REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

HCCMISC /E1119/2020

IDRATA DEVELOPERS LIMITED.....APPLICANT

VERSUS

NAJMUDEN DHANJI JIWA.....RESPONDENT

RULING

INTRODUCTION

1. This ruling determines two applications, namely, the application dated **5th** October 2020 filed by Idrata Developers Limited (herein after referred to as the first application) and the application dated **27th** October 2020 filed by Najmuden Dhanji Jiwa (herein after referred to as the second application). The common thread between the two applications is that they arise from the same arbitral proceedings between the parties herein. The Arbitration proceedings culminated in the arbitral award published on **9th** July, 2020 by Arbitrator Mr. Dan Kenneth Ameyo

2. The point of departure is that the two applications seek diametrically opposed orders. Whereas the first application seeks to set aside the said award, the second application seeks an order that the award be recognized, adopted and enforced as an order of this court.

3. The factual matrix which triggered the arbitral proceedings are essentially uncontroverted. It is common ground that the parties entered into a Sale Agreement dated **5th** September 2014 in which the applicant agreed to sell to the Respondent Apartment No**. B3** on **LR No. 22/198** at an agreed price of **Kshs. 27,500,000/=**. There is no dispute that the Sale Agreement contained an arbitration clause. A dispute arose between the parties which was to the Arbitrator and both parties submitted to the jurisdiction of the Arbitral Tribunal and fully participated in the arbitral proceedings.

4. The Respondent's claim against the applicant before the Arbitrator was for breach of the aforesaid Agreement. He prayed sought refund of the purchase price and general damages for breach of contract, interest thereon at commercial rates and costs of arbitration.

5. The final award was published on **9th** July 2020. The Arbitrator directed the applicant to within **14** days of publication of the Award pay the Respondent **Kshs. 27,500,000/=** being refund of purchase price and general damages in the sum of **KShs. 2,000,000/=.** He directed that the said sum shall attract interests at current mean lending rate declared by Central Bank of Kenya from **5th** September 2014 until paid in full.

The first application

6. The first application is premised on the provisions of sections **35 (2) (a) (iv); (b) (ii) (3)** and **4** of the Arbitration Act (herein after referred to as the Act) and Rule **7** of the Arbitration Rules, 1997. It prays that the award be set aside and the dispute be remitted back to the Arbitrator for an additional award on the quantum of the rental income at the market rate payable to the applicant by the Respondent from **1st** September 2017 to the date of handing vacant possession. Lastly, the applicant prayed for costs of the application to be provided for. Prayer **1** of the application is spent.

7. The core grounds in support of the application are that listed on the face of the application and explicated in the supporting affidavit of Tariq Nazir Ahmed, the applicant's Chief Executive Officer. The applicant's contestation is that the award deals with matters not contemplated by or not falling within the terms of the reference to arbitration, and/or it contains decisions on matters beyond the scope of the reference to arbitration.

8. In particular, the applicant argues that the award of general damages **Kshs. 2,000,000/=** for breach of contract is *ultra vires*, in-excess of jurisdiction and/or terms of reference to arbitration. The basis for this contention is that because the Arbitration clause had limited the dispute to matters arising out of or relating to the agreement yet the award deals with a tort not contemplated by or not falling within the terms of the reference, or contains decisions on matters beyond the scope of the reference to arbitration.

9. Further, the applicant states that the award of interests of **Kshs. 2,000,000/=** on general damages at current lending rates declared by Central Bank of Kenya from **5th** September 2014 until payment in full for breach of contract is *ultra vires*, in-excess of jurisdiction or terms of reference to arbitration because the Arbitration clause limited the dispute to those matters arising out of or relating to the agreement and breach thereof, hence the award purported to deal with or determine a dispute not contemplated by or not falling within the terms of the reference to arbitration, or contains decisions on matters beyond the scope of the reference to arbitration.

10. It is also the applicant's case that the Arbitrator failed to determine the dispute according to considerations of justice and fairness by awarding general damages and interest to the Respondent as a remedy for frustration of the contract and or breach thereof contrary to the law and judicial precedent leading to unjust enrichment, injustice and unfairness which are matters not contemplated by or not falling within the terms of the reference to arbitration, or decisions beyond the scope of the reference to arbitration.

11. Further, the applicant argues that the award is fatally ambiguous and inconclusive on the dispute between parties regarding market rate rental income because it rendered an ambiguous and a vague unenforceable determination and/or it fails to render definitive determination on the quantum of rent payable by the applicant to the Respondent notwithstanding that the quantum of rent at market rate was and is still in dispute between parties. It argues that such indecision is a matter not contemplated by the Arbitration Agreement. Also, that that the award and fails to render a definitive determination on quantum of costs despite parties having submitted their respective Party to Party Bills of Costs, which indecision is a matter not contemplated by or is *ultra vires* the Arbitration Agreement.

12. Th applicant contends states that the order that the Purchase price of **Kshs. 27,500,000/=** be paid within **15** days of publication of the award is *ultra vires* or in-excess of Clause **C (iii)** of the contract between parties which provided that the purchase price shall in case of rescission be refunded upon sale of the apartment the subject of the contract.

13. It argues that the award is contrary to or inimical to public policy for being inconsistent with judicial precedent, laws of Kenya and contrary to justice. In particular, the applicant argues that the award is contradictory, illogical and incongruent to the law of contract in so far as it finds that the contract was frustrated and at the same time finding that the applicant was in breach of the contract which holdings cannot apply at the same time.

14. Further, the applicant states that the award countenances unjust, double enrichment and extortion by the Respondent in so far as it awards general damages for breach of contract and interest on the purchase price which is contrary to the law and judicial precedent which findings are inimical to public policy.

15. Further, it states that the award of interest on the purchase price of **Kshs. 27,500,000/=** from **5th** September 2014 being the date of the Agreement of Sale until payment in full is without basis, contrary to the law, judicial precedent and justice and amounts to unjust enrichment because it awards interest to the Respondent for a period when the said amount had in fact not been paid to the applicant; the **1st** Schedule of the Contract shows that the **Kshs. 27,500,000/=** was paid by instalments of **Kshs. 5,500,000**/= on 5/09/2014, **Kshs. 6,000,000/=** on 8/12/2014, **Kshs. 6,000,000/=** on 08/06/2015 and **Kshs. 5,500,000/=** on 8/08/2015.

16. Additionally, the applicant states that the award of interest on purchase price even after finding that the contract was frustrated and parties discharged from their obligations is inconsistent to the law, justice and morality and judicial precedent. It also states that in awarding general damages, the Arbitrator disregarded binding Court of Appeal decisions in; *Provincial Insurance Company of East Africa Ltd vs. Mordekai Mwanga Nandwa**[1]*** and *Dharamshi vs. Karsan**[2]*** and *Jubilee Insurance Company Of Kenya V Zahir Abib Jiwan & Anor**[3]***which is against public policy. Also, the applicant states that failure to determine costs amounts to indecision which is not contemplated by the Act and is or *ultra vires* the Arbitration Agreement between parties.

17. Lastly, the applicant states that the award is inconsistent with section **29 (4)** and **(5)** of the Act for failing to determine the dispute in accordance with the contract, justice and fairness and for finding that the Respondent rescinded the contract without basis which is inconsistent with pleadings and the evidence tendered contrary to public policy and is *ultra vires* the arbitration clause.

The Respondent's Reply

18. The Respondent, Mr. Najmuden Dhanji Jiwa swore the Replying Affidavit dated **27th** October 2020 in opposition to the first application. The crux of his opposition is that both parties participated in the proceedings and the award was made in their presence. Further, after the determination, the applicant never took steps to either have the award corrected or interpreted, and, that the application is incompetent because the period provided for challenging the award has since lapsed. Further, the Respondent contents that the applicant is citing grounds of appeal disguised as falling under section **35** of the Act. Also, he argues that the determination was inconformity with the law.

19. The Respondent also argues that under section **32C** of the Act, an arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rate and with such rates as may be specified in the award unless the parties to the Arbitration otherwise agree. Further, the Respondent argues that the quantum of rent payable at the time of the dispute was confirmed by the applicant's expert witness who testified that the rent for standard apartments was **Kshs.120,000/=** which figure is neither incapable of definition nor is it ambiguous or unenforceable.

