REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 110 OF 2019 (OS)

IN THE MATTER OF THE ARBITRATION ACT, 1995

AND IN THE MATTER OF AN ARBITRATION OVER

CONSTRUCTION OF RESIDENTIAL MASIONETTES ON LR NO. 209/3218/2

ON SUGUTA ROAD, KILELESHWA

BETWEEN

SONILE HOLDINGS LIMITED ……. PLAINTIFF

AND

VINAYAK BUILDERS LIMITED …..…….……..…….…..... DEFENDANT

AND

SIMON SAILI MALONZA ……...……. INTERESTED PARTY

JUDGMENT

The application

1. The plaintiff has moved the court by an Originating Summons dated 25th April 2019 under the provisions of **sections 13**, **14** and **17** of the ***Arbitration Act, 1995*** ("the ***Act***") seeking resolution of the following issues:

> *(a) Whether the Arbitrator, Simon Saili Malonza, has substantive jurisdiction to hear and determine the dispute between the Plaintiff and Defendant declared by the Defendant via letter dated 4th April 2018 and/or any other letter issued by the Defendant prior to 4th April 2018.*
>
> *(b) Whether the Arbitrator, Simon Saili Malonza, should be removed as the arbitrator in the dispute between the parties on account of misconduct and/or other sufficient grounds.*
>
> *(c) Whether the arbitral proceedings before Simon Saili Malonza between the Plaintiff and the Defendant shall be terminated by an order of this court for want of jurisdiction or for any other sufficient reason/cause.*
>
> *(d) What is the appropriate order as regards the costs of this proceedings?*

2. The Summons is supported by the supporting affidavit of Dominic Kinayian Kojen, the plaintiff's managing director, sworn on 25th April 2019. It is opposed by the replying affidavit sworn by Premji Vekaria sworn on 24th May 2019. Together with the Summons, the plaintiff filed a Notice of Motion dated 25th April 2019 seeking an order staying the arbitral proceedings. When the application came up for hearing,

the parties agreed to canvass the Summons instead of the Motion. Counsel for the parties adopted their written submissions which were supplemented by oral submissions in support of their respective cases.

Background

3. As the title of these proceedings show, the dispute between the parties concerns arbitral proceedings. It is based on a Standard Joint Building Council, Kenya Agreement and Conditions of Contract for Building Works dated 14th November 2016 ("the JBC Agreement") between the plaintiff and the defendant for the construction of apartments on the plaintiff's property; LR No. 209/3218/2 situated along Suguta Road, Kileleshwa, Nairobi. The contract sum was Kshs. 56,671,420.00. The contract period was 52 weeks commencing 1st November 2016 and ending on 31st October 2017. In due course, the defendant declared a dispute and the matter was placed before the interested party ("the Arbitrator").

4. The plaintiff raised a preliminary objection on the ground that the arbitral tribunal did not have jurisdiction primarily on the ground that the defendant notified the dispute outside the 90-day period provided in the JBC Agreement and that the defendant failed to allow for amicable settlement before declaring a dispute. It also contended that the matter had been settled by an agreement between the parties. The Arbitrator considered the objection and issued a ruling dated 22nd March 2019 dismissing the preliminary objection thus precipitating these proceedings.

The Arbitration Clause

5. The dispute revolves around Clause 45.0 of the JBC Agreement titled, *"Settlement of Disputes"* which provides as follows:

