Sureinvest Company Limited & 4 others v Royal Media Services Limited & 3 others (Miscellaneous Application E509 of 2022) [2023] KEHC 2212 (KLR) (Commercial and Tax) (17 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2212 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E509 OF 2022

EC MWITA, J

MARCH 17, 2023

BETWEEN

SUREINVEST COMPANY LIMITED ..... 1ST APPLICANT

STENNY INVESTMENTS LIMITED ..... 2ND APPLICANT

TRIAD NETWORKS LIMITED ..... 3RD APPLICANT

AKM INVESTMENTS LIMITED ..... 4TH APPLICANT

JANUS LIMITED ..... 5TH APPLICANT

AND

ROYAL MEDIA SERVICES LIMITED ..... 1ST RESPONDENT

ROYAL CREDIT LIMITED ..... 2ND RESPONDENT

SAMUEL KAMAU MACHARIA ..... 3RD RESPONDENT

PURITY GATHONI MACHARIA ..... 4TH RESPONDENT

RULING

Introduction

1. This ruling disposes of two applications. The first application is the Chamber Summons dated July 6, 2022, seeking interim relief pending the hearing and determination of the main prayer for adoption and enforcement of the first partial award.

2. The second application is the Notice of Motion dated September 28, 2022, seeking certification of this matter together with High Court Misc Application No E250 of 2021 and Criminal Revision

Application No E115 of 2022 Directline Assurance Company Limited and 4 Others v Hillary Mutyambai & 3 others for empanelment of an uneven bench of judges to hear them.

3. The crux of the dispute between the parties concerns the shareholding and control Directline Assurance Company Limited (the company) and arbitral proceedings conducted by Mr. Philip Alike, the sole arbitrator. The applicants' complaint was that Samuel Macharia and Purity Macharia had interfered with business operations of the company had and prevented them, as majority shareholders, from dealing with the affairs of the company.

4. The respondents, on the other hand, contested enforcement of the transfer of shares from the 4th applicant to the 1st, 2nd and 3rd applicants on grounds of fraud and illegality. The arbitral tribunal published a partial award on 22nd June 2022 and the final award on 27th September 2022 in favour of the applicants.

5. The respondents filed an originating motion in Misc Application No E250 of 2021 against the 2nd to 5th applicants, seeking stay and termination of the arbitral proceedings as well as removal of Mr. Philip Aliker as the sole arbitrator. The respondents also sought leave in the criminal court to prosecute the applicants and other persons for criminal offences arising from contravention of section 23 (4A) of the *Insurance Act* which caps shareholding, director control and sharing of dividends to 25% per person. The respondent's point of contention is that the arbitral tribunal found that the 4th and 5th applicants hold 70.336% and 20% of the shares respectively while the respondents hold the remaining shares.

6. On their part, the applicants instituted this matter, seeking to have the respondents deliver possession of the offices, books, documents and other property belonging to the company within 24 hours pursuant to the Arbitrator's Procedural Order No 9 of 1st July 2022 or, in the alternative, that the partial award be enforced.

7. On various dates between 6th July and September 22, 2022, the court (Okwany J.) who was seized of this matter and Misc Application No 250 of 2022, declined to issue any interim orders to either party. On September 12, 2022, the respondents applied for the recusal of the Judge but the Judge was transferred to another station before the application could be heard. The two matters were reassigned to this court for further action.

First application

8. The first application is brought under section 36 of the *Arbitration Act, 1995* and rule 9 of the Arbitration rules. The applicants seek an order directing interim the respondents to deliver possession of the offices, books, documents and other property belonging to the company within 24 hours pursuant to the Arbitrator's Procedural Order No 9 of 1st July 2022, pending the hearing and determination of the prayer for enforcement of the partial award.

9. The application is based on the grounds on its face and the affidavit sworn by Janice Teresia Wanjiku Kiarie and written submissions and digest of authorities dated 23rd December 2022.

10. The applicants affirm that they have met the conditions for enforcement of the award as the award and the arbitration agreement are before the court. They assert that they have demonstrated that there is an urgent need to allow the application as the respondents continue to mismanage and take money out of the company, a fact that has not been controverted. Therefore, this urge for interim relief.

