REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 222 OF 2018

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION AND THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF ARBITRATION-CONTRACT PKG/16B

BETWEEN

REPUBLIC.....APPLICANT

VS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

ENG. A. O. ROGO.....2ND RESPONDENT

AND

NYORO CONSTRUCTION LIMITED.....*EX PARTE* APPLICANT

RULING

The Parties

1. The applicant is a limited liability company incorporated in Kenya under the provisions of the Companies Act.[1]It undertakes road construction and civil works.

2. The first Respondent is the Honorable Attorney General, the Principal government legal adviser and representative pursuant to Article **156** of the Constitution. He represents the national government in court or in any legal proceedings to which the national government is a party, other than criminal proceedings.

3. The second Respondent is an adult Kenyan and an Engineer within the meaning assigned to it under section 2 of the Engineers Act.[2] He was the sole Arbitrator in the Arbitration proceedings between the *ex parte* applicant and the first Respondent, which culminated in the decision made on 4th May 2018.

Factual matrix

4. The *ex parte* applicant states that the Government of Kenya contracted it to repair and re-open Nakuru Town Roads under contract number PKG/16B. It states that a dispute arose regarding the said contract and the same was referred to the second Respondent for arbitration, and, that, the second Respondent rendered his award on 4th May 2018.

5. The *ex parte* applicant states that aggrieved by portions of the award, it invoked the provisions of Article 47 of the Constitution and section 34 (1) & (4) of the Arbitration Act,[3] (herein after referred to as the Act) and applied to the Arbitrator for clarification of certain ambiguities and an additional award of Ksh. 1,063,506,188/=. It states that the Arbitrator declined to entertain the application stating that he was *functus officio.*

6. Legal foundation of the application

7. The *ex parte* applicant states that the award and the arbitrator's refusal to consider its application was wrong and against its right to legitimate expectation. It also states that the Arbitrator misdirected and misconducted himself both in the award and in the refusal to review his award.

8. In addition, it states that the Arbitrator acted without jurisdiction and against clear statutory provisions, hence, it was denied a legitimate expectation of a substantial part of its claim, and, unless the orders sought are granted, it risks losing in excess of Ksh. 1,980,167,649.70

The orders sought

9. The *ex parte* applicant prays for the following orders:-

a. An order of Certiorari to quash the decision of Eng. Rogo of 14th May 2018.

b. An order of Mandamus directed at Eng. Rogo commanding him to reconsider the application by Nyoro Construction Company Limited dated 14th May 2018 and re-compute interest and or render award on accrued interest on certificate to No. 1 to 12 (a) and (b) that were the subject of arbitration before the said Eng. A.O. Rogo.

c. That in the alternative the award of Eng. Rogo be placed before another arbitrator agreed by the parties and or appointed for computation of interest on certificate No. 1 to 12 (a) and (b) of the contract.

d. That costs of this application be awarded to the ex parte applicant in any event.

The Second Respondent's Preliminary Objection

10. The second Respondent's counsel filed a Preliminary Objection on 25th September 2018 stating as follows:-

a. That the Arbitration Act is a separate and distinct regime of law not amenable to the judicial review jurisdiction of the High Court.

b. That the Arbitration Act is very specific as to the instances when a court of law can intervene in arbitral proceedings and, none is by way of judicial review.

c. For this court to admit jurisdiction in an application such as this, it would be contrary to Kenya's public policy in allowing arbitration as an alternative mode of dispute resolution, both domestically and internationally.

d. The application is an attempt to have the arbitrator's award reviewed or appealed against, which can only be done within the framework of the Arbitration Act.

e. That this court has no jurisdiction to entertain this application.

The arguments

11. The second Respondent's counsel submitted that the instant application stems from an Arbitration Award rendered by the second Respondent under the Act. He argued that aggrieved by certain portions of the Award, the *ex parte* applicant filed an application for correction and for an additional award under Article 159 (2) (c) (d) of the Constitution and section 34 of the Act. He stated that the Arbitrator declined to consider the issues raised in the application stating that he was *functus officio* once he publishes his Award.