> ***45.1*** *In case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor either during the progress or after the completion or abandonment of the Works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties. Failing Agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of the The Architectural Association of Kenya, on the request of the applying party.*
>
> ***45.2*** *The arbitration may be on the construction of this contract or on any matter or thing of whatsoever nature arising under or in connection therewith, including any matter or thing left by this contract to the discretion of the Architect, or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation referred to in Clause 34:0 of these conditions, or the rights and liabilities of the parties subsequent to the termination of contract.*
>
> ***45.3*** *Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute.*
>
> ***45.4*** *Notwithstanding the issue of a notice as stated above, the arbitration of such a dispute or difference shall not commence unless an attempt has in the first instance been made by the parties to settle such dispute or difference amicably with or without the assistance of third parties.*
>
> ***45.5*** *In any event, no arbitration shall commence earlier than ninety days after the service of the notice of a dispute or difference.*
>
> ***45.6*** *Notwithstanding anything stated herein the following matters may be referred to arbitration before the practical completion of the Works or abandonment of the Works or termination of the contract by either party.*
>
> ***45.6.1*** *The appointment of a replacement Architect, Quantity Surveyor or Engineer upon the said persons ceasing to act.*
>
> ***45.6.2*** *Whether or not the issue of an instruction by the Architect is empowered by these conditions.*
>
> ***45.6.3*** *Whether or not a certificate has been improperly withheld or is not in accordance with these conditions.*
>
> ***45.6.4*** *Any dispute or difference arising in respect or war risks or war damage.*
>
> ***45.7*** *All other matters in dispute shall only be referred to arbitration after the practical completion or alleged practical completion of the Works, or abandonment of the Works, or termination or alleged termination of the contract, unless the Employer and the Contractor agree otherwise in writing.*
>
> ***45.8*** *The Arbitrator shall, without prejudice to the generality of his powers, have powers to direct such measurements, computations, tests or valuations as may in his opinion be desirable in order to determine the rights of the parties and assess and award any sums which ought to have been the subject of or included in any certificate.*
>
> ***45.9*** *The Arbitrator shall, without prejudice to the generality of his powers, have powers to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given.*
>
> ***45.10*** *The award of such Arbitrator shall be final and binding upon the parties.*

Plaintiff's Case

6. The facts leading to this case are set out in the affidavit of Dominic Kiniyian Kosen. The dispute between the parties was triggered by a notice of default dated 4th April 2018 from the defendant to plaintiff in terms of Clause 45.1 and 45.6.3 of the JBC Agreement. After outlining several issues related to the delay in issuing and payment of certificates and failure to make up its loss and expense claim, the defendant stated as follows:

> ***VINAYAK BUILDERS LTD.***
>
> *BUILDING AND GENERAL CONTRACTORS*
>
> *P. O. Bo: 5014-00506 Nairobi, Kenya*
>
> *4th April 2018*
>
> *Sonile Holdings Limited*
>
> *Nyaku House 1st Floor,*
>
> *Hurlingham, Argwings Kodhek Road*
>
> *P.O. Box 25344-00603*
>
> ***NAIROBI – Kenya***
>
> *Email: ********
>
> *ADVANCE COPY EMAILED*
>
> *Dear Sirs*
>
> ***PROPOSED CHRYSTAL APARTMENTS PROJECT DEVELOPMENT ON L.R. NO. 209/3218/2 SUGUTA ROAD KILELESHWA***
>
> ***Notice of dispute***
>
> *Notice of dispute is hereby issued in terms of Clauses 45.1 and 45.6.3 of the contract between ourselves dated 14th November 2016 for determination of whether or not a certificate has been improperly withheld or is not in accordance with these conditions based on the following grounds: -*
>
> *1. Upon commencing works in October 2016 the Main Contractor executed works and made application for interim payment number 01 amounting to Kshs. 6.233,210.33 on 15th November 2016. A certificate was expected to be issued within 14 days i.e. by 29th November 2016 but it was not until 26th January 2017 the certificate for the grossly reduced amount of Kshs. 3,409,030.50 was issued. However the contractor immediately presented it to the Employer. It was not however paid within the 1`4 days provided in the contact.*
>
> *2. The Contractor sent reminders on 10th January 2017 and in (a) meeting as indicated in (the) architect('s) email dated 9th March 2017.*
>
> *3. Meanwhile the Contractor continued to execute works and yet again made another application for interim payment number 02 for Kshs. 5,536,578.26 on 16th February 2016. The certificate was yet again delayed being issued on 15th March 2017 for Kshs. 4,201,397.50. However the contractor immediately presented it to the Employer. It was not however paid within the 14 days provided in the contract.*
>
> *4. The Main Contractor continued to execute works and once again made another application for interim payment number 03 for Kshs. 3,503,712.64 on 12th April 2017. The certificate was yet again grossly delayed being issued on 7th July 2017 for 2,069,697.60. However the contractor immediately presented it to the Employer. It was not however paid within the 14 days provided in the contract.*
>
> *5. Complaints due to non payment of the certificates were transmitted to the Employer on 20th February, 2017, 10th April 2017 and 12th April 2017.*
>
> *6. On 13 July 2017 the Contractor complained of understatement of the valuations of the serious effects of delayed payments on the Contractor's cash flows and project progress.*

7. Notice of termination was thereby issued by the Contractor on 12th October 2017 sighting non payment of all the issued certificates. By this time none of the certificates had been paid.