11. The applicants contend that sections 14(8) and 17(8) of the *Arbitration Act* do not apply to the circumstances of this case and that there is no valid application filed to set aside the arbitral award. The applicants rely on *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR for the propositions

that an application to set aside an arbitral award cannot be brought outside section 35 of the *Arbitration Act*; that *Civil Procedure Rules* do not apply in arbitral proceedings and that the application is intended to delay the finality of an award and its speedy enforcement both of which are major objectives of the choice of arbitration.

12. The applicants further argue that the respondents are in contempt of the orders of the arbitral tribunal and should not be heard without purging their contempt. They rely on *Hadkinson v Hadkinson* [1952] All ER for the argument that every person affected by an order made by a court of competent jurisdiction, even where he believes the order to be irregular or void, is obliged to obey it.

Response

13. The respondents have filed replying affidavits sworn on September 12, 2022 and November 7, 2022 by Evans Nyagah, a principal officer of the 1st respondent and Chief Executive Officer of the company in response to the application. The respondents also filed written submissions dated November 17, 2022 and a reply dated January 16, 2023.

14. According to the respondents, sections 14(8) and 17(8) of the *Arbitration Act* bar enforcement of any portion of the award during the pendency of this suit, HC Misc Application No E250 of 2021 and Criminal Revision Application No E115 of 2022. This is so because sections 14(8) and 17(8) prohibit interim reliefs in enforcement of awards. The respondents rely on *National Bank of Kenya v Duncan Owuor Shakali and another*, (Civil Appeal No 9 of 1997) for the argument that no court will give a relief in an interlocutory application if the effect is to dispose of the entire suit.

15. In the respondent' view, the decision in Anne Mumbi Hinga v Victoria Njoki Gathara (supra), is distinguishable because the applicant in that case had obtained leave of court to enforce the award as a decree, while in this case, the applicants have not obtained such leave.

16. The respondents also assert that since the arbitrator was obliged to recuse himself, the award he delivered is null and void. To support this view, the respondents rely on *Anyang' Nyong'o v Attorney General and 10 others* (Reference No 1 of 2006 (Ruling) [2006] EACJ 3 (27 November 2006) and *R (Pinochet Ugarte) v Bow St Metropolitan Stipendiary Magistrate* [2000] 1 AC 61.

17. The respondents again contend that the award is unenforceable as it is in conflict with public policy in terms of section 35(2)(b)(ii) of the *Arbitration Act*. This is because the award purports to enforce the memorandum and articles of association which is an illegal contract because it permitted the admission of the 1st to 3rd applicants into membership of the company in contravention of section 23 (4A-D) of the *Insurance Act*.

18. The respondents assert that enforcement of the award will contravene both the statute and the common law, and relied on *Mapis Investment (K) Limited v Kenya Railways Corporation*, Nrb CA 14 of 2005, [2006] eKLR. Reference is also made to *Arlidge, Eady and Smith on Contempt*, 2nd Edition (page 645), to support the proposition that the application is an offence and a contempt of court in that its object is to destroy the subject matter of the three suits and interference with administration of justice.

19. The respondents submit, therefore, that the applicants placed themselves above the law and undermined the rule of law by attempting to take over the management of the company on October 27, 2022 and issuing a notice on November 10, 2022 to convene a meeting to give effect to the award.

Second application

20. The second application is brought by the respondents under Articles 165 (3) and (4) and 159 of the *Constitution*, sections 6, 13, 17 of the *Arbitration Act*, section 3 of the *Judicature Act* and sections 1A, 1B and 3A of the *Civil Procedure Act*. The respondents seek an order that this application together with High Court Miscellaneous Application No E250 of 2021 and High Court Criminal Revision Application No E115 of 2022, be referred to the Chief Justice for empanelment of an uneven bench of judges to hear the three applications.

