REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 10 OF 2018

IN THE MATTER OF THE ARBITRATION ACT 1995, LAWS OF KENYA

IN THE MATTER OF ARBITRATION IN RELATION TO THE SITES LICENSE AGREEMENT DATED 5TH SEPTEMBER 2012

(SITES NOS. 4,9,10,11,12 & 14)

BETWEEN

MAGNATE VENTURES LIMITED .....PLAINTIFF/RESPONDENT

-VERSUS-

KENYA RAILWAYS GOLF CLUB.....DEFENDANT/APPLICANT

-AND-

BACKLITE LIMITED.....INTERESTED PARTY

RULING

BACKGROUND

The plaintiff/applicant filed application on 12th January 2018, and sought interim orders pending arbitration the court granted orders of maintenance of status quo until 12th March 2018 and thereafter extended to 16th March 2018 when the application was canvassed. The Ruling was delivered on 11th April 2018.

The defendant informed the Court that the Plaintiff erected new bill boards at the Defendant's site and sought orders for removal of the said Bill boards. The Court extended interim orders pending the Deputy Registrar confirming by filing a report the position on the ground.

On 13th April 2018, the Court heard applications filed on 12th January 2018 and 8th March 2018. On 15th May 2018, the Court granted orders of maintaining status quo/preserving the subject matter pending arbitration. The Court also issued an injunction to restrain the defendant from interfering in any manner with the Plaintiff's Bill board site located and erected on Defendant's suit property L.R.No 209/11379.

On 15th June 2018, the Plaintiff came to the Bill board site and fixed signage. The Defendant filed an application under certificate of urgency which the Trial Court heard on 3rd July 2018 and determined that maintenance of status quo meant that bill boards were not to be interfered with by the Defendant pending arbitration. The plaintiff was to maintain billboards without interference by the Defendant.

On 23rd July 2018 the court heard the application filed by the proposed interested party M/S Backlight Limited and Ruling was delivered on 6th December 2018 and the interested party was enjoined to the suit.

PLAINTIFF'S APPLICATION OF 9TH FEBRUARY 2019

By a Chamber summons application dated 9th January 2019, brought pursuant to **Section 36 (1) of the Arbitration Act 1995 and Rule 6 and 9 of the Arbitration Rules 1997** and all other enabling provisions of Law, the Applicant sought orders;

a) ....spent

b) That this Court be pleased to recognize and adopt the Final Award made and published by Mr. Justice (Rtd) J. B. Havelock MBS and Mr. Peter Gachuhi, FCIArb on the 26th November 2018 as a judgment of this Court;

c) That Judgment be and is hereby entered in favour of the Plaintiff as against the Defendant in terms of the Final Award published on 26th November, 2018 by Mr. Justice (Rtd) J. B Havelock MBS and Mr. Peter Gachuhi FCIA rb;

d) That the court be pleased to grant leave to the Applicant to enforce the said Award as a decree of this Honourable court;

e) That costs of this application and of this suit be borne by the Defendant.

The Application was based on the grounds;

1. On 15th May 2018, an Order was made restraining the Defendant from interfering with the Plaintiff's 6 sites and billboards erected on property Land Reference Number 209/1139, pending the determination of the dispute herein in arbitration;

2. The Arbitral Tribunal was constituted on 21st May 2018 and comprised three Arbitrators; Mr. Justice (R td) J. B. Havelock MBS, appointed by the Chattered Institute of Arbitrators, Dr. Kariuki Muigua, FCIArb appointed by the Defendant and Mr. Peter Gachuhi, FCIArb appointed by the Plaintiff;

3. On 10th July 2018, the Defendant purported to withdraw from the arbitral reference whereas on 12th July 2018 Dr. Kariuki Muigua FCIArb withdrew from the Arbitral Tribunal;

4. The Arbitral reference proceeded before Mr. Justice (Rtd) J. B. Havelock MBS and Mr. Peter Gachuhi, FCIArb, was concluded and the Final Award published on 26th November 2018;

5. There is no application by the Defendant to set aside the Award; and

6. Leave of the court is required to enforce the Award as a judgment of the Court.

The Defendant did not file response to the Plaintiff's application.

DEFENDANT'S APPLICATION OF 19TH FEBRUARY 2019

By a notice of motion dated 19th February 2019, brought pursuant to **Section 35 (2) (a) (v) of the Arbitration Act 1995 and Rule 7 of the Arbitration Rules 1997 and section 3A Civil Procedure Act Chapter 21 of the Laws of Kenya** and all other enabling provisions of law, the Respondent sought for orders ;

a) The Arbitral Award made and published by Mr. Justice (Rtd) J. B. Havelock MBS and Mr. Peter Gachuhi, FCI Arb on the 26th November 2018 be set aside;

b) The court do supersede the arbitration and proceed to determine the dispute;

c) In the alternative to prayer 2 above the court do remit the dispute for Arbitration afresh before an Arbitral Tribunal set up in accordance with the Agreement between the parties dated 5th September 2012;

d) The court grants any other or further relief as this Honourable court may deem fit;

e) Costs of this application be in the cause.

The Application was based on the grounds;

1. That the composition of the Arbitral Tribunal during the hearing and publication of the Award was not in accordance with the agreement of the parties. The agreement of the parties provided for an arbitral composed of 3 arbitrators. On 12th July 2018, prior to the hearing of the dispute and publication of the award, one of the Arbitrators, Dr. Kariuki Muigua withdrew from the arbitral tribunal leaving only two Arbitrators. The remaining arbitrators proceeded to hear and determine the dispute despite withdrawal by the Applicant and the Applicant's objections;

2. The Arbitral Tribunal was not properly constituted in terms of the agreement of the parties during the hearing of the dispute and publication of the Award;

3. The Arbitral Tribunal committed a grave misconduct in proceeding to hear and determine the dispute notwithstanding that the tribunal was not properly constituted.

