REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURT

CIVIL SUIT NO. 172 OF 2018 (O.S)

IN THE MATTER OF AN APPLICATION UNDER

SECTIONS 13, 14 (3) AND 17 (6) OF THE ARBITRATION ACT NO. 4 OF 1995

BETWEEN

PARAGON LIMITED.....APPLICANT

-VERSUS-

SAGAR BUILDERS LIMITED.....1ST RESPONDENT

STEVEN OUNDO.....2ND RESPONDENT

RULING

By an Originating Summons dated the 9th of April 2018 brought under **Sections 14(3) and 17 (6) of the Arbitration Act, 1995, Rule 3(1) of the Arbitration Rules 1997 and all other enabling provisions of the Law. The Applicant filed an application challenging the Ruling on 2 applications by the Applicant filed before the 2nd Respondent on 28th June 2016 delivered on 13th November 2017 and raised the following issues for determination;**

1. The 2nd Respondent (Arbitrator) erred in law and in fact in dismissing the Applicant's Application dated 28th June 2016 vide his ruling vide dated 13th November 2017

2. The 2nd Respondent(Arbitrator) is not an impartial and is thus not capable of arbitrating the dispute between the Applicant and the 1st Respondent

3. The 2nd Respondent(Arbitrator) has no jurisdiction to hear and determine the dispute between the Applicant and the 1st Respondent

4. The 2nd Respondent (Arbitrator) erred in law and in fact in finding that 1st Respondent's claim against the Applicant is not time barred.

5. The 2nd Respondent (Arbitrator) erred in fact and in law in determining that he has jurisdiction to arbitrate the dispute between the Applicant and the 1st Respondent

6. The 2nd Respondent(Arbitrator) erred in law, and in fact in holding that the arbitration proceedings were commenced by a non-party to the agreement between the Applicant and the Respondent

7. The 2nd Respondent (Arbitrator) erred in law by determining that he was properly appointed as an Arbitrator.

8. The 2nd Respondent(Arbitrator) ruling dated 13th November, 2017 be and is hereby quashed and/or set aside and in place thereof the Applicant's application dated 28th June 2016 be allowed.

9. Costs of this application and proceedings before the Arbitration tribunal be borne by the Respondents.

The application is supported by the affidavit of **David Gatende** who is the Chairman of the Board of Directors of the Applicant. That the Applicant and the 1st Respondent entered into a contract for the erection and completion of **20** residential apartments and associated civil works. A practical completion certificate was issued on 7th March, 2008. He deponed that 8 years later the Applicant received a demand notice from **Steg Consultants** stating that they had been retained by the Respondent to act for them in an alleged contractual dispute between themselves and the Applicant over a contract dated 20th September, 2005 and concluded on 7th March, 2008. The arbitration was commenced without notifying the Applicant contrary to **clause 45.3** of their contract; Agreement and Conditions of Contract for Building Works. He deponed that prior to the demand notice; the 1st respondent had never informed the Applicant of any dispute.

The deponent further stated that the Applicant made several attempts to write to the 1st Respondent with a view of seeking clarification and possible settlement of the alleged dispute but it yielded no results as the 1st Respondent did not respond. On 25th May 2016, the Applicant received a letter from 2nd Respondent on his appointment as sole Arbitrator. On 9th June 2016, the Applicant wrote a letter to the Architectural Association of Kenya demanding the appointment of the Arbitrator and arbitration proceedings be terminated since the same was being conducted contrary to the provisions of the Contract. The Applicant alleged that the 2nd Respondent was not impartial as he disclosed to parties that he was a former chairperson of the **Architectural Association of Kenya**. Thus, the Applicant filed applications challenging the jurisdiction and impartiality of the 2nd Respondent. The 1st Respondent replied to Application and was given a date for highlighting submissions. However, before the highlighting of submissions, an issue was raised as to the source of the introduction of a notice produced by the 1st Respondent after submissions were filed. The notice was from the Architectural Association of Kenya showing that that Chairman of Architectural Association of Kenya was superseded by President of the Architectural Association of Kenya. It was insinuated that a representative of the 1st Respondent in the arbitration proceedings was in communication with the Architectural Association of Kenya.

The Applicant then moved to court in a **Judicial Review case number 466 of 2016** seeking to quash the Arbitrator's appointment. In a ruling of the Judicial Review Division of the High Court delivered on 29th March 2017, the court directed the parties to pursue the process under the Arbitration Act, raise the issue(s) before the Arbitrator and upon determination, any aggrieved party may challenge the outcome before the Court. He stated further that the application that challenged appointment and competence of the Arbitrator, was dismissed by the arbitrator and the applicant was to pay costs of Kshs. 384,356/- .