21. This application is premised on the grounds on its face and the affidavits by Evans Nyaga, the 1st respondent's principal officer, Royal Media and Chief Executive Officer of the company [Directline], sworn on September 12, 2022, September 28, 2022, October 3, 2022, October 28, 2022, and November 7, 2022 respectively. The respondents further rely on their written submissions dated November 17, 2022 and oral highlights

22. The respondents argue that the issues in the suits concern weighty constitutional and commercial matters for determination, which include, the right to fair hearing under the *Constitution*, standards of fairness, nature of review under Article 165(6-7 and judicial supervision in the context of arbitration, judicial review or supervision of the Insurance Regulatory Authority, governance of, transfer of shares in an insurance company, contract taken in the form of arbitration agreements introduced through amendments to Memorandum and Articles of Association of a company and standard of disclosure by arbitrators.

23. The respondents rely on Article 165(4) of the *Constitution* and the decisions in *Sir Chunilal v Mehta and Sons Ltd v The Century Spinning and Manufacturing Co. Ltd* 1962 AIR 1314, *Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 others*, Nairobi Civil Appeal No 4 of 2015 [2017] eKLR, *J Harrison Kinyanjui v Attorney General & another* [2012] eKLR and *Del Monte Kenya Limited v County Government of Muranga & 2 others* [2016] eKLR on what amounts to a substantial question for purposes of empanelment of a bench.

24. The respondents further cite Angawa v Cabinet Secretary for Basic Education, Petition E371 of 2021, where the court found that the matter was for empanelment because parties had filed a voluminous record which would take a single judge substantial time to dispose.

1st and 3rd applicant's response

25. The 1st and 3rd applicants filed grounds of opposition dated October 24, 2022 and a replying affidavit sworn on November 9, 2022 by Kevin Dermot McCourt, a director of the 1st applicant. They contend that the application is an abuse of court process for the reason that the respondents have concealed material information by not disclosing that in High Court Criminal Revision Application No E115 of 2022, there is an application to have Milimani Chief Magistrates Court Miscellaneous Criminal Application No E2754 of 2021, Directline Assurance Company Limited v Hilary Mutyambai and 3 Others heard by another magistrate other than Hon. Abdul Z who is currently handling the matter. The current application to empanel a 3 judge bench is, therefore, an afterthought.

26. The applicants state that the respondents have refused to obey the arbitral award and have been taking money out of company's as set out in the affidavit of Janice Theresa Wanjiku Kiarie sworn on August 17, 2022. The applicants again contend that the application is intended to delay the hearing of the application for enforcement of the arbitral award published on May 11, 2022 and sent to the parties on June 22, 2022.

27. The applicants maintain that the application for empanelment is frivolous, vexatious and is a continuation of the respondents' improper attempts to deny the applicants' access to justice. The applicants take the view, that the application does not meet the threshold set out in the *Constitution* in that there is no substantial question of law raised under Article 165 (3) (b) or (d) for determination and does not, therefore, meet the test for certification for empanelment. They rely on *Okiya Omtatah Okoiti & another v Anne Waiguru-Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR.

28. According to the applicants, a single judge of the court has jurisdiction and power to hear any constitutional matter, and rely on J. Harrison Kinyanjui v Attorney General & Another [2012] eKLR. They argue that certification for empanelment will delay the quick disposal of this matter and relied on *Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others* [*supra*].

29. The applicant assert that this matter, High Court Miscellaneous Application Number E250 of 2021 and High Court Criminal Revision Application No E115 of 2022 concern different issues in different jurisdictions and cannot, therefore, be heard together.

30. It is also the applicants' case that Evans Nyaga who has sworn an affidavit in support the application for empanelment is not a party to this suit and has no authority to swear the affidavit on behalf of the company which is also not a party to this suit.

31. The applicants argue that if the application is allowed, it will amount to a stay of the enforcement of the arbitral award, and should the court be inclined to hear it, the test for granting stay set out in *Halai & another v Thornton & Turpin (1963) Ltd* [1990] eKLR should be considered and the respondents ordered to pay at least 50% of the costs of the award being Kshs. 60,871,797 and of costs of the reference being Kshs 15,389,337.70 and provide security of for the balance.