PLAINTIFF'S REPLYING AFFIDAVIT OF 8TH MARCH 2019

The plaintiff replied to the Defendant's Notice of Motion seeking to set aside the Arbitral award of 26th November 2018 on the following grounds;

1) The plaintiff and defendant entered into Sites License Agreement of 5th September 2012 on plaintiff's use of Sites **Nos 4,9,10,11,12& 14** on the Defendant's suit property **LR209/11379** for 5 years.

2) **Clause 18** of the License Agreement prescribed the Arbitration Clause; that when a dispute arose, either party would make a reference to a single Arbitrator in default of agreement each party to appoint its Arbitrator and the other Arbitrator shall be appointed by the Chartered Institute of Arbitrators.

3) The plaintiff wrote to the Defendant on 11th January 2018 of a dispute to be referred to arbitration.

4) By series of letters exchanged by the parties they proposed Arbitrators; the Plaintiff settled on Mr.P.M. Gachuhi; the defendant settled on Dr.Kariuki Muigua and the Chartered Institute of Arbitrators appointed Mr J.H.Havelock.

5) By a letter from the Defendant of 9th January 2018, the Defendant confirmed termination of lease and procurement process was completed with the contract signed and awarded to the highest evaluated bidder; the Plaintiff filed the matter in Court seeking interim measure of protection pending arbitration. By Court's ruling of 15th May 2018; the Court granted interim injunction and maintenance of status quo pending arbitration.

6) The Arbitral tribunal consisting of the 3 Arbitrators as prescribed by Arbitration Clause, informed parties vide letter of 21st May 2018 by J.B.Havelock Chartered Arbitrator of scheduled Preliminary meeting to be held on 11th June 2018 at 2.30 pm.

7) By letter from the Defendant dated 26th May 2018, the Defendant notified the Arbitral Tribunal that they withdrew from the Arbitration proceedings as having reconsidered their position, the Agreement that sought the dispute to be referred to arbitration expired on 31st December 2017. The Defendant confirmed non attendance of the preliminary meeting of 11th June 2018 as indicated in the Arbitrator's letter of 21st May 2018.

By copy of this letter the other 2 Arbitrators, the Claimant and advocates were informed of the Defendant's withdrawal.

8) On 30th May 2018, the Arbitral Tribunal wrote to the Defendant and sought clarification if the dispute was resolved. The Tribunal posited that it is now well established in law that an arbitration clause in an agreement which expires survives independently and separately from the Arbitration agreement.

The Arbitrators encouraged the Defendant to attend the Preliminary Meeting of 11th June 2018 so as to ensure that the Arbitral Tribunal does not proceed *exparte*. The Arbitrator notified the Defendant that the Arbitral Tribunal had already incurred expenses for which it would seek reimbursement from the parties.

9) The Defendant by letter of 6th June 2018 stated that the expired Agreement between the parties did not specifically provide that the Arbitration clause would survive expiry of the contract and insinuated that the Tribunal appeared to already to have taken a position before the Arbitration.

The Defendant clarified further that Arbitration can only proceed by consent of parties and parties to the Tribunal confer jurisdiction of arbitration. The Defendant asserted that the position not to attend the Preliminary meeting had not changed. If any costs were incurred the Tribunal was to be reimbursed by the Plaintiff.

10) The Plaintiff was present at the Arbitral Tribunal on 11th June 2018 for the scheduled Preliminary meeting. The Arbitral Tribunal adjourned the Preliminary meeting to the 25th June 2018. The Arbitrator wrote to the Defendant on 12th June 2018 and stated that the 3 Arbitrators held a preliminary meeting and there was no representation from the Defendant. As a result in order to give the Defendant time to consider the matter and its participation in the Arbitral Tribunal, the Preliminary meeting was stood over to 25th June 2018 at 2.30 pm.

The Arbitrator on behalf of the other Arbitrators stated as follows;

a) An Arbitration clause in an agreement survives independently and separately from the contract between parties.

b) The Arbitral tribunal was supplied copies of Ruling from **L.J.Ngetich in HCCC 10 of 2018** dated 15th May 2018 where the Court endorsed arbitration proceedings.

The Defendant was informed that failure to attend the Preliminary meeting of 25th June 2018, the Arbitral Tribunal may proceed *exparte*.

11) The Preliminary meeting was held on 25th June 2018 the Defendant refused to attend.

12) The Plaintiff filed upon the Arbitral Tribunal the Statement of Claim and served the Defendant on 9th July 2018.

13) The Defendant failed to file its Statement of Defence on 30th July 2018.

14) The Defendant by a letter of 13th July 2018 to the Plaintiff's advocate acknowledged receipt of the Statement of Claim and returned the same in its original form for the plaintiff's retention because the Defendant withdrew from Arbitration and would not need to be served with any pleadings at all.

15) By letter of 12th July 2018, Dr Kariuki Muigua wrote to the Umpire Arbitral Tribunal Rtd Judge J.B.Havelock on his withdrawal from arbitration proceedings. He enclosed the letter from the Defendant of 10th July 2018 to him,where he was advised that his appointment to the Tribunal ceased upon the Defendant's withdrawal from the said Arbitration proceedings. Also, that any continued participation by him purportedly on the Defendant's behalf would not bind the Defendant as they withdrew from the Arbitration proceedings.

16) The Arbitral Reference was mentioned before the Arbitral Tribunal on 20th August 2018. The Tribunal noted the withdrawal of the 3rd Arbitrator from the proceedings. The Arbitral Tribunal directed that it would proceed notwithstanding the withdrawal of the 3rd Arbitrator with the reference on 5th October 2018. A hearing Notice was served to parties to the Arbitration. The Defendant was served and confirmed service on 18th September 2018. The Plaintiff served the hearing Notice to the Respondent and an affidavit of service was also filed.