It was deponed further that the ruling of the Arbitrator was based on a fundamental misapprehension of law and facts giving an example where the Arbitrator in his ruling **Pg 16-30** found that the 1st Respondent did not meet the mandatory pre-conditions for commencement of arbitration proceedings yet proceeded to find that the same was of no consequence. The deponent further emphasized that the 2nd Respondent further misapprehended the law on limitation of actions and proceeded to hold that the certificate issued on 23rd April 2012 was validly issued which validity was contested by the Applicant. The certificate of practical completion having been issued on 14th January 2008, the final accounts ought to have been issued within six months that is on 14th July 2008 and the final certificate should have been issued on 14th September 2008 as per the contract between the Applicant and the 1st Respondent. In the circumstances, the Respondent's claim became time barred after six months from 14th September 2008.

1st RESPONDENT'S REPLYING AFFIDAVIT FILED ON 7TH JUNE 2018.

The 1st Respondent opposed the application based on grounds of opposition and Replying Affidavit dated 17th May, 2018. The 1st Respondent argued that the arbitral process was properly initiated in accordance with the contract, the Arbitrator's Ruling was correct therefore there are no justifiable grounds for challenging the said Ruling.

The 1st Respondent further argued that the Applicant's application is time barred for having been filed out of the compulsory 30 days period after notification of the Arbitrator's decision as per **sections 14 (3) and 17(6) of the Arbitration Act.** The instant application was filed **5 months** from the time the Arbitrator notified parties of the Ruling. The 1st Respondent contended that the Applicant did not seek leave to apply out of time and therefore the application is in flagrant violation of statutory timelines.

He reiterated that the Arbitrator was rightfully and procedurally appointed by the President of the Architectural Association of Kenya in accordance with the contract and therefore the Arbitrator has the jurisdiction to hear, arbitrate and determine the dispute between the parties.

The 1st Respondent informed the Court that this court has no jurisdiction to hear and determine the instant application and referred to **section 10 of the Arbitration Act** which limits court's intervention on matters of Arbitration.

On the issue of Arbitration claim being time barred, the 1st Respondent claimed the contrary, that the final certificate was issued on 23rd April 2012 and since **the Arbitration Act** gives **14 days** from the date of presentation of the final certificate for payment. Then that would mean time began running from 7th May, 2012 and six years would end on 7th May, 2018 for the claim to be time barred. The notification for arbitration commenced through a letter dated 16th April, 2016 which was within the statutory period.

The 1st Respondent raised the issue that the Arbitrator could not be impartial merely because he was the former chairman of the Architectural Association of Kenya.

It was further argued that the contract allowed the parties to a dispute to appoint an agreed an Arbitrator or an Arbitrator appointed by the Chairman or Vice Chairman of the Architectural Association of Kenya or by the Chairman or Vice Chairman of the **Chartered Institute of Arbitrators**. That the Applicant was notified before the appointment of the Arbitrator by the 1st Defendant's representative.

The 1st Respondent reiterated further that the Applicant was notified about the dispute and was invited for concurrence for the dispute to be

submitted to arbitration. The 1st Respondent's representative wrote to the Applicant's representative and a name of the proposed Arbitrator forwarded to the Applicant for consideration but they were unable to agree within the stipulated time frame of thirty days. Therefore, the 1st Respondent through it representative wrote to the Architectural Association of Kenya requesting for the appointment of an arbitrator.

DETERMINATION

ISSUES

The Court considered pleadings filed by parties through respective Counsel and highlighting of written submissions and the emerging issues for determination are;

1. **Whether this court has jurisdiction to hear and determine the Application of 9th April 2018**

2. **Whether there was/is a dispute or arbitration claim for determination**

3. **Whether the due process was followed in appointment of the Arbitrator and he had jurisdiction to hear the matter**

4. **Impartiality and Independence of the Arbitrator**

1) Whether the Court had/has jurisdiction to hear the instant application/O.S

The Applicant relied on **Section 10 of Arbitration Act & Rule 3 of Arbitration Rules 1997 & Section 14 (3) & 17(6) Arbitration Act** to buttress the fact that the Court has jurisdiction to hear and determine the application. Secondly, the **Judicial Review Ruling in JR 466 of 2016 of 29th March 2017**. This Court's Ruling mandated parties to pursue the procedure prescribed under the Arbitration Act, raise the issue(s) before the Arbitral Tribunal once a decision was/is made, any aggrieved party may file application in Court to reject the challenge in the High Court. The Applicant reiterated that the Court should not turn away the Applicant from the seat of justice.