20. Additionally, the Respondent contends that the finding on frustration was predicated upon the applicant's counter-claim for specific performance which was dismissed, and, that, to the extend that the application is premised on matters of law and facts, it falls outside the ambit of section **35** of the Act.

21. In further opposition to the application the Respondent argues that the right of appeal was not provided in the subject Agreement, hence, this court lacks jurisdiction to deal with the grounds raised in the application. It is also the Respondent's case that the award was within the scope of the reference and the Arbitrator only dealt with issues arising out of the Agreement. Further, that the application does not meet the exceptions provided under the Act to warrant this court's intervention. Also, that errors of law or fact (if any), on the part of the Arbitrator cannot fit within public policy, and, that the alleged ambiguities, rate of rent, quantum of costs and other errors if any should have been referred to the Arbitrator for correction by 08/08/2020.

22. The Respondent also maintains that since the statutory time under Section **34(1)** of the Act has lapsed, the applicant cannot either enlarge time nor can he donate jurisdiction to this court or seek the intervention of the court on matters outside section **35** of the Act. Further, that the claim for general damages was never opposed during the hearing, and that the argument that the arbitrator exceeded jurisdiction should have been raised as provided under section **17(3)** of the Act.

23. It's the Respondent's case that the proper forum to raise the claim for general damages was before the Arbitrator because requiring the court to correct matters of law amounts to widening the scope of section **35** of the Act contrary to the holding in *Christ for All Nations v Apollo Insurance Co. Ltd.*[4] Lastly, that the applicant's indolence in raising the issue of general damages constitutes abuse of process; and, public policy tilts in favour of finality of arbitral awards.

Applicant's Replying Affidavit

24. M/S Idrata Developers Limited filed the supplementary affidavit dated **19th** November 2020 sworn by Mr. Tariq Nazir in response to the Respondent's Replying Affidavit and also in Reply to the second application.

25. With regard to the Respondent's Replying Affidavit, the applicant maintains that the application to set aside the award is not outside the scope of the law but it is restricted to and or brought under sections **35(2) (a), (iv), (b) (ii) and (4)** of the Act; and, it does not seek an appeal or review as argued by the Respondent.

26. It is the applicant's position that the agreement between the parties is not in dispute, and that, the application to set aside the award discloses a *prima facie* case and or reasonable grounds. Further, that section **32C** of the Act provides that the award of interest cannot go beyond agreement of parties, and, to the extent that the award offends section **32C** of the Act and the Agreement of Sale, the award is impeachable under sections **35(2) (a)(iv)** and **b(ii)** of the Act.

27. The applicant also maintains that the determinations on interest is *ultra vires* sections **35(2) (a) (iv)** and **b(ii)** of the Act and it illegally enriches the Respondent contrary to public policy which renders the award repugnant to justice and morality. Also, that, the award is unclear on the rental income payable to the applicant despite the quantum being under dispute, hence, hence, it lacks finality which is a matter beyond the scope of arbitration because the parties contemplated a finality of decision on the matters in dispute.

28. The applicant reiterates that the findings of breach of contract and frustration at the same time are inimical to public policy and the laws of Kenya because frustration and breach of contract cannot both be findings on same contract. Further, that the Arbitrator's jurisdiction was to render an award in accordance with the law as agreed in the arbitration Agreement. And, that the award is *ultra vires* the Arbitrator's jurisdiction.

29. It is the applicant's case that this court has jurisdiction to intervene to the extent that it same offends section **35(2) (a) (iv)** and **(b) (ii)** of the Act; that the award is marred by illegalities as set out in sections **35** Act which cannot be cured by way of review by the arbitrator but can only be addressed by this court under **35(2) (a) (iv)** and **(b) (ii), (4)** of the Act. Further, that the award of **Kshs. 2,000,000/=** and interest is repugnant to the law, justice and morality and can be impeached under **35(2) (a) (iv)** and **(b)(ii)** of the Act.

30. The applicant also maintains that the allegations that the claim for general damages was not opposed and or ought to have been objected under section **17** of the Act is false, misleading, and afterthought and frivolous. Additionally, that an award of general damages for breach of contract is not only *ultra vires* the Arbitrator's jurisdiction and the laws of Kenya but it is repugnant to justice and morality.

31. Lastly, the Respondent maintains that the award of general damages was not made in exercise of justice and fairness, but outside the scope of the law and the arbitration agreement, thus, it cannot be allowed to stand.

The second Application

32. Mr. Najmuden Dhanji Jiwa, the claimant in the Arbitration proceedings who is named as the Respondent in the first application filed the second application dated **27th**October 2020. The application is expressed under section **3A** of the Civil Procedure Act,[5] Sections **36** and **37(2)** of the Act, and Rules **6** and **9** of the Arbitration Rules, 1997, and all other enabling provisions of the law. He prays that the arbitral award dated **9th** July 2020 be recognized, adopted and enforced as an order of this court, that he be granted leave to enforce the arbitral award as decree of this court, and, that, the costs of the application be provided for.

33. The core grounds are that the parties submitted to arbitration by mutual consent and participated in the proceedings; that the award made in favour of the applicant on **9th** July 2020; that the award falls within the scope of reference to arbitration; that the parties did not reserve the right to appeal; that the statutory period for correction and interpretation of the award lapsed without the Respondent taking any steps; and, that public policy tilts in favour of finality of arbitral awards.

Applicant's Response to the second application

34. The applicant in the first application who is the Respondent in the second application M/S Idrata Developers Limited filed the

supplementary affidavit dated **19th**November 2020 sworn by Mr. Tariq Nazir Ahmed its Chief Executive Officer and Director in reply to both the Respondent's Replying Affidavit and the second application.

35. In response to the second application the first applicant maintains that the orders sought should be refused because the award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration; that it contains decisions on matters beyond the scope of the reference to arbitration; that the award is contrary to public policy.

Applicant's advocates submissions in support of the first application

36. Mr. Litoro, the first applicant's counsel submitted that the award deals with matters outside the terms of the reference to arbitration or beyond the scope of the reference contrary to section **35(2)(a)(iv**) of the Act. He singled out the award of general damages of **Kshs. 2,000,000/=** for breach of contract and argued that it is *ultra vires,* in-excess of jurisdiction and falls outside the terms of reference because it deals with or determines matters falling outside the terms of the reference and outside the scope of the reference.

37. He submitted that the award of interests on general damages for breach of contract is *ultra vires*, in-excess of jurisdiction or terms of reference because the Arbitration clause had limited the dispute to maters arising out of or relating to the agreement. He argued that the arbitrator failed to determine the dispute according to considerations of justice and fairness by awarding general damages and interest as a remedy for frustration and breach of the contract at the same time. He submitted that the said award was contrary to the law and judicial precedents and lead to unjust enrichment, injustice and unfairness which are matters not contemplated by the terms of the reference and are beyond the scope of the reference to arbitration.

38. Mr. Litoro also submitted that the award is ambiguous and inconclusive on the dispute on the market rate rental income in so far as it renders ambiguous and vague unenforceable determination or fails to render definitive determination on the quantum of rent payable by the applicant to the Respondent yet the quantum of rent at market rate was and is still in dispute between parties. Further, that the indecision is a matter not contemplated by the Arbitration Agreement between parties.

39. Mr. Litoro argued that the award is ambiguous and fails to render definitive determination on quantum of costs despite parties having submitted their respective Party to Party Bills of Costs and accorded the Arbitrator jurisdiction to determine the same which indecision is a matter not contemplated by or is *ultra vires* the Arbitration Agreement.

40. Counsel submitted that the order or direction that the Purchase price of **Kshs. 27,500,000/=** be paid within **15** days of publication of the Award is *ultra vires* or in-excess of clause **C(iii)** of the contract which provided that the purchase price shall in case of rescission be refunded upon sale of the subject Apartment. He submitted that the award offends section **35(2)(b)(ii)** of the Act for being contrary to or inimical to public policy and inconsistent with judicial precedents and laws of Kenya, and, that the above award is illogical and in incongruent to the law of contract for finding that the contract was frustrated and at the same time holding that there was breach of contract. He submitted that in the event of frustration, the parties are discharged from their contractual obligation hence breach and frustration cannot apply at the same time.

