REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

MISC CIVIL APPLICATION NO.444 OF 2017

JOHN GATHARA KURIA.....APPLICANT

VERSUS

MUNYAMBU NJUGUNA GACHANJO.....1ST RESPONDENT

KEZIAH WANGARI MUNYAMBU.....2ND RESPONDENT

RULING

1. Before me are two applications for consideration and determination. The first application by the Applicant John Gathara Kuria is dated 1st November 2017 which seeks the following orders:-

a. THAT the Honourable Arbitral Award delivered by Hon. Ms. Eunice Lumallas dated 31st May, 2017 but released to the parties on 7th August, 2017 and all consequential orders thereof be set aside and that the respondent's claim as lodged before the said arbitrator be dismissed with costs to the Applicant.

b. THAT the costs for this application be in the cause.

2. The second application is by the Respondents M/s Munyambu Njuguna Gachanja and Keziah Wangari Munyambu dated 3rd May 2018 and seeks the following orders:-

a. THAT this Honourable Court be pleased to receive, recognize and to enforce the Arbitral Award and all consequential orders thereof delivered by the learned sole Arbitrator Hon. Ms. Eunice Lumallas dated 31st May 2017 in favour of the Applicants as a Judgment of this Honourable Court.

b. THAT upon granting prayer (1) above, a decree be issued in terms of the award.

c. THAT the costs of this application be provided for.

Brief facts of the suit

3. A dispute arose out of a sale agreement of a piece of land title no **NAIROBI/BLOCK82/1589** between **John Gathara Kuria** on one part, herein called the applicant and **Munyambu Njuguna Gachango** and **Keziah Wangari Munyambu** on the other hand, herein called the first and second respondents respectively, dated the 25th day of October 2013.The sale was subject to the parties fulfilling their respective obligations as per the agreement. Upon completion the Applicant supplied completion document to the purchasers advocate and the purchasers lodged a transfer in their favour in the lands ministry. However the respondents stated that the applicant/vendor breached the sale agreement and therefore sought relief through arbitration as per the conditions in the sale agreement.

4. Hon. Eunice Lumallas was appointed as the arbitrator and proceeded to hear and determine the dispute. The final award was published on 31st May 2017 where the applicant was supposed to pay a collective sum broken down as follows;

1. That the Respondent shall pay the Claimants the sum of Kenya shillings Eight Hundred and Thirty Two Thousand Four Hundred only (Kshs.832,400,00) broken down as follows:

a. Rent for the month of March 2014 – Kshs. 352,400.00

b. Net deposits for rent and service charge – Kshs.480.000.00.

2. That the Respondent shall pay the Claimants the sum of Kenya Shillings Four Million, Ninety Six Thousand Nine Hundred and Forty Six and Cents Forty (Kshs.4,096,946.40) broken down as follows:

a. Architectural fees for drawing the Architectural plans Kshs.1, 422,160.00.

b. Civil Engineers fees for drawing the structural plans Kshs.1, 740.000.00 inclusive of VAT.

c. Charges payable to the Nairobi City County Kshs.774.786.40.

d. Charges payable to the National Environmental management Authority (NEMA) Kshs.160, 000/-.

3. That the Respondent shall pay the Claimants interest on the Kenya Shillings Eight Hundred and Thirty Two Thousand Four Hundred only (Kshs.832, 400.00) at the rate of 14% from the due date of 8th March 2014 until payment in full.

4. That the Respondent shall pay the Claimants interest on Kshs.4,096,946.40 to be calculated as simple interest at court rates, currently at 14% per annum to commence fourteen (14) days from the date of collection of this award until payment in full to take into account any inflation.

5. The Respondent shall bear its own costs of the reference and pay those of the Claimants.

6. The parties shall equally bear the costs of my Award in the sum of Kenya Shillings Seven Hundred and Sixty Three Thousand Five Hundred (Kshs.763, 500/) inclusive of administrative costs and VAT.

