



**SBI International Holdings (Kenya) v Kenya National Highway Authority
(Commercial Civil Case E374, E375, E377, E229 & E228 of 2020) [2021]
KEHC 31 (KLR) (Commercial and Tax) (14 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 31 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E374, E375, E377, E229 & E228 OF 2020
JM MATIVO, J
SEPTEMBER 14, 2021**

BETWEEN

SBI INTERNATIONAL HOLDINGS (KENYA) PLAINTIFF

AND

KENYA NATIONAL HIGHWAY AUTHORITY DEFENDANT

RULING

1. In order to put the defendant's/applicant's application dated 12th May 2021, the subject of this ruling into a proper perspective, it is useful to bring into view, albeit briefly the factual background which triggered the dispute the subject of this litigation. I had the benefit of highlighting the same history and context of this dispute in the ruling dated 19th February 2021. Inevitably, I will heavily borrow from the said account.
2. For starters, the parties herein signed International Federation of Consulting Engineers (FIDIC) contracts. A key characteristic of FIDIC contracts is that they adopt a multi-tier dispute resolution process which usually provides as a first step, for disputes to be submitted for adjudication before a Dispute Adjudication Board (DB). If one (or both) of the parties is dissatisfied with a DB decision, a period is allowed for amicable settlement. In the event of no settlement, during the 'amicable settlement' period, the final stage is to proceed to arbitration.
3. Pursuant to the said agreements, the defendant/applicant engaged the Plaintiff to undertake construction works detailed therein after the defendant accepted the Plaintiff's bid in the various tenders involving execution and completion of the agreed works and specified therein. The General Conditions of Contract provided at Sub-Clause 20.2 for the appointment of a DB which would be the first forum for adjudication of any dispute that may rise between the parties as concerns the Contract. The parties covenanted at Sub-Clause 20.4 of the General Conditions of Contract that within 84 days



after receiving such reference, or within such other period as may be proposed by the DB and approved by both Parties, the DB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause and that the decision shall be binding on both Parties unless and until it shall be revised in amicable settlement or an arbitral award as described.

4. Sub-Clause 20.4 of the General Conditions of Contract, a decision of the DB is binding on the parties, and that the said clause inter alia imposes immediate contractual obligations which must be performed promptly. Under the contract, the determinations of the DB is binding unless upset by amicable settlement of the parties or by an arbitral award.
5. The Plaintiff's case is that inconformity with its obligations under the contract, it performed its part of the contract, and upon being entitled to payment, the defendant disputed the payment, and as per contract, the Plaintiff referred the disputes to the DB, comprising one adjudicator, Mr. John Papworth of Shapwick, England who heard the dispute and rendered a determination under Sub-Clause 20.4 of the General Conditions of Contract on 10th July 2020, directing the defendant/applicant to pay the Plaintiff the amounts specified in each Plaintiff within 14 days of the decision of DB. The DB expressly held that the Contract requires the Parties to comply promptly with its decision, and failure to do so is a breach of contract, whether or not either or both Parties issues a notice of dissatisfaction.
6. The PI decisions of the DB have never been set aside, either by amicable settlement or by arbitration, so the decisions are enforceable and contractually binding upon the defendant. The defendant/applicant has neglected to pay. Whilst the defendant filed a Notice of Dissatisfaction under Sub-Clause 20.4 of the General Conditions of Contract reserving the right to appeal, the binding decision of the DB has not been challenged by an arbitration. As a consequence, of the foregoing, the Plaintiff in the Plaintiff prays for judgment against the defendant for the sums claimed in each Plaintiff plus interests thereon at 3% above Central Bank of Kenya Base Lending rate per annum plus costs of the suit.
7. The defendant filed Notices of Preliminary Objections in these consolidated suits dated 6th November 2020 objecting to this court's jurisdiction to hear these suits on grounds that the contracts contained a mandatory arbitration clause at Clauses 20.6 and 20.7 of the General Conditions of Contract. It also stated that the suits are incurably defective for failure to comply with Order 4 rule 1 (4) of the Civil Procedure Rules, 2010 because the Verifying Affidavit of Gilad Mishni dated 18th September, 2020 was not accompanied by a Board resolution demonstrating authority to swear or file it on behalf of the company.
8. Contemporaneous with the Preliminary Objections, the defendant/applicant filed identical applications in each file seeking orders that this court refers these suits to arbitration as envisaged at Clauses 20.2-20.7 of the contracts citing of the . It also prayed for costs. In a ruling dated 19th February 2021, I dismissed the said application stating: -

