, if the 1<sup>st</sup> respondent's decision communicated to the applicant through the 1<sup>st</sup> respondent's letters of 23 May 2022 and 13 July 2022 is what the applicant is aggrieved by, it is that decision that the applicant ought to be seeking this Honourable Court to disqualify by way of a quashing order. This is for the simple reason that once a decision has been made, the appropriate judicial review order to upset it is the order of certiorari. This is what the Court of Appeal held in Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR.

“Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

42. Not that the applicant cannot not seek the order for mandamus. Of course, it can but it would be inconsistent with the 1<sup>st</sup> respondent's impugned decision if it is granted before the decision is quashed. I am rather perturbed that the entire applicant's case revolves around the 1<sup>st</sup> respondent's impugned decision yet it has not sought for the order that the decision be called into this Honourable Court for purposes of it being quashed.

43. As far as the order of mandamus is concerned, the Court of Appeal explained the import of the relief in the same case Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others. The court noted:

“What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:- “The order of mandamus is of a most



extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.” At paragraph 90 headed “the mandate” it is stated:

‘The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.’

44. The 1<sup>st</sup> respondent does not deny that he has a public duty to perform in appointing an arbitrator. As matter of fact, his case is that he appointed one and it is for this very reason that he lacks jurisdiction to appoint another. Unlike the 2<sup>nd</sup> respondent’s learned counsel’s submissions a fair share of which were dedicated to the argument that the 1<sup>st</sup> respondent’s duty is a contractual duty rather than a public duty, the 1<sup>st</sup> respondent’s position is that he is limited in that respect for want of jurisdiction.
45. It is worth noting that all the parties agree that indeed an arbitrator was appointed and presided over arbitral proceedings, at least to the extent of determining whether he had jurisdiction or not. While the applicant is of the view that up to that point its dispute against the respondents cannot be said to have determined on merits, the respondents are of a contrary view. Their case is that the applicant’s dispute has been concluded and it would be illegal to regurgitate it. This is what I gather to be the bone of contention.
46. The implication of these rival arguments is that, in exercising its discretion to either grant or decline to grant the order of mandamus, the court must first establish whether indeed there exists a dispute. If the dispute exists, the next question is whether the applicant merits the order of mandamus to compel the 1<sup>st</sup> respondent to appoint an arbitrator.
47. The answer to first question is fairly easy for the simple reason that it was provided by Majanja J. in his ruling of 5 July 2021. At paragraph 21 of the ruling, the learned judge noted as follows:

“ 21. As I understand, the arbitrator only declined jurisdiction to entertain the proceedings because the parties before him were not parties to the contract. The arbitrator did not say nor was he called upon to state that there was no dispute between the parties. The contract subject of the dispute has an arbitration clause which mandates the parties; that is the applicant and the respondent to proceed to arbitration in the event of a disagreement. The fact that the respondent invoked the arbitration clause albeit against what the arbitrator considered a non-existent party does not negate the fact that there exists a dispute which has not been resolved in the manner contemplated by the parties under the contract. This means that the dispute resolution mechanism between the parties cannot be short-circuited by issuing a statutory demand under the *Insolvency Act*. By invoking the arbitration clause in the first instance, the respondent recognised that there was a dispute that ought to have been resolved by arbitration. Although it proceeded against the wrong party, it is now estopped from denying that a dispute exists between the parties



to the contract under which its demand is based. Since the debt is disputed on substantial grounds, it then follows that the statutory demand dated 6<sup>th</sup> January 2021 cannot stand. It must be set aside.”