5. The Applicant was dissatisfied with the award. The applicant moved the court to set aside the arbitral Award delivered by Ms. Eunice Lumallas dated 31st May, 2017. He based his grounds on an affidavit stating that the arbitral award contained findings which were beyond the scope of reference of the arbitrator. He further stated that the arbitrator did not decide according to terms of the contract between the parties thus she exceeded her jurisdiction. The applicant was also of the contention that the arbitrator failed to appreciate the issues for determination and thus arrived at an unlawful award. In the affidavit dated 1st November 2017 the applicant deponed that the respondents had an opportunity to conduct their due diligence part of which he was involved in showing them the property which was to their satisfaction. It is averred that at the time of completion, a dispute arose when the Applicant forwarded the architectural plans because there was a disparity in the number of floors as per the plans which was two as against the actual building which is five. That the Applicant contends further, the sale agreement described the property as residential area with no specifications as to the number of floors. The Applicant further contends the only relief and remedy available to an aggrieved party in the sale agreement was to rescind the sale and not opt for arbitration. The Applicant also stated that the awarded by the arbitrator were not provided for in the sale agreement.

6. The respondents are opposed to the application dated 11th November 2017. It is contended that the application is fatally defective, unmerited and an abuse of the court process. It is further contended that the application amounts to an appeal against the arbitral award and that there is no valid reason in the application to warrant the setting aside of the arbitral award. It is Respondent contention that the arbitrator determined the case within the scope of the law and the issues as presented and canvassed by the parties. The application is termed as an afterthought meant to deny the respondents the enjoyment of the fruits of the award

7. Before the hearing of the two applications I directed as the two applications are intertwined that they be heard together and the same be determined by way of written submissions. I further directed the Advocates do highlight on their submissions. The Applicant's submissions dated on 25th September 2018 were filed on 27th September 2018 whereas the Respondents submissions dated 28th September 2018 were filed on 1st October 2018. The Advocates for both parties highlighted on their submissions on 19th November 2018.

8. I have very carefully perused the two pending applications for determination; the counsel rival submissions and considered the oral submission by both counsel, and the issues arising for consideration thereto can be summarized as follows:-

a. Whether the Applicant has established sufficient grounds; that the Arbitral award deals with matters not falling within the terms of reference to the arbitrator or went beyond the scope of the reference to arbitrator.

b. Whether the Arbitrator exceeded her jurisdiction?

c. Whether the award offends public policy?

d. Whether the award can be received, recognized and enforced as a decree of this court?

A. Whether the Applicant has established sufficient grounds; that the Arbitral award deals with matters not falling within the terms of reference to the arbitrator or went beyond the scope of the reference to arbitrator.

9. The Applicant's application dated 1st November 2017 is brought pursuant to section 35(2) (A) (IV) & (B) (II) of the Arbitration Act 1995. Under the aforesaid provision, an Arbitral award can only be set aside as per the grounds set out under the said section. Section 35(2) (a) (iv) and b(ii) provides thus:-

"2) An arbitral award may be set aside by the High Court only if—

(a) The party making the application furnishes proof—

(iv) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(b) The High Court finds that—

(ii) The award is in conflict with the public policy of Kenya."

10. The Applicant in seeking to set aside the award has raised three issues as regards whether the arbitrator re-wrote the contract on behalf of the parties; whether there was a breach of the contract on part of the Vendor/Applicant and which are the remedies for breach available in the Sale Agreement and whether the Hon. Arbitrator went beyond the scope of her jurisdiction by awarding remedies not provided in the contract.

11. It is the Applicant's contention that the Arbitrator's award contains finding, which are beyond the scope of the reference. The parties herein as per the sale agreement dated 25th October 2013 under clause 10 (K) of the Sale Agreement agreed as follows:-

"Should any dispute arise between the parties with regard to the interpretation, rights, obligations and/or implementation of any one or more of the provisions of this agreement, the parties shall in the first instance attempt to resolve such dispute by amicable negotiations.

Should such negotiations fail to achieve a resolution within fifteen (15) days, either party may declare a dispute by written notification to the other, whereupon such dispute shall be referred to arbitration under the following terms:-

i. Such arbitration shall be resolved in accordance with the provisions of the Kenyan Arbitration act 1995 (as amended from time to time);

ii. The tribunal shall consist of one arbitrator to be agreed upon between the parties failing which such arbitrators shall be appointed by the Chairman for the time being of Chartered Institute of Arbitrators of Kenya upon the application of either party;

iii. The place and seat of arbitration shall be Nairobi and the language of arbitration shall be English;

iv. The award of the arbitration tribunal shall be final and binding upon the parties to the extent permitted by law and either party may apply to a court of competent jurisdiction for enforcement of such awards;

v. Notwithstanding the above provisions of this clause, a party is entitled to seek preliminary injunctive relief for interim or conservancy measures from any court of competent jurisdiction pending the final decision or award of the arbitrator."