47. In FIDIC contracts, the process of dispute resolution by adjudication is contractual in nature. The terms are contained in the agreement between the parties in the form of a dispute resolution clause. By submitting to the contract, the parties willingly agree to be bound by the terms of the agreement including the dispute resolution process. Courts cannot rewrite a contract validly entered between parties. In *Freeman NO and Another v Eskom Holdings Limited*, Kathree-Setiloane AJ held that the defendant's assertion that it need not comply with the adjudicator's determination pending the arbitration was not a bona fide defence that is good in law because the parties had agreed that the adjudicator's decision is final and binding unless and until revised by arbitration; it is therefore of an interim nature.



48. From the judicial pronouncements discussed above, the following principles can be culled. One, that a DAB decision is binding on the parties and enforceable in court proceedings as a contractual obligation, unless and until the determination has been overturned or varied in arbitration proceedings. Two, while the DAB decision is not final, the obligation to make payment or otherwise perform under it once the decision is given, should be given effect without delay. Three, such provisions are aimed at ensuring continuation of work pending arbitration and to obviate tactical creation of disputes with a view to postponement of liability.
49. It follows that a party who is dissatisfied by a decision of the DAB must comply promptly with the adjudicator's determination, notwithstanding the party's delivery of a notice of dissatisfaction. The notice preserves the party's right to require arbitration, but does not affect the binding nature of the adjudicator's determination. Under clause 20.4 the General Conditions, the DB decision is binding on the parties and that the successful party is entitled to enforce the decision unless it is set aside by amicable settlement or by arbitration, which right is preserved by Clause 20.7 of the Particular Conditions of the Contract. A reading of the terms of the contract validly signed between the parties and the numerous judicial pronouncements cited above interpreting similar contracts leave me with no doubt that the applicants' case is fit for dismissal.
50. Flowing from my analysis of the law and the issues discussed above, it is my conclusion that the applicant's 5 applications dated 6th October 2020 are unmerited. Accordingly, I dismiss the said applications with no orders as to costs.

The instant application

9. Vide the application dated 12th May 2021 the subject of this ruling expressed under the provisions of *Civil Procedure Rules, 2010, Sections 1A, 1B and 3A* of the *Civil Procedure Act*¹ and Article 159 (2) (a) (b) and (d) of the Constitution of Kenya and all other enabling provisions of the Law, the defendant/applicant prays for an order that this court stays the proceedings in these consolidated matters, including any request for judgment and all the consequential orders thereto and that the defendant/applicant be granted leave to file its defense(s) in all five matters out of time. The applicant also prays for costs of the application to be in the cause. Prayers (1), (2) & (3) of the application are spent.
10. The application is founded on the grounds listed on the face of the application which are also explicated in the annexed affidavit of Nathaniel Chisenga Munga, Advocate, the defendant's/applicant's Senior Legal Officer dated 12th May 2021. The reasons cited are that the court only read a paragraph of the ruling advised the Parties that a detailed Ruling would be e-mailed to the parties which was not done but it was instead uploaded into the e-filing platform in E375 of 2020 which was not the lead file, hence there was a delay in accessing the ruling. The applicant states that there has been no unreasonable delay since the Ruling was delivered on 19th April, 2021 and the 14 days for filing a defense lapsed on 4th May, 2021. Further, that it has without unreasonable delay filed its defence, and the defendant has a strong case which ought to be determined on merit.

¹ Cap 21, Laws of Kenya.



11. The defendant/applicant states that the Plaintiff's claims aggregates to over Kshs. 1 billion to be paid from taxpayer's coffers and that the omission to file the defence was not due to negligence. It also states that the Oxygen Principles envisage that sometimes technicalities and technological advancements such as the e-filing platform could cause lapses which should not deny a litigant justice. Additionally, the applicant states that the Plaintiff has filed Request for Judgment in each file, hence, the defendant is apprehensive that detrimental orders may be issued against it without being heard on merit.
12. The applicant also states that the mistake of counsel should not be visited on the client, and that the Plaintiff will not suffer any prejudice should the defendant be granted leave to file its defense(s) out of time. Further, this court ought to dispense justice by hearing the matters on merit. It states that it is in the interests of equity and justice that this court stays any orders issued pursuant to the Request for Judgment if at all and also grants the prayer for stay. Additionally, the defendant states that it has an arguable defense and it should be given its day in court to present the same and the matters be decided on merit. Also, it states that the Plaintiff/Respondent will not suffer any loss that cannot be compensated by an award of damages if the orders are granted and it is in the interests of justice and fairness that the application be allowed.