1st Respondent relied on the same sections but laid emphasis on **Section 14(3) & 17(6) of the Arbitration Act** with regard to filing the application to reject the challenge within 30 days of being notified of the decision. The 2nd Respondent delivered the Ruling on Preliminary Objections filed on 28th June 2016 on 13th November 2017. On 15th November 2017, the Arbitrator informed parties to the Arbitration through their representatives of publication and collection of the Arbitral award upon payment of Ksh 76,178.00 by each party.

The 1st Respondent relied on the case of ***Owners of The Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1986-1989] 1 EA 305*** ***CAK, Nyarangi, JA stated:***

> ***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, the court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence."***
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> ***Terna Bahrain Holding Company WII vs Ali Marzook Ali Bin Kamil Al Shamsi. Mohammed Alibin Marzouqali Bin Kamilal Shamsi & Marzourq Ali Marzouq Ali Bin Kamel Al Shamsi [2012]EWHC 3283(COMM)*** which held;
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> ***"An extension of time is refused because I have concluded that the application would in any event fail if time were extended. However, even if I had concluded the challenge was a good one, which would have succeeded, I would have exercised my discretion to refuse an extension of time in the light of the substantial delay which was as a result of a deliberate choice of perceived tactical advantage."***

In ***Zadock Furnitures Systems Ltd & Anor vs Central Bank of Kenya [2014],***

> ***"I wish to state that the application before this court is made pursuant to Section 14 (3) of the Arbitration Act and therefore the challenging party who was unsuccessful before the arbitral tribunal should apply to the High Court for relief 30 days after being notified of the decision to reject the challenge."***

This Court can only hear and determine matters raised in accordance with **Section 10 of the Arbitration Act**. In ***Prof. Lawrence Gumbe & Another VS. Honourable Mwai Kibaki & Others, High Court Miscellaneous No. 1025 of 2004***, it was held;

> ***"Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation-oriented..."***

The application filed on 9th April 2018 was/is brought under **Section 14(3) and 17 (6) of Arbitration Act** which mandates that any challenge shall be lodged in Court within **30 days** after having received Notice of the Ruling.

In the instant case, the Arbitrator issued Notice to the parties through their advocates on 15th November 2017 that the Preliminary award was

ready for collection subject to fees of Ksh 152,356/- being settled and each party was to pay Ksh 76,178/- This letter is marked **SNH-5 annexed** to 1st Respondent's Replying Affidavit bundle filed on 7th June 2018.

The Applicant confirmed that they paid the said sum and obtained the copy of the Ruling on 8th March 2018 which was not challenged. Although clearly it was over 3 months, the collection of the Ruling was conditional to payment. As long as payment was not made then the Ruling would not have been released. Consequently, time ought to run from when the Notice and Ruling were received. The Applicant could determine whether to exercise their right to lodge the instant application or not without being in possession of the Ruling and appraise themselves of its content to inform the decision on the way forward. Whereas this court is cognizant that extension of time is not granted in arbitration matters, as held in ***Anne Mumbi Hinga vs Victoria Njoki Gachara [2009]eKLR*** case, the circumstances here are of when time begun to run; is it on the date of notice or the ruling was received? For a party to exercise legal options the Ruling ought to be availed and in this case the Notice made it conditional that each party would pay its portion, then obtain the Ruling. I find it logical and reasonable to count the 30 days from when the Applicant received the Ruling 8th March 2018 and upon familiarizing with the content of the Ruling and filed the application 9th April 2018. The Court finds it has jurisdiction to hear and determine the instant application.

The impugned Ruling is on the Preliminary issues raised before the Arbitrator and Ruling delivered on the Preliminary issues.

The Court will only address the questions/issues raised by the Applicants as Preliminary Issues before the Arbitrator and the Rebuttal by the Respondent and the Arbitrator's Ruling which is the subject of the challenge. A preliminary Question/issue/objection is described as hereunder;

Mukisa Biscuits Manufacturing Co. Ltd. V West End Distributors (1969) EA**,** Sir Charles Newbold P observed as follows,

> ***"The first matter relates to the increasing practice of raising points which should in normal manner, quite improperly by way of preliminary objection. A preliminary Objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points."***

The Applicant vide 2 applications filed before the Arbitrator on 28th June 2016 challenged the Arbitrator's impartiality under **Section 13 & 14 of Arbitration Act** and with regard to Arbitrator's jurisdiction under **Section 17 of Arbitration Act**.

2. Whether there was/is a dispute or arbitration claim for determination

The Applicant contended that the dispute is statute barred under **Section 4 (1) (a) of Limitation of Actions Act;** that no actions founded on contract maybe brought after the end of 6 months. **Section 34 of Limitation of Actions Act** makes the said Act applicable in arbitration proceedings.

