REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 144 OF 2019

KENYA ALLIANCE INSURANCE CO. LTD.....APPELLANT

AND

ANNABEL MUTHOKI MUTETI.....RESPONDENT

(Being an appeal from the ruling of the Chief Magistrate's Court of Kenya at Machakos delivered on the 17th October, 2019 by Honourable E. H Keago (SPM) in Machakos Chief Magistrate's Civil Case No. 246 of 2019)

ANNABEL MUTHOKI MUTETI.....PLAINTIFF

=VERSUS=

KENYA ALLIANCE INSURANCE CO. LTD.....DEFENDANT

JUDGEMENT

1. This appeal arises from the ruling of the Chief Magistrate's Court of Kenya at Machakos delivered on the 17th October, 2019 by Honourable E. H Keago (SPM) in Machakos Chief Magistrate's Civil Case No. 246 of 2019. That ruling arose from an application filed by the appellant by way of Chamber Summons dated 14th May, 2019, by which the Appellant applied for reference of the said dispute to arbitration and sought that during the pendency of the said arbitral proceedings, the proceedings before the trial court be stayed.

2. In his ruling dated 17th October, 2019, the learned trial magistrate stayed the said proceedings in order for the parties to agree on an arbitrator within 30 days and in default the matter be referred to Court Annex mediation.

3. The proceedings before the lower court were commenced by way of a plaint dated 17th April, 2019. According to the Respondent, who was the Plaintiff, being the registered owner of motor vehicle registration no. KCM 003N she insured the same with the Appellant herein which insurance was in force by the time the said vehicle got involved in an accident on 14th October, 2018 resulting into loss and damage to the Respondent. Though the Respondent reported the said loss to the Appellant, the Appellant refused to satisfy the Respondent's claim and compensate the Respondent.

4. The appeal is based on the following grounds:

> **1) The Learned Magistrate erred in law in ordering a limited stay of proceedings for thirty (30) days only contrary to the provisions of Section 6 of the Arbitration Act, No. 4 of 1995.**
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> **2) The Learned Magistrate erred in law and fact in ordering that in default of an agreement between the parties on an arbitrator to handle the dispute within thirty (30) days, the matter be referred to court annexed mediation which order was contrary to provisions of the arbitration clause in the insurance policy between the parties as well as the provisions of the Arbitration Act, No. 4 of 1995.**
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> **3) The Learned Magistrate erred in law and on fact in failing to permanently stay all proceedings in Machakos Chief Magistrate's Court, Civil Case No. 246 of 2019 pending arbitration of the dispute between the parties as provided for under Section 6 of the Arbitration Act, No. 4 of 1995.**

4) The Learned Magistrate erred in law and on fact in disregarding the express provisions of arbitration clause in the insurance policy between the parties which provided that if parties are unable to agree on an arbitrator within 30 days, either party to refer the dispute to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) for appointment of an arbitrator.

5) The Learned Magistrate erred in law and on fact in failing to direct that in default of agreement between the parties on an arbitrator within 30 days, either party to refer the dispute to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) for appointment of an arbitrator.

6) The Learned Magistrate erred in law and of fact in referring parties to arbitration for thirty (30) days only contrary to the provisions of Section 6 of the Arbitration Act, No. 4 of 1995.

7) The Learned Magistrate erred in law and on fact in referring parties to arbitration on condition that parties agreed on an arbitrator within thirty (30) days contrary to the provisions of the arbitration clause in the insurance policy between the parties as well as the provisions of the Arbitration Act, No. 4 of 1995.

8) The Learned magistrate erred in law and on fact in ordering that the matter be referred to court annexed mediation on the basis that it is a matter that is pending before the court for determination either way which order is contrary to the provisions of the arbitration clause in the insurance policy between the parties as well as the provisions of the Arbitration Act, No. 4 of 1995.

9) The Learned Magistrate erred in law in disregarding the case of Nyutu Agrovet Limited –VS- Airtel Networks Limited 2015 (eKLR) on the limited court interventionist policy espoused by the Arbitration Act, No. 4 of 1995 in so far as disputes subject to arbitration were concerned.

10) The Learned Magistrate's ruling was rendered/delivered *per incuriam*.

5. It was submitted on behalf of the Appellant that the brief back ground is that the suit in the lower court was filed by the respondent seeking to recover from the appellant the sum of Kshs. 811,832.34 being repair charges for motor vehicle registration number KCM 003N as well as loss of user of the said vehicle in the sum of Kshs. 1,410,500. It was the respondent's claim that there existed an insurance contract between the parties where the defendant had insured the said vehicle. It was also alleged that the appellant had refused to repair the said vehicle following a road accident involving the vehicle which occurred on 14th October 2018 whereupon the respondent had the vehicle repaired and incurred the said repair costs which costs the appellant declined to settle.

6. According to the Appellant, as the relationship between the parties was governed by the said insurance policy which provided for dispute resolution through mediation or arbitration, the appellant did enter appearance in the suit and contemporaneously filed an application pursuant to section 6(1) of the ***Arbitration Act***, No. 4 of 1995 (the Act) seeking stay of the proceedings pending arbitration of the dispute between the parties and a referral of the dispute to arbitration. In a ruling delivered on 17th October 2019, the learned magistrate found that arbitration ought to have been pursued and thereby stayed the proceedings for 30 days for the parties to agree on an arbitrator to handle the dispute. The court further directed that in default of agreement, the matter be referred to *court annexed mediation* on the basis that "*it is a matter pending before the court for determination either way"*.