17) By a Letter of 13th September 2018 Counsel for the Defendant notified Plaintiff's Counsel that he no longer represented the Defendant and he was not to be served with any pleadings or notices with regard to the matter.

18) The Arbitration proceedings were carried out on 5th October 2018.After the plaintiff's testimony, directions for filing submissions were filed by Plaintiff and served to the Defendant on 19th October 2018.

19) On 22nd October 2018, the Defendant notified the plaintiff's advocate that if the written submissions were in respect of the Abortive Arbitration that was under that Arbitral Tribunal umpired by Rtd Judge Mr.Justice J.B.Havelock; there was no such arbitration going on between Magnate Ventures Ltd and the Railway Golf Club at the moment because the Purported Arbitration collapsed on 12th July 2018 when the Arbitrator purporting to represent the Kenya Railway Club in the Arbitral Tribunal withdrew from the arbitration, resulting in collapse of the arbitration. The Defendant returned the written submissions served on them and did not wish to be served with any pleadings/and/or process in a matter where they were not parties and were not interested in.

20) On 26th November 2018, the Arbitral Tribunal notified the Defendant and Plaintiff that the Arbitral award was ready for collection

21) By letter of 4th December 2018, the Defendant was shocked by letter of 26th November 2018 inviting them to collect the Arbitral award. They contended that by letter of 26th May 2018, they withdrew from the arbitration proceedings. By letter of 12th July 2018, the Arbitrator they appointed withdrew from the arbitration proceedings.

The Defendant made is clear that they were not party to the arbitration proceedings. The Defendant returned the letter of 26th November 2018 and was not going to exchange any further correspondence and the matter was closed.

GROUNDS OF OPPOSITION FILED BY INTERESTED PARTY

The Interested party Ms Backlite Ltd opposed the Plaintiff's application of 9th January 2019 on the following grounds;

The interested party has a valid contract with the Defendant of 31st December 2017.The Interested party was successfully joined in these

Proceedings by the Court. However, since it was not party to the Arbitration proceedings, the Arbitral award cannot be binding on the interested party.

The Arbitration proceedings were/are a nullity as there were simultaneous proceedings between the same parties in the High Court over the same subject matter.

The Arbitral proceedings were/are a nullity because there was no existing and/or valid agreement between the plaintiff and the Defendant. The Clause of disputes to be resolved by way of arbitration cannot survive an expired contract.

The Arbitral proceedings having proceeded in the absence of both the Defendant and the interested party who are parties to the suit is invalid

DEFENDANT'S SUBMISSIONS

1. **On whether the Arbitral Tribunal which was not properly constituted it had jurisdiction to hear and determine the matter**, the Defendant relied on the following cases and rationale;

Associated Engineers Co vs Government of Anhra Pradesh & Anor [1992] AIR 232 **held;**

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.

In ***National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Anor[2001] eKLR*** held;

A Court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud, undue influence are pleaded and proved.

This Court is to be persuaded by the case of***; In Insurance Company of North America Ltd INA vs Public Service Mutual Ltd 2009 WL 1873585 (SDNY JUNE 30 2009);*** where it was held that when one of the Arbitrators withdrew and the Arbitration Agreement did not provide for a replacement mechanism, the Court had sufficient reason to exercise its jurisdiction in filling that vacancy.

An excerpt from **Asian Leading Arbitrator's guide to International Arbitration** reads;

"It is a hall mark principle of arbitration; that the jurisdiction or mandate of the Tribunal to hear and decide claims by the parties proceeds from the agreement by the parties."

The Defendant submitted that since Dr Kariuki Muigua withdrew from the arbitration proceedings, the remaining 2 Arbitrators had no jurisdiction to proceed with the matter as they were not properly constituted as per the arbitration clause. They ought to have terminated proceedings or sought direction from the Court on how to proceed. Moreso, since the Defendant objected to the proceedings and did not take part in the hearing.

2. **Whether it is in the interest of justice for the award to be set aside**.

The matter proceeded *exparte* without participation of the Defendant. As a result the dispute was not determined on merits as the Defendant's case was not canvassed. The Defendant had a good defense as set out in the Defendant's affidavit in support of the application to set aside the arbitral award. The Defendant relied on the legal advice of former Counsel and withdrew from arbitration proceedings. It is because of the mistaken advice that the Defendant was unable to present its case before the Arbitration Tribunal. The Defendant should not be punished due to the Counsel's mistake.

The Defendant relied on ***Edney Adaka Ismail vs Equity Bank Ltd [2014] eKLR*** held;

"It is true that where the justice of the case mandates, mistakes of advocates even if they are blunders should not be visited on the clients when the situation can be remedied by costs."

The Defendant was denied its fundamental right to be heard as enshrined under Article 50 of the Constitution. In the case of; ***Patriotic Guards Ltd vs James Kipchirchir Sambu [2018] eKLR*** cited the case of ***Mbaki & Others vs Macharia & Anor (2005)*** that held;

"The right to be heard is a valued right, it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

INTERESTED PARTY'S SUBMISSIONS

The High Court vide Ruling of 6th December 2018 confirmed that orders or decision to be arrived at by the Court or Arbitral Tribunal would affect the intended interested party and therefore it was declared a necessary party to this suit.

The plaintiff did not appeal in the Court of Appeal or seek review of the same from the High Court. The High Court's supervisory role over Tribunals and subordinate Courts cannot adopt and enforce the award that will conflict with final orders that will affect a party that was not part of the arbitration proceedings. Therefore, the parties ought to be sent back for arbitration.

The interested party stated that by virtue of **Section 6(1) Arbitration Act,** there was no dispute between the parties as the contract/ agreement expired. The interested party relied on the case of ***In the Diocese of Marsabit Registered Trustees vs Technotrade Pavilion [2014]*** The dispute must, however relate to matters agreed for arbitration. The lease agreement was for 6 years and on expiration a notice of non renewal was served and not challenged. It is that challenge of the notice that would have constituted the dispute for arbitration.