48. In the face of this ruling, it would be improper for me to reach a decision, contrary to that reached by Majanja, J. on the aspect of whether a dispute exists or not. The learned judge was categorical that indeed a dispute exists between the parties to the contract.
49. The next question is whether the order of mandamus would be available to the applicant. I have already expressed my reservations on the applicant’s bid for a mandatory order before seeking to have the 1<sup>st</sup> respondent’s impugned decision quashed. The point here is whether I can issue a mandatory order when the impugned decision is still intact is a relevant factor that I would consider in exercise of my discretion whether or not to grant the order for mandamus.
50. The other consideration that I have had to make is whether the order, if granted would of any value to the applicant. In other words, is there the danger that the order may eventually be rendered futile if granted? It has been held in *R versus Brent Health Authority, ex p Francis* [1985] QB 869, [1985] 1 All ER 74, that the effect of granting an order for judicial review is an important consideration that would influence the court’s discretion to either grant or decline to grant the order. And in *R v GLC, ex p Blackburn* [1976] 3 All ER 184 and *Factors (R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164 it has been held that the court is bound to consider whether the grant of the remedy is unnecessary or would be rendered futile.
51. With these considerations in mind, I proceed on the understanding that the applicant’s intended proceedings would be fresh proceedings and, no doubt, it is for this reason, that it seeks the appointment of an arbitrator afresh. For the avoidance of doubt, in paragraphs 16 to 19 of the affidavit filed alongside the motion, it has been sworn as follows:
  - “ 16. That in his ruling for the 2<sup>nd</sup> Respondents’ application to set aside the statutory demand, the Honourable Judge rightly observed that there still exists a dispute between the the ex parte Applicant and the 2<sup>nd</sup> Respondents herein as the same has not been substantively resolved by an arbitral process as per the contract between them.
  17. That given the need to certify sums due under the Contract, the Ex parte Applicant on 2<sup>nd</sup> September 2021 and 13<sup>th</sup> October 2021 sought from the project architect and confirmation whether they still held the role of Architect and Quantity Surveyors as provided in the contract but the said project architect failed, refused and/or neglected to respond which prompted the ex parte applicant to issue a notice of dispute dated 8<sup>th</sup> November 2021 to the 2<sup>nd</sup> respondents herein.
  18. That the ex parte applicant’s notice of dispute of 8<sup>th</sup> November 2021 indicated the right parties to be sued in relation to the contract of the 12<sup>th</sup> December 2012 as Libyan Arab Africa Investment Company Kenya Limited, Ahmed Mohamed Amaer and Mohamed Mwaswai Shtewi all trading as Ledger Plaza Hotel- Nairobi (Former Laico Regency Hotel Nairobi-Kenya) and relating to a contract for the facelift of Laico Regency Hotel Nairobi Kenya duly executed by the 2<sup>nd</sup> herein on 12<sup>th</sup> December 2012.



19. That the ex parte applicant did not receive any response from the 2<sup>nd</sup> respondents which prompted it to invoke Clause 45 of the Contract between it and the 2<sup>nd</sup> Respondents and notified the 2<sup>nd</sup> Respondents in writing and requested to submit the dispute to arbitration and to thereupon appoint an arbitrator within 30 days failure whereof an arbitrator would be appointed by the president of the 1<sup>st</sup> Respondent herein.”
52. Parts pertinent to this application in Clause 45 of the contract which is the arbitration clause that the applicant has invoked in seeking to commence arbitral proceedings read as follows:
- “45. 1 In case of dispute or difference shall arise between Laico or architect on his behalf that the contractor, either during the progress or after completion or abandonment of the works, such a dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an arbitrator within 30 days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an arbitrator, the arbitrator shall be appointed by the chairman for the time being of the Law Society of Kenya, on the request of the applying party.
45. 3 Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within 90 days of the date of occurrence of the matter issue giving rise to the dispute.
45. 4 Notwithstanding the issue of a notice as stated above, the arbitration of such a dispute or difference shall not commence unless an attempt has in the 1<sup>st</sup> instance been made by the parties to settle such dispute or difference amicably with or without the assistance of at third parties.
45. 5 In any event, no arbitration shall commence earlier than ninety days after the service of the notice of dispute or difference.”
53. Of particular relevance to this application is clause 45. 3 on the limitation period within which arbitral proceedings ought to be taken. I have not been able to establish from the pleadings and affidavits sworn for the applicant the exact date of the occurrence of the matter giving rise to the dispute. But this may be inferred from the applicant’s own depositions and pleadings. In paragraph 5 of the affidavit in support of the application, for instance, it has been sworn as follows:
- “THAT a dispute having arisen between the parties to the contract the Applicant filed a Statement of Claim dated 12<sup>th</sup> August 2020 and subsequently vide a letter dated 4<sup>th</sup> June 2020 the President of the Law Society of Kenya appointed Messers Anthony Milimu Lubulellah as Sole Arbitrator to hear and determine the said dispute.”
54. If the applicant filed its statement of claim on 12 August 2020, it would imply that, going by the timeline set in clause 45.5 of the arbitration clause, the latest date the cause of action arose was sometime in the month of May 2020. But it is possible that it may have occurred much earlier if the 1<sup>st</sup> respondent appointed an arbitrator in June 2020. If the court was to give the applicant the benefit of the doubt and, therefore, proceed on the assumption that the action accrued in May 2020, the immediate question is whether the applicant, by issuing a notice of the dispute on 8 November 2021,



initiated the arbitral proceedings within the limitation period and whether those proceedings would be concluded within the mandatory period set in the arbitration clause.