7. According to the Appellant, the main issue in this appeal is whether in light of the provisions of Section 6(1) of the Act, as well as the insurance policy governing the parties, the Learned Magistrate could rightly order, as he did, a limited stay of proceedings and direct that if no agreement was reached on an arbitrator within 30 days, the dispute be referred to court annexed mediation. It was submitted that the application that was before the court was based broadly on the provisions of section 6(1) of the Act.

8. In support of its submissions the Appellant relied on **Mt. Kenya University vs. Step Up Holding (K) Ltd [2018] eKLR**, **UAP Provincial Insurance Company Ltd vs Michael John Beckett (2004) eKLR** and **Eunice Soko Mlagui vs. Suresh Parmar& 4 Others [2017] eKLR** and submitted that the obligation of the lower court when faced with the application that was before it was to consider whether the appellant had placed itself within the threshold set by the Court of Appeal above. Once it satisfied itself that indeed the threshold had been reached, the court had no alternative but to **permanently** stay proceedings and refer parties to arbitration and no more. However, in its ruling, it was submitted that it is undoubtedly obvious that the learned magistrate was satisfied that the appellant had met the threshold requisite under Section 6 (1) of the Act as expounded by the Court of Appeal in the above case of *Niazsons(K) Ltd* (supra). Once he was so satisfied, the learned magistrate was statutorily bound to indefinitely stay all proceedings in the case before him and refer parties to arbitration. He could not invent, as he did, other orders which are not legislated under the said Section. It was therefore contended that the learned magistrate could not rightly restrict the time within which the parties had to agree on an arbitrator to 30 days since he had no such powers under Section 6 of the Arbitration Act. There is nothing in Section 6 or the entire ***Arbitration Act*** that allowed him to do so.

9. Likewise, it was submitted, his order that the matter be referred to court annexed mediation in the event that there was no agreement on an arbitrator within 30 days was in total violation of the insurance policy because the insurance policy had a default mechanism that if parties were unable to agree on an arbitrator within 30 days of the dispute arising, either party could refer the matter to the Chairman of the Chartered Institute whose decision would be binding on the parties.

10. Moreover, it was contended, the order was also in violation of the Act. According to the Appellant, the order for referral of the dispute to court annexed mediation merely meant that if there was no agreement on an arbitrator within 30 days, the matter would be referred back to the court process since court annexed mediation is basically mediation that is court supervised. However, there is nothing under section 6 of the Act that allows the court to do so. In fact, save for the limited instances where the court is allowed to intervene in the arbitration process, a court has no jurisdiction to interfere in matters arbitration. A court cannot refer parties to arbitration and then purport, through judicial craft, to bring the dispute back to court as the lower court did and reference was made to the decision of **Ochieng, J** in **Africa Management Communications Limited vs. Airtel Kenya Networks Limited [2016] eKLR**

11. It was submitted that indeed, the arbitration regime is only subject to court intervention in very limited circumstances which are expressly provided for in the Act. In other words, a court has no powers to intervene in the arbitration process except as provided under the Act. The restrictive interventionist approach can be traced back to Section 10 and 32A of the Act.

12. This restricted interventionist approach, it was contended, demonstrates the legislative intent towards limiting courts intervention in disputes subject to arbitration unlike the hitherto existing legislation which was repealed by Act No. 4 of 1995. In the current arbitral regime, a court assumes jurisdiction only as provided by the Act and no more.

13. The extent of a court's limited intervention in arbitral matters, according to the Appellant, was laid bare by a five judge bench of the Court of Appeal in the case of **Nyutu Agrovet Limited vs. Airtel Networks Limited [2015] eKLR** and based on the foregoing, it was submitted that the arbitral regime is a regime *sui generis* and that it only allows for limited court intervention which must be specifically provided for in the Act and which cannot be formulated by a court of law through judicial craft. Section 6(1) of the Act is one such instance where the court is allowed to intervene by staying the proceedings (which are subject to an arbitration agreement) before it and referring parties to arbitration. Once the requirements of that section are fulfilled, the court has no choice but to wholly and unconditionally refer the dispute before it to arbitration.

14. In this case, it was submitted, the court purported to stay proceedings for a limited period of 30 days. It therefore referred the parties to arbitration on condition that an arbitrator was agreed within 30 days. The Act imposes no such condition. In essence, if there was no agreement, the stay would lapse and the lower court proceedings would progress. Having satisfied himself that there was a dispute which endeared itself to arbitration, the learned magistrate had no jurisdiction under the Act to limit the stay period as he did. The Act required the magistrate to permanently stay the proceedings and refer the parties to arbitration and no more. Once the Learned Magistrate referred parties to arbitration, the matter acquired a unique form under a totally separate jurisdiction governed by the Act. In that jurisdiction, it was upon the parties to agree on an arbitrator and if no agreement was reached, the Act provided for the appropriate procedure (Section 12) and besides, the insurance policy provided that either party would refer the issue of appointment of an arbitrator to the Chairman of Chartered Institute of Arbitrators whose decision would be binding on the parties.