12. He argued that the Act prescribes the manner and process of challenging an award. It was his submission that section 10 of the Act prescribes the process and circumstances under which an award can be challenged. He submitted that the section provides for intervention under limited circumstances specified under the act. To buttress his argument, he relied on *XXCEL Africa Limited T/S Mathare United Football Club (MUFC) v Kenyan Premier League (KPL) & Another*[4] which held that the powers conferred upon the High Court under Article 165 of the Constitution can only be exercised within the parameters of section 10 of the Act.

13. In addition, the second Respondent's counsel relied on *Sylvana Mpabwanayo Ntaryamira v Allen Waiyaki Gichuhi, Arbitrator and Richard Waeru Njoroge*[5] in which the court made three fundamental holdings. *First,* a person who willingly enters into an agreement with an arbitration clause ought not to be permitted to fall back on the Constitution in order to avoid his obligation to refer the disputes, which properly fall within the arbitration clause to the agreed alternative dispute resolution mechanism. *Second,* a challenge to arbitral proceedings ought to be in accordance with the terms of the arbitration or legislation guiding the arbitration process. *Third,* judicial review proceedings ought not to be the first port of call.

14. He also placed reliance on *The County Government of Kitui v Hon Justice E. Torgbor and Power Pump Technical Company Limited*[6] which held that:-

"… the jurisdiction of the High Court to supervise and intervene in arbitration proceedings or an arbitral award can be either by an application for setting aside of an arbitral award under section 35 of the Arbitration Act or by way of judicial review on

constitutional grounds as provided by Article 165 (6) of the Constitution.

Therefore, any allegations of breach of constitutional provisions or principles in arbitration proceedings or in an arbitral award will in my opinion convert an hitherto purely contractual and or commercial transaction into a transaction with a constitutional and public law element…However, in the absence of such constitutional grounds and basis, it is my opinion that the statutory procedure set out in section 10 and 35 of the Arbitration Act wll oust judicial Review of Arbitration proceedings and an arbitral award."

15. Lastly, counsel submitted that looking at the applicant's grounds; the applicant does not meet the tests laid down in the above case, hence, it ought to fail.

16. The first Respondent's counsel supported the Preliminary Objection. He cited the definition of a Preliminary Objection in *Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd*[7] and argued that the objection fits the said definition. He further submitted that the Act is not amenable to Judicial Review jurisdiction of this court. He relied on Owners *of Motor Vehicle "Lillian S" v Caltex Oil (Kenya) Ltd*[8] and urged the court to decline jurisdiction.

17. Counsel further submitted that the jurisdiction of the High Court to supervise and intervene in Arbitration proceedings or an Arbitral Award is only by an application for setting aside an arbitral award under section 35 of the Act. To buttress this argument, he relied on *Anne Mumbi Hinga v Victoria Njoki Gathara**[9]*** for the holding that the grounds set out in section 35 of the Act are exclusive and that any other grounds not included in the said section are impermissible. Counsel also cited section 32A of the act, which provides that no recourse is available against the award otherwise than in the manner provided for in the act. He submitted that recourse to the High Court is only available under section 35 of the act.

18. In addition, the second Respondent's counsel relied on *Mahican Investments Limited & 3 Others v Giovanni & Others*[10] which held that:-

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

19. Lastly, counsel relied on *Revital Healthcare (EPZ) Limited & Another v Ministry of Health & 5 Others*[11] for the proposition that where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course, and, that, the available redress would not be adequate.

20. The *ex parte* applicant's counsel submitted that it is not true that arbitral proceedings are not amenable to judicial review. He argued that the issue before the court is whether the *ex parte* applicant was within the law to invoke judicial review proceedings challenging the Arbitrator's refusal to exercise his jurisdiction under section 34 (1) (4) of the Act. He relied on *Sylvana Mpabwanayo Ntavaymira v Allen Gichuhi & Another* (supra) in which the court held that:-

"That an arbitrator is a non-state agency whose action, omission or decision affects the legal rights of the parties before him to whom the arbitral proceedings relate cannot be doubted. It is therefore my view and I also hold that pursuant to the provisions of the Article 47 as read with the provisions of the Fair Administrative Action Act, 2015, judicial review orders may where appropriate issue against the decision of an arbitrator."