The Plaintiff's grounds of opposition

13. The Plaintiff filed ground of opposition dated 9th June 2021 stating that the court has no jurisdiction to re-write the contract between parties citing *National Bank of Kenya v Pipelastik Samkolit (K) Ltd & another*,² and *SBI International Holdings (Kenya) v Kenya National Highway Authority*,³ *SBI International Holdings (Kenya) v Kenya National Highway Authority*,⁴ *Esor Africa (Pty) Ltd/Franki Africa (Pty) Ltd v Bombela Civilis (Pty) Ltd*⁵ and *Tubular Holdings (Pty) Ltd v Dbt Technologies (Pty) Ltd*.⁶ It also states that the defendant has no justiciable defense against DB decisions under Clause 20.4 which have not been set aside by amicable settlement or arbitration. Also, that the court has an obligation under section 10 of the not to intervene in matters governed by the arbitration, and challenge to the DB decisions is a matter that can only be undertaken by arbitration as per Clauses 20.4, 20.5 and 20.6 of the Contract and not by court.
14. The Plaintiff also states that the application is a gross abuse of judicial process because the High Court has severally decided similar cases (see Nairobi High Court Civil Case No. E075 of 2020 *SBI International Holdings (Kenya) v Kenya National Highway Authority* vide rulings dated 15th September 2020 and 19th April 2020 determining the defendant's responsibility under Contract Clause 20.4 to pay now and argue later holding that a DB decision cannot be challenged in enforcement proceedings, but by arbitration and parties have the obligation to promptly comply with the DB decision. It states that the application is a game of chance to delay and scuttle compliance with contractual obligations. Further, that the defendant seeks equitable reliefs yet it is in breach and therefore undeserving of any equitable reliefs. (Citing *Kawaljeet Singh Rekhi v Peter Wainaina Kamau & 2 others*⁷).

² {2001} e KLR.

³ High Court in Nairobi High Court Civil Case No. E075 of 2020.

⁴ Nairobi High Court Civil Case No. E075 of 2020.

⁵ SGI-IC Case No. 12/7442 (High Court of South Africa).

⁶ Case No. 06757/2013 (High Court of South Africa).

⁷ {2016} e KLR.



The applicant's/Defendant's advocates submissions

15. Mr. Munga, the applicant's counsel urged the 4-day delay in filing the defense is not court inordinate. He argued that the Respondent is relying on the "pay now, argue later principle" but the applicant seeks to be heard on merit. He also urged the court not to visit the mistake of counsel on the client. He argued that the "pay now argue later principle is not absolute" and that it has exceptions and it would be unfortunate to enforce the payment without considering the matter on merits. He urged the court to invoke the oxygen principle and allow the application.

The Respondent's/Plaintiff's advocates submissions

16. Mr. Bwire, the Respondent's counsel argued that under section 62 of the , the court having dismissed the applicant's application for reference to arbitration, the moratorium under section 6 of the Act stood lifted and it ought to have filed its defense. He argued that the reasons offered have been settled by the court severally and cited *National Bank of Kenya v PipeplasticSamkolit (K) Ltd* for the proposition that courts cannot re-write contracts between parties. He submitted that the defendant can only argue about the merits of the decision in another forum because these proceedings seek to enforce the "pay now and argue later principle." He argued that the defenses filed seek to challenge the DB decision which can only be determined under clauses 20.4,20.5 and 20.6 of the agreement. He submitted that there is no issue for trial in these proceedings, the only position being "pay now and argue later" principle and that the issues the applicants seek to raise can only be raised during the arbitration, but, in the meantime, it has an obligation under clause 20.4 to honor the DB decision.
17. Mr. Bwire argued that the applicant is seeking an equitable relief of setting aside, yet it has approached the court with dirty hands because it is bound to comply with the DD decision. He submitted that the application aims at prejudicing, embarrassing or delaying these proceedings; that it is an abuse of court process because the applicant is also a party to HCCC 075 of 2020 in which the court pronounced itself on the same issue, hence it playing a game of chance. He submitted that the applicant shall have another avenue for redress in the arbitral proceedings, but in the meantime, it has an obligation to "pay now and argue later." He argued that the applicant's attitude is embarrassing the Republic of Kenya in the eyes of the international community by refusing to honor its contractual obligations.