The 2nd applicant's response

32. The 2nd applicant has also filed grounds of opposition dated October 12, 2022 in response to this application. The 2nd applicant takes the same view that this application is malicious, frivolous, vexatious and an abuse of the court process and is a calculated move to delay the conclusion of this matter thereby endangering the right to justice without delay as envisaged under Article 159(2) (b) of the *Constitution*.

33. The 2nd applicant maintains that the application is fatally defective as it seeks to have civil and criminal proceedings joined and heard together; the application is incurably defective for the reason that the deponent of the supporting affidavit has no authority to swear that affidavit; the application does not meet the test and threshold for empanelment; the issues raised in the three matters are not complex, unique or novel to the extent that they can be said to raise a substantial question of law worthy of empanelment of an expanded bench to determine; that judicial resources are scarce and it is in the interest of the justice that there be a quick and timely dispensation of justice and the matters be determined by a single judge to save the court's resources.

34. The 2nd applicant further argues that the respondents have not demonstrated any denial, violation, infringement or threat to their rights and fundamental freedoms to warrant grant of the orders sought.

The 4th applicant's response

35. The 4th applicant filed a grounds of opposition dated October 17, 2022 arguing that the application is an abuse of the process of the court; that the application is intended to delay the finalization of this

matter and that the application does not raise complex issues that would merit empanelment since this is a matter for adoption of an arbitral award.

36. The applicants also fault the respondents for failing to disclose that they made an application in Criminal. Revision Application No E115 of 2022, to have Milimani Chief Magistrates' Court Misc Criminal Application No 2754 of 2021, heard by another magistrate other than Hon. Abdul Z and that Mutende J. was to give directions on the matter on November 7, 2022. The respondents asked the magistrate to recuse herself on July 14, 2022 after she delivered a ruling dismissing the respondents' application for contempt of court. Proceedings in that case were stayed by Githua J. pending the outcome of the criminal revision application.

37. The applicants take the view that the dispute between the parties in the arbitration has been settled through arbitral award. The applicants relied on the ruling by Majanja J. delivered on September 28, 2022 in HCCC E247 of 2022 Directline Assurance Company Limited v AKM Investment Limited and 3 Others, concerning the shareholding dispute in the company which had been filed at the instance of the respondents. Majanja J. struck out that suit on grounds that it was an abuse of the court process because it was a collateral challenge to the award.

38. The applicants rely on *Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 others* (*supra*) to argue that there is no basis for certifying the matter for empanelment.

Determination

39. I have considered the applications; responses, submissions by counsel for the parties as well as decisions relied on. For convenience, I will deal with the second application first because its success will have an effect on the first application.

Empanelment

40. The application seeks an order certifying this application and Misc Application. No E250 of 2021, both in this Division and Criminal Revision Application No E115 of 2022 pending in the Criminal Division, as raising substantial questions of law under Article 165(4) and be referred to the Chief Justice for empanelling an uneven bench of judges to hear them.

41. The respondents' case is that issues in the three applications are weighty constitutional and commercial issues for determination. These include, the right to fair hearing under the *Constitution*, standards of fairness, nature of review under Article 165(6-7), judicial supervision in the context of arbitration, judicial review or supervision of the Insurance Regulatory Authority, governance of and transfer of shares in an insurance company, contract taken in the form of arbitration agreements introduced through amendments to Memorandum and Articles of Association of a company and standard of disclosure by arbitrators.

42. The applicants oppose the application, arguing that there is no substantial question of law because the issue in the applications pending before this (Commercial) Division concern enforcement of an arbitral award which does is not a substantial question of law to warrant certification for empanelment. The applicants again argue that the application in the criminal division relates to a criminal issue and jurisdiction of the criminal court is different from that of this court (Commercial Court). The applicants hold the view, that a single judge of this court can hear and determine the applications in this division as they only deal with enforcement of arbitral award while the criminal division should determine the issues in that division.

43. Article 165(4) of the *Constitution* provides that a matter certified by the court as raising a substantial question of law under clauses 3(b) and (d) should be heard by an un even number of judges being not less than three, assigned by the Chief Justice. Sub Article 3(b) provides for the jurisdiction of the court to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Sub Article 3(d) grants jurisdiction to hear any question respecting interpretation of the *Constitution* including determination of whether any law is inconsistent with or in contravention of the *Constitution*, whether anything done under the authority of this Constitution is inconsistent with or in contravention of the *Constitution*, among others.