The Applicant further argued that as per **Clause 34.17** of the Agreement between parties, the final account should have been provided 6 months from the date of practical completion. The date of practical completion was 14th January, 2008 and the extended period was up to 14th July 2008. Thereafter, the Final certificate should have been issued within 60 days of 14th July 2008 and took them to 14th September, 2008. 14 days after 14th September 2008 which was 28th September 2008 the amount due to the Contractor would have been due as a debt if it had not been paid.

A cause of action accrued on this date and in accordance with **Section 4 (1) (a) of the Limitations of Actions Act** it was extinguished on 28th September 2014.

The Applicant stated that it is not legally/factually correct to assert that the cause of action is based on the Architect's letter dated 24 th April 2012. Moreover, the motive for issuing such a letter is suspect as no explanation is given as to why the said letter was not issued in 2008.

It is not contemplated under **Section 23 of the Limitation of Actions Act** which only covers instances of actions relating to land, mortgage and property of a deceased person, that a suit can be reinstated or extended.

The Applicant relied on the case of ***V.K. Construction Company Ltd vs Mpata Investment Ltd [2009] eKLR*** where it was held that it was the failure to pay which constituted breach of contract and therefore the cause of action.

It is a provision of **the Limitations Act Cap 22** that matters arising out of a contract should not be brought to court after six years.

The Applicant argued that the Arbitration claim was time barred. According to the Applicant the practical completion certificate was issued on 7th March, 2008 and it signaled the completion of the contract. Therefore, from 2008 until the day the 1st Respondent began the arbitration claim in March, 2016, the six years had lapsed and therefore the arbitration claim was time barred.

On the other hand, the 1st Respondent has argued that the Practical Completion Certificate was issued on 7th March, 2008. The Final Account was issued on 11th June 2010. The Final Certificate was issued on 23rd April 2012. The argument here is the time for the claim; when should the time have started running? Is it from the last day the final certificate was issued that is 23rd April, 2012, or earlier? The Respondent therefore emphasized that from April 2012 to March 2016, six years had not lapsed and therefore they were not time barred to institute the arbitration claim.

In ***Allan P. Karanja Wathigo V C.M.C. Holdings Company Ltd [2007]*** **eKLR**…

> ***"I feel that it is important to emphasize the fact that the time stipulated in the Limitation of Actions Act, only begins to run from the date when the cause of action accrues. That may or may not be the date when parties execute a contract or agreement."***

> ***"… I wish to point out that ordinarily, the execution of an agreement, does not, by itself, give rise to a cause of action. It is usually when one or the other party to such an agreement breaches the said agreement that a cause of action accrues."***

The Arbitrator's Ruling at **Pg 17** the Arbitrator confirmed the List of documents as follows;

> On 7th March 2008- Practical Completion Certificate issued
>
> 11th June 2010- Final Account issued
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> 23rd April 2012- Final Certificate issued
>
> 31st March 2016- Steg Consultants on behalf of the Claimant wrote to the Respondent demanding payment of the final certificate sum
>
> 12th April 2016- The Synthesis on behalf of the Respondent responded to the said demand but disputing the computation of the outstanding sum and interest charges.
>
> 16th April 2016- **Steg Consultants** on behalf of the Claimant wrote to Synthesis Ltd responding to issues of payments due, liquidated damages and interest and stating that a dispute had since arisen and giving details of the person they preferred to arbitrate the matter.

The parties signed a contract on 20th September 2005 where the date of commencement of works was 7th September 2005, date of practical completion was 23rd August 2006, period for final measurement and valuation was/is 6 months, defects liability period was/is 6 months. The release of the Final Certificate is in contention with regard to the timelines the parties contracted in the agreement/Contract. Similarly, lack of payment was/is also contrary to the contracted period. The chronology of events and the filing of the documents demonstrate *prima facie* that the 1st Respondent issued contractual documents without adherence to contractual timelines. This is further demonstrated by its letter of 31st March 2016.