15. Consequently, the Applicant submitted that in so far as the order directed that in default of agreement on an arbitrator, the matter be referred to court annexed mediation, the order was an interventionist one since it meant that arbitration would not be pursued after the lapse of 30 days and the matter would be ripe for a court driven process. In that event, that the learned magistrate ordered a limited stay of proceedings for 30 days and directed that the matter be referred to court annexed mediation in the event of default on agreement on an arbitrator within the 30 days, he totally erred and his decision ought to be upset.

16. The Appellant submitted that it brought to the attention of the learned magistrate the decision of the Court of Appeal in **Nyutu Agrovet Limited vs. Airtel Networks Limited [2015] eKLR** and that had the magistrate cautioned himself on this limited court interventionist policy as expounded in the said case, his decision would have been different and he would not have sent the parties to court annexed mediation as he did.

17. It was submitted further that in ignoring the provisions of section 6(1) of the Act as well as the above case of **Nyutu Agrovet Limited** (supra) his ruling is one that was rendered *per incuriam* and ought not be allowed to stand.

18. The Appellant therefore submitted that the Learned Magistrate erred as submitted above and that the circumstances of this matter appeals to this Court to grant the orders sought in the Memorandum of Appeal.

Respondent's Submissions

19. Appeal was however opposed by the Respondent.

20. According to the Respondent, Section 6(1) of the ***Arbitration Act*** provides two exceptions when a matter cannot be referred to arbitration one being where the arbitration agreement is null and void, inoperative or incapable of being performed. In this case the Respondent referred to paragraph 9 of the policy document and submitted that a plain reading of this clause shows two major inconsistencies which prove the impracticability of staying these proceedings and referring the suit to arbitration. First, the dispute between the parties herein is one of indemnity. The appellant herein had the contractual duty to indemnify the respondent in the event an accident occurred involving the respondents motor vehicle registration number KCM 003N. The next issue to be determined would be when the dispute arose between the parties herein which would either be when the accident occurred on 14/10/2018 or after repairs on the subject motor vehicle at D T Dobie were concluded at an assessed cost of Kshs. 811,832/34= on 27/2/2019. Be it as it may be, the requisite period of thirty (30) days for referring the dispute to an arbitrator had already lapsed by the time the Appellant moved the trial court vide the Chamber Summons dated 14/5/2019.

21. It was also noted that paragraph 9 of the policy document goes ahead to state that the arbitral award is not only binding between the parties but it is also final. It follows that the aggrieved party has no other recourse in law should this matter be subjected to arbitration. According to the Respondent, this contradicts the provisions of Article 47 of the Constitution of Kenya and contended that there being no recourse to the arbitral award any aggrieved party being it the Appellant of the Respondent herein will have been denied administrative justice in every sense of the word. It was her view that the denial of any avenue for appeal makes the arbitration clause null and void, inoperative or incapable of being performed. This submission was based on the case of **Joseph Kamau Kiguoya vs. Rose Wambui Muthike [2016] eKLR** whereby the trial court cited with approval the ***Black's Law Dictionary 9th Edition*** definition of the term void. The court, it was submitted, went further and cited with approval the case of **Mistry Amar Singh vs. Kulubya [1963] E.A 408**, whereby the Court cited the following passage from **Scott vs. Brown, Doering, Mc Nab & Co. (3), (1892) 2 QB 724.**

22. In the Respondent's view, Paragraph 9 of the policy is both null and void for denying any aggrieved party the opportunity to challenge the decision of the arbitrator. The same cannot therefore be relied upon as the basis of staying Machakos CMCC No. 246 of 2019 pending arbitration.

23. Further to the foregoing, the appellant breached a fundamental term of the contract by not indemnifying the respondent herein. The contract therefore becomes void *ab initio*. The same appellant cannot therefore make reliance on some clauses in the policy document specifically seeking to have the suit before the lower court stayed pending arbitration, as the contract in its entirety is null and void.

24. As regards the question whether there is in fact any dispute between parties with regard to matters agreed to be referred to arbitration, the respondent submitted that no dispute between the parties capable of being referred to an arbitrator. The respondent's claim is a simple matter for the recovery of monies paid to D T Dobie after motor vehicle registration number KCM 003N was repaired. The Appellant herein has never repudiated the insurance cover the respondent herein had taken with them for motor vehicle registration number KCM 003N and thus the appellant is duty bound to indemnify the appellant. The respondent therefore submitted that she is entitled to recover from the appellant the monies paid to D T Dobie after motor vehicle registration number KCM 003N was repaired. In this regard, the Court was urged to be guided by the case of **Ellis Mechanical Services Ltd –vs- Waters Construction Ltd (Note) [1978] I LLOYD'S REP 33 as cited with approval in the case of Reliable Electrical Engineers Ltd & another vs. Kenya Petroleum Refinery Ltd [2015].**

25. While appreciating the role of alternative dispute resolution in our legal system, the Respondent however submitted that the same should not be used by litigants as a delaying tactic where there is an undisputed claim. Indeed, all evidence tendered before this court shows that this is a simple liquidated claim and not a matter to be arbitrated on.The Court was urged to be guided by the case of **Bahari Transport Company vs. A.P.A. Insurance Co. Ltd [2007] eKLR** whereby the trial court cited with approval Vol.25 ***Halsbury's Laws of England*** 4th Edition page 275.