41. Mr. Litoro submitted that the award is unjust, amounts to double enrichment and extortion by the Respondent against the applicant in so far as it awards general damages for breach of contract and at the same time awards interest on the purchase price and general damages contrary to the law and judicial precedent which findings are inimical to public policy.

42. Additionally, Mr. Litoro argued that the award of interest on the purchase price of **Kshs. 27,500,000/=**from **5th**September 2014 being the date of the Agreement of Sale until payment in full is without basis, contrary to the law, judicial precedent and justice and amounts to unjust enrichment as it awards interest to the Respondent for a period the said amount had not been paid to the applicant as shown by the **1st** Schedule to the contract.

43. Further, Mr. Litoro submitted that awarding the aforesaid interest despite the Arbitrator finding that the contract was frustrated and parties were discharged from their obligations is inconsistent with the law, justice and morality and judicial precedent. Also, that the Arbitrator disregarded Court of Appeal decisions in *Provincial Insurance Company of East Africa Ltd v Mordekai Mwanga Nandwa**[6]*** and *Dharamshi v Karsan* and *Jubilee Insurance Company of Kenya v Zahir Abib Jiwan & Anor**[7]*** on what contitutes public policy. Also, he submitted that the Arbitrator failed to determine the dispute according to considerations of justice and fairness by awarding general damages and interest to the applicant's prejudice contrary to the law.

44. He argued that the award is ambiguous, vague and unenforceable for failing to render definitive determination on the quantum of rent payable by the applicant to the Respondent yet the quantum of rent at market rate was and is still in dispute between parties, and, that the indecision was not contemplated by the Arbitration Agreement. Further, he argued that the award is ambiguous and fails to render a definitive determination on quantum of costs despite parties having submitted their respective Party and Party Bills of Costs. He argued that the said indecision is a matter not contemplated by the Arbitration Agreement and it is contrary to public policy.

45. Additionally, Mr. Litoro submitted that the award is inconsistent with section **29 (4)** and **(5)** of the Act because it failed to determine the dispute in accordance with the contract between parties in so far as it held that the Respondent rescinded the contract without basis contrary to the pleadings and evidence tendered. He cited *Patrick Muturi v Kenindia Assurance Company Limited**[8]*** which held that a party dissatisfied with the arbitral award must bring his application within the strictures of section **35** of the Act. He cited *Commercial Arbitration*[9] thus: -

> *"An award will be entirely void if …; if the matters in dispute fell outside the scope of the agreement; if the arbitrator was not validly appointed, or lacked the necessary qualifications; or if the whole of the relief granted lay outside the powers of the arbitrator. The award will be partially void if the relief granted related to a matter which was not referred or if for some other reason it was outside the jurisdiction of the arbitrator. In all these situations, the primary active remedy is for the Court to declare that the award is void, in whole or in part."*

46. Mr. Litoro cited *Christ for all Nations v Apollo Insurance Co Ltd*[10]in support of the proposition that an award will be set aside on the grounds provided under section **35(2) (b) (ii) & 35(2)(a)(iv)** of the Act. He argued that the award of interests at commercial rates was beyond the scope of the arbitration agreement and not contemplated in the reference to arbitration. He argued that there was an agreement on interests because the parties incorporated the provisions of Law Society Conditions of Sale (1989) which provides at clause **8(1)** that no interest is payable on purchase price in case of delay in completion.

47. Also, Mr. Litoro submitted that to the extent that the award went beyond the parties' agreement and awarded interest, it offends section **32C** of the Act and the Agreement, rendering it impeachable under sections **35(2) (a) (iv)** and **(b) (ii)** of the Act. He cited *Patrick Muturi v Kenindia Assurance Company Limited**[11]*** for the holding that under section **32C** of the Act, an Arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rates as may be specified in the award. He argued the award does not conform to section **32c** of the Act. It was his submission that the arbitrator veered of the path cut out for him by the contract and proceeded to act on the wrong premises.

48. Mr. Litoro cited *Airtel Networks Kenya Limited v Nyutu Agrovet Limited*[12] which faulted the arbitrator for expanding the margins and boundaries of the contract between the parties and argued that the Arbitrator ignored that the parties deliberately excluded interest in the event of refund by adopting clause **8(1)** of the LSK Conditions of Sale (1989). He argued that awarding interest was injurious to public policy because it was inconsistent with the Constitution, the law of contract and judicial precedents, and inimical to the interest of Kenya because it amounts to a court re-writing parties' contract.

49. Further, he argued that failing to give effect to party's express wishes offends justice and morality. He cited *Mohamed Abushiri Mukullu v Minister for Lands and Settlement & 6 others**[13]*** which held that courts must consider public policy and the interests of the country. He distinguished the first application with the decision in *Dewdrop Enterprises Ltd v Harree Construction Ltd* [14]where the court set aside part of an arbitrator's award for failing to award the applicant interest at commercial rates on grounds that it was within the arbitrator's terms of reference. He argued that in the instant case, the contract did not provide for interest in the event of refunding the amount. As a consequence, he submitted that awarding of interests was outside the scope of the terms of reference.

50. Mr. Litoro cited *Patrick Muturi v Kenindia Assurance Company Limited* (supra) in which the court set aside parts of an award for being beyond the scope of the reference. He referred to *Commercial Arbitration**[15]*** for the proposition *inter alia* that an award will be void if the whole of the relief granted lay outside the powers of the arbitrator and partially void if the relief granted relates to a matte not referred to arbitration or if it is outside the jurisdiction of the arbitrator.

51. Mr. Litoro submitted that general damages are not awarded for breach of contract, hence, the direction that the applicant pays general damages for breach of contract in the sum of **Kshs. 2,000,000/=** is *ultra vires*, in-excess of jurisdiction or terms of reference to arbitration because the contract limited the dispute to matters arising out of or relating to the agreement. To buttress his argument, he cited *Jubilee Insurance Company of Kenya Ltd v Zahir Habib Jiwan & another,**[16]**John Richard Okuku Oloo v South Nyanza Sugar Co. Ltd* and *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited**[17]*** for the proposition that general damages cannot be awarded for breach of contract except in certain circumstances where a party was oppressive, high-handed, outrageous, insolent or vindictive. He placed further reliance on *Sirgoi Holding Limited v Bowen Building Contractors (K) Ltd**[18]*** for the proposition that general damages did not fall in the ambit of the arbitrator's powers hence it was erroneous and for setting aside.

52. Additionally, Mr. Litoro argued that the award of **Kshs. 2,000,000/=** is *ultra vires*, in-excess of jurisdiction and/or terms of reference to arbitration, and, it deals with a tort which was not contemplated by or not falling within the terms of the reference and deals with matters beyond the scope of the reference. He relied on *Sirgoi Holding Limited v Bowen Building Contractors (K) Ltd**[19]*** for the proposition that in a contract, damages for a tort arising in the course of the breach of contract can only be in the alternative as opposed to ''in addition to'' a claim for breach of contract,[20]and that, the jurisdiction of the arbitrator is tethered by the arbitration agreement, reference and the law.

53. He argued that in awarding general damages, the Arbitrator disregarded, *Provincial Insurance Company of East Africa Ltd v Mordekai Mwanga Nandwa**[21]*** and *Dharamshi v Karsan**[22]*** and *Jubilee Insurance Company of Kenya v Zahir Abib Jiwan & Anor**[23]*** which is against public policy.[24] He cited *Evangelical Mission for Africa & another v Kimani Gachuhi & another**[25]*** for the holding that a contract or arbitral award will be against public policy of Kenya if it is immoral or illegal or it would violate in clear unacceptable manner basic legal and/or moral principles or values in the Kenyan society.

54. Mr. Litoro submitted that the direction that the purchase price of **Kshs. 27,500,000/=** be refunded within **15** days of publication of the award is *ultra vires* or in-excess of clause **C (iii)** of the contract which provided that the purchase price shall in case of rescission be refunded upon sale of the subject apartment. Citing *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited*[26] he argued that the Arbitrator arrogated jurisdiction and re-wrote the contract between the parties and went outside the confines of the contract.

55. He cited *Rural Housing Estates Limited v Eldoret Municipal Council*[27] for the holding that the Act introduced the concept of Public Policy as a consideration by the court while determining whether or not uphold by the award. He relied on *Christ For All Nations v Apollo Insurance co. Ltd**[28]*** which held that an award could be set aside under section **35(2)(b)(ii)** for being inconsistent with the public policy if it is: - (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality.