The Letter by Steg Consultants to Paragon Ltd dated 31st March 2016 titled Demand for payment reads;

> ***"We are retained by Sagar Builders Ltd to address you and make demand, which we hereby do in that;***
>
> ***1. The Practical Completion Certificate having been issued on 7th March 2008 and having determined Defects Liability Period to end on 14th July 2008, the Final Certificate should have been issued by 14th July 2008 in terms of Clause 34.21 and payment thereof in terms of Clause 34.5***
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> ***2. The Final Account having been issued on 11th June 2010 (albeit in delay), the Final certificate should indeed have been issued without further delay and payment immediately after.***
>
> ***3. The Final Certificate having been issued (albeit in delay)on the 23rd April 2012, payment should have been made without further delay.***
>
> ***4. Discounts having been obtained on the Final Certificate sum of Ksh 8,475,493.00 on the make believe promise of immediate payment, the same is hereby cancelled.***
>
> ***5. The Final Certificate sum of Ksh 8,475,493.00 having been payable within 14 days of 14th July 2008, the same attracted interest at 22.5 % from the said date to continue until payment in full.***
>
> ***This is now to demand payment of Final Certificate sum of Ksh 8,475,493.00 together with interest at 22.5% in the sum of Ksh 14,644,606.98 currently amounting to the total sum of Ksh 23,120,099.98 together with our collection charges of Ksh 3,500,000 same being remitted within 7 days failure to which we have clear instructions to take legal action against you at your detriment to costs and sequel risks.***

Synthesis Ltd wrote to Steg Consultants and in reply to the letter of 31st March 2016 stated as follows;

> **We are in receipt of your letter dated 31st March 2016 addressed to our client (Paragon Ltd)**
>
> ***We note the contents of your letter but we however disagree with your computation of the outstanding sum and the interest charges.***

We wish to clarify the following issues;

1. The amount certified by the Architect due to Sagar Builders was Ksh.8,475,493.00

2. The Board agreed to charge penalties for the delay in delivering the Project. The Board computed a reduced damage claim that was apportioned to the main contractor and sub-contractors.

3. The client recovered liquidated amount of Ksh 3,584,000 from Sagar Builders certified payment.

4. Net amount payable to Sagar Builders Ltd was therefore Ksh 4,891,493.00. The client prepared the RTGS payment of KSH 3,000,000/-through the bank for processing.

5. To our knowledge we assumed the account had been settled as no matters arose from the transaction. As we recall at the time, Mr Virji happened to be out of the country for some time and therefore no one was in a position to confirm immediately whether the funds were received or not from his end.

According to the ***Allan P. Karanja Wathigo v C.M.C. Holdings Company Ltd supra*** the cause of action arises when one of the parties to the contract breaches a term(s) of the Contract.

I have outlined the 2 pertinent letters from the Applicant and Respondent in full to confirm that the 1st Respondent admitted in the letter of 31st March 2016 inordinate unexplained delay in issuing the Contractual certificates to the Applicant. On the other hand the Applicant admitted Ksh 3,000,000/- was due and owing and by the time the letter of 31st March 2016 was addressed to them , the letter of 12th April 2016 strongly suggests that the Applicant defaulted payment of the said amount. So, since both parties breached terms of the contract Agreement and Conditions of Contract for Building Works when would the cause of action be and hence the period of Statute of Limitation begin to run?

The Applicant relied on the case of ***V.K. Construction Company Ltd vs Mpata Investment Ltd [2009] eKLR*** it was held that it was failure to pay and not refusal to pay which constituted breach of contract and therefore the cause of action. The Applicant is of the view that the date of practical completion was 14th January 2008 and 6 months extended to 14th July 2008. The Final Certificate should have been issued within 60 days that is on 14th September 2008 and after 14 days in default of payment of the debt the cause of action would have arisen on 28th September 2008. From this date to 31st March 2016, the limitation period of 6 years would have taken effect and therefore there is no dispute for determination. If by the letter of 12th April 2016, the Applicant had paid Ksh 3,000,000/- as admitted, the above argument would hold water because the rest of the claim would be an afterthought, or the Final Certificate a fraud, dishonest or erroneous as was found in the above cited case. This Court finds that the admission of Ksh 3,000,000/- as due and owing to the Respondent, was then the date of default and constitutes the cause of action.

In this Court's view, it is when the admitted Ksh 3,000,000/- became due and owing and the Applicant defaulted to settle the amount. So, if the Final Certificate was issued albeit in delay on 23rd April 2012, the default; failure to pay the admitted sum crystallized **14 days** thereafter from 5th-6th May 2012 and 6 years would come to an end in 2018. There is no contention of works not done except delay on completion. The amount was due for work already done by the 1st Respondent. From the documents above there is clearly a dispute that parties resulted to Arbitration. The dispute is not time barred.