8. Letter for termination was eventually sent on 22nd December 2017.

9. A meeting was later convened to amicably resolve the project issues. The Main Contractor was subsequently paid the whole pending amount as acknowledged by the letter dated 12th January 2018 to the architect. The Contractor similarly resumed work as per the resolutions at the meeting.

10. Consequently, and due to the works executed, the Contractor made application for interim payment number 04 for Kshs. 7,145,139.54 on 9th February 2018. The certificate was yet again delayed being issued on 9th March 2018 for the grossly understated sum of Kshs. 2,716,552.82. However the contractor immediately present it to the Employer. The certificate is set to be paid within the 14 days provided in the contract.

11. Pursuant to the said resolution meeting held at (the) architects office, the Architect extended time for the project by 12 months form 1st November 2017 to 31st October 2018.

12. On 5th March 2018 the Contractor made a Loss and Expense claim of Kshs. 12,842,630.30 to the Architect and Quantity Surveyor in terms of the contract and also the JBC Agreement reached at the said resolution meeting. The Architect is yet to evaluate the Claim.

13. The Main Contractor has however continued to execute works and has since once again made another interim payment number 05 for Kshs. 7,853,734.62 on 16th March 2018. A certificate is yet to be issued against the clear provisions of (the) contract.

From the foregoing it is clear there are disputes with respect to financing the project and on whether the Contractor is entitled to certificates and payment of the sums outlined above. ***This is consequently to give notice of dispute and invite you to concur in the appointment of an Arbitrator in terms of the contract to determine the disputes****. The name below is provided for possible concurrence: -*

Tom Onyango Oketch,

Hon. Arbitrator,

Patom House, 113 Mikinduri Lane, Langata Road,

P.O. Box 67819-00200

NAIROBI – Kenya

*Email: ******

You may be pleased to provide any other alternative name for our consideration within the 30 day notice period*. Kindly note our liberty to approach the appointing authority should you fail to respond as necessary.*

Yours faithfully

VINAYAK BUILDERS LTD

[Signed]

7. Following that letter, the defendant informed the plaintiff by a letter dated 6th August 2019, that it had appointed QS P. S. Kisia of Steg Consultants to represent it in the matter. On 7th August 2018, Mr Kisia wrote to the Chairperson of the Architectural Association of Kenya ("AAK") requesting appointment of an arbitrator as, *"A dispute has arisen with respect to whether or not the Claimant is entitled to payment certificates (and the consequences thereof)."*

8. On 6th August 2018, the plaintiff's representative, Mr Dominic Kosen and the defendant's representative, Mr Premji, met and discussed extended preliminaries, variations and claims and reached an agreement. That agreement was reduced to a handwritten agreement dated 8th August 2018 signed by them. They agreed that there was no dispute regarding all extended preliminaries earlier agreed and that all certificates and variations should be paid, that joint measurements should be done between the QS and the defendant's QS to avoid future disagreements and that the parties should continue to engage in discussions and follow through to ensure that the project is brought to completion. They also agreed that the claims for Kshs. 2,629,806 and Kshs. 5,922,000.00 being claims for labour and machinery and equipment respectively be set aside.

9. The plaintiff averred that on 13th August 2019 when the defendant had suspended works, the Architect issued Certificate No. 10 amounting to Kshs. 6,227,504 which has been paid in full. On the 14th August 2017, the defendant, through QS Kisia wrote a letter to the Architect, confirmed that it had received the Quantity Surveyor's valuation which he noted did not include the sums for loss and expense as

is necessary. He intimated that unless a proper certificate was issued, the works would remain suspended particularly in light of the fact that the notice of arbitration was subsisting to determine whether in fact the defendant was entitled to payment for loss and expense. He also noted that the defendant was not fully satisfied with the sums in the valuation.