56. Mr. Litoro argued that a contract cannot be frustrated and breached at the same time. To fortify his argument, he cited *John Richard Okuku Oloo (supra)*which citing ***Alibhai Gulam v Mohamed Yusuf**[29]*** **held that** *the doctrine of frustration does not apply where there is a breach of the contract. He also submitted that* the award amounts to double enrichment in so far as it awards general damages for breach of contract and interest, which is contrary to the law and judicial precedent and inimical to public policy. He cited *Evangelical Mission for Africa & another v Kimani Gachuhi & another**[30]*** which held that the award to the extent it enriches the Respondents unjustly is against the social-economic ethos of the Republic of Kenya.

57. Also, he submitted that the award of general damages of **Kshs. 2,000,000/=** was without basis and is erroneous. He cited *Catholic*

*Diocese of Malindi Registered Trustees v Aben group Ltd**[31]*** for the proposition that *the claimant must be put as far as possible in the same position he would have been if the breach complained of had not occurred.*[32] *He relied on Kenya Airports Authority v World Duty Free Company Limited t/a Kenya Duty Free Complex**[33]*** for the holding that an award will be set aside if it is in conflict with public policy of Kenya.

58. Citing *Evangelical Mission for Africa & another v Kimani Gachuhi & another**[34]*** Mr. Litoro argued that an unjust decision cannot be rationally explained. He submitted that the award is contrary to public policy for being inconsistent with section **29 (4)** and **(5)** of the Act and for failing to determine the dispute in accordance with the contract, justice and fairness. He cited *Rural Housing Estates Limited v Eldoret Municipal Council,**[35]*** *Patrick Muturi v Kenindia Assurance Company Limited**[36]*** both of which the court set aside awards for being contrary to public policy and for dealing with disputes outside the terms of reference.

59. He also argued that the award is ambiguous, vague and inconclusive regarding market rate rental income payable by the applicant to the Respondent and that the rent market rate was and is still in dispute and the Arbitrator's indecision is a matter not contemplated by the Arbitration Agreement between parties. Mr. Lito submitted that the Arbitrator failed to determine the costs payable to the parties rendering the award outside the scope of reference. He cited *Dewdrop Enterprises Ltd v Harree Construction Ltd*[37] and argued that indecision amounts to misconduct and an error on the face of the record. Citing *Josephat Waweru Miano* & Another vs *Samuel Mwangi Miano* & *Another*[38] he urged the court to allow the application and dismiss the second application.

Second Applicant's Advocates submissions

60. Mr. Ombati, the counsel for the applicant in the second application filed a Preliminary Objection to the first application premised on section **35(3)** of the Act which provides that an application for setting aside an arbitral award may not be made after **3** months have elapsed from the date which the party making the application received the arbitral award, or if a request had been made under section **34** from the date which the request was disposed of by the arbitral award.

61. He argued that vide a letter dated **24th** June **2020**, the Arbitrator notified the parties that the arbitral award was ready, hence, the first application ought to have been filed by **23rd** September **2020**. He argued that the applicant never made any request under section **34 (6)** of the Act for enlargement of time, hence, the first application is incompetent. He relied on *Transwood Safaris Ltd v Eagle Aviation Ltd & 3 others**[39]*** which held that in order to comply with section **35(3)** an application to set aside an arbitral award may not be made after **3** months have elapsed from the date the notice was received notifying the parties the arbitral award is ready for collection. He relied on *Bulk Transport Corporation v Sissy Steamship Co. Ltd* [40] which held that time rans from the date upon which the award was made and published to the parties. He relied on *Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others**[41]*** for the holding that the word "receipt" in section **35** means when notice is given that the arbitral award is ready for collection. Also, he cited *University of Nairobi v Multiscope Consultancy Engineers Limited* [42] in which the court struck out an application for setting aside an arbitral award filed after the expiry of **3** months.

62. Mr. Ombati also submitted that allowing the application is an affront to public policy. He cited *Open Joint Stock Company Zambeznstony Technology v Gibb Africa Limited* [43]and argued that the key issue is whether the application was made within time. He cited *Kenya Airports Authority v World Duty Free Company Limited t/a Kenya Duty Free Complex*[44] which held that once it is brought to the attention of an Arbitral Tribunal (even if not pleaded) that it is about to make a pronouncement that runs against public policy, then the tribunal ought to pause and interrogate the allegation so as not to cross the red line. He submitted that it would be against public policy for the court to adjudicate over an application instituted in contravention of the express provisions of the statute. He argued that the application must fail for being filed out of time.

63. Regarding the prayer for setting aside, Mr. Ombati cited *National Bank of Kenya Limited v Moeish Consult Limited* [45] and *Kenya Oil Company Limited & Another v Kenya Pipeline Co**[46]*** in support of the proposition that the manner in which an arbitrator deals with evidence and reaches conclusions is beyond the reach of the court exercising jurisdiction under section **35** of the Act, and, that, the arbitrator is the master of facts. Also, he cited *Geogas S.A v Trammo Gas Ltd (The "Baleares")**[47]*** which held that the arbitrators are masters of the facts and the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrator, and, that, it is irrelevant whether the court considers those findings of fact to be right or wrong nor does it matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. The court further proceeded to hold that parties conclude an arbitration agreement because they do not wish to litigate in the courts, hence, parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. Further, that the principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact.

64. Mr. Ombati cited *Mahican Investment Limited v Giovani Gaid & 80 Others**[48]*** which held that in order to demonstrate that the matters objected to are outside the scope of the reference to arbitration, the applicant must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute. He argued that section **17(3)** of the Act provides that a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. He submitted that no such contestation was raised during the arbitral proceedings, and that the award was well within the scope of reference of the arbitration.

65. Mr. Ombati argued that all the matters raised in the first application were raised and canvassed during the arbitral proceedings in which the applicant fully participated. He submitted that the Act limits court intervention in Arbitration proceedings under sections **10, 35** and **39** of the Act. He submitted that the restriction is attributed to public policy that there should be finality in arbitral proceedings. He placed reliance on *CMC Aviation Limited & another v Anastassios D. Thomos**[49]*** which emphasized the fact that when the High Court is called upon to intervene in an arbitral award, the court is not being called upon to determine the dispute nor is the court authorized to undertake any other role other than either recognition and enforcement of the award or the setting aside of the award.

66. Mr. Ombati cited *Anne Mumbi Hinga v Victoria Njoki Gathara**[50]*** which held that there is no right for any court to intervene in arbitral process or in the award except in the situations specifically set out in the Act or as previously agreed in advance by the parties, and, there is

no right to appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in the Act. Also, it was held that the court has no appellate jurisdiction over the arbitral award and it is immaterial that this court would have arrived at a difference conclusion from that reached by the arbitrator.

67. Mr Ombati argued that the application is incompetent to the extent that it raises matters outside section **35** of the Act, and, that, there was also no agreement between the parties that section **39(1)** of the Act would apply so as to infuse life into the appellate jurisdiction of this court on any question of law arising in the course of the arbitration or out of the award. Further, he argued that the applicant's submissions at paragraph **23** of his submissions fall outside the strict confines of section **35** of the Act.

68. Mr. Ombati cited *Great Body Gym Limited v Shah & Patel (Industries) Limited* [51] in which the court declined an application under section **35 (b) (ii)** because the applicant had raised grounds of appeal, and further held that questions of fact are always within the sole domain of the Arbitrator. He submitted that Section **32A** of the Act provides that except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by the Act.

69. He argued that the application is incompetent because it is predicated on the award of general damages, interest and rent payable thereby inviting the court to analyses the disputed facts afresh and arrive at its own independent conclusion. To buttress his argument, he cited *Ministry of Environment and Forestry v Kiarigi Building Contractors & another**[52]*** where it was held that when parties agree to refer a matter to arbitration, they must take the consequences of that award and be bound by the fact that not every error committed by the arbitrator becomes a ground upon which the dissatisfied party may apply to set aside the award. Further, under section **35** of the Act, the court does not exercise appellate jurisdiction as the parties are entitled to reserve the same if they wish. He cited *Mahan Limited v Villa Care**[53]***for the holding that the parties make a covenant to each another that the decision of the Arbitrator would be final and binding on them, and, that, they must have contemplated that the Arbitrator may sometimes get it wrong but they voluntarily bind themselves to the risks involved in a final and binding clause and to live with the outcome absent the grounds in section **35** of the Act.