44. the *Constitution* does not define what constitutes a "substantial question of law." This leaves the issue at the discretion and interpretation of the court dealing with the matter to determine whether the issue raised for purposes of certification amounts to a substantial question of law to call for reference to the Chief Justice for empanelment of uneven bench to hear it.

45. It is, however, plain from the constitutional text, that the issue must be one that falls either under Article 165 (3)(b) or (d) of the *Constitution* alluded to earlier. That is, the issue must be one of violation or infringement of fundamental rights or interpretation of the *Constitution* or both.

46. What amounts to a substantial question of law has been the subject of judicial consideration. In *Chunilal v Mehta& sons Ltd v Century Spinning & Manufacturing Co. Ltd* (*supra*; 1962 AIR 1314), the Supreme Court of India stated that a question of law will be a substantial question of law if it directly and substantially affects the rights of the parties and that in order to be substantial, it must be such that there may be some doubt or difference of opinion or there is room for difference of opinion in its interpretation. If, however, the law is well-settled by the highest court, the mere application of it to particular facts would not constitute a substantial question of law.

47. The issue was again considered in *Santosh Hazari v Purushottam Tiwari* (2001) 3 SCC 179 where it was held that:

> A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any Lis.

48. The above decisions have been applied in this jurisdiction in a number of cases. In *Community Advocacy Awareness Trust & others v The Attorney General & others* (High Court Petition No 243 of 2011); [2012] eKLR, the court observed that the *Constitution* does not define, 'substantial question of law which leaves the issue to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges to determine the matter.

49. In *Harrison Kinyanjui v Attorney General & another* [2012] eKLR, the court again held thus:

> [T]he meaning of 'substantial question' must take into account the provisions of the *Constitution* as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the *Constitution*, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges.

50. The decisions referred to above emphasise that a question of law would be a substantial question of law if it directly or indirectly affects the rights of parties, if there is some doubt or difference of opinion on the issues raised, the issue is capable of generating different interpretations and has not been determined by the highest court. (See also *Hon. Philomena Mbete Mwilu & another v Attorney General & others* [2018] eKLR).

51. The applications before this division arose from arbitral proceedings where arbitral award have been made. The issue before the court is for recognition and enforcement of the arbitral award in terms of the *Arbitration Act*. On the other hand, the issues said to be substantial questions of law, calling for certification for empanelment, include violation of the right to fair hearing, standards of fairness, nature of review under Article 165(6),(7), judicial supervision in arbitration, judicial review or supervision of the Insurance Regulatory Authority, governance of and transfer of shares in an insurance company, arbitration agreements introduced through amendments to Memorandum and Articles of Association of a company and standard of disclosure by arbitrators.

52. Is a claim of violation of the right to a fair hearing or issue of standards of fairness and nature of review under Article 165(6),(7) a substantial question of law that should be certified for hearing by an expanded bench? I do not think so. Whether one's right to fair hearing has been infringed is not, in my view, a novel issue requiring a bench of more than one judge to dispose of. It is a routine issue that can and should easily be disposed of by a single judge of any of the Divisions of this court. So would be with regard to determination of standards of fairness and or review under the *Constitution*.

53. Regarding judicial supervision in arbitration proceedings, there was no demonstration that this is a new issue since courts have pronounced themselves on the extent of judicial review, including by the highest court in this country.

54. Similarly, judicial review or supervision of the Insurance Regulatory Authority, governance of and transfer of shares in an insurance company are not, in my respectful view, substantial questions of law that a single judge cannot adequately resolve. There was no demonstration that the issue is so fundamental that only an expanded bench can resolve it.