12. Under clause 10(K) of the Sale Agreement dated 25th October 2013 the scope of the Arbitration was well set out, thus interpretation, rights, obligations and implementation of the provisions of the agreement.

13. In this regard I am guided by the case of **Kenya Tea Development Agency Ltd & others Vs Savings Tea Brokers Ltd (2015) eKLR** in which it was held:-

"...the jurisdiction of the Arbitrator is tethered by the arbitration agreement, reference and the law. The express words used in the arbitration agreement or as interpreted with reference to the subject matter of the contract will determine whether a claim is based on tort was contemplated by the agreement or falls within the terms or scope of the reference to arbitration. Even where general, broad, generous and elastic words are used in arbitration agreement or reference to arbitration, courts will still interpret them by reference to the subject matter of the contract..."

14. This court is dealing with a matter in which both parties determined in their Sale Agreement to have any dispute arising out of the said agreement to refer the same to arbitration. This court in dealing with a matter such as this one and in making the determination should bear in mind that the court's role is limited in matters in which parties have expressly agreed and have submitted themselves to arbitration. Section 10 of the Arbitration Act in expressly terms provides:

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

15. In the case of **East African Power Management Ltd Vs Investment (K) Ltd (Nairobi Civil Appeal No. 55 of 2006)** the Court of Appeal held that under section 10 of the Arbitration Act, the court had a limited role in intervening in matters where parties had agreed to refer a matter to arbitration except where the Act specifically provided for such intervention. The court consequently proceeded to hold that the said provision was mandatory and that the court role in arbitration matters was merely a facilitative one.

16. Further it should be noted that once parties chose to refer any dispute to arbitration, the same is binding upon them. In the case of **Nyutu Agrovet Limited Vs Airtel Network Limited (2015) eKLR** the Court of Appeal stated thus:-

> **"When parties expressly exclude Court intervention in their arbitration agreement, then they should honour it and embrace the consequences. Consequently the parties herein are bound by the arbitration clause and the Award that emanated therefrom."**

17. The Applicant contention is that the remedies available in the event of breach of the contract by the vendor are enumerated under special conditions of clause E of the sale agreement, hence the same constitutes all the remedies for breach as agreed by the parties. That the Hon. Arbitrator in making a determination ought to be guided purely by the agreement as anything outside of that will impose a contractual obligation not contemplated by the parties in the conflict.

18. The Applicant referred to the case of **Associated Engineering Co. Vs Government of Andhra Pradesh and Another [1992] Air 232,** Quoted in **Kenya Tea Development Agency & 7 Others Vs Savings Tea Brokers Ltd Misc. Application N.129/2014** where the Supreme Court of India held that:-

> **"The Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract, if he has travelled outside the bonds of the contract, he has acted without jurisdiction."**

19. The Applicant further contents a look at the award, it is evident that the Hon. Arbitrator went off target by invoking items that are not provided for in the contract and as such acted out of her scope of jurisdiction as she had no power to award the award she made such as awarding architect fees and all other costs therein enumerated in the event of any breach of the contract. That it is urged the quotation the basis of the award are not actual payments made by the respondents and should not have been awarded together with interest and more so when the Applicant is not the correct registered proprietor of the suit property. In view of the above it is contended that the arbitrator outstepped her jurisdiction.