10. On 15th August 2018, the Architect wrote to the plaintiff referring to the default notice issued via email on 1st August 2018, informing it that it had failed to comply with instructions to remedy defaults of not carrying out work diligently and since the default had continued it stated that, *"Notice is hereby given that with employer, in compliance with clauses 38.1, 38.2 and 38.6 of the contract, may without prejudice, exercise the right to terminate the contract in accordance with clause 38.2 of the contract."*

11. After the termination of the JBC Agreement, the defendant wrote to the plaintiff a variation order dated 20th August 2018 for Kshs. 18,939,027.99 in which it stated that Kshs. 27,149,285.22 had been upto the date of the variation order. The plaintiff stated that it had paid the defendant Kshs. 28,649,285.22 which included the certified amount of Kshs. 27,149,285.22 and payment of Kshs. 1,434,014.54 paid without a certificate. By a letter dated 12th September 2017 which was actually written in 2018, QS Kisia wrote to the Chairperson of AAK to appoint an arbitrator, *"to obviate the continues exposure by the Contractor"*. He noted that following the notice of 4th April 2018, the parties had met severally to attempt amicable settlement but had failed to resolve their dispute. In the letter he concluded as follows:

> *The issue of whether the contractor is no longer party to the termination is a legal issue to be placed before the Arbitrator for determination. Clause 45.2 however is clear that the arbitration may be on various limps (sic) including rights and liabilities of the parties subsequent to the termination of the contract.*

12. In light of the facts I have outlined, the thrust of the plaintiff's case is that the Arbitrator lacked jurisdiction to hear and determine the dispute communicated to him by a letter dated 24th September 2018 from AAK. The plaintiff contended all instances of failure to pay certificates or understatement of certificates set out in the letter dated 4th September ought to have been notified 90 days from the date of occurrence or discovery of the issue giving rise to the dispute for the notifying party to notify the dispute in terms of Clause 45.3 of the JBC Agreement. The plaintiff maintained that the defendant failed to give notice of a dispute within the time prescribed by the JBC Agreement hence its right of action expired when it failed to notify the dispute.

13. The plaintiff further submitted that there was no dispute as the parties resolved all the issue amicably and that the notified issues have been overtaken by events hence there is no dispute. The plaintiff contended that contrary to Clause 45.5 of the JBC Agreement, the defendant did not attempt to settle the issue or differences with or without the assistance of third parties within the time prescribed by the JBC Agreement.

14. The plaintiff relied on ***West Mount Investments Limited v Tridev Builders Company Limited*** **ML HCCC No. 230 of 2016 (OS) [2017] eKLR** and ***Kenya Airfreight Handling Ltd (KAHL) v Model Builders and Civil Engineers (K) Limited*** **ML HCCC No. 548 of 2016 (OS) [2017] eKLR** in support of the proposition that contractual time bar clauses are necessary as they support commercial transactions and relationships and should be strictly enforced.

15. The plaintiff argued that the Arbitrator misconducted himself by his conduct and behavior and without giving due consideration to its case, without weighing the evidence before him. It stated that the Arbitrator further misconducted himself and when he relied on the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which was expressly excluded in the arbitral proceeds as well as non-existent evidential material, conjecture, guesswork and speculation to make the ruling before him. The plaintiff also accused the Arbitrator of dismissing crucial evidential material in the ruling dated 22nd March 2019.

The Defendant's Case

16. The defendant opposed the application on several grounds. It stated that the allegation raised by the plaintiff related to matters over and surrounding the payment of certificates which are the proper subject and within the scope of Clause 45 of the JBC Agreement. In addition, it added, that the matters complained of are matters of fact and not law which can only be determined at the hearing once the plaintiff properly supports its evidence.

17. The defendant submitted that it was not true that all the matters in dispute between the parties had been determined or otherwise settled. It contended that the subject of the reference to arbitration accrued by virtue of a separate and distinct cause of action. It urged that the Arbitrator considered all the matters of fact raised by the parties and reached a fair and just determination in his ruling.

18. The defendant submitted that the application was incompetent as it was filed outside the 30-day timeline stipulated in **section 17(8)** of the ***Act***.

19. As regards the application to remove the arbitrator, the defendant contended that this court lacks jurisdiction to entertain the application for removal of the Arbitrator in its original jurisdiction. It submitted that the application ought to have been made before the Arbitrator in the first instance and in any case the application before the Arbitrator was a challenge to his jurisdiction and not an application for removal. Counsel for the plaintiff submitted that the application runs afoul **sections 14(2)**, **14(3)** and **14(8)** of the ***Act***.