Determination

18. The core prayer sought by the defendant/applicant is leave to file its defense(s) out of time. Courts have severally outlined the factors to be considered in applications of this nature.⁸ The factors can be summarized as follows: -
19. The above factors are not rigid. It is always undesirable, and indeed impossible, to lay down hard and fast rules in matters that affect discretion. The main goal of the court is to determine whether the interests of justice favour granting the order. Taken, by and large, the object is to see that the defendant

⁸ See *Kaur v. Janeallam* 2019 ONSC 4249

- a. whether the motion was brought promptly after the defendant learned of the default judgment;
- b. whether there is a plausible excuse or explanation for the defendant's default in complying with the Rules of Civil Procedure;
- c. whether the facts establish that the defendant has an arguable defence on the merits;
- d. the potential prejudice to the defendant should the motion be dismissed, and the potential prejudice to the plaintiff should the motion be allowed; and
- e. the effect of any order the court might make on the overall integrity of the administration of justice.



does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defenses in a class of cases where speedy decisions are desirable. The presence of an arguable defense on the merits may justify the court exercising its discretion to set aside a default judgment, even if the other factors are unsatisfied in whole or in part. In general, therefore, the test is to see whether the defense raises a real issue and not a sham, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible, defense on those facts. Leave to defend is based on the defenses which are disclosed in the affidavit in support of the application or in the draft defense filed. The following propositions (though not exhaustive) may offer a useful guide: -

- a. If the defendant satisfies the court that he has a good defense to the claim on its merits the defendant is entitled to unconditional leave to defend.
- b. If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defense although not a positively good defense the defendant is entitled to unconditional leave to defend.
- c. If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit or draft defense does not positively and immediately make it clear that he had a defense, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defense to the Plaintiff's claim the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.
- d. if the defendant has no defense or the defense set up is illusory or sham or practically moonshine then ordinarily the defendant is not entitled to leave to defend.
- e. If the defendant has no defense or the defense is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to judgment, the court may protect the Plaintiff by only allowing the defense to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defense."

20. A casual reading of the above propositions show that proposal (a) applies where the defendant has a good defense to the claim on its merits; suggestion (b) arises in a situation where the defendant has a fair, bona fide or reasonable defense to defend, although not a positively good defense; proposition (c) arises if the defendant would be entitled to leave to defend on such conditions which the court may impose as to the time or mode of trial without any payment into court or furnishing security; proposition (d) indicates that defendant is in a situation where there is no reasonable defense or the defense set up is illusory or sham or practically non-existent. Ordinarily, the defendant is not entitled to leave to defend. It is important to mention that there is no statutory provision which confers a defense which is not provided for under the law. Thus, where a party has no defense at all, (i.e., the defence is a sham), leave will be refused.
21. Before me is an arbitration dispute. The parties willingly signed FIDIC contracts. The General Conditions of Contract provided at Sub-Clause 20.2 provided for the appointment of a DB which would be the first forum for adjudication of any dispute that may rise between the parties concerning the contract. The parties covenanted at Sub-Clause 20.4 that within 84 days after receiving such