26. The Respondent therefore submitted that it is not only just but fair to dismiss the appeal with costs as the same is not merited and the orders sought are incapable of issuing.

Determination

27. I have considered the issues raised in this appeal. The appellant's grounds of appeal can be summarised in two grounds. In effect the appellant is aggrieved by the part of the ruling directing that the proceedings be stayed for a period of thirty (30) days during which time the matter be referred to arbitration and that in the event of the failure by the parties to agree on an arbitrator, the matter be referred to court annex mediation.

28. Section 6(1) of the ***Arbitration Act*** provides as follows;

> ***"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—***
>
> ***(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or***
>
> ***(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."***

29. In the decision being appealed from the Learned Trial Magistrate found as hereunder:

> **"It is apparent that parties had through the policy agreed on how to resolve their dispute on the issue of the policy and it (sic) important that the procedure ought to have been followed. The court does not make a contract for the parties but where there is no settlement, the court will have to make some directions. Arbitration is one of the methods advanced by our constitution and it's important that the same be impressed. On the basis of that I will stay the proceedings herein for the parties to agree on an arbitrator to handle this dispute within 30 days and in default the matter be referred to Court annexed mediation for reasons that it will be a matter pending before court for determination either way. The costs await the out (sic) of the other processes."**

30. A holistic consideration of the decision clearly reveals that the trial court was satisfied that Section 6(1) of the ***Arbitration Act*** applied to the matter before him, otherwise he would not have referred the matter to arbitration and that is my understanding of the decision in the case of **Blue Limited vs. Jaribu Credit Traders Limited Nairobi (Milimani) HCCS No. 157 of 2008** where **Kimaru, J** stated *inter alia* as follows:

> **"It is now settled law that where parties have agreed to resolve any issue arising out of a commercial agreement, the courts are obliged to give effect to the said agreement of the parties by staying proceedings and referring the dispute for resolution by arbitration. Before staying proceedings, the court has to be satisfied that there is a valid arbitration clause in the agreement capable of performance. At the stage of the application for stay of proceedings, the court is not called upon to determine the merits or otherwise of the plaintiff's suit nor the counterclaim filed by the defendant. The court is further not required at this stage of proceedings to consider the validity, legality or otherwise of the agreement that was entered between the plaintiff and the defendant. The court is only required to consider whether there was a valid arbitration clause in the agreement capable of being enforced by the court...That principle recognises the fact that where there is an arbitration clause in an agreement, such clause is considered as a separate and severable agreement between the parties who have agreed to resolve any dispute arising from the agreement by arbitration. A party to an agreement cannot raise issues relating to the validity or otherwise of the agreement to defeat the arbitration clause in the agreement. The issue as to whether the agreement which was entered between the plaintiff and the defendant is valid or not is an issue which can only be determined during the hearing of the dispute on arbitration. The court's concern is whether the arbitration clause in the agreement is valid and therefore capable of being performed as envisaged by section 6(1)(a) of the Arbitration Act, 1995. Having**

considered the agreement, the court holds that the arbitration clause is valid and is capable of being performed...Section 7(1) of the Arbitration Act, 1995 grants to the court jurisdiction to grant interim measure of protection where it is established that there exists a valid and enforceable arbitration agreement."

31. The rationale for respecting the parties' agreement was explained in the case of **Eunice Soko Mlagui vs. Suresh Parmar& 4 Others [2017] eKLR,** where is was held that;

"Section 6 of the Arbitration Act is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitrating where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution."

32. No party has contested that finding since the Respondent has not cross-appealed despite the fact that in this appeal it seemed to be contending that the matter ought not to have been referred to arbitration. Having referred the matter to arbitration the restrictive interventionist approach in section 10 of the said Act kicked in and the said section provides that:

"Except as provided in this Act, no court shall intervene in matters governed by this Act."

33. The role of the Court in matters arbitration was explained in the case of **Kenya Pipeline Company Limited vs. Datalogix Limited and Another Nairobi HCCC No. 490 of 2004 [2008] 2 EA 193**, where **Warsame, J** (as he then was) held that:

"It is clear from the reading of section 6(1) that the decision to refer the matter to arbitration is left to the discretion of the court and the court must give effect to the terms of the contract which provide for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give effect to the wishes of the parties and their contractual relationship. Arbitration is a modern way of resolving disputes quicker, amicably and in a friendly environment and manner. It is for that reason that the court would always endeavour to encourage parties to resolve their disputes through arbitration. It is against public policy to deprive parties of their choice and hinder their attempt to resolve their disputes through arbitration…Our system of law and dispute resolution should not countenance the existence and continuation of two parallel processes in respect of the determination of an issue arising between the same parties or parties claiming under them over the same subject matter."

