REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 241 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, THE LAW REFORM ACT, ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010, THE CONSTITUTION OF KENYA, 2010 AND ALL ENABLING PROVISIONS OF THE LAW

BETWEEN

REPUBLIC.....APPLICANT

VS

PMS INNOVATEUS LIMITED.....1ST RESPONDENT

CHRISTINE KABAKA.....2ND RESPONDENT

AND

PZ CUSSONS LIMITED.....EX PARTE APPLICANT

JUDGMENT

The Parties

1. The applicant is a limited liability company incorporated in Kenya under the provisions of the Companies Act.[1]It carries on the business of manufacture, sales, marketing of soaps, lotions and or beauty products.

2. The first Respondent is a limited liability company incorporated in Kenya under the Company's Act.[2] It carries on the business of manufacture, merchandising and promotional services.

3. The second Respondent is the head of the legal affairs of the Baobab Development Group. She was the sole Arbitrator in the Arbitration proceedings between the applicant and the first Respondent, which culminated in the final Award, dated 18th January 2019.

Factual matrix

4. The applicant alleges that on 15thFebruary 2018, the first Respondent unilaterally appointed the second Respondent as an Arbitrator in respect of the arbitration proceedings referred to above. It claims that the said appointment was confirmed at a meeting between both Respondents herein in its absence. The applicant also claims that the second Respondent demanded that it pays a deposit of Ksh. 40,000/= cater for reservation of the venue.

5. The applicant states that it never participated in the arbitration proceedings, which culminated in the impugned award. It also states that the Respondents initiated the arbitration proceedings relying on a conflict resolution clause in the agreement between the parties,

which agreement lapsed on 30th May 2011.

Legal foundation of the application

6. The applicant premised its case on the ground that the agreement upon which the arbitration proceedings proceeded had lapsed, and, that, the claim was statute barred by dint of section 4(1) (a) of the Limitation of Actions Act.[3] It also contends that the second Respondent acted *ultra vires*, and the impugned decision violates its rights under Articles 47 and 50 of the Constitution and section 4 of the Fair Administrative Action Act[4] (herein after referred to as the FAA Act).

The orders sought

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

a. An order of Certiorari to quash the final award dated 18th January 2019.

b. An order of Prohibition to prohibit and or restrain the first and second Respondents from enforcing the final award dated 18th January 2019.

c. Costs of this application be in the cause.

The First Respondent's Replying Affidavit

8. Joanne Mwangi, the first Respondent's Chief Executive Officer swore the Replying Affidavit dated 28th June 2018. He deposed that the applicant and the first Respondent entered into a Merchandising Operations Agreement dated 1st July 2010. He averred that a dispute arose in connection with the said agreement and the parties decided to invoke the conflict resolution mechanism under clause 9 of the agreement. He averred that the previously mentioned clause was adhered to and that the applicant was copied and he received every correspondence leading to the second Respondent's appointment.

9. Mr. Mwangi averred that on 23rd August 2017, the first Respondent's Advocate wrote to the applicant requesting for consultations in line with clause 9(1) referred to above which provides that an aggrieved party shall, before referring the matter to Arbitration, deliver a written request for consultation. He deposed that pursuant to the said clause, the first Respondent's Advocates wrote to the applicant on 23rdAugust 2017 requesting for consultations but the applicant never replied. He further deposed that after the lapse of 30 days without a response in conformity with the said clause, the first Respondent's advocate wrote to the applicant and proposed an Arbitrator, but he failed to reply.

10. He further deposed that the said clause provided that in the event the parties do not agree on an arbitrator, then, the arbitrator would be appointed by the Marketing Society of Kenya. He added that pursuant to the said clause, the first Respondent's advocate wrote to the Marketing Society of Kenya and requested that an arbitrator be appointed, and, that, the said letter was copied to the applicant. He deposed that the Chairman of the Marketing Society of Kenya vide a letter dated 12thFebruary 2018 proceeded to appoint the second Respondent as an arbitrator and that the first Respondent's advocate wrote to the arbitrator and copied the letter to the applicant. Further, he averred that the second Respondent accepted the appointment in writing and copied the letter to the applicant.

11. Mr. Mwangi averred that he never appointed the arbitrator as alleged, but, the Marketing Society of Kenya in line with the agreement between the parties appointed him, and, in any event, the applicant was copied all the correspondence. He averred that the appointment of the arbitrator was not unilateral as alleged.

12. He also averred that the applicant's preliminary objection on the alleged limitation of time was raised before the arbitrator and dismissed, and, that, the applicant failed to appear at the hearing of his Preliminary Objection, hence, by raising it here, he is attempting to appeal against the said dismissal by the Arbitral Tribunal.