21. It was his submission that the above decision settled the question whether arbitration proceedings are amenable to judicial review. He further submitted that in any event, the second Respondent's counsel in his submissions concedes that in appropriate circumstances judicial review is allowed in arbitral proceedings.

22. Lastly, he argued that the second Respondent submitted on the details of the contract thus removing his [12]submissions from the purview of a preliminary objection by submitting on the substantive merits of the application. He relied on *George Oraro v Barak Eston Mbaja*[13] for the proposition that where a court needs to investigate facts, the matter cannot be raised as a preliminary point.

Determination

23. Upon considering the arguments presented by the parties, I find that only one issue distils itself for determination, i.e., whether this court is divested of jurisdiction to hear this case.

24. The starting point is section 10 of the Act, which provides for the extent of court intervention in the following words:- "*Except as provided in this Act, no court shall intervene in matters governed by this Act."*

25. The language, purport and effect of this provision is replicated in section 32A of the act which provides for the effect of an award in the following terms:-

32A. Effect of award

Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.

26. It cannot be by accident that Parliament used identical language in two separate provisions in the same statute to speak with such clarity on one issue. This is a rare occurrence in Parliamentary enactments. Rarely does Parliament repeat it elf in legislative drafting. Why the emphasis. What was the intention of the drafter?

27. Our Constitution requires a purposive approach to statutory interpretation.[14] In this regard, I find useful guidance in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,[15] where Ngcobo J stated:-

> *"The technique of paying attention to context in statutory construction is now required by the Constitution ..."*

28. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[16] The often-quoted dissenting judgment of Schreiner JA, eloquently articulates the importance of context in statutory interpretation:-

> *"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."**[17]***

29. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.[18] In *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others**[19]*** Stopforth Olivier JA provided useful guidelines for the factors to be considered when conducting a purposive interpretation of a statutory provision:-

> *"In giving effect to this approach, one should, at least, (i) look at the preamble of the Act or at the other express indications in the Act as to the object that has to be achieved; (ii) study the various sections wherein the purpose may be found; (iii) look at what led to the enactment (not to show the meaning, but also to show the mischief the enactment was intended to deal with); (iv) draw logical inferences from the context of the enactment."*

30. The above excerpt is useful while ascertaining the purpose of a statute. Thus, when an arbitral award under attack or when the jurisdiction of this court is assailed as has been in this case, the starting point is the applicable statute. After all, a court's jurisdiction flows from either the Constitution or legislation or both. Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent .[20]Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.[21]

31. Jurisprudence is the very basis on which any Tribunal or court tries a case; it is the lifeline of all trials. A trial without jurisdiction is a nullity. The importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to this Court; *afortiori* the court *can suo motu* raise it.

32. Talking about the law as the basis of jurisdiction and the purpose and effect of a statutory provision, section 10 of the Act has been the subject of judicial construction by our superior courts on many occasions. In *Prof. Lawrence Gumbe & Another Vs. Honourable Mwai Kibaki & Others,**[22]*** the above provision was explicated by **Nyamu J** eloquently expressed himself as follows:-

> *"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..."*

33. The Court of Appeal in *Anne Mumbi Hinga v Victoria Njoki Gathara**[23]*** addressing applications that are not expressly provided for in the Arbitration Act, and which purport to rely on the Civil Procedure Act and the Rules stated as follows:-

> *"A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states: "Except as provided in this Act no court shall intervene in matters governed by this Act."*
>
> *In the light of the above, the superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act. This includes entertaining the application the subject matter of this appeal and all the other applications purporting to stay the award or the judgment/decree arising from the award…The provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate. In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act. It is clear to us that no application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration. It follows therefore all the provisions invoked except Section 35 and 37 do not apply or give jurisdiction to the superior court to intervene and all the applications filed against the award in the superior court should have been struck out by the court suo motu because jurisdiction is everything as so eloquently put in the case of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd 1989 KLR 1."*