55. When called upon to consider an application for certification for empanelment, the court should bear in mind that although the *Constitution* recognizes that there may be cases that would sometimes require more than one Judge thus the reason why Article 165(4) found space in our constitution, the jurisprudential value of the decision of a bench would not override that of a single judge of the same court, so that it is not the number of judges but the value of the decision whether of a single judge or by an expanded bench. In that regard, only a matter which satisfies the constitutional criteria for empanelment should be certified. (See *Republic v Public Service Commission & Keriako Tobiko Ex parte Nelson Havi* [2017] eKLR.)

56. In *Vadag Establishment v Y A Shretta & another* (Misc High Court Civil Suit No 559 of 2011) the Court again observed that the High Court, whether constituted by one judge or more than one judge, exercises the same jurisdiction and neither decision can be said to be superior to the other in terms of the doctrine of stare decisis since their precedential value is the same.

57. I fully agree with the views expressed above on the jurisprudential value of decisions of a bench or of a single judge of this court. I am of the view, that the applications before this division and that in the criminal division can be heard by singles judge in the Divisions. I am also fully aware that a bench would sometimes require resources both personnel and financial resources as well as more time to resolve the matters than if they were heard by a single Judge in each Division which would be in tandem with the principle espoused in Article 159(2)(b) that justice shall not be delayed.

58. I must also point out that two jurisdictions are involved in the matters sought to be certified, criminal and civil jurisdictions. Each jurisdiction has its own limit and matters from two different jurisdictions (civil and criminal) may not be heard together as the issues and mode of conducting matters in the two jurisdictions differ and so is the standard of proof. In short, the issues may not necessarily relate to the interpretation and application of the *Constitution*. I appreciate that the *Constitution* and statutes confer both civil and criminal jurisdictions on this court. The court must, however, exercise the two jurisdictions at different times in different matters and under different circumstances and not in one case as the parties seeking certification desire.

59. In the premise, I am not persuaded that these are the kind of matters that call for exercise of the court's discretion in favour of certification for an expanded bench. The issues sought to be decided by an expanded bench of judges are not substantial questions of law but ordinary disputes that a single judge either Criminal or Civil Divisions can handle to save judicial time and resources. This is so because the court is required to ensure just determination of cases, efficient uses available and administrative resources and quick disposal of proceedings.

First application

60. The first application, dated July 6, 2022, seeks interim reliefs pending the hearing of the payer for enforcement of the award. The application dated July 6, 2022, seeks, in the main, recognition and enforcement of the first partial award published on 11th May 2022 as a judgement and decree of the court. There same application however seeks interim delivery of books documents and other property of the company, pending hearing and determination of the main prayer

61. Having declined to certify the applications for empanelment, and fully aware that matters should be heard and finally determined instead of piecemeal orders, I am of the view, that the application for enforcement of the arbitral award should be hear so that parties may know their rights instead of dealing with interim orders while the main order and substance of the application is pending. That way, the court will be able to address all issues that may be raised in the application once and for all.

62. The court takes this view because of the position in applicable law allows the court to consider an application for recognition and enforcement of an arbitral award as a whole and not to issue interim orders that would by implication result into recognition of the award for purposes of enforcement before the application is disposed of.

Conclusion

63. Having considered the twin applications, for certification for purposes of empanelment of an expanded bench, and for interim relief, I come to the following conclusions.

64. First, the application for empanelment does not satisfy the threshold of raising a substantial question of law to warrant referral to the Chief Justice for appointment of a bench of uneven judges to hear it. The issues raised, if anything, are normal legal disputes that can be determined without necessarily empanelling a bench of more judges. The issues are also civil and criminal and may not be heard by one bench since the jurisdiction of the courts in criminal and Civil Divisions is different. Similarly, the court is alive to the fact that judicial resources must be properly utilised with a view to resolving the disputes without delay.

65. Second, granting interim orders is not appropriate at this stage. Where an arbitral award has been made, the court's duty is to consider an application for recognition an enforcement. There would be no justification to issue interim relief before the award is recognised and adopted for purposes of enforcement. It would be proper that the application for recognition and enforcement be heard and bring the matter to a final conclusion so that parties know the final outcome, thus their next course of action.

66. Consequently, and for the above reasons, the applications for certification for empanelment is dismissed. The request for interim relied is declined. Each party will bear own costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH 2023

E C MWITA

JUDGE