70. Additionally, counsel cited *Christ for all Nations v Apollo Insurance Co. Ltd**[54]*** which held that an award could be set aside under section **35(2) (b) (ii)** for being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality. He also cited *Glencore Grain Ltd v TSS Grain Millers Ltd**[55]*** which held that a contract or arbitral award will be against the public policy of Kenya if it is immoral or illegal or it would violate basic legal and/or moral principles or values in the Kenyan Society.

71. On the argument that the decision is *ultra vires*, Mr. Ombati submitted that the applicant must demonstrate that the arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter. He cited *Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others**[56]*** for the holding that a court will not interfere with the decision of an Arbitrator even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator because to interfere would place the court in the position of a Court of Appeal.

72. On the award of interest, Mr. Ombati cited *Synergy Industrial Credit Limited v Cape Holdings Limited* [57] for the holding that an arbitral tribunal has discretion to award remedies where its powers are not specifically limited. He placed reliance on *Telenor Mobile Communications As v. Strom LLC**[58]*** in which the court rejecting a complaint that the arbitral tribunal had awarded a remedy that the parties had not asked for cited *US District Court, Southern District of New York* for the holding that: - "arbitrators enjoy broad discretion to create remedies unless the parties' agreement specifically limits this power. While an arbitrator's award must draw its essence from the parties 'agreement…the effectiveness of arbitration in resolving complicated commercial disputes would be severely undermined if arbitrators were limited to the mechanical application of contested contractual provisions. If the arbitration clause does not include any limit on the arbitrators' powers to craft a remedy, a respondent must overcome a powerful presumption that the arbitral body acted within its powers. Accordingly, while an arbitrator may not award relief expressly forbidden by the agreement of the parties, an arbitrator may award relief not sought by either party, so long as the relief lies within the broad discretion conferred by the Federal Arbitration Act."

73. Counsel submitted that the award of interest on purchase price was predicated on an analysis of the conflicting provisions of the Law Society of Kenya Conditions of Sale, 1989 with the Arbitrator exercising his discretion in favour of the Respondent. He submitted that as the master of facts, the arbitrator applied his mind and exercised his discretion based on the peculiar facts of the case from which he deemed the award of interest as befitting and also directed that the Respondent pays the rent, at current market rate, from the date he took possession to the date he hands vacant possession to the Respondent.

74. He argued that the submission that the award of interest is injurious to public policy is far-fetched. Further, that the submission that the award of interest went beyond the agreement of parties contrary to section **32C** of the Act and the Agreement for Sale as coined under paragraph **17** of the Applicant's submission is feeble. He cited *Ministry of Environment and Forestry Case* and submitted that the interest awarded is neither inordinately high nor amounts to unjust enrichment but is merely compensatory and bears reasonable relation to any damage resulting from delay in recovering the sums awarded. Further, he argued that issues of correction of the rent ought to have been referred to the Arbitrator for correction.

75. To buttress his argument, he cited *Rural Housing Estates Limited v Eldoret Municipal Council**[59]*** and submitted that the facts in the said case are distinguishable from those in the instant case in that special condition **D** of the agreement between the parties provided the scenarios under which the Respondent would not be entitled to compensation or damages; none of which was proved by the applicant during the arbitral proceedings. He submitted that errors of law or facts on the part of the Arbitrator cannot be stretched to fit within the elasticity of public policy or necessitate the intervention of the court unless the grounds provided under the Act are strictly proved.

76. On the question of costs, Mr. Ombati argued that the parties filed their respective Bills of Costs both of which were considered by the Arbitrator and a determination made. He agreed with the applicant that the arbitrator rendered a decision that was outside the scope of reference to arbitration when he declined to award costs to the applicant, but argued that any errors regarding costs should have been raised under section **34**.

77. He submitted that the first applicant attempted to enlarge the definition of public policy by inviting the court to venture into factual

interrogation of the merits of the award in an effort that would invariably offend the very tenets of the jurisdictional limitations of the court under section **35(2)** of the Act. He relied on *Comroad Construction & Equipment Limited v Iberdrola Engineering & Construction Company**[60]*** which was held that for an award to be said to be in conflict with public policy it must be shown to have an element of illegality or its enforcement would be injurious to public good or offensive or repugnant to members of the public on whose behalf the powers of the State are exercised**.**

78. Mr. Ombati submitted that the applicant has not demonstrated anything injurious to public good, offensive or repugnant to members of the public. He argued that the applicant has failed to demonstrate that the award falls within any of the circumstances stipulated or envisaged under section **35 (2)** of the Act to qualify for setting aside. Lastly, Mr. Ombati prayed that the first application be dismissed with costs and the second application be adopted and enforced as a Decree of this Court.

Determination

79. The general approach on the role and intervention of the court in arbitration in Kenya is provided for in section **10** of the Act which provides that except as provided in the Act, no court shall intervene in matters governed by the Act. The section restricts the jurisdiction of the court in peremptory terms to only such matters as are provided for by the Act. The section epitomizes the recognition of the policy of party's ?autonomy" which underlie the arbitration generally and in particular the Act.

80. Section **10** articulates the need to restrict the court's role in arbitration so as to give effect to that policy.[61] The principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense. The Act was enacted with the key purpose of increasing party autonomy and minimizing court intervention

81. The intent and language of section **10** leaves no doubt that it permits two possibilities where the court can intervene in arbitration. *One* is where the Act expressly provides for or permits the intervention of the court. *Two,* in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. However, the Act cannot reasonably be construed as ousting the inherent power of the court to do justice. This position explicated by the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)**[62]*** which observed that this judicial intervention can only be countenanced in exceptional instances. The Supreme Court underscored the need for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimises the scope for intervention by the courts.

82. The Supreme Court stated that section **10** of the Act was enacted to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a court may intervene. Perhaps, I should stress the need, when courts have to consider the confirmation or setting aside of arbitral awards, to adhere to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimizes the scope for intervention by the courts. The import of the foregoing is that parties who resort to arbitration must know with certainty instances when the jurisdiction of the courts may be invoked. Such instances under the Act include, applications for setting aside an award, determination of the question of the appointment of an arbitrator, recognition and enforcement of arbitral awards, and other specified grounds such as where the arbitral tribunal rules as a preliminary question that it has jurisdiction.

83. Because the courts are requested to adopt, support and trigger the enforcement of arbitration awards, it is permissible for, and incumbent on, them to ensure that arbitration awards meet certain standards to prevent injustice.[63] However, by agreeing to arbitration, the parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else; and by agreeing to arbitration the parties limit interference by the courts to the grounds of procedural irregularities set out in Act, and, by necessary implication, they waive the right to rely on any further grounds of review, "common law" or otherwise.

84. In *Northwood Development Company Limited v Shuaib Wali Mohammed* [64] this court stated that the objective of arbitration is to obtain the fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense. The second objective should be the promotion of party autonomy (arbitration being a consensual process in that the primary source of the arbitrator's jurisdiction is the arbitration agreement between the parties). The third objective should be balanced powers for the courts: court support for the arbitral process is essential, the price thereof being supervisory powers for the court to ensure due process. True to the principle of party autonomy the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal's statutory duty to conduct the proceedings in a fair and impartial manner.

85. Further, in *Northwood Development Company Limited v Shuaib Wali Mohammed* [65] I stated that an arbitrator's jurisdiction derives from the parties' agreement. For an arbitrator to have jurisdiction, all the following must apply: - (i) There must be a binding agreement to arbitrate. (ii) The arbitrator must have been validly appointed. (iii) There must be a dispute that the parties had agreed to arbitrate. Under Section **35(1),** recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections **(2)** and **(3).** This implies that the court will not act in such matters unless an aggrieved party invites it to do so.