34. The circumstances under which the Court may intervene in matters covered by an arbitration clause were set out in the case of **Anne Mumbi Hinga vs. Victoria Njoki Gathara Civil Appeal No. 8 OF 2009** where the Court of Appeal stated as follows:

"Part VI of the Arbitration Act has a heading under the title "Recourse to High Court against Arbitral Awards" and the implication is that the High Court has no other power against an arbitral award outside the provisions of Section 35 and 37 of the Arbitration Act. It is clear, in the light of the above provision, that a party cannot ground an application to set aside an award outside section 35 of the Act. Failing to serve any process after an award has been made, is not one of the grounds for setting aside an award or any subsequent judgement or decree. Similarly, the grounds for refusal of recognition or enforcement which by large are almost similar to those for setting aside an award are contained in section 37 of the Arbitration Act and again it is clear that none of the grounds set out in the application fall under the provisions of section 37 of the Arbitration Act. A careful look at all the provisions cited in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override section 10 of the Arbitration Act which provides that except as provided in this Act no court shall intervene in matters governed by this Act…In the light of the above, the superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act and this includes entertaining the application the subject matter of this appeal and all other applications purporting to stay the award or the judgement/decree arising from the award...The provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules, 1997 apply the Civil Procedure Rules where appropriate. In the court's view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act. It is clear to the Court that no application of the Civil Procedure Rules would be regarded as appropriate if its effects would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration…It is clear to the court that none of the grounds relied on by the appellant fall under section 35 or section 37 of the Arbitration Act. An award having been published nearly 10 years ago after several mention notices concerning the award were ignored by the appellant and her advocates, the filing of the application constituted an abuse of the court process. The superior court had no business entertaining the application giving rise to this appeal as well and should have struck it out for lack of jurisdiction...One of the grounds relied on to invite the superior court's intervention in not enforcing the award was that of alleged violation of the public policy. Again no intervention should have been tolerated firstly because one of the underlying principles in the Arbitration Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards and secondly although public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed members of the public on whose behalf the State's powers are exercised…There is nothing whatsoever indicating that the award before the court fell under any of the above definitions of public policy, so as to warrant a challenge under the public policy exception…In the arbitration agreement there is an implied agreement between the parties to carry out the ultimate award. The concept of the finality of arbitration awards and pro arbitration policy is something shared worldwide by the States whose Arbitration Acts such as ours have been modelled on the UNICITRAL MODEL LAW. The common thread in all the Acts is to restrict judicial review of arbitral awards and to confine the

necessary review to that specified in the Acts. The provisions of this Act are wholly exclusive except where a particular provision invites the court's intervention or facilitation. Where the parties attempt to heighten the level of judicial scrutiny of arbitration awards the policy of allowing flexibility to the parties, clashes with the equally important policies of finality and efficiency in arbitration. Permitting enhanced court review of arbitration awards opens the door to the full-bore evidentiary appeals that render the informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process which is an unacceptable process. The goal of flexibility must yield to a national policy favouring arbitration with just limited review needed to maintain arbitrations essential virtue of resolving disputes straightaway…By entering into an arbitration agreement a party necessarily gives up most rights of appeal and challenge to the award in exchange for the virtue of finality of the award. From the above it is clear that from the case before the court the appellant has made nonsense of all the virtues of having gone to arbitration resulting in a delay of 10 years following resort to many interlocutory applications aimed at upsetting the finality of the award which is illegal and unacceptable...In this case it is quite clear to the court that it was wrong for the court to have entertained a challenge to an arbitral award aimed at reviewing or setting aside an award outside the provisions specifically set out in the Arbitration Act 1995. The court had no jurisdiction to do so in the first place under the clear provisions of the Act. Intervention by the filing of several applications which has in turn resulted inconsiderable delay should have been treated as a jurisdictional issue under the Act and dealt with straightaway. On the court's part, it recognises that the matters raised in the application before the superior court and this appeal are well outside the provisions of section 39 of the Arbitration Act and for this reason, the court has no hesitation in striking out this appeal and setting aside the superior court ruling and striking out the application with costs."

35. The extent of a court's limited intervention in arbitral matters was laid bare by a five judge bench of the Court of Appeal in the case of **Nyutu Agrovet Limited vs. Airtel Networks Limited [2015] eKLR.** In striking out the appeal, the various judges considered the tenor and effect of the Arbitration Act No. 4 of 1995 *vis-a-vis* a courts interventionist powers under the Act. According to **Karanja J.A:**

"As stated earlier on, it is important to rehash the evolution of arbitration law in this country in order to put this matter in its proper perspective, and particularly on the concept of "finality" which is an important precept in the law of arbitration. Arbitration is one of the dispute resolution mechanisms recognised under Article 33 of the United Nations Charter. It is an internationally recognised form of dispute resolution particularly in the area of trade and commerce. It is a private consensual process which though adversarial in nature has been for many years a preferred mode of settling of international and commercial trade disputes. It is preferred by many parties who usually agree on the mode of appointment of the arbitrator long before a dispute arises. It is also meant to be cheaper, faster and more confidential as compared to ordinary litigation. This is nonetheless debatable at present as arbitration is becoming more cumbersome, expensive and inefficacious as each day goes by.