In the case of ***Fairacres Development Ltd vs Margaret Apondi Olotch T/A M.A.Kiosk*** where it was held ;

"It is trite law that arbitration clauses apply only where there is a dispute between the parties, on a matter covered by the agreement and by the arbitration clause. But all these pre suppose such a dispute arising during the subsistence of the agreement- here the lease agreement which terminated on 31/12/2013. Anything happening thereafter cannot be called a dispute between the parties for after that date, there was neither an agreement nor parties."

PLAINTIFF'S SUBMISSIONS

The Plaintiff relied on **Section 22 of Arbitration Act** on the commencement of arbitration proceedings as at 11th January 2018 when the Defendant received Plaintiff's 2 letters declaring a dispute and resolution through arbitration**.**

Despite appointment of arbitrators as espoused by the arbitration clause 18 of the Site Lease agreement; the Defendant opted out of the arbitration proceedings as disclosed and outlined by the Plaintiff's Replying Affidavit above. The Arbitral Tribunal served the defendant with notices and the Plaintiff serve the Defendant with pleadings.

The Defendant 's reason for opting out of arbitration proceedings was due to the Counsel's legal advice, The plaintiff cited the case of ***Adopt a Light Ltd vs Magnate Ventures Ltd & 3 Others Civil Appeal No. 254 of 2009(UR)*** **at pg 15** where it states**;**

> ***"Because parties in breach of their contracts, some of which involve colossal sums of money, will want to employ every trick in the book and to use the Courts to frustrate the expeditious resolution of disputes involving them, on the basis of the principles of party autonomy in arbitration, legislatures of many countries in the world have sought to insulate arbitral proceedings against such trickery."***

In ***Habo Agencies Ltd vs Wilfred Odhiambo (2016) eKLR C.A***. held;

> ***"Whereas it is true that in general , mistake of Counsel should not be visited upon a client, it is equally true that when Counsel as agent is vested with authority to perform some duties and does not perform that duty as directed by the principal, such principal should bear the consequences."***

Withdrawal of Defendant's Arbitrator on mistaken legal advice could not terminate arbitration proceedings or impair the composition of the Arbitral tribunal for purposes of **Section 35 (2) (a) (v) of the Arbitration Act.**

The Defendant's argument that the 2 Arbitrators ought to have terminated arbitration proceedings and sought directions from Court on how to proceed, this requirement was/is not provided for in the Agreement. The Arbitration Act and Arbitration Rules of Chartered Institute of Arbitrators 2012 that govern conduct of arbitration proceedings do not provide for such procedure.

The Defendant relied on **Sections 14, 15, 16 & 17 of the Arbitration Act** on a party's right to challenge jurisdiction and/or composition of the Arbitral Tribunal where there is failure or impossibility to act, termination of mandate or substitution of and withdrawal of arbitrator. The Defendant did not apply to Court and challenge jurisdiction/ composition of the arbitral Tribunal or the conduct of arbitration proceedings.

The Defendant's inability to present its case;

The Defendant and interested party's position that they were unable to present their case as contemplated under **Section 35 (2) (a) (iii) of the Arbitration Act** should unsustainable as the Defendant did not reply to the application of 19th February 2019.

The defendant has not provided proof of inability to present their case. The Defendant was served with notices, directions and pleadings by the Plaintiff and Arbitral Tribunal but the Defendant intentionally and premeditatedly refused to attend and participate in the arbitration proceedings.

The plaintiff relied on **Rule 18 (2) (g) of Arbitration Rules of Chartered Institute of Arbitrators 2012** which provides;

> ***"To proceed in the arbitration notwithstanding the failure or refusal of any party to comply with these Rules or with its Orders and directions or to attend any meeting or hearing, but only after giving that party written notice that it intends to do so…"***

In the case of ***National Oil Corporation Of Kenya Ltd Vs Prisko Petrolueum Network Ltd eKLR*** which held;

> ***"No plausible reasons were offered as to why the Respondent elected not to participate in the proceedings. To encourage such ill advised conduct to thrive amongst parties to a proceeding will defeat the purpose of adjudication of cases and duty to comply with Court summons and process. Indeed, arbitration will be hurt by such discordant conduct or parties to an arbitration agreement."***

DETERMINATION

This Court has considered the pleadings filed and oral highlights of submissions by parties herein and the issues isolated for determination are;

> **1. Was/is there an Arbitration Clause/Agreement that sets out the choice of forum for disputes ? Was there an agreement between the parties' which gave rise to a dispute?**
>
> **2. Did the Arbitral tribunal conduct arbitration proceedings in compliance with the parties Agreement and Arbitration Act?**
>
> **3. Was the interested party entitled to participate in the arbitration proceedings?**
>
> **4. Is the result /outcome arbitral award valid to be recognized adopted & enforced or to be set aside?**
>
> **1. Was/is there an Arbitration Clause/Agreement that sets out the choice of forum for disputes between the parties ?**

Section 3 of Arbitration Act defines the arbitration agreement as**;**

> ***"arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not;***

It is common ground that parties; the Plaintiff and Defendant entered into a Site License Agreement of 5th September 2012.

The contract ran from 1st January 2013 up to 31st December 2017

Clause 18 of the Agreement provided for arbitration where a dispute arose between the parties.

By letter dated 11th January 2018 from the Plaintiff to the Defendant; the Plaintiff made reference to **Clause 5** of the Agreement that granted the Plaintiff to renew the Agreement for another term. Pursuant to the said **Clause 5**, the Plaintiff wrote to the defendant on 4th October 2017 and gave notice of intention to renew the Contract. The Defendant did not respond. On 20th December 2017, the Plaintiff wrote a reminder and there was no response from the Defendant. On 8th January 2018 the Plaintiff exercised one of its options to renew the Agreement on existing terms and paid full license fees for 2018. Upon receipt of the Defendant's letter of 9th January 2019 where the Defendant informed the Plaintiff that they had already contracted with a 3rd Party and was prepared to refund the licence fee and therefore their contract was terminated, the Plaintiff wrote the said letter of 9th January 2019 citing a dispute/challenge on renewal. These circumstances gave rise to the dispute to be resolved by arbitration under Clause 18 of the Agreement.