86. Subsection **(2)** sets out the grounds upon which the High Court will set aside an arbitral award. The grounds which the applicant must furnish proof for the arbitral award to be set aside are: incapacity of one of the parties; an invalid arbitration agreement; lack of proper notice on the appointment of arbitrator, or of the arbitral proceedings or where the applicant was unable to present its case; where the award deals with a dispute not contemplated by or one outside the terms of reference to arbitration or matters beyond the scope of reference; where the composition of the arbitral tribunal or the arbitral procedure was contrary to the agreement of the parties except where such agreement was in conflict with provisions of the Act and the parties cannot derogate from such; or where fraud, undue influence or corruption affected the making of the award. Apart from the above, the High Court may also set aside arbitral awards where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the award is in conflict with the public policy of Kenya.

87. The Act however limits the time frames within which the disgruntled party may lodge their applications with the High Court for setting aside of arbitral awards. Section **35(3)** of the Act provides that where three months have lapsed since the award was entered the court will not entertain any applications to set the same aside. This limitation may serve to prevent such applications to be made in bad faith and also to

ensure that such decided matters are put to rest. This was the holding in *Nancy Nyamira & Another v Archer Dramond Morgan Ltd*[66] where it was observed that: - "...Given the objectives of the Arbitration Act…, it is important that courts enforce the time limits articulated in that Act – otherwise courts would be used by parties to underwrite the undermining of the objectives of the Act."

88. The law requires that an application for setting aside an arbitral award be made within three months of receipt of the award by the applicant. If the application is made pursuant to an application for recognition of award the same must be within **3** months of the award. In *Kenyatta International Convention Centre (KICC) vs Greenstar Systems Ltd**[67]*** the court was emphatic that:-

> *"…there being no Provision in the Arbitration Act for extension of time, it is to be understood that strict compliance with the timeline set out in Section **35 (3)** of the Act is imperative, and comports well with the principle of finality in arbitration. In deed in the Ann Mumbi Hinga case, the Court of Appeal proceeded to hold, in no uncertain terms, that Section **35** of the Arbitration Act bars any challenge even for a valid reason after **3** months from delivery of the award."*

89. Decided cases are in agreement that the court can only deal with arbitration matters as encapsulated by the Act. The court's jurisdiction is limited by section **10** of Act. Section **35(3)** does not grant an opportunity for the court to exercise discretion and extend the period to file an application to set aside the arbitral award beyond the statutory **3** months from the date of receipt of the award.

90. Section **35 (3)** provides that an application for setting aside the arbitral award may not be made after **3** months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section **34** from the date on which that request had been disposed of by the arbitral award. The award is dated **9th** July 2020. It is signed by counsel for both parties signifying receipt of the award. Mr. Ombati's argument that time begins to run from the date the parties are notified that the award is ready is not supported by section **35 (3)** which provides: - "… **3** months have lapsed from the date which the party making the application received the award."

91. A reading of the above provision leaves no doubt that time begins to run from the date the party making the application receives the award. As stated above, the award was delivered on **9th** July 2020 in the presence of the parties. Both parties signed the award to signify receipt. Consistent with the above section, **3** months began to run from the said date and not on **24th** June 2020 when the notification was issued. The application was filed on **5th** October 2020 within the time prescribed by the law. The argument that the application was filed out of time collapses.

92. Next, I will address the question whether the applicant has established any of the grounds provided under section **35** of the Act to warrant the orders sought. Recognition and enforcement of an arbitral award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court with proof of any of the grounds enumerated in section **35**. It is accepted that a court cannot be expected to enforce an arbitral award which has been obtained as a result of an arbitral procedure which discloses any of the grounds in section **35.**

93. The grounds cited in support of the first application and the parties' submissions for and against the first application are captured in detail in the factual analysis and submissions section of this judgment. It will serve no useful purpose for me to rehash them here. However, it will suffice to briefly highlight the grounds upon which the first application is founded.

94. Briefly, the first applicant argues that the award deals with or determines matters not contemplated by or falling within the terms of the reference to arbitration and that the award determined matters beyond the scope of the reference. The contestation here is anchored on the assertion that the award of general damages for breach of contract is *ultra vires* and in-excess of jurisdiction and falls outside the terms of reference. Further, it is contended that the award of interests on general damages is *ultra vires*, in-excess of jurisdiction or in excess of the terms of reference. It is applicants' position that the Arbitration clause limited the dispute to maters arising out of or relating to the agreement, and that, that the award is ambiguous and inconclusive for failing to determine costs.

95. Other grounds cited by in the first application are that the order requiring the purchase price of **Kshs. 27,500,000/= to** be paid within **15** days of publication of the Award is *ultra vires* or in-excess of clause **C (iii)** of the contract which provides that the purchase price shall in case of rescission be refunded upon sale of the subject Apartment; that the award is inimical to public policy and inconsistent with judicial precedents and laws of Kenya; and, that the award is illogical and in incongruent to the law of contract for finding that the contract was frustrated and at the same time holding that there was breach of contract; that the award of general damages and interest at the same time is double enrichment; that the award of general damages is *ultra vires*, in-excess of jurisdiction and/or terms of reference to arbitration and it deals with a tort which was not contemplated by or not falling within the terms of the reference and which is beyond the scope of the reference. Lastly, it was contended that the Arbitrator failed determine the costs payable to the parties which rendered the award outside the scope of reference.

96. It is basic law that by agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else.[68] Typically, they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute relitigated or reconsidered. They may, obviously, agree otherwise by appointing an arbitral appeal panel. By agreeing to arbitration, the parties limit interference by courts to the ground set out in section **35** of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise.

97. The principle of party autonomy in arbitration proceedings and need to give due deference to an arbitral award, is something courts world over have consistently up held. This approach is not peculiar to Kenya; it is indeed part of a worldwide tradition. Kenyan law, dictates a high degree of deference for awards arising from consensual arbitration tribunals. The concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes have given rise in other jurisdictions to the adoption of a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards.

98. Before considering the applicant's grounds highlighted above, it is necessary to determine the nature of the inquiry, the arbitrator's duties, and his powers. The arbitration clause clearly provides that "any dispute, difference or question whatsoever which may arise between the parties including the interpretation of rights and liabilities of either party shall be referred to an arbitrator under the rules of the Arbitration Act, 1995 of Kenya (Act No 4 of 1995) as amended by the Arbitration (Amendment Act, 2009 (Act No 11 of 2009) or other Act or Acts for the time being in force in Kenya or any statutory modification or re-enactment for the time being in force, such arbitrator to be appointed by agreement of both parties and in the absence of agreement within **(14)** days of the notification of the dispute by either party to the other then o the application of any one party by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) and the decision of such arbitrator shall be final and binding on the parties hereto.

99. In addition, it is important to bear in mind the following points. *First*, we must recognize that fairness in arbitration proceedings should not be equated with the process governing the conduct of proceedings before our courts. *Secondly*, there is no reason why an investigative procedure should not be pursued as long as it is pursued fairly. The manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. *Thirdly*, the process to be followed should be discerned in the first place from the terms of the arbitration agreement itself. Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of section **35,** the goals of private arbitration may well be defeated.

100. I am clear in my mind that a final award must deal with all the issues put to the tribunal. It is also settled law that a final award that does not do so is imperfect. However, this does not mean that arbitrators must deal with each individual item separately but they must take each item into consideration in arriving at their conclusion. The essential function of an arbitrator is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain alive.

101. Talking about issues flowing from the pleadings, the applicant argues that the Arbitrator exceeding the scope of the reference. The term 'exceeding his powers' requires little by way of elucidation and the following statement by Lord Steyn says it all: -[69]

> "*But the issue was whether the tribunal "exceeded its powers"…this required the courts… to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have…*"

102. As was held in *Cf Bull HN Information Systems Inc v Hutson*[70] "to determine whether an arbitrator has exceeded his authority . . . courts "do not sit to hear claims of factual or legal error . . ." . . . and "[e]ven where such error is painfully clear, courts are not authorized to reconsider the merits of arbitration awards. . ."

103. The term acting outside the scope of his mandate must be understood in context. The ground is to all intents and purposes identical to a ground of review available in relation to proceedings of inferior courts. It is a valid ground under the Act for setting aside an award if an arbitrator had 'exceeded his powers.' To exceed one's powers does not go to merit but to jurisdiction. However, where a decision maker misconceives the nature of the inquiry a hearing cannot in principle be fair because the body fails to perform its mandate.