First Respondent's grounds of opposition

13. The first Respondent filed grounds of opposition stating that it did not exercise a judicial or quasi-judicial function, hence judicial Review orders cannot issue. It also stated that the applicant failed to follow the procedures laid down in section 14 of the Arbitration Act,[5] hence, he has not exhausted the remedies provided under section 9 (2) (3) and (4) of the FAA Act. Further, it stated that the applicant has not demonstrated exceptional circumstances as provided under section 9 (4) of the FAA Act. It also stated that the argument citing limitation of actions act offends section 35 of the Arbitration Act.[6]

The Second Respondent

14. The second Respondent did not file any pleadings in this case. At the hearing, her counsel informed the court that the second Respondent did not wish to file submissions.

Issues for determination

15. Upon carefully analysing the facts presented by the parties herein, I find that the following issues distil themselves for determination:-

a) Whether this court is divested of jurisdiction on grounds that the suit offends the doctrine of exhaustion of statutory provided dispute resolution mechanism.

b) Whether the first Respondent's claim was statute barred.

c) Whether the first Respondent unilaterally appointed the arbitrator.

d) Whether the applicant has established any grounds for the court to grant the Judicial Review Orders sought.

a) *Whether this court is divested of jurisdiction on grounds that the suit offends the doctrine of exhaustion of statutory provided dispute resolution mechanism*

16. The first Respondent's counsel submitted that the applicant is challenging an arbitration process, and, that, the Arbitration Act [7] provides a mechanism for challenging such decisions. He cited *Re Preston*[8] where the court stated that a Judicial Review remedy should not be available where an alternative remedy exists, and, should only be made as a last resort. He placed further reliance on *Speaker of the National Assembly v James Njenga Karume*[9] that held that where there is as clear procedure for redress of any particular grievance prescribed by the Constitution or an act of Parliament, that procedure should be strictly followed. In addition, he cited *Rich Productions Limited v Kenya Pipeline Company & Another*[10]for the proposition that the court must be slow to undermine prescribed alternative dispute resolution mechanisms.

17. To further buttress his argument, counsel cited section 9(2) (3) (4) of the FAA Act and argued that the applicant has not exhausted the available remedies under sections 14 and 35 of the Arbitration Act.[11]He relied on *Republic v Ministry of Interior and Coordination of National Government ex parte ZTE*[12] for the holding that Judicial Review is a remedy of last resort, hence, parties ought to follow the procedure provided under the statute. He also relied on *Republic v National Environmental Management Authority*[13] for the proposition that where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.

18. Lastly, the first Respondent's counsel cited *Syvana Mpabwanayo Ntaryamira v Allen Waiyaki Gichuhi & Another*.[14] In this case, the court was emphatic that a person who willingly entered into an agreement with an arbitration clause ought not to be permitted to fall back on the Constitution in order to avoid his obligations to refer the disputes, which properly fall within the arbitration clause to the agreed alternative dispute resolution mechanism. The court went further to hold that where a party challenges the manner in which the arbitral proceedings are being conducted, the same ought to be in accordance with the terms of the arbitration or the legislation guiding the arbitration process and he ought not to resort to judicial review proceedings as a port of first call.

19. Despite the fact that the issue under discussion is dispositive and that this case can stand or fall on this issue, the applicant's counsel never addressed it at all.

20. The applicant and the first Respondent signed a Merchandising Operations Agreement dated 1st July 2010. Relevant to the issue under consideration is clause 9 of the agreement which provides for conflict resolution as follows:-

Conflict Resolution

I. The parties agree that should a dispute arise with respect to this agreement, they shall make good faith efforts to resolve the dispute on a business basis through negotiations. Such consultations shall begin immediately after either party has delivered to the other a written request for consultation.

II. If within thirty (30) days following the date on which such notice is given the dispute cannot be resolved, the parties agree to submit the matter to a single arbitrator to be appointed jointly and failing agreement, by the chairman, for the time being, of the Marketing Society of Kenya.

III. Such Arbitration shall be conducted in Nairobi, Kenya and resolved in accordance with the provisions of the Kenya laws of Arbitration as amended from time to time.

21. The starting point for a proper analysis and appreciation of the issue under consideration is sections 14 and 35 of the Arbitration Act[15] cited by the first Respondent's counsel. Section 14 provides as follows:-

14. Challenge procedure

1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.

2) Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.

4) On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.

5) The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.

6) The decision of the High Court on such an application shall be final and shall not be subject to appeal.

7) Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

8) While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.

22. Section 35 of the Arbitration 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.

23. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself, or in the forum provided under the statute. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. There are numerous decisions of this court holding that this doctrine is now of esteemed juridical lineage in Kenya.[16] The doctrine was felicitously stated by the Court of Appeal[17] in *Speaker of National Assembly vs Karume*[18] in the following words:-

"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

24. The above case was decided before the promulgation of Constitution of Kenya. However, many Post-2010 court decisions have found the reasoning sound and have provided justification and rationale for the doctrine under the 2010 Constitution.[19] The Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others*.[20] It stated that:-

> *"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews… The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution*."

25. Additionally, the High Court in the *Matter of the Mui Coal Basin Local Community*,[21] stated the rationale thus:-

> *"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."*

26. From the above jurisprudence, at least two principles are clear. *First*, while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.[22] The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

27. For a litigant to bypass the dispute resolution mechanism provided under a statute, he must apply exemption from the court. The applicant ought to have moved the court under section 9(4) of the FAA Act and demonstrate exceptional circumstances as explained below in this judgment. Any aggrieved person is obliged to exhaust the mechanism provided under the act or apply for an exemption. More fundamental is the fact that the only way out to by-pass this mechanism is to cite exceptional circumstances and move the court under section 9(4) of the FAA Act[23] discussed below.

28. Section **9(2)** of the FAA Act[24] 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**. Also relevant is sub-section **(3)** which provides that "the High Court or a subordinate Court *shall*, if it is not satisfied that the remedies referred to in sub-section **(2)** have been exhausted, direct that an applicant *shall* first exhaust such remedy before instituting proceedings under sub-section **(1).**

29. It is instructive to note the use of the word *shall* in the above provisions. 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.

30. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or 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.

31. 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.

32. A proper construction of section **9(2) & (3)** above leads to the conclusion that the said provisions are couched in mandatory terms. The only way out is the exception provided by 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.

33. What constitutes exceptional circumstances depends on the facts of each case[29] and it is not possible to have a closed list. Article **47** of the Constitution is heavily borrowed from the South African Constitution. In addition, the FAA Act[30] is heavily borrowed from the South African equivalent legislation, hence, jurisprudence from South African Courts interpreting similar circumstances and provisions are of greater value, relevance and may offer useful guidance. Flowing from the foregoing conclusion, I find that the

following points from a leading South African decision relevant:-[31]

> *i. What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . ."*
>
> *ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*
>
> *iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.*
>
> *iv. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.*
>
> *v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.? In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.*

34. Additionally, what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.[32] I should perhaps add that there is no definition of 'exceptional circumstances' in the FAA Act,[33] but this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.[34]

35. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule. As stated above, what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. I am unable to discern any exceptional circumstances in this case, nor, was it demonstrated that there are exceptional circumstances in this case. There was no attempt to demonstrate that the internal remedy would not be effective and/or that its pursuit would be futile for this court to permit the applicant to approach the court directly.

36. It has not been established that applying the dispute resolution mechanism established under the agreement and the enabling statute will be impractical nor has it been demonstrated that the dispute must be determined by the court. A look at the agreement and the provisions of the enabling statute and the facts of this case suggest otherwise. The agreement and the provisions of the law are very clear on how to commence the proceedings and the mechanism for approaching the court.

37. The second requirement is that 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.[35] 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.[36] Section **9(4)** of the FAA Act[37] postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. My reading of the said provision is that the applicant must first apply to the court and demonstrate the existence of exceptional circumstances.

38. As stated above, the law is that Section **9(4)** of the FAA Act[38] postulates an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy. Put differently, an applicant must formally apply to the court and demonstrate exceptional circumstances. The law contemplates a situation where by an applicant makes his application, demonstrates the existence of exceptional circumstances and consistent with rules of fair play, afford the other party the opportunity to respond or disapprove his case and leave it to the court to determine. No competent application was presented before this court to determination the question whether or not the *ex parte* applicant demonstrated exceptional circumstances; nor do I see any exceptional circumstances in the circumstances of this case.

39. Perhaps, I should add that it is uncontested that the impugned decision constitutes an administrative action as defined in section **2** of the FAA Act.[39] Therefore, an internal remedy **must** be exhausted prior to Judicial Review, **unless** the *ex parte* applicant can show exceptional circumstances to exempt him from this requirement.[40] An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.[41] An internal remedy is adequate if it is capable of redressing the complaint.[42]

40. As stated earlier, no argument was advanced before me that the internal remedy is not effective. There was no suggestion that the remedy under the act does not offer a prospect of success. There is no argument before me that the remedy under the act cannot be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law. There was no suggestion that the remedy cannot be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct. Lastly, there was no suggestion, even in the slightest manner that the internal remedy is inadequate

and incapable of redressing the complaint.