The first arbitration law in Kenya dates way back to 1914 in the form of the Arbitration Ordinance 1914, which was a reproduction of the English Arbitration Act, 1889. This ordinance accorded courts in Kenya ultimate control over the arbitration process in Kenya. It was basically being used in resolution of commercial disputes as an alternative to litigation. The first Arbitration Act as we know it today was enacted in 1968 and was almost a replica of the Arbitration Act 1950 of the United Kingdom. This Act, like the U. K. Act provided too much intrusive powers to the courts to interfere with arbitral proceedings and the awards. This was contrary to the intention of the traders who intended that arbitration should be unfettered from the courts' intricate legal procedures which hampered efficiency in dispute resolution and resultantly slowed down growth in trade. There was therefore a deliberate intention to reduce court influence in arbitration. This led to the adoption of the UNICITRAL Model arbitration law which led to the legal reforms repealing the 1968 Act replacing it with the Arbitration Act, 1995. The 1995 Arbitration Act is therefore based on the UNICITRAL Model. This model was adopted in 1995 with a view to bringing our arbitral law within the globally acceptable and applicable practices and procedures. This was important because it would encourage foreign and international traders who would not feel smothered by the different procedures and circumstances prevailing in national judiciaries and other dispute resolution organs.

One of the aims of adopting the model law on International Commercial Arbitration was that the same would be acceptable to states with different legal, social and economic systems which would thus contribute to the development of harmonious international economic relations. The model constitutes a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice.

Since its adoption by UNICITRAL the model law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on this model Law. Enviably, ours is one such Nation. It is axiomatic that the world is a global village and particularly when it comes to international trade. It is important therefore that nations like ours that mostly thrive on international trade, and which also seek to woo foreign investors to their countries recognise and observe such legislation with fidelity. This boosts investors' confidence because they have faith in an internationally recognized system that will protect their investments in case disputes arise. They are also assured that an award resulting from such a system would be enforceable internationally.

It is important therefore to ensure that our arbitration law, which as it stands now, meets the specific needs of international commercial arbitration, remains undiluted and true to the international standards espoused by the UNICITRAL model which we have adopted. One important feature of arbitration which is internationally accepted and which is meant to make arbitration more attractive as opposed to litigation is the concept of finality. Article 5 of the UNICITRAL Model Law on international commercial arbitration provides that;

"no court shall intervene except where so provided in law''

This provision is expressly mirrored in Section 10 of our Arbitration Act, 1995. Almost all the other provisions are replicated. The setting aside of an arbitral award is provided for under Article 34 and the grounds for setting aside are

similar to those encapsulated in Section 35 of our Act. These two provisions are meant to ensure finality in arbitral proceedings, and forestall situations where parties who initially opted for arbitration to settle their disputes find themselves entangled in the quagmire of protracted endless litigation which they were trying to avoid in the first place."

36. On the principle of limited court intervention and finality, the Learned Judge stressed further:

"I also hold the view that Section 10 and 35 of the Arbitration Act must be interpreted within the context of the concept of finality as internationally recognized in arbitral proceedings conducted under the UNICITRAL model. They are not unconstitutional at all. Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treats with deference is all about. This Court explained this issue clearly in Kenya Oil Company Ltd & Anor-vs-Kenya Pipeline Company, Civil Appeal No. 102 of 2012 in the following terms;

"The Arbitration Act, 1995 adopted the Model Law on International Commercial Arbitrations that was adopted in 1985 by the United Nations Commission on International Trade Law (UNITRAL). In addition to improving, simplifying and harmonizing practices in international commercial arbitration, the Act recognizes the principle of party autonomy and limits the role of the courts in commercial arbitration".

"The principle of party autonomy underpinning arbitration is premised on the platform that provided it does not offend structures imposed by law, parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts or by limiting the circumstances under which recourse to the courts may be had."

When parties expressly exclude court intervention in their arbitration agreement, then they should honour it and embrace the consequences. They cannot turn round and claim that the very law they have freely chosen to govern their business is unconstitutional. That is what the respondent is trying to do here. I would like to reaffirm this Court's decision in Anne Mumbi Hinga vs Victoria Njoki Gathara, Civil Appeal No. 8 of 2009 where the Court emphatically stated as follows;

"We therefore reiterate 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 Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act."

In the same case, while addressing the requirement as to finality of an arbitral award, the Court observed that finality as a concept in arbitration is shared worldwide by states that have modelled their Act on the UNICITRAL Model like Kenya. It noted that the common thread running through all these Acts is the restriction of court intervention except where necessary and in line with the provisions of the Act. The Court went on to note that Sections 35 and 37 of the Act are wholly exclusive except where a particular clause invites the intervention of the Court."

37. On his part, **Mwera J.A** similarly restated the origin and rationale behind court's limited intervention in arbitral matters by holding that:

"For the moment, it is not in doubt that the international business community in its wisdom, formulated the UNCITRAL MODEL RULES of arbitration which most business countries like Kenya took into consideration to formulate their respective statutes. It is accepted without argument that the legislature considered, on behalf of the business community, that arbitration was actually a useful tool as a matter of public policy, to settle disputes. Accordingly, the Arbitration Act, (1995) was passed and then more importantly the people of Kenya in the Constitution 2010 (Article 159(1)(c) stated in one voice that the desire of the business community to prefer dispute resolution, not through the courts, but via their own agreed arbitration process was indeed a noble way. So I can say that the consensual, voluntary and preferred way of arbitration is a great idea. And because the commercial community desired to keep clear of the courts as far as possible, through Parliament, business people included in the Arbitration Act, only limited instances to allow for court intervention when engaged in arbitration. To ensure that only limited court intervention would be allowed, the parties to any arbitration proceedings do state in the relevant agreement that the award issued will be final and binding. And to be certain in terms of the finality of an arbitral award, the business people told their representatives in the National Assembly to pass the Act which states, inter alia, that:

"32A. 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 for by this Act."