104. Section **35 (2)** of the Act requires in peremptory terms that an application to set aside an arbitral award can only be allowed if the party making the application furnishes proof of the grounds provided therein. Failure to furnish evidence as decreed by the said provision is a fertile ground for the application to be refused. The Arbitrator was tasked to determine the dispute, difference or question whatsoever which may arise between the parties, including disputes relating to the interpretation of the rights and liabilities of either party. In the Statement of Claim filed before the Arbitrator, the Respondent who was the claimant prayed for: -

a. An order that the Respondent is in breach of the contract/ or contract has been frustrated.

b. Order for refund of the entire purchase price of Kshs. 27,500,000/=.

c. General damages for breach of contract;

d. Interest on (a) above at court rates from 5th September 2015 until payment in full at commercial rates of 20%,

e. Any other relief that this tribunal may deem fit to grant.

105. The applicant in the first application was the Respondent before the Arbitral Tribunal. In its defence and counter-claim it sought the following orders against the claimant: -

a. Dismissal of the claimant's Statement of Claim.

b. An order of specific performance directing the claimant to execute and return the engrossed lease.

c. An order for specific performance directing the Claimant to pay all outgoings.

d. An order directing the claimant to pay rent to the Respondent at the rate stated in the counter-claim for the date set therein.

e. In the alternative to (b) and (c) above, rescission by the Respondent, of the letter of offer and the contract by reason of the claimant's breach of the contract.

f. An order that the claimant grants the Respondent vacant possession of the property.

g. In the event of a refund of the purchase price, an order of forfeiture of 10% thereof in favour of th Respondent; and that

h. Costs of the Claim and Counter-claim be awarded to the Respondent

106. Issues for determination flow from the pleadings filed. In addition, the arbitrator had, the power (i) not to decide an issue which he deemed unnecessary or inappropriate; (ii) to decide any further issues of fact or law, which he deemed necessary or appropriate; (iii) to decide the issues in any manner or order he deemed appropriate; and (iv) to decide any issue by way of a partial, interim or final award, as he deemed appropriate.

107. The general principle that when parties select an arbitrator as the judge of fact and law, the award is final and conclusive, irrespective of how erroneous, factually or legally, the decision is. Such an error, cannot amount to misconduct unless the mistake was so gross and manifest that it could not have been made without some degree of misconduct or partiality, in which event the award would be set aside not because of the mistake, but because of misconduct.

108. Even if the arbitrator had either misinterpreted the agreement or the facts or failed to apply the law correctly, or had regard to inadmissible evidence, it does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To adapt the words of Hoexter JA:[71]

> *"It cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court."*

109. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly.[72] Errors of the kind mentioned by the applicant have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in an arbitration has to apply the law but if he errs in his understanding or application of the law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.

110. In *Telcordia Technologies Inc v Telkom SA Ltd*[73] the Supreme Court of Appeal of South Africa stressed the need, when courts have to consider the confirmation or setting aside of arbitral awards, for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimizes the scope for intervention by the courts. This same position was reiterated by our Supreme Court in the *Nyutu Case.*

111. My reading of the pleadings filed before the Arbitrator and the final award leaves me with no doubt that the arbitrator understood clearly that his duty was to interpret the agreement and that he had, in this regard, to choose between the conflicting contentions tendered by the parties. He understood particularly well that he had to determine the meaning of the contract with reference to its true construction and that he could only have regard to admissible evidence. He understood the prayers in the Statement of the Claim and the Defence and Counter-Claim. In fact, all the orders he granted in the award flow from the pleadings before him and the evidence. Both parties addressed all the issues determined by the Arbitrator.

112. A perusal of the pleadings filed in the Tribunal, the opposing evidence tendered and the detailed submissions tendered before the Arbitrator and the Award leave no doubt that the issues being raised in the instant application were raised and submitted upon before the Arbitrator. It follows that the argument that the Arbitrator went outside his mandate is incorrect. He determined the issues he was called upon to decide. In *Mahican Investment Limited v Giovani Gaid & 80 Others* it was held: *In order to succeed (in showing that the matters objected to are outside the scope of the reference to arbitration) the applicant must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute.*

113. The applicant cannot purport to raise issues of fact he raised or ought to have raised before the tribunal. Whether the interest was payable, what is the applicable rate, and whether general damages were payable and the quantum thereof were matters within the ambit and scope of the determination. Inviting this court to determine such issues amounts to asking this court to re-evaluate the facts as if it is hearing an appeal. In fact, majority of the grounds cited are essentially grounds of appeal.

114. The other ground cited by the applicant is that the award is against public policy. The basis for this argument is that the impugned portions of the Award offend the law and authorities. It is common ground that one of the grounds for the court to reject the award enforcement is if the award is violation of 'public policy.' In fact, arbitrability and public policy are closely related. Arbitrability relates to the legality of an arbitration agreement or process, while public policy refers to the laws or standards that either the agreement or the award might contravene.[74]

115. Arbitrability and public policy thus overlap in arbitration practice. A violation of public policy, may render an agreement in arbitrable.[75] Courts often refer to "public policy" as the basis of the bar.[76] Thus, if the court feels that an issue falls in the scope of public policy, the court may intervene only, to protect the benefit of the public. An obvious example is criminal law, which is generally the domain of the national courts.[77] The criminal case involves the violation of good morals affecting the public; therefore, the parties' autonomy is restricted and the court will decline to enforce the award.

116. Generally, public policy is used to describe the imperative or mandatory rules that parties cannot exploit.[78] Public policy is outside and beyond the scope of arbitration and stays within exclusive judicial jurisdiction, and it also can be the obstacle to the arbitration of certain disputes. The concept of public policy often is used to describe the imperative rules of each country. Public policy serves as the rationale on which a domestic court may refuse the enforcement of an arbitral award, which is contrary to the laws or standards of the court's jurisdiction. If the court feels that enforcement of an award would violate the basic notions of morality and justice, the court may vacate such award.[79]

117. Domestic public policy is expressed by legislative enactments, constitutional constraints, or judicial practice within individual states.[80] Hence, public policy is a legal principle founded on the concept of public good. It can be used to protect the morale of a country or justify a court's intervention where an agreement is considered harmful to the public welfare. Even though such public policy will disturb only one part of community, the court should weigh the whole of the community in applying public policy considerations if it believes that such actions may impact their own public good and morale. Public policy has three distinct levels: domestic, international, and transnational.[81] Domestic public policy is when only one country is involved in arbitration, the parties come from the same country, and thus the laws and standards of that country's domestic public policy apply. Domestic public policy generally is seen as being the fundamental notions of morality and justice determined by a national government to apply to purely domestic disputes within their jurisdiction. These mandatory rules of public policy are found in a State's laws and are designed to protect the public interests of that State, not of any particular private individual or entity.

118. International public policy is when an international element gets involved, either from the underlying transaction's nature or from the nationality of the parties. The concept is comprised of the rules of a country's domestic public policy applied in an international context. In other words, we can say that international public policy normally is more liberal than domestic public policy. International public policy is an application of a country's domestic public policy in an international context, but the court tends to consider several factors other than public interest internationally. The court will balance the interests of its own domestic public policy with the needs of international commerce.

119. The main case regarding public policy in England is *Deutsche Schachtbau-und Tiefbohrgesellschafl MB.H (D.S.T.) v. Ras Al Khaimah Nat'l Oil Co. (Rakoil).*[82] In this case, the court reasoned that in order for an English court to set aside the award on the public policy defense, the claiming party must prove that there is "some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.[83] In addition, it was not contrary to public policy of England if the arbitrator used common principles underlying the laws of the various nations to govern contractual relations, especially when the parties failed to specify which system of law would apply. The English court confirmed that it had to violate a particular existing justified interest of the English public to be a public policy exception.[84]The court must see that such recognition and enforcement of award may endanger the interest of the state's citizens by executing its public authority. Thus, any public policy exception that cannot show clearly how the recognition and enforcement could damage the interest of state's public will not be considered as a bar to recognize or enforce the award.

120. A review of all the grounds propounded by the applicant in support of the plea that the award or portions thereof offend public policy leave me with no doubt that the applicant has not satisfied the tests laid down in the above cited case(s). It is not enough to recite a Constitutional provision or a statutory provision or an enactment as has happened in this case. The party alleging breach of public interest must prove beyond doubt how the recognition and enforcement of the award would damage public good or how it would be clearly injurious to the public good or, that possibly, that the enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.