34. The same position was expressed by the High Court in *Nyutu Agrovet Limited v Airtel Networks Limited**[24]*** as follows:-

> *"Certainly, I do not agree that the Civil Procedure Act applies to arbitral proceedings, even as the issue has not been fully ventilated before us. However, much as I am not yet ready to pronounce that, the Arbitration Act is a complete code excluding any other law applicable in civil-like litigation; I do not see where the Civil Procedure Act applies in this matter. Rule 11 of the Arbitration Rules states:*
>
> *"11. So far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under these Rules."*
>
> *The subject, is only as far as it is appropriate Civil Procedure Rules shall apply to the Arbitration Rules – not the Act. In any event a rule cannot override a substantive section of an Act – section 10."*

35. I stand guided by the above judicial pronouncements interpreting section 10 of the Act. Perhaps I should add that the word "*shall*" appears in the section. It reads "… no court *shall* intervene in matters governed by this Act.

36. The classification of statutes as mandatory and directory is useful in analysing and solving the problem of the effect to be given to their directions.[25]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[26] The real question in all such cases is whether, a thing, has been ordered by the legislature to be done, and what is the consequence, if it is not done. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

37. It is the duty of courts of justice to try to get at the real intention of the legislation by carefully attending to the whole scope of a statute. The Supreme Court of India pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

38. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[27] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[28] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

39. Section 10 of the act iscouched in mandatory terms. It ousts this court's jurisdiction in matters governed by the act except as provided in the Act. This position is replicated in section 32A of the act. This leads me to the question, what are these matters, which are governed by the act.

40. The starting point for a proper analysis and appreciation of the above question is section 35 of the Act.[29] Section 35 of the Act, Part VI provides for recourse to High Court against Arbitral Award in the following words:-

> ***35. Application for setting aside arbitral award***
>
> *1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).*
>
> *2) An arbitral award may be set aside by the High Court only if—*
>
> *a) the party making the application furnishes proof—*
>
> *i. that a party to the arbitration agreement was under some incapacity; or*
>
> *ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or*
>
> *iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
>
> *iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or*
>
> *v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or*
>
> *vi. the making of the award was induced or affected by fraud, bribery, undue influence or corruption;*

b) the High Court finds that— (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or (ii) the award is in conflict with the public policy of Kenya.

3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

41. Clearly, section 35(1) limits recourse to court against arbitral awards to only applications for setting aside the award and only under the grounds or circumstances listed in subsections (2) and (3) of the said section.

42. The *ex parte* applicant did not invoke the above provisions. Instead, it invoked Order 53 Rule 1 and 2 of the Civil Procedure Rules and section 34(1) (2) of the Act. The Court of Appeal and the High Court in the earlier cited authorities pronounced themselves with sufficient clarity that the Civil Procedure Rules do not apply to Arbitration proceedings. That position renders the applicant's application incompetent to the extent it expressed its application under Order 53 Rules 1 & 2 of the Civil Procedure Rules.

43. In addition, the applicant invoked section 34(1) (2) of the act. This section provides for an application for correction and interpretation of arbitral award or an additional award. The section is very clear. The request under this section is to be made to the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature. The section has nothing to do with an application to the High Court. Differently put, the said section is inapplicable and has been improperly invoked in the application under consideration.

44. In addition, by invoking section 34(1) (2) of the act, the application offends language and spirit of section 35(1) of the act which limits recourse to the High Court against an arbitral award to only by an application for setting aside the award under subsections (2) and (3) of the said provision. In the same vein, the application offends the express provisions of section 32A of the act. It follows that the invocation of the said provision renders the application incompetent for offending express provisions of the act.