- reference, or within such other period as may be proposed by the DB and approved by both Parties, the DB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause and that the decision shall be binding on both Parties unless and until it shall be revised in amicable settlement or an arbitral award as described.
22. Sub-Clause 20.4 creates contractual obligations which are immediate and which must be performed promptly. By dint of the said clause, the fact that a party had engaged the other to attempt amicable settlement or the fact that a party had reserved the right to appeal the decision of the DB to arbitration by giving notice to the other party of its dissatisfaction and intention to commence arbitration does not suspend the duty to perform the obligations determined by the DB, and conversely does not bar a successful party before the DB from enforcing the decision of the DB. Determinations of the DB being an assessment of rights and obligations of parties under the contract is enforceable, binding and continue to be binding unless upset by amicable settlement of the parties or by an arbitral award.
 23. The DB heard the dispute and rendered its determination on 10th July 2020 directing the defendant to pay the Plaintiff the amounts specified in each Complaint within 14 days of the decision. The DB decision has never been set aside, either by amicable settlement or by arbitration. Under the contract, a party who is dissatisfied by a decision of the DAB must comply promptly with the adjudicator's determination, notwithstanding the party's delivery of a notice of dissatisfaction. The notice preserves the party's right to require arbitration, but does not affect the binding nature of the adjudicator's determination. Under clause 20.4 the General Conditions, the DB decision is binding on the parties and that the successful party is entitled to enforce the decision unless it is set aside by amicable settlement or by arbitration, which right is preserved by Clause 20.7 of the Particular Conditions of the Contract.
 24. The issues raised in this application bring to fore the Concept of the Dispute Board. In construction contracts, the DB mechanism is formulated on the basis that issues which may lead to potential disputes should be prevented and disputes should be resolved in real time, as opposed to resorting to litigation or arbitration which are considered as last resorts and effectively used only after the completion of the projects. As Dr. Omoto states, "The best way to resolve disagreement is to prevent it from becoming a formal dispute."⁹ To that end, the concept of appointing a board of independent and experienced construction professionals at the beginning of a project was born. Such boards were to serve as continuous team members, supervising the project and keeping an equal distance between the parties, namely the contractor and the employer.¹⁰
 25. The contract provides that the DB's decision 'shall be binding on both Parties who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award ...'. On the other hand, the contract establishes that 'if the DAB has given its decision as to the matter in dispute to both parties, and no notice of dissatisfaction has been given by either Party within 84 days after it has received the DB's decision, then the decision shall become final and binding upon both Parties.' These are the two core provisions setting forth the 'binding' and/or 'final' nature of dispute DB decisions.
 26. In principle, as of the date of its issuance, any dispute board decision is binding in nature - it is a contractual obligation with which the parties should comply. Furthermore, in case neither party gives notice of dissatisfaction with the decision, the decision also becomes final. The finality of the decision adds a different layer on top of the contractual obligation, as in most legal systems the final decision is

⁹ Dr. Eng. Toshihiko Omoto, 'Dispute Boards Resolution and Avoidance of Disputes in Construction Contracts', JCAA Newsletter, no.23, November (2009).

¹⁰ *Dispute Boards as Pre-Arbitration Tools: Recent Developments and Practical Considerations*, [Kluwerarbitrationblog.com](https://www.kluwerarbitrationblog.com)



enforceable. A security of payment regime addresses the imbalance between contractor and employer. Its driving principle is the aphorism ‘pay now, argue later.’ When a dispute over a payment obligation arises, the regime facilitates the contractor’s cash flow by requiring the employer to pay now, but without disturbing the employer’s entitlement (and indeed also the contractor’s entitlement) to argue later [in arbitration] about the underlying merits of that payment obligation.

27. In *Tubular Holdings (PTY) Ltd and DBT Technologies (PTY) Limited* (Tubular Holdings Case)¹¹ the South African High Court rendered a decision fully recognizing the enforceability of DB decisions until they are reversed by a tribunal. The judge stated: - ‘I therefore find that terms of the relevant contractual provisions are perfectly clear: the parties are obliged to promptly give effect to a decision by the DAB. The issue of a notice of dissatisfaction does not in any way detract from this obligation ...’” This above case provides a clear example advising parties to a construction contract where a DB is in force to comply with the DB’s decision instead of proceeding with challenges and therefore being in breach of the contract. The parties to a construction contract accept the DB mechanism by way of contractual consent. In the same manner they contractually consent to be bound by the DB decision. Non-compliance with a DB decision is therefore a contractual breach by a party that must be assessed in the light of contract law provisions. For example, unless the contract indicates a penalty or liquidated damages for such breach, the affected party will only be entitled to request compensation, corresponding to the damage it incurred directly due to the failure of the other party to comply with the DB decision. This, however, is not the intended result of the DB mechanism. The intended result is the compliance of the party with the decision.
28. The foregoing being the nature of the contract voluntarily signed by the parties herein, I am afraid that the defendant/applicant has not demonstrated that it has a plausible defence to persuade this court to grant it leave to defend this case. A reading of the material before me leaves no doubt that the instant case falls under category (d) of the propositions discussed earlier. From the material presented in this case and on the face of the propositions of the law discussed above, it can safely be said that the defendant/applicant has not demonstrated that it has a plausible defence to warrant leave of this court to defend these proceedings. On this ground alone, the defendant/applicant’s application fails.
29. The applicant invoked this court’s inherent powers under Section 3A of the *Civil Procedure Act*.¹² Simply put, the applicant invited this court to exercise its inherent powers and grant the orders sought. Courts derive their power from the Constitution and the statutes that regulate them. The jurisdiction of each hierarchy of the courts is limited within the boundaries of the written law apart from the High Court which is sometimes said to have inherent jurisdiction to do things not specifically provided for. Historically, the high court, in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. Freedman C J M, citing I H Jacob *Current Legal Problems*, adopted the following definition of ‘inherent jurisdiction:’¹³ “. . . the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them...”