55. That the notice envisaged in clause 45.1 and 45.3 was issued on 8 November 2021 is fact borne out of the applicant's own depositions in paragraph 18 of the affidavit verifying the facts relied upon. The deponent has sworn as follows:

“That the Ex-parte Applicant's notice of dispute of 8<sup>th</sup> November 2021 indicated the right parties to be sued in relation to the contract of the 12<sup>th</sup> December 2012 as Libyan Arab African Investments Company Kenya Limited , Ahmed Mohamed Amaer and Mohamed Maawal Shtewi all trading as Ledger Plaza Hotel-Nairobi (Former LAICO Regency Hotel Nairobi-Kenya) and relating to a contract for Facelift of LAICO :Regency Hotel Nairobi Kenya duly executed by the 2nd Respondents herein on 12<sup>th</sup> December 2012.”

56. So, if the matter giving rise to the dispute occurred in May 2020 and the notice of the dispute was issued in November 2021, almost one year and a half, down the line, can the applicant be said to have issued the notice of the dispute in time or within the prescribed timeline. The answer is obviously in the negative because according to clause 45.3 of the arbitration clause, “no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within 90 days of the date of occurrence of the matter issue giving rise to the dispute”.
57. In a nutshell, to grant of an order of mandamus in these circumstances would, in effect, not just be contrary to the terms that the parties have bound themselves to under the contract but would also be tantamount to the court rewriting the contract for the parties. This would be against public policy.
58. Without belabouring the point, I have had to weigh in on the prospects of the applicant's success in the intended arbitral proceedings to the extent that is necessary to demonstrate that the 1<sup>st</sup> respondent, or any other party for that matter, cannot be compelled to breach the law and that, granting an order of mandamus, in these circumstances, would be an exercise in futility.
59. If I have to say anything more and only because the conduct of an applicant in an application for judicial review is consequential in the court exercising discretion whether or not grant the relief or reliefs sought, it is not clear why the applicant decided to proceed against the wrong party in its initial claim which aborted for want of jurisdiction on the part for the arbitrator. I say so because it is apparent from the applicant's own pleadings and affidavits that the information as to who, in the first place, ought to have been the respondent in its claim was always available. All that was required of the applicant was for it to take some elementary steps in due diligence and obtain the requisite information. No better place is this point clarified than in paragraph 29(n) to (s) of the affidavit verifying the facts the applicant has relied upon. In those paragraphs it has been sworn as follows:

- “ n) The Ex-parte Applicant has now done its due diligence and has established the correct parties to the contract who can be sued.
- o) The Ex-parte Applicant contends that since LAICO Regency Hotel Nairobi is a business and not a Company it can only be sued through its partners.
- p) It is evident from a Certificate of Registration of a Change of Particulars dated 15<sup>th</sup> July 2008 that Laico Regency Hotel-Nairobi was previously registered under the provisions of the [Registration of Business Names Act](#) on 7<sup>th</sup> July 2008 and the 2<sup>nd</sup> Respondents herein registered as carrying business on LR 209/



9514 Loita Street Nairobi under the business name LAICO Regency Hotel-Nairobi. (Annexed herewith is a copy of the Certificate marked Exhibit CMT 14)

- q) A company search done on 5<sup>th</sup> January 2021 proves that Libyan Arab African Investments Company Kenya Limited was incorporated on 10<sup>th</sup> August 2007 by Mohamed Amaer, Mohamed Shtewi Maawal as directors/shareholders and that Libyan African Investment Company Limited was the majority shareholder with a shareholding of 9998 ordinary shares. (Annexed herewith is a copy of the Search marked Exhibit CMT 15)
- r) A further certificate of registration of change of particulars dated 10<sup>th</sup> September 2019 clearly show that the 2<sup>nd</sup> Respondents herein changed their LAICO Regency Hotel Nairobi business to Ledger Plaza Hotel Nairobi. (Annexed herewith is a copy of the Certificate marked Exhibit CMT 16)
- s) In light of the foregoing, it is clear that the contract subject of the dispute was executed between the Ex-parte Applicant and Libyan Arab African Investments Company Kenya Limited, Ahmed Mohamed Amear , Mohamed Maawal Shtwei, all trading as Ledger Plaza Hotel Nairobi (formerly LAICO Regency Hotel Nairobi).