45. It is beyond argument that section 35 of the Act, which is reinforced by section, 32A of the act provides for recourse to the High Court against an arbitral award. Section 35 is explicit. Subsection (1) provides that recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3). The section sets out the grounds for setting aside. The applicant did not approach the court for setting aside as the law provides. It applied for Judicial Review orders to challenge an arbitral process as opposed to setting aside as the law provides. The only recourse under the act is to set the award aside. It follows that the application is incurably defective for offending the said section, and on this ground, the application must fail.

46. The *ex parte* applicant's counsel sought refuge in the Constitution. He argued that the Constitution expanded the scope of judicial review jurisdiction. Even though he did not expound on this argument, I note that the applicant cited Article 47 of the Constitution and the Fair Administrative Action Act[30] (herein after referred at FAA Act). He placed heavy reliance on the court decisions mentioned earlier which suggest that judicial review is permissible in certain circumstances. The said argument is attractive. However, the argument falls on two grounds.

47. *First*, it is settled law that a case is only an authority for what it decides. This is correctly captured in the following passage:-[31]

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides..." (Emphasis added)

48. The ratio of any decision must be understood in the background of the facts of the particular case.[32] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[33] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[34]

49. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[35]In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[36] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[37]

50. The applicability of the cases cited to the circumstances of this case is highly in doubt. A reading of the application and the grounds cited shows that the applicant is simply attacking the award and the refusal by the arbitrator to entertain his request. It raises no constitutional questions at all. I am alive to the fact that every case has a constitutional underpinning, be it criminal cases, civil or commercial. However, it is important to point out that not every dispute ought to be filed in the constitutional division of the high court unless it raises constitutional issues.

51. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.[38] The

issues raised in this case can be resolved by interpreting the facts and the relevant statute. The dispute has nothing to do with Article 47 of the Constitution.

52. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights or values.[39] The issues stated above fall in the realm of the governing act, the award, and the contract, the subject of the arbitration.

53. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others*[40] in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak*[41] notes that:-

> *"The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of .....the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction."*[42]

54. Put simply, the following are examples of what constitutes constitutional issues; the constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation.[43] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore, the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the court.

55. The application does not raise any constitutional questions at all. This court abhors the practice of parties converting every issue in to a constitutional question when in fact they do no not fall anywhere close to violation to constitutional rights. This is an arbitration dispute.

56. The second ground upon which the *ex parte* applicant's argument of invoking the Constitution fails is because the argument ignores the fact that in order to operationalize Article 47, Parliament enacted the FAA Act. It follows that the FAA Act has a constitutional under pinning.

57. Section **9(2)** of the FAA Act provides that the High Court or a subordinate court under subsection **(1)** **shall not** review an administrative action or decision under the Act **unless the mechanisms including internal mechanisms for appeal or review** **and all remedies available under any other written law are first exhausted**.

58. A proper construction of section **9(2) & (3)** above leads to the conclusion that the provisions are couched in mandatory terms. The only way out is the exception provided under section 9**(4),** which provides that: - "Notwithstanding subsection **(3),** the High Court or a subordinate court *may*, *in exceptional circumstances* and *on application by the applicant*, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Two requirements flow from the above sub-section. *First*, the applicant must demonstrate exceptional circumstances.

59. Thus, under section 9(4), on application by the applicant, the court may grant an exemption. My reading of the law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal and statutory remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section **9(4)** of the FAA Act.[44] The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given.[45]

Disposition

60. In view of my analysis and the determination of the issues discussed above, it is my conclusion that the *ex parte* applicant ought to have approached the court as provided under section 35 of the act. It is my finding that this application offends sections 10, 32A and 35 of the act. On this ground alone, the preliminary objection succeeds.

61. It is also my finding that the application does not raise any constitutional issues at all to warrant the invocation of Article 47 of the Constitution. Simply put, the application discloses a dispute under the Arbitration Act. The *ex parte* applicant ought to have been guided by the clear provisions of sections 10, 32A and 35 of the act.

62. The Arbitration Act is a self-contained statutory enactment prescribing its procedures and mechanism of challenging disputes under the act. The Civil Procedure Act[46] and rules do not apply to arbitral proceedings. This is because Section 10 of the Act makes the Arbitration Act a complete code. It follows that rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act, which states.