In ***Nyutu Agrovet Limited vs Airtel Networks Ltd [2015] eKLR*** it was held;

> ***"Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporated the Arbitration agreement into their contract and at times even include the finality clause as was the case here…"***

The Defendant was at liberty to invoke **Section 6 of Arbitration Act** on stay of proceedings for the Court to determine if

> ***"the Arbitration agreement was null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to matters agreed to be referred to arbitration."***

The Defendant appeared in Court and was represented by Counsel when the Court in a Case Filed by the Plaintiff on 12th January 2018. Similarly; in the Arbitral Tribunal, the Defendant could raise Preliminary question/issue(s) to challenge whether there was a valid contract and/or Arbitration Clause/Agreement that gave rise to a dispute or not.

The Court in its Ruling of 15th May 2018 at pg 27 of the Ruling annexed to the Plaintiff's affidavit states;

> ***"From the pleadings and submissions herein, it is not disputed that the contract alleged to have expired has an arbitration clause. It is also evident that the arbitral process has commenced. From the submissions each party has appointed an Arbitrator….Parties who opt to include an Arbitration Clause in a contract/agreement are taken to have voluntarily constructed a dispute resolution mechanism''***

Therefore, this Court was satisfied that there was an existing agreement of 5th September 2012 to run for 5 years between the parties on renewal of the Site license as depicted by the Plaintiff's letter to the Defendant on 4th October 2017 while the agreement was still in force.

Similarly, there is a choice of forum in **Clause 18** of the agreement that the parties would have dispute resolution in the manner prescribed by the Arbitration Agreement.

> **2. Did the Arbitral tribunal conduct arbitration proceedings in compliance with the parties Agreement and the Arbitration Act?**
>
> **a) Did the Arbitral Tribunal have jurisdiction in terms of its composition to arbitrate the dispute after the Defendant withdrew from Arbitral Proceedings?**
>
> **b) Did the Arbitral Tribunal deal with a dispute not contemplated by parties and/or outside the terms of reference as is alleged/claimed that the Agreement between parties had expired and hence there was no dispute?**
>
> **c) Is the Arbitral award contrary /in conflict with public policy?**

This Court is guided by **Section 10 of the Arbitration Act** as to the jurisdiction of the Court over the arbitral award. The case of ***Anne Mumbi Hinga vs Victoria Njoki Gathara C.A. [2009]*** is on point on the Court jurisdiction/role.

> ***"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 parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in circumstances set out in Section 39 of the***

Arbitration Act."

The Court is also guided by mandatory provisions of **Section 35 Arbitration Act** on Application to set aside arbitral award**, Section36 of Arbitration Act** on recognition and enforcement of arbitral awards and **Section 37 of Arbitration Act** Grounds for refusal and Enforcement of awards.

a) Did the Arbitral Tribunal have jurisdiction in terms of its composition to arbitrate the dispute after the Defendant withdrew from Arbitral Proceedings?

The Defendant submitted that the Arbitral Tribunal was not properly constituted it lacked jurisdiction to hear and determine the dispute and arrive at an arbitral award. With respect, the chronology of events demonstrate that the constitution of the Arbitral Tribunal was adhered to in terms of the Arbitration agreement **Clause 18** and the Defendant participated and appointed Arbitrator.

Shortly thereafter, the Defendant on its own motion for its own reasons decided to withdraw from arbitration proceedings and instructed their Arbitrator to withdraw; These circumstances cannot lawfully and legally constitute a question of jurisdiction as the same was complied with by the parties. The Defendant's conduct in the proceedings tampered and interfered with the composition of the Arbitral Tribunal. The Defendant is the author of the improper constitution of the Arbitral Tribunal.

Let us assume that the Arbitral Tribunal was not properly constituted; the Defendant deponed that the Tribunal ought to have halted the proceedings and sought guidance from the Court.

The Plaintiff posits that the Defendant's withdrawal from arbitration proceedings was undertaken with the intention of scuttling or frustrating the arbitral proceedings and the failure of fruition of the Defendant's conduct cannot be blamed on the Plaintiff.

The Defendant was notified of every step, process and action that the Arbitral Tribunal took and once the Defendant was made aware by letter of 13th September 2018 Order for Directions 2 that the arbitral proceedings would commence; as the aggrieved party and by virtue of **Section 5 Arbitration Act** ought to have challenged the issue of jurisdiction.

In the defendant's submissions **Asia Leading Arbitrator's Guide to International Arbitration titled Challenge to the Arbitral Tribunal**

A. Improper Constitution of the Arbitral Tribunal

> ***"In cases where the objection to improper constitution of the Tribunal relates to the manner or procedure for appointment it is recommended that a party raises the objection at the earliest opportunity rather than wait for issuance of an award and apply to set aside the award on that basis…The Tribunal may rule on the objection as a preliminary issue prior to resolution of the dispute on its merits. The efficiency and resultant saving of costs when the issue is dealt with in this manner is obvious."***

The Court finds that the issue of jurisdiction did not apply in the circumstances and the Arbitral Tribunal was properly and legally constituted. The issue if at all ought to have been ventilated at the beginning of the proceedings by an aggrieved party. The Defendant's conduct precludes it from relying and taking advantage of the issue of jurisdiction as a legal basis for setting aside the arbitral award. **Section 5 of the Arbitration Act**, shows that the Defendant waived its right to raise the issue of jurisdiction as a preliminary question. Secondly, at this stage, the Plaintiff deponed that the Tribunal was not under a legal obligation to stop proceedings and seek guidance from the Court. It is not provided for anywhere in the law. Conversely, **Rule 18(2)(g) of the Arbitration Rules Of the Chartered Institute of Arbitrators 2012** grants the Tribunal leeway to proceed notwithstanding intentional default and/or withdrawal from proceedings as long as the party is issued with written notice that the Arbitral Tribunal intends to do so; proceed with the Arbitral proceedings. In this case the letter of 13th September 2018 was sufficient notice in writing to the Defendant.

b) Did the Arbitral Tribunal deal with a dispute not contemplated by parties and/or outside the terms of reference as is alleged/claimed that the Agreement between parties had expired and hence there was no dispute?