¹¹ South Gauteng High Court Johannesburg Decision dated 3 May 2013 for the case no: 06757/2013.

¹² Cap 21, Laws of Kenya.

¹³ *National Union of Metal Workers of South Africa & others v Fry’s Metal (Pty) Ltd* 1972 21 DLR (3d) 75 at 81 quoting I H Jacob, *Current Legal Problems* (1970) p 51.



30. Jerold Taitz, in his book, *The Inherent Jurisdiction of the Supreme Court*¹⁴ succinctly describes the inherent jurisdiction of the high court as follows: -“ . . . This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court.”
31. I.H. Jacob in "*The Inherent Jurisdiction of the Court*"¹⁵ quoted by Jerold Taitz (supra) states: "[it] exists as a separate and independent basis of jurisdiction, apart from statute or Rules of Court ... It stands upon its own foundation, and the basis for its exercise is ... to prevent oppression or injustice in the process of litigation and to enable the court to control and regulate its own proceedings ... [it] is a necessary part of the armory of the courts to enable them to administer justice according to law. The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers ... it operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice."
32. The inherent jurisdiction of the high court has long been acknowledged and applied by courts.¹⁶ However, a court's inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have. In *National Union of Metal Workers of South Africa & others v Fry's Metal (Pty) Ltd*¹⁷ it was held: -“While it is true that this Court's inherent power to protect and regulate its own process is not unlimited – it does not, for instance, “extend to the assumption of jurisdiction not conferred upon it by statute. . .”
33. The wisdom flowing from the above references is; what can the High Court do, in exercise of its inherent jurisdiction, to achieve the desirable justice and practicality in the prayers sought in an application which the law does not specifically provide for? In this respect, it must be mentioned at the outset the inherent powers of the court are not an open license for the court's exercise of unlimited discretion. It is invoked to effect procedural fairness between the parties where a statute falls short of doing so or where there is a gap in the law. The inherent power claimed is not merely one derived from the need to make the court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation.¹⁸ The parties herein signed a clear agreement prescribing the mode of dispute resolution. They covenanted that the decision of the DB shall be final and enforceable. Inherent jurisdiction of this court cannot be unleashed to upset the parties' clear intention which is underpinned by the and judicial precedents. The attempt to invoke this courts inherent jurisdiction on the face of such clear provisions of the contract, the law and judicial precedents fails.
34. The applicant also invoked the overriding objective of the *Civil Procedure Act* and the Rules by citing sections 1A and 1B of the *Civil procedure Act*. Reliance was also placed on Article 159 (2) (a) (b) and (d) of the Constitution. The overriding objective is a principle of law which was first introduced to the

¹⁴ Jerold Taitz, University of Cape Town, Juta, 1985.

¹⁵ (1970) 23 Current Legal Problems 23 at pp. 51-52.

¹⁶ *Ritchie v Andrews (1881-1882) 2 EDL 254; Conolly v Ferguson*

¹⁷ 2005 (5) SA 433 (SCA) para 40 citing *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A) at 7 F. 6*

¹⁸ *Se Ex parte Millsite Investment Co (Pty) Ltd 1965 (2) SA 582 (T) at p 585F-G Vieyra J and Union Government and Fisher v West 1918 AD 556.*



Kenyan legal system vide the amendment done on the Civil Procedure Act and the Appellate Jurisdiction Act in 2009. It is a principle of law aimed at delivering substantive justice without undue regard to technicalities. The principle is aimed at dealing with cases justly, expeditiously placing litigants at equal footing. It aims at ensuring that the ends of justice is met in the trial process.