20. Counsel for the defendant submitted that plaintiff had not shown any circumstances that gives rise to justifiable doubt as to the Arbitrator's impartiality and independence under **section 13(3)** of the ***Act*** which provides that an arbitrator may be challenged only if circumstances exists that give rise to justifiable doubts as to his impartiality and independence, or that he does not possess the qualifications agreed to by the parties or that he is physically or mentally incapable of conducting the proceedings or that there exists justifiable doubt as to his capacity to do so. Counsel further cited the provisions of **section 16B** of the ***Act*** which provides for immunity of the arbitrator for anything done or omitted to be done in good faith in discharge of his functions. In this case, counsel urged that the plaintiff had not shown that the arbitrator had not acted in good faith.

Issue for determination.

21. The Summons is grounded on three provisions of the ***Act,*** that is **sections 13, 14** and **17**. **Section 13** deals with grounds of challenge of the arbitrator while **section 14** deals with the procedure for challenge. **Section 17** deals with the arbitration tribunal's jurisdiction to rule on its own jurisdiction. I now proceed to deal with the first two issues framed as questions in the Summons against the provisions I have cited.

Misconduct of the Arbitrator

22. The question as to whether the *Arbitrator should be removed on account of misconduct and/or other sufficient grounds* is founded on the allegation that he relied on the ***Evidence Act*** which is expressly excluded in arbitral proceedings as well as nonexistent material, conjecture, guesswork and speculation to make the findings contained in the ruling and that he dismissed crucial evidential material in the ruling.

23. **Section 13** of the ***Act*** sets out and limits circumstances under which parties can challenge an appointed arbitrator or arbitration tribunal. For purposes of this application and the grounds set out in the application these include doubts as to the impartiality or independence of the Arbitrator. Specifically, **section 13(3)** provides as follows:

> *13(3) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so.*

24. **Section 14** goes on to provide for the challenge procedure. The relevant part provides as follows:

> *14(1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.*
>
> *(2) Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.*
>
> *(3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.*
>
> *(4) On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.*
>
> *(5) The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.*
>
> *(6) The decision of the High Court on such an application shall be final and shall not be subject to appeal.*
>
> *(7)* ----------
>
> *(8)* ----------

25. A cursory consideration at the procedure for a challenge at **section 14(2)** aforesaid, shows that an application challenging the arbitrator must be made before the arbitral tribunal in the first instance and the arbitral tribunal shall decide the matter.

26. In this case, the plaintiff filed a *Notice of Preliminary Objection as to Jurisdiction of the Arbitrator* dated 22nd January 2019 before the Arbitrator. The notice was expressly made under **sections 9, 17, 19A, 22, 29(5)** and **33** of the ***Act*** and provisions of the Clauses 45.1, 45.2, 45.2, 45.4, 45.6.3 of the JBC Agreement. The contract did not raise any issues that would fall within the provisions of **section 13(3)** of the ***Act***. Further, since the plaintiff failed to follow the prescribed procedure in challenging the Arbitrator, it cannot raise the matter as it has done before the court. I come to the same conclusion that Gikonyo J., did in ***Chania Gardens Limited v Gilbi Construction Company Limited and Another*** **ML Misc. App. No. 482 of 2014 [2015] eKLR** that:

> *Undoubtedly, the challenge has to be decided first by the arbitrator before the party challenging the arbitrator applies to the High Court for removal of the arbitrator. The application before me offends all these gallant provisions which are aimed at protecting the arbitral proceedings, and therefore, serves irreplaceable purpose in adjudication of arbitrations. It would certainly fail on that front. But will it fit the bill when placed on the scales of merit?*

27. In answering to issue (b) in the Summons, I find and hold that since the claim for misconduct was not placed before the arbitral tribunal in the first instance as required by **section 14(2)** of the ***Act***, this court has no jurisdiction to pronounce itself on the issue of misconduct. It is therefore not necessary to determine whether, in fact, the allegations set out in the application amount to misconduct by the arbitrator.

Whether application was time barred

28. The main and substantive issue for determination is whether the Arbitrator had substantive jurisdiction to hear and determine the dispute between the plaintiff and defendant declared by the defendant via letter dated 4th April 2018 and/or any other letter issued by the defendant prior to 4th April 2018. Since the Arbitrator ruled that he had jurisdiction, the plaintiff is entitled to move this court under **section 17** of the ***Act*** which states as follows:

17(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court within 30 days after having received notice of that ruling, to decide the matter.