The Defendant and Interested Party deponed that the reference to arbitration was /is null and void as the contract between Plaintiff and Defendant expired and relying on **Section 6(1) of Arbitration Act** there was no dispute.

In the case of ***Diocese of Marsabit Registered Trustees vs Technotrade Pavilion Ltd[2014] eKLR*** it was held;

> ***"The dispute must however relate to matters agreed to be referred to arbitration…..The lease provided that the Applicant will yield up the demised premises at the expiration or sooner termination term of the lease. The lease expired as provided for and a notice that was given on 16th March 2012 was not challenged. It is that challenge of the said notice which would have constituted a dispute on renewal of the lease and perhaps could have been a basis for referral for arbitration."***

In the instant case the plaintiff's letter of 11th January 2018 takes issue with notice to renew of 4th October 2017, reminder letter of 20th December 2017and finally the Defendant's response after expiry of the contract on 8th January 2018.Unlike the above cited case, the Plaintiff challenged the contents of Defendant's letter of 9th January 2019 and in terms of **Section 6 (1) Arbitration Act** there was a dispute.

The facts as outlined by the Plaintiff in the Replying Affidavit confirm that from the outset, the parties agreed that there was a dispute for determination before the Arbitral Tribunal. Consequently, they operationalized Clause 18 of the Agreement by appointment of Arbitrator(s) as stipulated and agreed. A single Arbitrator could be agreed on by parties, if not a decision of multiple arbitrators of who one shall be

appointed by each of the parties and one shall be appointed by the Chartered Institute of Arbitrators Kenya would be made.

By letter of 26th January 2018, the Plaintiff appointed Mr. P. M. Gachuhi as Arbitrator

By letter of 29th January 2018 the Defendant appointed Dr. Kariuki Muigua as Arbitrator.

By letter of 22nd March 2018 the Chartered Institute of Arbitrators appointed Mr.J.H.Havelock as Arbitrator

These appointments complied with **Clause 18** of the parties Agreement.

Thereafter, unfolding events involving the parties adversely impacted the process of arbitration and culminated with the withdrawal by the Defendant at first vide letter of 26th May 2018 that the Defendant would not attend the Arbitration Preliminary Hearing /Meeting scheduled on 11th June 2018. Similarly, on 12th July 2018, the Arbitrator appointed by the Defendant informed the Arbitral Tribunal that the Defendant vide letter of 10th July 2018 whose copy was enclosed instructed their Arbitrator to withdraw from the arbitration proceedings and the Arbitrator subsequently withdrew from these proceedings. The arbitral award that is the subject of recognition and enforcement by the Plaintiff and setting aside by the Defendant is as a result of the Arbitration proceedings that were carried out *ex parte* after the Defendant withdrew from these proceedings.

The Defendant in its letter of 26th May 2018 informed the Arbitral Tribunal that the Agreement sought to be referred to in the Arbitration already expired on 31st December 2017 and therefore there was no dispute.

Section 17 (1) (a) & (b) Arbitration Act provides;

> ***"The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any Objections with respect to existence or validity of the Arbitration Agreement and for that purpose;***
>
> ***a) An Arbitration Clause which forms part of a contract shall be treated as an agreement independent of other terms of the contract and;***
>
> ***b) A decision by the Arbitral Tribunal that the contract is null and void shall not in itself invalidate the arbitration clause."***

The Defendant and/or Counsel ought to have appeared /presented its view /objection/position to the Arbitral Tribunal as a Preliminary Question/Objection. The Arbitral Tribunal would determine at the Preliminary stage whether there was an Arbitration Agreement between the parties or not, whether; if there was, it had expired on 31st December 2017; whether there was a dispute for arbitration between the parties or not.

The Defendant was represented by Counsel and in spite of whatever legal position they took they had started the arbitration process and ought to have appeared in person and/or Counsel at the earliest opportunity to raise their objection to the proceedings. Better still they had the opportunity to reconsider their stance as shown by the Arbitrator's letters of 30th May 2018 where the Defendant was encouraged to attend the Preliminary meeting scheduled on 11th June 2018. On 12th June 2018 the Arbitrators wrote to the Defendant again imploring the Defendant and/or advocate to attend the Preliminary meeting now scheduled on 25th June 2018. This was after the Arbitrators adjourned the Preliminary Meeting of 11th June 2018 '**in order to give the Respondent time to consider the matter and its participation in the Arbitral Tribunal'**

So, the Defendant failed to seize the opportunity to challenge ongoing arbitral proceedings despite the opportunity and effort by all parties/Arbitrators and instead chose deliberately, intentionally and purposely to stay away from Arbitral proceedings that they were part of putting into operation.

On the issue of whether there was a dispute for determination in the arbitration proceedings. I have considered the submissions by Counsel for both parties on the question of whether there was a valid legal Arbitration Clause/Agreement between the parties. I have also looked at authorities and they strongly suggest the position as prescribed by **Section 17 of the Arbitration Act.**

The case of ***Adopt A Light Ltd vs Magnate Ventures Ltd & 3 Others [2009] Civil Application 159 of 2009 eKLR***; where parties approached Court of Appeal on appeal that the Arbitration proceedings would not commence until the Superior Court(High Court) determined the issue of jurisdiction and validity of contract so as to establish whether there was a dispute for determination by the Arbitral Tribunal. The Court of Appeal cited **Section 17 of Arbitration Act** on the issue and dismissed the motion with costs.