38. At page 8, he continued:

"And what the Prof. Lawerence Gumbe case (above) says of political parties who had filed a matter before a committee for arbitration mandated to settle their disputes finally, is specific and clear as to what that means:

"The Court is prevented by section 10 of the Act --- from interfering in the arbitral process in any other manner except as set out in the Act and by extension the rules made under the Act." [Nyamu, J.]

The Court then considered the mechanisms set down by law for settlement of civil disputes – the Civil Procedure Act and

Rules and the Arbitration Act and said the following:

"A comparison of the two pieces of legislation underscores an important message introduced by the latter Act: the finality of disputes and a severe limitation of access to courts. Sections 6, 10, 12, 15, 17, 18, 28, 35 and 39 of the Act are particularly relevant in this regard."

39. On his part, **Musinga J.A** expressed himself as hereunder:

"34. Article 159(c) of the Constitution enjoins the Judiciary to promote alternative forms of dispute resolution including reconciliation, mediation and arbitration. To that extent, arbitration is constitutionally recognized as one of the methods of resolving disputes and where parties choose that route, the guiding law is the Arbitration Act. Section 10 of the Act is explicit that:

"Except as provided in this Act, no court shall intervene in matters governed by this Act."

Kenya has adopted the UNCITRAL Model Law on international commercial arbitration which stipulates that courts of law cannot intervene in an arbitral process except in circumstances as provided by the law. Courts must instead play a supportive role. Our Arbitration Act provides for both domestic and international arbitration, see section 2 of the Act…39. No court should interfere in any arbitral process except as in the manner specifically agreed upon by the parties or in particular instances stipulated by the Arbitration Act."

40. On his part, **M'Inoti, JA** expressed himself as hereunder:

"It is clear beyond per adventure that the Act deliberately limits the instances in which the courts may intervene in arbitral proceedings. Section 10 of the Act, for example, limits the courts' intervention in rather explicit and unequivocal terms as follows:

"10. Except as provided in this Act, no court shall intervene in matters governed by this Act."

Section 10 is borrowed word for word from Article 5 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985. Regarding Article 5 of the Model Law, UNICTRAL in its Analytical Commentary on the Model Law observed as follows:

"Although the provision, due to its categorical wording, may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of the courts. It merely requires that any instance of court involvement be listed in the model law. Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system, which are not listed in the model law. The resulting certainty of the parties and the arbitrators about the instances in which court supervision is to be expected seems beneficial to international commercial arbitration." (Emphasis added)."

41. In response to the appellant's argument that the Act cannot oust the court's jurisdiction, the judge stated;

"Upon closer scrutiny, however, and in particular in the context of arbitral proceedings, the argument is not, in my opinion, easily sustainable. The decision to settle for arbitration as the dispute resolution mechanism of choice is one that is consciously and deliberately taken by the parties. In settling for that mode of dispute resolution, the parties know the limits that are placed on their right to resort to the courts once they have opted for arbitration. In other words, by settling for arbitration, it is the parties who have by their own deliberate choice opted to oust the jurisdiction of the courts or otherwise limit the right of the courts to intervene in their dispute…Parties cannot settle for arbitration, which they know very well does not readily brook judicial intervention and then turn round and complain that the limitations inherent in their chosen dispute-resolution mechanism is illegal or contrary to public policy. As the Court of Appeal of New Zealand stated in CBI NZ LIMITED V. BADGER CHIYODA [1990] LRC 621 in arbitral proceedings, there is nothing contrary to public policy in the finality of the arbitrator's award."

42. Though the respondent has not formally challenged the decision the subject of this appeal, it was contended that to the extent that the arbitral award is expressed as final, such an award contravened section 47 of the ***Fair Administrative Action Act***. However as appreciated by the Court of Appeal in **East African Power Management Limited vs. Westmont Power (Kenya) Limited Civil Appeal No. 55 of 2006:**