To confirm there is a dispute does not amount to confirming validity of the claim instead it is to confirm that there are issues/questions and/or matters between the parties based on their contract to be interrogated. The dispute cannot be determined at the Preliminary stage but through parties' filing pleadings and/or documents and either tender oral evidence subject to cross-examination to test credibility of the witness and veracity of the evidence. So whereas the Applicant made a legitimate legal claim; with regard to the unexplained delay in filing the Certificates and demanding payment; that explanation shall be made and considered during the Arbitration hearing of the parties evidence at the hearing to determine all contested issues. In ***V.K. Construction Company Ltd vs Mpata Investment Ltd [2009]eKLR supra***, The court conducted a trial, took evidence from witnesses and came to the conclusion that **Certificate 14** was a repeat of **Certificate 13** that had been paid and therefore was erroneous, dishonest and/or fraudulent. With regard to **Certificate 15** was issued **3 years** after date of completion of the project and was handed over, so it ought to have been issued 6 months before handing over after final measurements were taken. This case reaffirms the position that the decision of the merits of the dispute can only be determined after a hearing, in this case at/in the parties' choice of forum; arbitration proceedings.

3. Whether the due process was followed in appointment of the Arbitrator and whether he had jurisdiction in the matter.

Clause 45.1 of the Agreement and Conditions of Contract for Building Works published by the Joint Building Council, Kenya provides;

"In case of dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the works, such dispute shall notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an arbitrator within thirty days of notice. The dispute shall be referred to arbitration and final decision of a person to be agreed on by parties. Failing agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of the Architectural Association of Kenya on the request of the applying party"

Clause 45.3 provides;

"Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute."

Clause 45.4 provides;

Notwithstanding the issue of a notice as stated above, the arbitration of such a dispute or difference unless an attempt has in the first instance been made by the parties to settle such dispute or difference amicably with or without the assistance of 3rd parties.

Clause 45.5 provides;

In any event , no arbitration shall commence earlier than 90 days after service of the notice of a dispute or difference.

The 1st Respondent through Steg Consultants wrote to the Applicant through their agent Synthesis Ltd on 16th April 2016 the Notice of Arbitration on the basis of Ksh 3,000,000/- that the Applicant admitted was not paid. The 1st Respondent proposed an Arbitrator and gave the Applicant 14 days to respond instead of 30 days as required under Clause 45.1 of the Agreement/Contract.

However, 30 days later/1 month on 17th May 2016, the 1st Respondent through its agent wrote to the Chairman Architectural Association of Kenya for Appointment of Arbitrator.

On 18th May 2016, the President of Architectural Association of Kenya appointed the 2nd Respondent as the Arbitrator and informed all parties to the dispute and their agents.

On 25th May 2016 the 2nd Respondent wrote to all parties and their agents and informed them of his appointment as Arbitrator.

On 9th June 2016, the Applicant's Counsel on record, wrote to the President of Architectural Association of Kenya and protested that there was no dispute as the project was completed 8 years ago as per the agreement annexed/enclosed. Secondly, that the provisions of the Agreement with regard to settlement of disputes were not adhered to. Thirdly, that the 1st Respondent did not inform the Applicant whom Steg Consultants were. Fourthly, that all attempts by the Applicant, through the Architects to communicate with the 1st Respondent were futile.

Therefore, the Applicant was not willing to participate in the Arbitration proceedings.

The President of the Architectural Association of Kenya replied vide the letter of 14th June 2016, to the effect that having made the appointment based on documents presented, the Association was *functus officio* and any complaint/concern ought to be made before the Arbitrator.

This Court cannot rewrite terms of the contract between the parties. The Agreement and Conditions of Contract for Building Works was signed by both parties on 20th September 2005 and the terms included the provisions outlined above. This Court relied on the case of; ***National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Anor [2000]eKLR 112*;**

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

The parties complied with regard to issuance of Notice vide letter of 31st March 2016 and more importantly, Steg Consultants disclosed upfront that they were retained by the 1st Respondent, Sagar Builders Limited to demand for payment. The Applicant through its agent Synthesis Ltd, wrote to the 1st Respondent on 12th April 2016. By letter dated 16th April 2016, 1st Respondent through its agent wrote to the applicant Notice of Arbitration and although the Applicant was given 14 days to respond, the 1st Respondent wrote to Chairman Architectural Association 30 days later as per the Agreement. The Applicant cannot now challenge the issue of notice as it was written by the 1st Respondent's agent as not sufficient notice because, the Applicant replied to their letter vide letter of 16th April 2016 and the Applicant also communicated to the 1st Respondent through its agent Synthesis Ltd. The Applicant could not have communicated with a stranger and if the allegation that the 1st Respondent did not give notice of dispute was true, the Applicant in its reply through its agent on 12th April 2016 would have raised the issue; that they did not know who Steg Consultants were. Moreover, the letter of 31st March 2016 by Steg Consultants at the outset clearly stipulated they were instructed by the 1st Respondent. This part of the process the Court finds it is in compliance with clause 45.1 of the Agreement.