The Supreme Court in ***Dhanjal Investments Ltd vs Kenindia Assurance Co Ltd [2018] eKLR*** where the Appellant and the Respondent entered into an Insurance policy agreement that covered the period 11th September 1999 – 30th June 2000. On 4th March 2000, while the policy was in force, at one of the Appellant's properties tourists were robbed properties and money. The Appellant informed the Respondent of the incident. 9 of the tourists instituted proceedings in UK through their Tour Operator for recovery of damages from the Appellant. The Appellant notified the Respondent. The Respondent did not respond. The Appellant filed complaint with the Commissioner of Insurance. Under **Clause 10** of the policy the Respondent had a right to refer to arbitration any dispute but the Appellant had no such right. **Clause 11** provided 12 month limitation period. The Appellant construed the Respondent's letter of 31st July 2007 as a disclaimer of liability and in order not to be caught up with the limitation period, under **Clause 11(2)** of the Arbitration Act appointed an Arbitrator. The Arbitrator accepted the appointment and convened preliminary meeting. Both Appellant and Respondent were invited and informed of the Preliminary Meeting, the Respondent never took any steps in the arbitration proceedings. The Arbitrator heard the Appellant and published arbitral award

on 8th December 2008.

The Respondent sought to set aside arbitral award; the High Court found that the Insurance policy contained Arbitration clauses which were binding on the parties and recognized and enforced the arbitral award. It was set aside by Court of Appeal and reinstated by the Supreme Court of Kenya. In all this the focus is on the fact that although the Insurance policy expired, the dispute arose during the subsistence of the policy and accordingly the dispute was arbitrable under the Arbitration Agreement that bound the parties.

In the case of ***Jitihada Furniture Ltd & 2 Others vs Asad Anwar [2019] ELC 248 of 2019*** I am persuaded thus;

> ***"In my view, an arbitration agreement in a contract does not expire with the expiry of the term of the contract. Even if the term of the contract expires, the arbitration agreement which is contained in the Arbitration clause remains in force and binds the parties t the contract and all future disputes are to be determined in accordance with the Arbitration Agreement…."***

The totality of the cited case give credence to **Section 17 of the Arbitration Act**; the arbitration agreement is independent from the contract/agreement and survives the Agreement/Contract. Similarly between the parties was a Site Agreement which contained the Arbitration Agreement/Clause. The Arbitral Tribunal had a dispute between the parties to resolve whose proceedings culminated to the impugned arbitral award.

The Defendant ought to have raised the issues either of jurisdiction/constitution of the Arbitral Tribunal, the issue of whether there was a dispute or not in light of the Arbitral Agreement.

c) Is the Arbitral award contrary /in conflict with public policy?

The Defendant raised the issue with regard to setting aside the Arbitral award under **Section 35 2 (a) (iii) & (b) (2) Arbitration Act** as it was contrary/in conflict with/ to public policy in Kenya.

In the case of ***Christ For All Nations Vs Apollo Insurance Co Ltd (2002) EA 366*** Ringera J held public policy as ;

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

The Defendant submitted that it was in the interest of justice for the award to be set aside because, the Defendant was keen to resolve the dispute and fully participated in constituting the Tribunal. However, on relying on the advice of their Counsel as per the annexture at pg43 of the Defendant's affidavit it withdrew from arbitration. Therefore, the client/Defendant ought not to be punished on the mistaken advice of Counsel and cited relevant authorities.

The Defendant did not participate in the Arbitration proceeding and was not given a hearing according to the rules of natural justice; one should not be condemned unheard. **Article 50 of the Constitution of Kenya** mandates that any party is accorded fair hearing before an impartial and independent Tribunal/Forum. **Section 19 of the Arbitration Act,** which mandates equal treatment of the parties, amplifies this right and each shall be given a fair and reasonable opportunity to present its case. **Section 20 (2) of the Arbitration Act** on determination of rules of procedure, where parties to the arbitration cannot agree then the Tribunal may conduct the arbitration in the manner it considers appropriate having regard to affording parties a fair and reasonable opportunity to present their cases. Hence, Lack of fair hearing would amount to enforcing an arbitral award that is contrary to public policy.

In the instant case, parties to arbitration appointed arbitrators in line with the Arbitration Agreement. The Defendant soon thereafter withdrew from proceedings and later instructed the Arbitrator they appointed to withdraw. The Defendant's withdrawal from arbitral proceedings is depicted by letters of 26th May 2018, 6th June 2018, 10th & 13th July 2018. The Plaintiff through their advocate served the Defendant with Statement of Claim on 9th July 2018, Hearing Notice on 18th September 2018 and written submissions on 19th October 2018. The Arbitral Tribunal wrote and notified the Defendant of Preliminary meeting of 11th June 2018 on 21st May 2018. The Tribunal adjourned the said meeting and rescheduled it to 25th June 2018 to allow the Defendant reconsider its position and attend proceedings vide letter of 12th June 2018. The Order for Directions No. 2 was served to the Defendant that the hearing would commence on 5th October 2018.

All these details are to confirm that the Arbitral Tribunal complied with the Constitution 2010 and the Arbitration Act and accorded the Defendant opportunities to be heard.