60. The applicant acknowledges that it is after some exercise of due diligence that it has been able to establish the foregoing crucial information. For purposes of determination of this application, all I would say is that if the applicant had exercised a similar measure of due diligence from the onset, it would not have instituted its claim against a wrong party and, consequently, this application would have been rendered unnecessary. My point here is that the applicant's lackadaisical approach to its claim is the sort of conduct that would not endear it to a judicial review court. And it is for the same reason that the conduct of an applicant for judicial review reliefs counts. A judicial review court is enjoined to assess the conduct of the party applying, and consider whether it has been such as to disentitle him to relief. Undue delay (see *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 AC 738, [1990] 2 All ER 434, HL.), unreasonable or unmeritorious conduct (*R v Crown Court at Knightsbridge, ex p Marcrest Ltd* [1983] 1 All ER 1148), acquiescence in the irregularity complained of (*R v Secretary of State for Education and Science, ex p Birmingham City Council* (1984) 83 LGR 79) or waiver of the right to object (*R v Williams, ex p Phillips* [1914] 1 KB ) may all result in the court declining to grant relief.
61. It is worth remembering that, by the applicant's own admission, it took the ruling of Majanja, J. to remind it that a dispute exists. As it is apparent from that ruling, the applicant had proceeded on the presumption that no such dispute exists and it is for this reason that it had issued a statutory demand under the *Insolvency Act*. When all these factors are taken into account, there is every reason to safely conclude that, prior to moving to this Honourable Court, the applicant's conduct had elements of undue delay; it was unreasonable or unmeritorious; and, considering that it issued a statutory demand, the applicant may well be assumed to have waived its right to commence arbitration proceedings.
62. Finally, and perhaps the applicants' application ought to have been decided on this point as a preliminary point, the applicant has not stated in its statutory statement the grounds upon which the relief of mandamus is sought. I have scrutinised the statement and all I see are three heads of, first, the description of the parties; second, the facts; and, finally the reliefs sought.



63. Without the grounds on which judicial review reliefs are sought, an application for judicial review would be fatally defective. I say so because, the point of entry for a judicial review court to intervene and check the powers of subordinate courts or tribunals or such other bodies whose powers are subject to judicial review is the grounds upon which the application is made.
64. Order 53 Rule 1(2) states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:
- (2) 2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).
65. And Order 53 Rule 4(1) states unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave.
66. The grounds to which reference has been made in these provisions of the law have not been left to speculation. They were enunciated in the English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lord Diplock set out the three heads which he described as “the grounds upon which administrative action is subject to control by judicial review”. These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

“My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality,” the second “irrationality” and the third “procedural impropriety.” That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of “proportionality” which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court’s exercise of this role, resort I think is today no longer needed to Viscount Radcliffe’s ingenious



explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

67. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality as a further ground for judicial review has been developed.

Since they form the foundation upon which the application for judicial review is based, these grounds must be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave.

68. While reiterating the importance of stating grounds for judicial review in concise and precise terms, Michael Fordham in his book, *Judicial Review Handbook*, at Paragraph 34.1 states as follows:

"The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything' including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court."

69. The 'new order' referred to in this passage is Order 53 of the Rules of the Supreme Court of England whose provisions are more or less in *pari materia* with our own Order 53 of the Civil Procedure Rules, 2010. The point is, however, clear that courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity. It follows that where the grounds are not stated, the application is fatally defective as, strictly speaking, it has no foundation upon which it is built. On this ground alone the applicant's application would fail.

70. My conclusion is that the applicant's application is fatally defective, misconceived and an utter abuse of the process of this Honourable Court. It is hereby dismissed with costs to the respondents. It is so ordered.

**SIGNED, DATED AND POSTED ON THE CTS ON 20 JUNE 2024**

**NGAAH JAIRUS**

**JUDGE**