The appointment of the Arbitrator was questioned vide the fact that Clause 45.1 of the Agreement prescribed the request for appointment of Arbitrator ought to be by the Chairman /Vice Chairman of Architectural Association of Kenya. Yet, the appointment of the Arbitrator was by President of Architectural Association of Kenya. This Court finds compliance with Clause 45.1 of the parties Agreement, because for starters there is only one professional organization by the name Architectural Association of Kenya. Secondly, if there is no Chairman/Vice Chairman but there is the equivalent by the name of President of the same organization, then the position held by the Chairman is held by the President who may execute the responsibilities of the Chairman one of those being appointment of Arbitrator. Of interest, if the President of Architectural Association of Kenya could not execute duties of the Chairman of Architectural Association of Kenya, why did the Applicant write to the President of Architectural Association of Kenya on the appointment of the Arbitrator by letter of 9th June 2016? Why did the Applicant not in the said letter raise/refer to the anomaly that is; it is the Chairman of Architectural Association of Kenya who ought to appoint the Arbitrator?

I find the process of appointment of arbitrator was in compliance of Clause 45.1 of parties Agreement and the Arbitrator had jurisdiction to conduct arbitration proceedings.

The other requirement/condition precedent was to ensure that an attempt to settle the dispute before arbitration was undertaken by parties. It is deposed vide the Applicant's letter to the President of Architectural Association that the Applicant sought to discuss the matter with 1st Respondent through their Architect and the efforts were futile. There cannot possibly be a meeting of 1 party, there is no evidence that the 1st Respondent also tried to reach out to the Applicant for amicable settlement of the dispute. Therefore; both parties acted contrary to the term of their Agreement.

The only other term that was/is found wanting due to non -compliance is that the Arbitration proceedings ought to have started after 90 days from the date of notice under **Clause 45.3 & 45.5 of the Agreement**. In the instant case, the notice of a dispute was in form of the letter of 31st March 2016 from the 1st Respondent's agent to the Applicant. **90** days later meant that Arbitration proceedings ought to have commenced from June 2016. That Arbitration proceedings commenced earlier and it is contravention of the Agreement between the parties.

Therefore, from the evidence presented to the Arbitrator the process of appointment of Arbitrator is as per the Agreement of the parties save for commencement of Arbitral proceedings before the expiry of 90 days and pursuing amicable settlement of the dispute.

The parties may regularize the anomaly by this Court staying current Arbitral proceedings to allow parties regularize the mandatory requirement of **Clause 45.3 & 45.5** of parties' agreement. The proceedings are preserved and stayed for the unexpired period of 90 days in the interest of justice between the parties and in validity of the terms of the contract.

4. Impartiality and Independence of the Arbitrator

The first principle embodied in section **13 of the Arbitration Act (Cap 4 of 1995)** provides that when a person is approached for appointment as an arbitrator he must disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. That duty on the part of the arbitrator is a continuing duty right from the time that he is approached and through to the time he accepts appointment, conducts the reference, and renders his award.

In Misc Civil App No. 506 of 2011 ***Mistry Jadva Parbat Company Limited V Grain Bulk Handlers Limited [2012]eKLR*** . In that case, the court stated that an arbitrator could be removed and the Court relied on;

> "***only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence".***
>
> In **Misc Civil Application No.193 of 2014** ***Zadock Furniture System Limited And Maridadi Building Contractors Limited vs Central Bank Of Kenya [2015] eKLR*****,** the court held that;
>
> **"*The test for bias or prejudice must be that there is real danger that the arbitrator is biased, and in deciding whether bias has been established, the court personifies the reasonable man and considers all the material before it to determine whether any reasonable person looking at what the arbitrator has done, will have the impression in the circumstances of the case, that there is a real likelihood of bias*".**

Similarly, in ***PT Central Investindo vs Franciscus Wongso & Others & Another Matter [2014] SGHC 190***, the court held at paragraph 19, that the test for apparent bias/likelihood of bias was;

> **"*the applicant has to establish the factual circumstances that would have a bearing on the suggestion that the tribunal was or might be seen to be partial. The second inquiry is to then ask whether a hypothetical fair-minded and informed observer would view those circumstances as bearing on the tribunal's impartiality in the resolution of the dispute before it".***

When considering the issue of bias,

> **"*the court looks at the impression which would be given to other people. Even if he (arbitrator) was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand*"**

The Court in ***R vs David Makali & Others CA Criminal Application No 4 & 5 of 1995*** went on and considered the issue as follows;