The Defendant's claim that it was misadvised and should not be condemned unheard due to mistaken advice; the Court has to consider justice to both parties; agreed the Defendant may have been wrongly advised, this Court wonders why it had to directly communicate this position to the Tribunal whilst there was Counsel on record to do so, more so, if they gave the said advice and believed it to be the correct legal position. Secondly, why was the Defendant quite active in correspondence with the Tribunal to the exclusion of Counsel on record appearing before the Tribunal or writing on the Defendant's behalf to the Tribunal? Thirdly, if the Defendant was wrongly advised, the Counsel on record withdrew from representing the Defendant on 13th September 2018 as per the Advocate's letter. The *ex parte* proceedings were scheduled for 5th October 2018. The defendant ought to have appeared before the Arbitral Tribunal and explained the circumstances then or obtained services of another Advocate to represent them at the Tribunal which was not done. The reason for wrong advice is not justifiable in the circumstances as there were numerous opportunities to approach the Tribunal and explain the Defendant's dilemma. This Court is not satisfied that the withdrawal from proceedings was solely on advocate's wrong advice. The advocate was the defendant's agent and the Defendant is bound by actions of their advocate as was held in the ***Habo Agencies Ltd vs William Odhiambo (2016)***. Furthermore, the Defendant had opportunity to get other legal advice or appear before the Arbitral Tribunal after Counsel withdrew and before

commencement of the arbitration hearing.

In the case of ***Habo Agencies Ltd vs Wilfred Odhiambo (2016)*** it was held;

> ***"There is no doubt that the Respondent was aware of the Arbitral Proceedings and was bound by law. But he ignored the proceedings; such was arrogant and ill advised conduct by the Respondent. That behaviour will have a bearing on whether such party can be said in law to have been denied a right to be heard."***

The Defendant was accorded opportunities to be heard as confirmed by letters and notices and service of hearing notice and pleadings by Plaintiff and Arbitral Tribunal. The Arbitral on the other handed complied with the law vide **Section 26 (c) of Arbitration Act** which provides;

> ***"A party which fails to appear at a hearing or to produce documentary evidence, the Arbitral Tribunal may continue proceedings and make an award on the evidence before it."***

Accordingly, the issue that the Defendant was not accorded a fair hearing cannot arise and the arbitral award is not contrary to public policy.

3. Was the interested party entitled to participate in the arbitration proceedings?

Backlite limited was joined to the suit between Plaintiff and Defendant by the Court on 6th December 2018, long after arbitration proceedings concluded with an arbitral award on 26th November 2018.

The interested party entered into Site Licensing Agreement on 31st December 2017 after it was declared highest evaluated bidder in the procurement process. It was to commence on 1st January 2018

The Site Licensing Agreement between the Plaintiff and Defendant expired on 31st December 2017 but the Plaintiff as early as 4th October 2017 pursuant to Clause 5 of the said Agreement on the right to renew. The Defendant did not respond. The plaintiff sent a reminder vide letter of 20th December 2017 and the Defendant failed to respond. The Plaintiff on 8th January 2018 wrote to the Defendant and enclosed license fees for 2018. On 9th January 2018, the Defendant responded that they had signed contract with the interested party hence the dispute.

The interested party contended that 17 months into the contract they had not obtained vacant possession of the Site as was contracted between the parties.

The Court Ruling joining the interested party meant that the interested party was to participate in arbitration proceedings. The plaintiff did not appeal or review the Court order.

For the Court to adopt the arbitral award then the Court's Ruling joining the interested party ought to be taken into account.

The arbitration proceedings commenced on the Arbitration Agreement between the Plaintiff and Defendant and the dispute resolution mechanism that parties freely chose; arbitration. So that the interested party is not privy to the Site Licensing Agreement of 2012 between Plaintiff and Defendant.

Principles of Commercial Law by Kibaya Imaana Laibuta at Page 61 provides;

> ***"Privity of contract refers to legal relationship that exists between parties to a contract. The obligations imposed by, and the rights and benefits accruing from, their relationships do not affect 3rd Parties, not privy to the Contract."***

The case of ***Dunlop Pneumonic Tyre vs Selfridge & Co Ltd*** held that a stranger or a party who is not privy to a contract can neither challenge nor enforce the terms of the contract.

In the instant case, the interested party was joined to the suit, if it was to the arbitration proceedings by the date of the Court order, the proceedings had terminated and the Court order was overtaken by events. There is no nexus between the interested party and the Plaintiff, the interested party's claim is against the Defendant based on the contract entered into on 31st December 2017. Depending on the terms of the contract between the Defendant and interested each may pursue its claim under the Contract.

In the case of ***National Oil of Kenya Ltd vs Prisko Petroleum Networks [2014] eKLR*** the Court observed;

> ***"The Doctrine of privity of contract will then kick in to prevent blind connexion or interfacing of the 2 distinct agreements. It would be contrary to law and practice in arbitration to impose terms of one contract to another contract without clear legal connexion and intention of the parties to merge agreements or make one supercede the other."***

The Contract between the Plaintiff and Defendant of 5th September 2012 gave rise to the arbitration and instant proceedings. The contract between the Defendant and interested party was the one of 31st December 2017 which each of the contracting parties is at liberty to enforce. Clearly, the terms of each of these contracts cannot be interchanged or combined. The interested party though joined to the suit was/is not party to the arbitration proceedings.

4. Is the process and result /outcome arbitral award valid to be recognized adopted & enforced or to be set aside?

After consideration of evidence placed before this Court, I find that there was a valid Arbitration Agreement, a dispute for arbitration, the Defendant was granted constitutional right to a fair hearing and the interested party is not privy to the contract between Plaintiff and Defendant.

DISPOSITION

1. In the circumstances, the application to set aside the Arbitral award by the defendant of 19th February 2019 is dismissed with costs.

2. I find merit in the application of 9th February 2019 to recognize and enforce the arbitral award by Rtd Judge JB Havelock & Mr. Peter Mbuthia Gachuhi Arbitrators of 26th November 2018 as an order of this Court.

3. The costs of the application shall be borne by the Defendant and interested party.

DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND OCTOBER 2019.

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. OMARI H/B FOR NYAANGA FOR PLAINTIFF/RESPONDENT

NO APPEARANCE FOR DEFENDANT/APPLICANT

MS JASMINE- COURT ASSISTANT