41. The principle running through decided cases is that where there is an alternative remedy, or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted. In determining whether an exception should be made, and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism, in the context of the particular case, and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined, and whether the appeal mechanism is suitable to determine it.

42. The other principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that, a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively. This argument was not advanced before me nor do I find any.

43. In view of my analysis and the determination of the issues discussed above, it is my conclusion that the applicant ought to have exhausted the available mechanism and approach the court as provided by the enabling statute. I find that this case offends section **9 (2)** of the FAA Act.[43] The applicant has not satisfied the exceptional circumstances requirement under section **9(4)** of the FAA Act.[44] In conclusion, I find and hold that the applicant's application offends the doctrine of exhaustion of statutory available remedies. It must fail. On this ground alone, this application is dismissed.

b. Whether the first Respondent's claim was statute barred.

44. The applicant's counsel argued that the agreement between the parties lapsed on 30th May 2011, hence there existed no valid agreement as at the time the dispute arose, and, that the said agreement cannot be legally enforced because it is statute barred by dint of section 4(1) (a) of the Limitation of Actions Act.[45] To buttress his argument he cited *Malakwena arap Maswai v Paul Kosgei*,[46] a land case where the defence of limitation was successfully raised.

45. The first Respondent's counsel did not address this particular ground of assault.

46. As stated above, the applicant's counsel cited *Malakwena arap Maswai v Paul Kosgei*, a land case where the defence of limitation was up hled, decision that has no relevancy to the present case and circumstances. I have severally stated that it is settled law that a case is only an authority for what it decides, a position eloquently enunciated in the following passage:-[47]

"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)

47. The ratio of any decision must be understood in the background of the facts of the particular case.[48] 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.[49] 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.[50]

48. 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.[51]In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[52] 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.[53] My plea is to keep the path of justice clear of obstructions which could impede it.

49. The applicant's counsel's argument that the agreement between the parties had lapsed is legally frail, misleading and premised on an incredible misunderstanding of the law. The agreement in question is dated 1stJuly 2010. The agreement did not have an expiry clause. On the contrary, the agreement had a termination clause. It could only be terminated as provided under clause 6 of the agreement. There is nothing to show that the agreement had been terminated.

50. The applicant's counsel relied on the provisions of section 4 of the Limitation of Actions Act, [54]which provides that actions founded on tort may not be brought after the expiry of 6 years. He hinged his argument on the date of the agreement, which is dated 1stJuly 2010. I find this line of argument rather shallow and lacking any legal or factual backing. It is simply legally frail. *First,* as stated earlier, the agreement in question was not terminated as provided under clause 6 thereof. It was still in force and binding as at the time the dispute arose. *Second,* the agreement has prescribed a clear dispute resolution mechanism for disputes under the agreement. This mechanism extinguishes the said argument. *Third,* the agreement between the parties was clear. It is not the business of the court to assist parties to avoid their obligations under valid agreements. *Fourth,* a reading of the agreement shows that the parties willfully bound themselves to be bound by the arbitration clause, and the Arbitration Act,[55] hence, the dispute under the agreement and the act is triggered the moment the parties disagree and the a dispute is declared. In this regard, the provisions of the Limitation of Actions Act[56] relied upon cannot apply. *Fifth,* time under the agreement does not begin to run when the goods or services are rendered, as the applicant's counsel seems to suggest, but when a dispute is declared under the agreement.

51. I need not mention that the arbitrator dismissed the applicant's preliminary objection on the same ill-advised ground. The same ground cannot be available as a ground for Judicial Review.

c. Whether the first Respondent unilaterally appointed the arbitrator

52. The applicant's counsel argued that the arbitrator was unilaterally appointed by the first Respondent contrary to clause 9 (ii) of the agreement.

53. The first Respondent has explained in detail in the Replying affidavit the steps taken in appointing the arbitrator emphasizing two issues. *First,* he explained that the appointment was done strictly in accordance with clause 9 of the agreement. *Second,* he exhibited copies of letters copied to the applicant at every stage of the process.