> **"*I take the view that the Petitioner should establish such material facts as attend personal inclination or prejudice on the part of the [judge] towards a party on some extrajudicial reasons....The Applicant must therefore specifically set out facts constituting bias and prove them as such in order to establish real likelihood of bias for purposes of disqualification of the [judge]…….it is absolutely necessary that the party applying should lay all relevant material before [court]. The best way of delivering that requirement is by adopting a method that inherently enables some form of deposition and production of evidence.***

In this instant case, the Applicant submitted the grounds for believing that the Arbitrator would be biased and not impartial and independent as;

> a) The Arbitrator disclosed that he was the former Chairman of the Architectural Association of Kenya and as such he knew the Parties/Architects.

b) The Arbitrator failed to satisfy himself that there was a dispute for hearing and determination.

c) The Arbitrator failed to address concerns by the Respondent on whether there was compliance of **Clause 45.1, 45.3, 45.4 & 45.5** of the Agreement.

d) According to the Applicant upon receipt of the letter of 9th June 2016 as a reasonable person, the Arbitrator was expected to call/invite parties to submit on whether he had been validly appointed, whether he had jurisdiction and whether Steg Consultants were proper parties to the Arbitration as representatives or otherwise.

With regard to the 1st allegation of Arbitrator's disclosure of knowledge of parties; the disclosure was in compliance with **Section 13 (1) Arbitration Act;** he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. The Arbitrator disclosed his assignment prior to the appointment, he was chairman of Architectural Association of Kenya, a professional body of Architects; it is natural in the normal course of duties to know other Architects, Steg Consultants for the 1st Respondent and Synthesis Ltd For the Applicant. As Chairman of the Association he led the professional body and dealt with matters concerning fellow professional colleagues. Apart from this disclosure, the Applicant did not adduce evidence or relevant material before the Arbitrator during Preliminary proceedings specifically setting out facts constituting bias and prove them as such in order to establish real likelihood of bias and partiality on the part of the Arbitrator. The Applicant ought to have adduced direct, cogent and verifiable facts of Arbitrator's contact, communication of collusion with any /both parties to the dispute or with their appointed agents. In the absence of any evidence of an overt act(s) or omission by the Applicant, this Court finds the allegation of partiality unsubstantiated. The Arbitrator's disclosure of his role as former Chairman of Architectural Association of Kenya and hence the fact that he professionally knew members/parties does not by and of itself translate to bias or partiality, there must something more in circumstances/situation between the Arbitrator and parties to suggest that a reasonable person in society would read bias, prejudice or partiality by the Arbitrator. This Court finds no justifiable doubts in the circumstances.

With regard to the allegations outlined in **(b) (c) & (d)** the parties pleadings and submissions through respective Counsel that the same issues were the contents of the Preliminary Questions/Objections before the Tribunal on 28th June 2016. Upon hearing, the Arbitrator dealt with each and every allegation made and is the substance of the impugned Ruling. Contrary to the Applicant's assertion that the Arbitrator ought to have invited parties to address the concerns raised, the Applicant filed Preliminary Objection and the Applicant was granted a hearing and determination in terms of the Ruling.

The applicant was dissatisfied and aggrieved with the Arbitrator's Ruling and hence filed the instant application of 9th April 2018.

Every person is entitled under **Article 50 of Constitution of Kenya 2010** to a fair hearing before an impartial and independent Tribunal/Court. From the record; the parties were granted a fair hearing in the absence of cogent facts of prejudice or bias to any party. There has been no prejudice to either party, and if such bias and/or prejudice is occasioned to either party, the law provides safe guard in form of grounds for setting aside the arbitral Award **under Section 35 of the Arbitration Act.**

DISPOSITION

1. The court has jurisdiction to hear and determine the Application;

2. There was/is a dispute or arbitration claim for determination;

3. Due process was followed in appointment of the Arbitrator and he had jurisdiction to hear the matter;

4. There was/is non compliance of Clause 45.3 & 45.5 of the Agreement by parties; the Arbitration proceedings before the expiry of 90 days from the date when notice of dispute was filed. The proceedings are preserved and stayed for the unexpired period of 90 days in the interest of justice between the parties and in validity of the terms of the contract;

5. The parties failed to comply with Clause 45.4 of the Agreement. The parties are at liberty to pursue negotiations with a view to amicable settlement of the dispute before Arbitration proceedings resume.

6. There was no proof of partiality and non Independence of the Arbitrator.

7. Costs for improper exercise of the parties Agreement shall abide the outcome of the Arbitration proceedings.

DELIVERED SIGNED & DATED IN OPEN COURT ON 4TH NOVEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR MWESIGWE H/B MR. GAD FOR THE APPLICANT

MR MWESIGWE FOR THE 1STRESPONDENT

MS JASMINE- COURT ASSISTANT