63. The High Court has no jurisdiction to intervene in arbitration proceedings in any manner not specifically provided for in the Arbitration Act. It follows that the court has no jurisdiction to entertain the instant application whose effect is to review, quash or vary an arbitral award disguised as judicial review reliefs.

64. The provisions of the Act make it clear that it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate. Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules to regulate arbitrations under the Act.

65. No application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration. My view finds backing id the clear wording of section 32A of the act.

66. It follows therefore all the provisions invoked by the applicant, namely Order 53 Rules 1 and 2 of the Civil Procedure Rules and section 34(1) (2) of the act do not give jurisdiction to this court. The only provision-conferring jurisdiction to the High Court is section 35 of the act, which provides for recourse to the High Court. The *ex parte* applicant did not invoke the said section.

67. Even if the court were to be persuaded that the application is premised on Article 47 and the FAA Act, (which I am unable to), the application offends section **9 (2) (4)** of the FAA Act and the now esteemed doctrine of exhaustion of statutory available remedies.

68. In view of my foregoing conclusions flowing from my analysis herein before, I find and hold that the Preliminary Objection raised by the second Respondent's counsel and supported by the counsel for the first Respondent is successful. I allow the Preliminary Objection and dismiss the applicant's application dated 25th June 2018 with no orders as to costs.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 11th day of November 2019.

John M. Mativo

Judge

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[1] Cap 486, Laws of Kenya- NOTE: This Act was repealed by the Company's Act, Act No. 17 of 2015, whose commencement date was 15th September 2015.

[2] Act No. 43 of 2011.

[3] Act No. 4 of 1995.

[4] {2017} e KLR.

[5] JR App No. 449 of 2015.

[6] JR No. 254 of 2018.

[7] {1969} E.A 696.

[8] {1989} KLR 1.

[9] {2009} eKLR.

[10] {2005} e KLR.

[11]{2015} e KLR.

[12] Act No. 4 of 1995.

[13] {2005} e KLR.

[14] For examples of a purposive approach to statutory interpretation, see *African Christian Democratic Party v Electoral Commission and Others* {2006} ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC); at paras 21, 25, 28 and 31; *Daniels v Campbell NO and Others* {2004} ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 22-3; *Stopforth v Minister of Justice and Others*; *Veenendaal v Minister of Justice and Others* {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[15] {2004} ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[16] Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants, Cape Town 2000) at 244-50.

[17] *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662-3.

[18] *Dawood and Another v Minister for Home Affairs and Others; Shalabi and Another v Minister for Home Affairs and Others; Thomas and Another v Minister for Home Affairs and Others* {2000} ZACC 8; 2000 (3) SA 936 (CC) ; 2000 (8) BCLR 837 (CC) at para 47.

[19] {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[20] The Supreme Court in the matter of the Interim Independent Electoral Commission,Constitutional Application No. 2 of 2011 (unreported)

[21] *Samuel Kamau Macharia v. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011

[22] High Court Miscellaneous No. 1025 of 2004.

[23] {2009} eKLR.

[24] {2015} eKLR.

[25]*Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[26] Ibid.

[27] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[28] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[29] Act 4 of 1995.

[30] Act No. 4 of 2015.

[31] As observed in State of *Orissa vs. Sudhansu Sekhar Misra* MANU/SC/0047/1967

[32] *Ambica Quarry Works vs. State of Gujarat and Ors*. MANU/SC/0049/1986

[33] Ibid

[34] Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111 (vide para 59)

[35] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[36] Ibid.

[37] Ibid.

[38]http://www.yourdictionary.com/constitutional-question.

[39]Justice Langa in Minister of Safety & Security v Luiters, {2007} 28 ILJ 133 (CC)

[40] {2002} 23 ILJ 81 (CC)

[41] {2001} (1) SA 912 (CC)

[42] 2001 (1) SA 912 (CC)

[43] Supra note 5.

[44] Act No. 4 of 2015.

[45] See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]

[46] Cap 21, Laws of Kenya.