(7) The decision of the High Court shall be final and shall not be subject to appeal.

29. The defendant challenged the Summons on the ground that it has filed outside the time stipulated as the Arbitrator's ruling subject of **section 17** aforesaid was made on 22nd March 2019 and then dispatched to the parties on the same day. Since the Summons was filed on 25th March 2019, counsel for the defendant urged that the application was filed out of time.

30. The plaintiff was of the view that the Summons was filed in time because it received the ruling on 26th March 2019 as evidenced by the date stamp on the ruling. It urged that the Summons was filed within 30 days as the last day for filing was 27th April 2019 hence it was within time frame permitted.

31. The operative phrase in **section 17(6)** of the ***Arbitration Act*** for reckoning time within which the application must be filed is, *"30 days after having received notice of that ruling."* The date of receipt of the ruling is the first day and in this case it is evidenced by the date stamp on the ruling which shows that the plaintiff received notice of the ruling on 26th March 2019. Since the last day for filing was 27th April 2019, I find and hold that the Summons was filed within the prescribed time. I now turn to the consideration of the substantive question.

Whether the Arbitrator has jurisdiction

32. The plaintiff is, in terms of **section 17(6)** of the **Arbitration Act**, a party aggrieved by the decision of the Arbitrator holding that he had jurisdiction to determine the dispute. The jurisdiction of the Tribunal is to, *"decide the matter"*. This language implies that this court has original jurisdiction to decide the issue of jurisdiction afresh and reach its own conclusion unmoored from the decision of the arbitrator or arbitral tribunal.

33. In ***West Mount Investments Limited v Tridev Builders Company Limited*** **(Supra)**, Onguto J., observed as follows regarding the scope of jurisdiction under this provision:

[22] However, where the arbitral forum determines that it has jurisdiction then any party aggrieved may apply to the High Court to decide the matter of jurisdiction. It must be pointed out that the High Court determines the issue a fresh and in its original jurisdiction. The language of Section 17(6) of the Act does not point to an appeal or review of the arbitral forum's decision. It is an application lodged under Rule 3 of the Arbitration Rules 1997 through an originating summons returnable before the judge in chambers with a specific question as to jurisdiction stated.

[23] As already pointed out, the application to the High Court under Section 17(6) the Act is not an appeal. The court must then in considering the matter exercise an original jurisdiction and is not beholden to any findings of fact by the arbitral tribunal. The court is to evaluate the evidence, assess it and make its own conclusion while relating the same to the arbitration agreement which the court is also to construe independently. Even if it was to be deemed that an application under Section 17(6) of the Act is an appeal, it would still be a first appeal and the High Court would still be under an obligation to re-evaluate and consider all the evidence and material laid before the arbitral tribunal and make its own conclusions: see ***Selle v Associated Motor Boat Company [1968] EA 123*** *and* ***Ramp Ratua & Company Ltd v Wood Products Kenya Ltd CACA No. 117 of 2001***.

34. I also agree with Onguto J., that in deciding an application under **section 17(6)** of the ***Act***, the court it required to consider four substantive issues as follows:

[24] …..... First, is whether there is a valid arbitration agreement. Secondly, is whether the arbitral tribunal is properly constituted and, thirdly, whether matters have been submitted to arbitration in accordance with the arbitration agreement. Finally, is whether the matters submitted to arbitration fall within the scope of the arbitration agreement.

35. This brings me to the two issues framed in the Summons implicated under **section 17** of the ***Act***. They concern whether the matters presented for arbitration were submitted in accordance with the arbitration agreement. The first question is whether the arbitrator had substantive jurisdiction to hear and determine the dispute between the parties declared by the letter dated 4th April 2018 and/or any other letter issued by the defendant prior to that date. The second one is consequential and it is whether the arbitration proceedings should be terminated by the court for want of jurisdiction for any other sufficient reason or cause.

36. The plaintiff's case is that the defendant failed to comply with the Clause 45.3 of the JBC Agreement which requires that no arbitration proceedings shall be commenced unless a notice of the dispute had been given within 90 days of the occurrence or discovery of the matter or issue giving rise to the dispute. The plaintiff's case is anchored on the contents of the letter dated 4th April 2018 whose contents I have set out in paragraph 6 above.