35. In Safaricom Limited v Ocean View Beach Hotel Limited & 2 others¹⁹ the Court of Appeal expounded this doctrine thus, the overriding objective was aptly baptized the “O2” (the Oxygen Principle) because like oxygen, the principle has the potential to re-energize the civil system of justice and give the courts freedom to attain justice in each case in a manner that is just, quick and cheap and above all in a manner which takes into account the special circumstances of each case or appeal and the best way of handling it. The need for courts to administer justice without undue regard to procedural technicalities received constitutional underpinning, courtesy of Article 159 (2) (d). I am acutely aware that a code of procedure must be regarded as such. It is 'procedure' i.e. something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. I am equally alive to the fact that too technical a construction of sections of the law and civil procedure rules which leave no room for reasonable elasticity of interpretation should be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of Justice be used to frustrate it. However, as was held in Kamani v Kenya Anti-Corruption Commission (supra note 35)²⁰ the amendments to the Civil Procedure Act did not come to sweep away the well-known and established principles of law hitherto in place before the said amendment, and that the said amendments cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate conduct of cases. In the same vein, Article 159(2) (d) was not meant to be a panacea for all types of omissions.
36. The other reason why I am unable to exercise my discretion in favor of the applicant is that the instant dispute arose from arbitration proceedings. It is correct to say that these proceedings seek to enforce the decision of a DB. Simply put, the proceedings are enforcement in nature. That being the case the general approach on the role and interference of the court in arbitration proceedings 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. Section 10 limits the jurisdiction of the court in absolute terms to only such matters as are provided for by the Act. The section embodies the recognition of the policy of party's "autonomy" which underlie the arbitration generally and in particular the Act. Judicial decisions have engraved the extent of court intervention in arbitration, a position best captured in Ann Mumbi Hinga v Victoria Njoki Gathara²¹ which held that there is no right for any court to intervene in the 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.
37. Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes by an arbitral tribunal, as an alternative to adjudication by the courts or a public forum established by law. Parties by mutual agreement forgo their right in law to have their disputes adjudicated in the courts/public forum. Arbitration agreement gives contractual authority to the arbitral tribunal to adjudicate the disputes and bind the parties. The decision of the DB is binding. The arbitration agreement is the product of a consensual contract, so, this court must refrain from readily acceding to the invitation to “rectify the arbitration clause” by giving it an interpretation which was not contemplated by the parties. The applicant is inviting the court to venture into the

¹⁹ {2010} e KLR.

²⁰ Supra note 35

²¹ {2009} e KLR.



forbidden sphere of re-writing contracts willfully signed by consenting parties. To the extent that these proceedings seek to enforce the DB decision, this court cannot intervene except in situations contemplated by section 10 of the Act.

38. As the Supreme Court held in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*²² “extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court...” A common definition of judicial discretion is the act of making a choice in the absence of a fixed rule, i.e., statute, case, regulation, for decision making; the choice between two or more legally valid solutions; a choice not made arbitrarily or capriciously; and, a choice made with regard to what is fair and equitable under the circumstances and the law.
39. In *Smith v Middleton*²³ it was held that the discretion is to be exercised in a selective and discriminatory manner, not arbitrarily or idiosyncratically otherwise as Lord Diplock said in *Cookson v Knowles*²⁴ the parties would become dependent on judicial whim. Discretion must be exercised in accordance with sound and reasonable judicial principles. Here the order is discretionary because it depends on the application of a very general standard— what is ‘just and equitable.’ The exercise of the court’s discretionary power is influenced by considerations of justice and fairness, having regard to the facts and circumstances in the particular matter before it. It could also be exercised in order to stall the dilatory tactics adopted in the process of hearing a suit.
40. Flowing from my analysis of the law and the issues discussed above, it is my conclusion that the applicant’s applications dated 12th May 2021 is unmerited. Accordingly, I dismiss the said application with costs to the Plaintiff/Respondent.

Orders accordingly

Right of appeal

Dated, Signed and Delivered via e-mail at Nairobi this 14th of September 2021

John M. Mativo

Judge

²² {2014} e KLR.

²³ {1972} SC 30.

²⁴ {1979} AC 556.