"The arbitration clause in question is not in our view ambiguous. The intention of the parties to refer any dispute to arbitration is clearly expressed in the clause and as held by the Superior Court it was not only necessary to give effect to the intention of the parties but it was a mandatory duty on the part of the court. Again it has not been demonstrated that there is no agreement at all to refer to arbitration or that it is not valid. Thus, the court's limited role in intervening where parties have agreed to refer a matter to arbitration is set out in section 10 of the Arbitration Act as follows: *"Except as provided in this Act no court shall intervene in matters governed by this Act."* The equivalent to Article 6 of the Model Law upon which the Kenyan provision is based reads: *"In matters governed by this Law, no court shall intervene except where so provided by this Law."* In short, the role of the court as captured in the 1995 Act is a facilitative role. Thus, in the (ICC Publication, 1993) an English Judge, Lord Mustill in "*Comments and Conclusions" in Conservatory & Provisional Measures in International Arbitration 9th Joint Colloquium*" has described the relationship between the courts as follows: "Ideally, the handling of

arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organization which could take steps to prevent the arbitration agreement from being ineffective. When the arbitrators take charge, they take over the baton and retain it until they have made an award. At this point, having nolonger a function to fulfil, the arbitrators hand over the 'baton so that the court can in case of need lend its coercive powers to the enforcement of the award." Going by the above, the issues which have been raised...are all well within the ambit of a future arbitrator appointed under the agreement in question. Thus, whether or not there is a dispute is a matter the arbitrator can rule on. Similarly, whether or not the arbitrator to be appointed has jurisdiction to rule on his jurisdiction is beyond question. He would be entitled to rule on his jurisdiction. As at the date the Superior Court ruling was handed down...the dispute did not fall within the two exceptions as set out in section 6 [of the Arbitration Act] above and even with the new amendment the appellant cannot in the circumstances be said to have acknowledged the claim at all but on the contrary it disputes that it should reimburse the respondent and is therefore outside the scope of the amendment. The words "shall be referred to arbitration" mean that when parties agree that a dispute shall be determined by arbitration, they voluntarily cut themselves off the recourse to the courts of law and they must be held to their agreement by courts of law in accordance with the Arbitration Act, 1995. In our view, the amendment to the 1995 Act does not alter the position prevailing under New York Convection and the arbitrator is entitled to deal with all disputes whether strong or weak…Moreover, we find that where a dispute between the parties exists, the parties must be taken to have agreed that all disputes relating to a particular transaction are to be resolved by the same tribunal. They could not reasonably be said to have chosen an arbitral tribunal and a court of law at the same time to deal with different issues in the same transaction. First, courts will make the prima facie assumption that the parties intended that all disputes relating to a particular transaction to be resolved by the same tribunal and that by agreeing to arbitrate they have prima facie chosen Arbitration as the appropriate tribunal...Second, it will be assumed, unless the words of the clause were clearly intended to limit the arbitrators powers to invoke particular remedies such as rescission or rectification, that the parties intended the arbitrator to haven to the extent allowed by law, at least those powers which are exercisable by the Court...Third, words of broad import, such as "in connection with this contract" are to be given their natural meaning in the context in which they are found." See *Commercial Arbitration (2001 Companion)* page 118 By Mustill & Boyd…Thus, general words such as claims, difference and disputes confer the widest possible jurisdiction and must be construed by reference to the subject matter of the contract in which they are included. This is what we have done in ascertaining whether a dispute on the taxes stems from the underlying contract between the parties."

43. Therefore, the trial court having been satisfied that the dispute before it was covered by an arbitration clause, its role was limited to facilitating the parties to realise their intendment. In this case, the clause in question stated as follows:

> ***If any dispute arises between you and us on any matter relating to this policy such dispute will be referred to;***
>
> > ***a) A single mediator to be agreed between you and us within thirty (30) days of the dispute arising and the mediation process to be finalized not later than thirty (30) thereafter.***
> >
> > ***b) A single arbitrator agreed between us, to be appointed within thirty (30) days of the dispute arising. If we cannot agree, either party will refer the dispute to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) whose decision will be binding on you and us. The arbitral award will be final. If the dispute is not referred to the arbitration process within twelve (12) months we will assume that you have abandoned the claim.***

44. It is therefore clear that the parties themselves provided for a situation where there was no agreement as to the arbitrator. In that event either party was at liberty to refer the dispute to the Chairman of the Chartered Institute of Arbitrators (Kenya Chapter) whose decision would bind the parties. The Court had no option but to respect that agreement and therefore erred in making a decision contrary to that clause that in the event of the failure to agree on an arbitrator within 30 days the matter would be referred to mediation. I agree with the Appellant that the effect of that decision was that the matter would be brought under the supervision of the Court since Court annexed mediation is essentially mediation under supervision of the court wherein the failure by the parties to settle the matter brings back the same to the mainstream litigation. That in my respectful view would be contrary to the objective of arbitration. I associate myself with the opinion of the decision of **Ochieng, J** in **Africa Management Communications Limited vs. Airtel Kenya Networks Limited [2016] eKLR** that after the case had been referred to arbitration, the court's jurisdiction is seriously curtailed; as provided for by Section 10 of the ***Arbitration Act***.

45. Having considered the issues raised in this appeal, I find the same merited. Accordingly, I allow the appeal, vary the ruling of **Hon. E. H. Keago (SPM)** dated 17th October, 2019 in Machakos Chief Magistrate's Court Civil Case No. 246 of 2019 and set aside the same to the extent that the said decision referred the parties to arbitration on condition that the parties agreed on an arbitrator within thirty (30) days and in default the mater be referred to court annexed mediation. Let the arbitral proceedings proceed in the manner contemplated in paragraph 9 of the Policy.

46. As none of the parties can be blamed for the decision, each party will bear own costs of the appeal. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 4th day of November, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Ochanda for Mr Ngugi for the Appellant

Mr Musya for Mr Munyao for the Respondent

CA Zakia