37. The defendant's position is that the issues raised by the plaintiff are factual issues which must be brought through evidence. The plaintiff contended that this could only be done through a full hearing before the arbitrator. I reject this position for two reasons. First, as I have held, this court's jurisdiction exercised under **section 17(6)** of the ***Act*** is original. When the plaintiff moves the court for relief and through a deposition places material before the court to support its case, the other party is required to respond to those facts otherwise what the plaintiff alleges remains uncontroverted. In ***Kenya Akiba Micro Financing Limited v Ezekiel Chebii and 14 Others*** **ML HCCC No. 644 of 2005 [2012] eKLR** the court stated that, *"[A] statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter."* This does not mean that the application must automatically succeed on that basis, the plaintiff still bears the burden of showing that the facts alleged establish its case.

38. The second reason, is that the nature of the plaintiff's case excludes the requirement of oral evidence. It concerns whether notice was given by the defendant in terms of the JBC Agreement. The JBC Agreement contemplates that notices shall be in writing. If there are any documents bearing on the issue of jurisdiction, then it is the responsibility of the parties to produce them. While there may be instances where the issue of jurisdiction must be resolved by an inquiry into facts, this case is different as will become apparent. The plaintiff has produced correspondence between the parties representing the sequence of events from the time the letter dated 4th April 2018 was issued. The defendant has not suggested that the plaintiff has failed to disclose relevant or material facts bearing on the issue. I therefore find that the documents produced by the plaintiff are uncontested and represent the transaction and interaction between the plaintiff and defendant.

39. Back to the case at hand, in the letter dated 4th April 2018 the defendant raised several issues and called upon the plaintiff to concur to the appointment of an arbitrator. The question then is whether the defendant complied with Clause 45.3 of the JBC Agreement by giving the plaintiff 90 days' notice before invoking Clause 45.1 thereof.

40. A reading of Clause 45 of the JBC Agreement, set out at paragraph 5 of this judgment, shows that an aggrieved party is required to give two notices. The first notice under Clause 45. 1 is for purposes of commencing arbitration proceedings by requesting the other party to concur to the appointment of an arbitrator within 30 days of the notice. This accords with **section 22** of the ***Act*** which deals with, "*Commencement of arbitral proceedings"* and provides as follows:

> *22. Unless the parties otherwise agree, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent.*

41. . The second notice under Clause 45.3 must be issued before Clause 45.1 is invoked. That notice must be within 90 days of occurrence or discovery of the matter or issue giving rise to the dispute otherwise the right to refer the matter for resolution under Clause 45.1 of the JBC Agreement is lost.

42. In this respect I agree with the decision in ***West Mount Investments Limited v Tridev Builders Company Limited*** **(Supra)** where the court considered the same clauses and concluded as follows:

> *[33] In casu, Clause 45 anticipates two notices in my view. Under sub clause 1, a notice commencing arbitration is expected to be given with the applying party requesting for an arbitrator to be appointed. This is in line with section 22 of the Act as to commencement of arbitration. Before the commencement though, there is a preceding notice to be given to notify a party of the dispute. Under Clause 45.3 of the JBC Agreement it is relatively clear that for the arbitration process to be commenced an applying party had to notify the other party of the dispute or controversy within ninety (90) days of the occurrence or discovery of the matter or issue giving rise to the dispute.*

43. A reading of the letter dated 4th April 2018 states that it was a *"Notice of Dispute"* leaving no doubt as to its purport and intent. Under Clause 45.3 of the JBC Agreement, the defendant was required to notify the plaintiff about each of the disputes or events referred to therein within 90 days of the occurrence or discovery of each matter in issue giving rise to the dispute. It is clear from the letter that each of the events or occurrences complained of and enumerated in paragraphs 1 – 13 were outside the 90-day period contemplated under Clause 45.3 when the dispute was declared by the letter of 4th April 2018. In the circumstances, the claims contained in that letter are contractually barred.