121. It is not enough to allege, as the applicant did that the award of interest and general damages amounts to double benefit and it is against public policy. It is not enough to allege that the award offends the law of contract for finding that the contract was frustrated and also holding that the applicant was in breach. *First*, arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the parties. The applicant's argument flies on the face of this basic principle of Arbitration. *Second*, the arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are to be determined. The applicant cannot now purport to rewrite the contract by attempting to free itself from the arbitration outcome which is binding upon the parties by hiding behind the concept of public policy. *Third*, the arbitrator is chosen, either by the parties, or by a method to which they have consented. *Fourth*, arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time that the arbitrator is appointed.

122. The Act confers the Arbitrator exclusive jurisdiction over questions of fact and law which excludes appeals and limits reviews. The court may only be approached as provided by the Act. The circumstances under which the court can intervene are enumerated in section **35** and as the Supreme Court stated in the *Nyutu Case* in exceptional circumstances otherwise the arbitral award is final. Unless the arbitration agreement provides otherwise, an award is only subject to the provisions of the Act, final and not subject to appeal or review and that each party to the reference must abide by and comply with the award in accordance with its terms. Clearly, the Legislature intended the arbitral tribunal to have exclusive authority to decide whatever questions submitted to it, including any question of law. That is what the parties agreed.

123. In view of my analysis of the facts, the law and authorities herein above detailed, it is my finding that the applicant has failed to establish any grounds for this court to set aside the arbitral award. Put simply, the applicant has not demonstrated any of the grounds provided in section **35** for setting the award aside. The upshot is that the first application dated **6th** November 2020 is dismissed with costs to the Respondent.

124. I now turn to the second application. I have weighed the material presented before me and the law. I find no impediment to the said application. The effect is that the application dated **27th**October 2020 is merited. I allow the said application and order that the arbitral award dated and published on **9th** July 2020 be and is hereby recognized, adopted and enforced as an order of this court. Leave be and is hereby granted the applicant Mr NAJMUDEN DHANJI JIWA to enforce the arbitral award dated and published on **9th** July 2020 as a decree of this court. I further order that the Respondent IDRATA DEVELOPERS LIMITED do pay the costs of the application dated **27th**October 2020 to the applicant NAJMUDEN DHANJI JIWA.

Orders accordingly

Signed and Dated at **Nairobi** this **16th** day of **March** 2021

John M. Mativo

Judge

---

[1] Civil Appeal No. 179 of 1995 (1995-1998) 2 EA 289.

[2] {1974} EA 41.

[3] {2017} e KLR.

[4] {200} EA 366.

[5] Cap 21, Laws of Kenya.

[6] Civil Appeal No. 179 of 1995 (1995-1998) 2 EA 289.

[7] {2017} e KLR.

[8] {2016} e KLR.

[9] Mustill and Boyd 2nd Edition at page 554.

[10] Nairobi H.C.C. No. 477 of 1999.

[11] {2016} e KLR.

[12] {2011} e KLR.

[13] {2015} e KLR.

[14] {2009} e KLR.

[15] 2nd Edition at page 554.

[16] {2017} e KLR.

[17] {2016} e KLR.

[18] {2019} e KLR.

[19] {2019} e KLR.

[20] Citing Lord Atkinson in the case of *Addis v. Gramophone Co.* (1908-1910) All ER 1

[21] Civil Appeal No. 179 of 1995 (1995-1998) 2 EA 289.

[22] {1974} EA 41.

[23] {2017} e KLR.

[24] Counsel also cited *Mohamed Abushiri Mukullu v Minister for Lands and Settlement & 6 others* {2015} e KLR citing the Supreme Court case of **Jasbir Singh Rai & 3 Others v Tarlochan Singh & 4 Others, {2013} e KLR.**

[25] {2015} e KLR.

[26] {2015} e KLR.

[27] {2009} e KLR.

[28] {2002} 2 EA 366.

[29] **{1946} EACA.25.**

[30] {2015} e KLR.

[31] {2020} e KLR.

[32] Also cited *Edward Okoth Okeyo v South Nyanza Sugar Co. Ltd* {2018} e KLR.

[33] {2018} e KLR

[34] {2015} e KLR

[35] {2009} e KLR.

[36] {2016} e KLR

[37] {2009} e KLR.

[38] {1997} e KLR.

[39] H.C Misc. Application No. 238 of 2003.

[40] Lloyd's Law Report 1979 Vol. 2 p. 289.

[41] {2005} e KLR.

[42] {2020} e KLR.

[43] {2001}

[44] {2018} e KLR

[45] {2020} e KLR

[46] NRB CA CA No. 102 of 2012 {2014} e KLR.

[47] 1 Lloyds LR 215.

[48] {2005} e KLR.

[49] {2017} e KLR.

[50] Civil Appeal No. 8 of 2009.

[51] {2018} e KLR.

[52] {2020} e KLR.

[53] ML HC Misc. Civil App. No. 216 of 2018 {2019} e KLR.

[54] {2002} EA 366.

[55] {2002} I KLR 606.

[56] {2005} e KLR

[57] {2020} e KLR.

[58] 524 F. Supp. 2d 332 (2007).

[59] {2009} e KLR.

[60] {2020] e KLR.

[61] See Sutton D.J et al (2003), Russell on Arbitration (Sweet & Maxwell, London, 23rd Ed.) p. 293.

[62] {2019} e KLR.

[63] Redfern and Hunter Law and Practice of International Commercial Arbitration 4ed (Sweet & Maxwell, London 2004) at 65-6; Kerr "Arbitration and the Courts – The UNCITRAL Model Law" (1984) 50 Arbitration 3 at 4-5; London Export Corporation Ltd v Jubilee Coffee Roasting Co. Ltd [1958] 1 WLR 271 at 278

[64]Misc. Civil Application No. E 1200 of 2021.

[65]Misc. Civil Application No. E 1200 of 2021.

[66] {2012} e KLR.

[67] {2018} e KLR.

[68] They may even reduce the level of procedural fairness by, e g, agreeing that the arbitrator may decide the matter without hearing them.

[69] *Lesotho Highlands Development Authority v Impregilo SpA* {2005} UKHL 43 para 24.

[70] 229 F 3d (1st Cir 2000) 321 at 330.

[71] Administrator, South West Africa v Jooste Lithium Myne (Edms) Bpk 1955 (1) SA 557 (A).

[72] *Armah v Government of Ghana* [1966] 3 All ER 177 at 187 quoted in Anisminic Ltd v Foreign Compensation Commission [1969] 1 All ER 208 (HL) at 223D-F.

[73] [2006] ZASCA 112; 2007 (3) SA 266 (SCA); 2007 (5) BCLR 503 (SCA) at para 4.

[74] 3 Julam D M Lew, Loukas A Mistelis and Stefan M Kroll, Comparative International Commercial Arbitration, Kluwer Law International, 32 (2003).

[75] Id

[76] 4 Laurence Shore, Defining "Arbitrability": The United States vs. The Rest of the World, New York Law Journal, 15 (2009).

[77] Mistelis L. & Brekoulakis S., Arbitrability: International & Comparative Perspectives, 4 (2009).

[78] Pierre Lalive. Transnational (or Truly International) Public policy and International Arbitration, : Comparative Arbitration Practice and Public Policy Arbitration ICCA InternationalArbitration Congress, 261(1987).

[79] 3 Bockstiegel, K., Public Policy and Arbitrability, Comparative Arbitration Practice and Public Policy Arbitration: ICCA International Arbitration Congress, 179(1987).

[80] Parsons & Whitmore Overseas Co. v. Societe Generale de L' Industrie du Papier, 508 F.2d 969, 974 (2d Cir 1974).

[81] KeIllleth Michael Curtin.. Redefining Public Policy in International Arbitration o/Mandatory National Laws, 64 DEF. COUNS. J., 271, 275, 281 (1997).

[82] Deutsche Schachtbau-und Tiefbohrgesellschaft MB.H (D.s. T.) v. Ras Al Khaimah Nat 'I Oil Co. (Rakoil). 2 Lloyd's Rep. 246, 254 (K.B.)(1987).

[83] Ibid

[84] Alexander J. Belohlavek, Arbitration, Order Public and Criminal Law: Interaction of Private and Public International and Domestic Law, 1347 (2009),