20. In the case of **Cape Holdings Limited Vs. Synergy Industrial Credit Limited (2016) eKLR** the claimant pleaded that, *"the arbitrator exceeded his scope by awarding compound interest and interest on interest. It was submitted that this was tantamount to re-writing the contract between the parties"* and the learned Justice C. Kariuki held that after going through the parties' agreements, pleadings and the submissions, the court, makes a finding that:-

> **"Clause D of the contract did not set the scope of the arbitrator's mandate and no amount of construction of the arbitration clause could expand the arbitrator's jurisdiction to include the so called oral agreements nicknamed as agreed terms of purchase (ATP). Clause D provides in part, thus; "agreement constitutes the entire agreement between the parties and any representations warranties or statements whether written, oral or implied and whether made before or after this agreement is expressly excluded."**

21. Further in **Mahican Investments Limited and 3 others vs. Giovanni Gaida & Others [2005] eKLR, Ransley J.** was of a like view when he held that:

> **"A court will not interfere with the decision of Arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of the Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties."**

22. Special condition (b) (viii) of the Sale Agreement provided that the Applicant was to provide approved building plans (both architecture and structural) as part of the completion documents. On 20/6/2014 and after receiving the entire purchase price, the seller's Advocate wrote and stated that the approved building plans were not available see page 80 of the Replying Affidavit. Having heard testimony of the parties the Arbitrator found that the Applicant failed to give approved building plans for the 5 storey building he sold to the Respondent and therefore was in breach of the Sale Agreement. It is hypocritical for the Applicant to argue that the Respondent should have inspected the building plans at paragraph 28 of his submissions. How could the Respondent have inspected that that which did not exist?

23. The Hon. Arbitrator found that the Applicant failed to provide approved building plans for the building sold to the Respondent as the same did not exist. The Applicant had not disclosed this before signing of the sale agreement. It would be absurd and illogical to expect that the sale agreement would have contained a provision for remedy if the Applicant failed to supply the building plans when such a scenario had not been anticipated. It was the Respondent's expectation that the Applicant would honour the sale agreement and supply the building plans. It was within the scope and mandate of the Arbitrator to grant a remedy that cures the breach. The only sensible thing to do was to order that the Applicant should meet the cost of obtaining the approved building plans. It is therefore clear that the Hon. Arbitrator did not travel beyond the terms of the reference or attempted to re-write the Sale Agreement. She gave effect to the intention of the parties.

24. It would be unreasonable to expect that advocates drafting contracts to include all possible remedies in case of breach. It is within the province of an Arbitrator to grant a remedy upon making a finding of breach of contract. Granting a remedy cannot amount to exceeding the scope of arbitration especially when the same was in the statement of claim. It was within the law for the Arbitrator to interpret the Sale Agreement to give effect. Contracts are not cast in stone and are subject to interpretation. The spirit of the letter of the contract should prevail when interpreting it.

25. The test for whether an Arbitrator went outside the scope of the reference to arbitration is that the Applicant must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter to the dispute. This was held so in the case of **Mavican Investment Limited Vs Giovani Gard & 80 others.** In the instance, the Applicant has failed to demonstrate beyond doubt that the Arbitrator dealt with matters not related to the suit property. Consequently the application fails on the ground of alleged exceeded scope of reference.

26. I find from the case referred to herein above for a court to interfere with the arbitration award it should do so only to the matters that pertain to the law. The arbitral award was twofold, once in respect to ascertain the liability of the parties and second in determining the damages. The Arbitrator in dealing with the matter before her did not overstep her jurisdiction in this issue no re-write the contract between the parties but proceeded to give effort to the intention of the parties and it was within the jurisdiction of the Arbitrator to grant appropriate remedy following her findings in this matter and in doing so, she acted with in her scope and in actual fact dealt with matters falling within the terms of reference. The Hon. Arbitrator did not exceed her scope of arbitration and did act within the law to interpret the Sale Agreement. I find the Applicant has failed to demonstrate how and to what extent the Hon. Arbitrator exceeded her scope in the arbitral award as per provisions of section 35 of the Arbitration Act.

B) Whether the Arbitrator exceeded her jurisdiction?

27. The Applicant contention is that the Hon. Arbitrator over stepped her jurisdiction and proceeded to re-write the contract between the parties herein in proceeding to make the award in favour of the Respondents in the terms she set up in the award which the Applicant urges was not provided for in the Sale Agreement entered into by the parties.

28. The parties appeared before the Hon. Arbitrator, each party set out its case for determination, called evidence and issues for determination set out. Parties were afforded an opportunity to put in written submissions which they all did.