44. The same letter dated 4th April 2018 purports to be a 30-day notice under Clause 45.1 of the JBC Agreement requesting the plaintiff to concur to the appointment of the proposed arbitrator. Since the notice issued under Clause 45.3 of the JBC Agreement is a condition precedent to commencing arbitration proceedings, I find the letter as a notice under Clause 45.1 null and void. For the notice under Clause 45.1 to be valid, the events or matters that would have caused the defendant to invoke those provisions would have taken place latest, 90 days prior to 4th April 2018. Under the provisions of **section 22** of the ***Act***, the letter dated 4th April 2018 constitutes a request for the dispute to be referred to arbitration and therefore marks the commencement of the arbitration. I therefore find and hold that the Arbitrator had no jurisdiction in so far as the letter of 4th April 2018 was a notice issued to commence arbitration under Clause 45.1 of the JBC Agreement.

45. The respondent also relied on the letter dated 7th August 2017 addressed to the Chairperson AAK. The letter states in the subject, *"Appointment of Arbitrator in default"* and refers to the fact that the, *"Respondent has not agreed to appointment of an arbitrator despite the Claimants invitation dated 14th April 2018."* Since the letter invites the appointing authority to act on the request of 14th April 2018, it cannot survive the conclusions I have reached that the defendant could not invoke the provisions of Clause 45.1 of the JBC Agreement without complying with Clause 45.3 thereof. While Clause 45 of the JBC Agreement covers disputes arising from the entire agreement, it can only be invoked in the manner provided for under the JBC Agreement itself.

46. The same fate must necessarily befall the letter dated 12th September 2018 referring to, *"Appointment of Arbitrator in default."* That letter however introduces new matters relating to termination which according to the defendant are matters within the province of the arbitrator. Since the arbitration proceedings were, within the meaning of **section 22** of the ***Act***, commenced by the letter of 4th April 2018, the defendant could not add or introduce new matters by circumventing the requirement of a notice under Clause 45.3 of the JBC Agreement. Since the letter sought appointment of the arbitrator under the notice I have now found null and void, the process could not be validated by further attempts to introduce new disputes unless the parties agreed otherwise.

47. In ***Kenya Airfreight Handling Ltd (KAHL) v Model Builders and Civil Engineers (K) Limited*** **(Supra)**, Onguto J., explained the nature of Clause 45.3 of the JBC Agreement as follows:

> *[32] I must also point out that contractual time bar clauses equivalent to clause 45.3 may often appear bad bargains as they limit the parties right to move to the preferred mode of dispute resolution but their aim and purport is crucial in commercial transactions and relationships. Parties should never deal whilst unknown claims await them. Consequently, contractual time bar clauses will be*

enforced and also strictly applied. I have to strictly enforce the instant clause.

48. In conclusion, I find that the defendant's letter dated 4th April 2018 was a notification of certain disputes but it was issued and served later than 90 days after the disputes arose. It was outside the time limited by Clause 45.3 of the JBC Agreement. Consequently, the defendant having failed to comply with Clause 45.3 of the JBC Agreement could not invoke Clause 45.1 to commence arbitration proceedings. The plaintiff has succeeded in establishing that the arbitrator did not have any jurisdiction to entertain any claim in so far as his appointment was grounded on the letter dated 4th April 2018 and subsequent correspondence.

49. I do not propose to deal with the other grounds raised by the plaintiff. The result of my findings is that while the dispute between the parties may not be resolved by arbitration under the JBC Agreement, the parties are still free to proceed to court or any other forum if they so agree. In the circumstances any comment on any other issues may prejudice the rights of the parties.

50. The parties also submitted at length on whether this court could stay the proceedings before the arbitrator pending determination of this application. Since the parties agreed to dispense with the application and deal with the Summons, it is not necessary to comment or otherwise deal with that aspect of the case.

Disposition

51. The result of my finding on the issue framed is that I now make the following orders:

(a) It is hereby declared that the Sole Arbitrator, Simon Saili Malonza, does not have jurisdiction to hear and determine the dispute between the plaintiff and defendant as declared by the defendant by the letter dated 4th April 2018 and/or any other letter issued prior to 4th April 2018.

(b) The ruling of the arbitrator dated 22nd March 2019 be and is hereby set aside.

(c) The defendant shall pay half the plaintiff's costs.

DATED and DELIVERED at NAIROBI this 21st day of JANUARY 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Kimutai instructed by Nyagah B. Githinji and Company Advocates for the plaintiff.

Mr Mutubwa instructed by Lubullelah and Associates Advocates for the defendant.