54. What emerges from the Replying Affidavit and the correspondence annexed thereto is that the applicant is being dishonest. He was at all material times engaged and kept informed as per the agreement. He opted not to co-operate. The agreement is explicit on the procedure where parties do not agree on the appointment of an arbitrator. The arbitrator is appointed by the Chairman of the Marketing Society of Kenya as provided under clause 9 (II) of the agreement. This is the provision that was invoked and the applicant was duly copied. For the applicant to turn around in total disregard of the above clause and the correspondence copied to him and allege that the first Respondent appointed the arbitrator unilaterally is to be dishonest to the extreme. This argument collapses.

55. In any event, section 35 of the Arbitration Act[57] cited above provides for a procedure of challenging the appointment of an arbitrator. The applicant never invoked this statutory procedure. It follows that raising the issue as a ground in Judicial Review proceedings is untenable, misguided and an afterthought.

d. Whether the applicant has established any grounds for the court to grant the Judicial Review Orders sought

56. The applicant's counsel argued that the award is against public policy since it was arrived at in violation of his rights under Articles 47 and 50 of the Constitution and the FAA Act.

57. The first Respondent's counsel submitted that the issues raised in this case do not meet the threshold for Judicial Review. It was his submission that this matter does not involve a public body, and, that, the issues raised are purely private which can be resolved by other legal means as provided by the statute. Lastly, counsel argued that this application is an abuse of court process, in that the applicant filed a preliminary objection in the arbitration proceedings which was dismissed.

58. I have already held herein above that section 35 of the Arbitration Act[58] provides for the procedure of challenging an arbitration award and the appointment of an arbitrator. This finding alone extinguished the applicant's argument. I need not say more.

59. Broadly speaking, the grounds upon which the courts grant judicial review were stated in the case of *Pastoli vs Kabale District Local Government Council and Others*[59] where it was held as follows:-

> *"in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted …illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without* ***jurisdiction*** *or* ***ultra vires*** *or* ***contrary to the provisions of a law*** *or* ***its principles are instances of illegality****. …****irrationality*** *is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such decision is usually a defiance of logic and acceptable moral standards...****procedural impropriety*** *is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice…It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument….."*

60. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

61. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation.

62. However, the illegality of the impugned decision has not been established nor has it been established that the Respondents acted illegally or in excess of their powers, hence the writs of *certiorari* and *prohibition* cannot issue in this case.

63. It is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognizable public law wrong that has been committed.[60]

64. Applying the legal tests discussed above to the facts and circumstances of this case, I find that the applicant's Amended Notice of Motion dated **20th** March 2019 must fail. Accordingly, I hereby dismiss the said application with costs to the first Respondent.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 4th 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] Ibid.

[3] Cap 22, Laws of Kenya.

[4] Act No 4 of 2015.

[5]Act No. 4 of 1995.

[6] Ibid.

[7] Act No. 4 of 1995.

[8] {1985} AC 835 at 825D, per Lord Scarman.

[9] {1992} e KLR.

[10] {2014} e KLR.

[11] Act No. 4 of 1995.

[12] JR No. 441 of 2013.

[13] {2011} e KLR.

[14]JR No. 449 of 2015.

[15] Act 4 of 1995.

[16] *Republic v Independent Electoral and Boundaries Commission* (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR

[17] Ibid.

[18] {1992} KLR 21.

[19] Ibid.

[20] {2015} eKLR.

[21] {2015} eKLR.

[22] Ibid.

[23] Act No. 4 of 2015.

[24] Act no. 4 of 2015.

[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] See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini; S v Dladla & others*; *S v Joubert; S v Scheitikat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

[30] Act No. 4 of 2015.

[31] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H.

[32] See *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) para 39, Mokgoro J

[33] Act No. 4 of 2015.

[34] Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 All ER 717 (CA) at 724a-b.

[35] Act No. 4 of 2015.

[36] 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]

[37] Act No. 4 of 2015.

[38] Act No. 4 of 2015.

[39]Act No.4 of 2015. (See *SA Veterinary Council & another v Veterinary Defence Force Association* {2003} ZASCA 27; 2003 (4) SA 546 (SCA) para 34).

[40] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

[41] Ibid para 44.

[42] Ibid paras 42, 43 and 45.

[43] Act No. 4 of 2015.

[44] Ibid.

[45]Cap 22, Laws of Kenya.

[46]{2004} e KLR.

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

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

[49] Ibid.

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

[51] 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).

[52] Ibid

[53] Ibid.

[54] Cap 22, Laws of Kenya.

[55] Act No. 4 of 1995.

[56] Cap 22, Laws of Kenya.

[57] Act No. 4 of 1995.

[58] Act No. 4 of 1995.

[59] {2008} 2EA 300

[60] See ***R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake*** **[1996] COD 248.**