29. Under **Section 17 (2) (3) (4) (5) (6) and (7)** of the Arbitration Act it is provided as follows:-

> **(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.**
>
> **(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.**
>
> **(4) The arbitral tribunal may, in either of the cases referred to in subsection (2) or (3) admit a later plea if it considers the delay justified.**
>
> **(5) The arbitral tribunal may rule on a plea referred to in subsections (2) and (3) either as a preliminary question or in an arbitration award on the merits.**
>
> **(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.**

30. From the reading of the above section, it is clear that a plea Arbitral tribunal does not have jurisdiction should be raised not later than the submission of the statement of defence. It is apparent that through a letter dated 15th September 2016, the Applicant had questioned the jurisdiction of the Hon. Arbitrator to determine issues raised in the statement of the claim *(page 109 of the Respondent's documents)* as the Applicant was contending determining of those issues would amount to re-writing the contract and that determination of the issues would be against the scope of the Arbitrator. The record of the Arbitral tribunal reveal that on 28th September 2016, the Arbitrator ruled on her jurisdiction and scope to hear the dispute, when she stated:-

> **"I find that some of the issues that Counsel for the respondent has raised in the letter under reference are issues to be presented before the tribunal and upon which reasonable assessment and determination ought to be made. In which case I believe the same ought to be canvassed in pleadings to be relied upon and at the hearing. With respect to the quoted section 17(3) of the Act, I believe the current ruling settles the same as it is subject to the competenz competenz rule."**

31. It is clear from the Arbitral Tribunal proceedings the Hon. Arbitrator ruled that she had jurisdiction to hear and determine the claim as filed before her. The Arbitration Act under section 17(6) is clear that upon a ruling on issue of jurisdiction by Arbitral tribunal, any aggrieved party by such ruling may apply to the High Court, within 30 days, after having received notice of that ruling to decide the matter. That the Arbitral Tribunal ruling of 28th September 2016 has not been challenged todate. That issue has been determined, and having not been challenged as provided, I find it would be wrong for the Applicant to purport to raise the same afresh in the High Court, and more so in an application seeking to set aside the Arbitral Award. The applicant is too late to challenging the Arbitral Tribunal award jurisdiction after the expiry of 30 days from the date of such ruling. The Applicant cannot in my view be allowed to re-litigate an issue that was clearly and in unambiguous settled by the Arbitration and failed to exercise his rights to challenge the same as provided by the law. There has to be an end to litigation. In the case of **Safaricom Limited Vs Ocean View Beach Hotel Limited & 2 others (2010) eKLR,** the court clearly stated that under the doctrine of Komptenz/Kompetaz an arbitral tribunal can rule on both the validity of arbitral clause and the underlying contract. The court proceeded to hold that an arbitrator can rule on whether he has jurisdiction to hear and determine a matter. I therefore find that the Hon. Arbitrator herein did nothing beyond what was expected of her. She acted upon the law in ruling that she had jurisdiction to hear and determine the matter before her. I therefore do find that the Hon. Arbitrator in hearing and determining this matter did not exceed her jurisdiction. I also find the plea that the Arbitral Tribunal had no jurisdiction was raised after time provided for by the provision of the law had lapsed and as such the plea is without legal basis.

C) Whether the award offends public policy?

32. One of the grounds for setting aside of an arbitral award by the High Court is where the award is in conflict with the public policy of

Kenya as provided for under section 35(2) (b) (ii) of the Arbitration Act. That in spite of the Applicant having on face of the application cited section 35 (2) (b) (ii) of the Arbitration Act, as one of the provisions relied upon, in support of his application for setting aside the arbitral Tribunal Award, in the application and in the submissions, he has not stated how and in what way the award is in conflict with the public policy of Kenya. An applicant cannot make a general allegation, fail to submit on the same and leave the court to speculate on the matter in issue but must bring forth the grounds in support of its contention to enable court make a proper and justified decision. The Applicant raised various issues before the Hon. Arbitrator, he was heard, and his submissions considered and the Hon. Arbitrator rendered a judgment on the issues raised. The final award is not contrary to the law or against the law. No single section that has been contravened by the award has been raised. I find no provision of law barring the Hon. Arbitrator from awarding monetary compensation for breach of contract. Section 32 C of the Arbitration Act on interest provides:-

> **"Unless otherwise agreed by the parties, to the extent that the rules of law applicable to the substance of the dispute permit, an arbitral award may include provision for the payment of simple or compound interest calculated from such date, at such rate and with such rests as may be specified in the award."**

In the instant matter, the Hon. Arbitrator awarded simple interest at court rates currently at 14% per annum from the completion date 8th March 2014 until payment in full. This is not illegal or contrary to public policy.

33. On the award it is averred by the Applicant the same was based on quotation, however the Hon. Arbitrator clearly stated that she relied on expert evidence by an architect and an engineer as per pages 10 to 12 of the Final Award dated 31st May 2017. The two experts testified before the Arbitral Tribunal and the Hon. Arbitrator found their evidence believable. Fraud and conmanship goes against public policy in Kenya but there is no evidence on record of its existence in this matter. On part of the Hon. Arbitrator. These vices are unlawful and immoral, but that was not demonstrated as against the Respondents. The questioned Sale Agreement was drawn by the Applicant's counsel and the Applicant was duty bound to give full and correct information to his counsel and ensure the same were correctly incorporated in the Sale Agreement. The Applicant committed to give approved building plans for the subject property being one of the completion documents. The building was five (5) storey building and the Applicant was under obligation to give the Respondents building plan for five storey building but not for 2 storey building. The Applicant failed to supply all completion documents. I find that it is unlawful and morally wrong for the Applicant having sold five storey building to fail to give building plan for five storey building but give a building plan for 2 storey building and claim that is an approved building plans for five storey building. The Applicant by his conduct demonstrated dishonest on his part and breach of Sale Agreement as he did not as the Hon. Arbitrator found, comply with the terms and conditions of the Sale Agreement.

34. In **Rwama Farmers Co-operative Society Ltd v Thika Coffee Mills Ltd (2005) eKLR** Hon. Mabeya, J held inter alia:

> **"From the foregoing, it is quite clear that the term "conflict with public policy" used in Section 35(2) (b)(ii) of the Arbitration Act, is akin to "contrary to public policy", "against public policy", "opposed to public policy". These terms do not seem to have a precise definition but they connote that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and that violate the basic norms of society."**

35. In Christ for all Nations Vs Apollo Insurance Co. Ltd. (2002) EA 366, for instance, **Ringera, J**, (as he then was) had occasion to consider the concept of public policy from the prism of **Section 35 (2)(b)(ii)** and had the following to say:

> **"An award could be set aside under page 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality."**

36. In view of the aforesaid, I find that the Applicant has failed to demonstrate the award offends public policy and in what way. He further failed to demonstrate that the Hon. Arbitrator dealt with a dispute not completed by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of reference to arbitration or the award is in conflict with public policy of Kenya.

37. The intention of the arbitral proceedings is to bestow the finality on dispute and that being the reason, a severe limitation is imposed on access to the court as at some time litigation should be brought to an end. The Applicant as noted earlier on, in his pleadings and submissions has never raised the concept of public policy and a party cannot be granted what he has not pleaded for as the law provided by the law.

D. Whether the award can be received, recognized and enforced as a decree of this court?

38. The Respondents through their application dated 3rd May 2018 brought pursuant to section 36(1) of the Arbitration Act, 1995, Rule 9 of the Arbitration Rules 1997 and all enabling provisions of the law prays that the court do receive, recognize and enforce the Arbitration Award and all consequential orders thereof delivered by the said sole Arbitrator Hon. M/s Lumallas dated 31st May 20`17 as a judgment of this court. Having considered the application to set aside the Arbitral award and having found no merit in the same, it logically follows that the final award stands and ought to be accordingly enforced as prayed in the Respondents application dated 3rd May 2018.

39. Having considered the two applications and having pronounced myself on the same, I proceed to make the following orders:-

> **a. The Applicant's application dated 1st November 2017 is without merit and is dismissed.**
>
> **b. The Respondents application dated 3rd May 2018 is meritorious. I proceed to make the following orders:-**

i. The Final Award made on 31st May 2017 by Honourable Arbitrator Eunice Lumallas, FCIArb, is hereby received, recognized as binding and leave is hereby granted as prayed for its enforcement as a Decree of this court.

c. The Respondents are granted costs of the two applications.

Dated, signed and **delivered** at **Nairobi** this **17th** day of **January, 2019.**

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J .A. MAKAU

JUDGE