REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION (MILIMANI LAW COURTS)

MISC. CIVIL CAUSE NO. 131 OF 2016

IN THE MATTER OF THE ARBITRATION ACT

(CHAPTER 49 OF THE LAWS OF KENYA)

AND IN THE MATTER OF THE ARBITRATION

BETWEEN

GOOODISON SIXTY ONE SCHOOL LIMITED……APPLICANT

AND

SYMBION KENYA LIMITED………………………RESPONDENT

RULING

Background

1. The material background to this matter is brief. The parties herein have been engaged in a dispute in relation to the construction of a school situated along Magadi Road. The school was being developed by the Applicant, and the Respondent was the Architect. Pursuant to an arbitration agreement between the parties, the dispute was referred to arbitration in March 2013 before a sole arbitrator, Mr Paul Ngotho.

2. On 3rd February, 2016, the applicant filed a challenge before the arbitrator seeking his disqualification. The grounds alleged for his disqualification and removal were failure to disclose circumstances likely to give rise to justifiable doubts as to his impartiality or independence, pursuant to **sections 13** and **14** of the **Arbitration Act, No 4 of 1995**. By a ruling published on 25th February, 2016, the arbitrator dismissed the applicant's challenge and determined that he was properly in office. On the same date, the arbitrator also published his Final Award and Costs Award, ultimately concluding the arbitration.

3. On 5th March, 2016, the arbitrator delivered a Ruling and Additional Award dealing with the applicant's counsel's email application of 29th February, 2016, requesting the tribunal to note that counsel was not acting for the respondent in the arbitral proceedings. The arbitrator dismissed the application.

4. By a notice of motion dated 23rd March, 2016, the applicant asked the court to, inter alia, uphold the challenge filed by them before the arbitrator and remove the arbitrator from the proceedings. In addition, they sought a declaration annulling the entire arbitral proceedings and the arbitrator's awards. Finally, they prayed that the court would order the commencement of the arbitration proceedings de novo under a new arbitrator.

5. The aforesaid motion of 23rd March, 2016, was heard by Ochieng' J, who dismissed it by his ruling of 6th October, 2016. This present motion of 22nd November, 2016, is for review of Ochieng' J's ruling, and should ideally have been before him. However, Ochieng'J recused himself from the matter on 1st March, 2017, and the file was brought before me administratively. By consent, the parties agreed to proceed with the application before me, rather than before a bench as had been requested by the applicant.

The Application

6. This application is stated to be brought under **Articles 50(1)** and **159** of the **Constitution**, **Section 14** of the **Arbitration Act (Cap 49)**, **Sections 1A, 1B, 3, 3A** and **80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules**. The application seeks the following orders:

“1…...Spent ;

2. …Spent;

3. THAT … this Honourable Court … be pleased to Review and set aside the Ruling of the Honourable Mr. Justice Fred A. Ochieng’ herein dated 6th October, 2016 and vacate any Orders made pursuant thereto;

4. THAT this Honourable Court be pleased to grant the Orders sought in the Applicant’s Notice of Motion Application dated 23rd March, 2016;

5. THAT costs of this Application be provided for.”

7. The parties are represented by Mr S Amin for the applicant, and Mr S Njuguna, appearing with Mr Gross act for the respondent.

Parties’ Representations/Submissions

8. The applicant’s case in the motion is outlined in the supporting affidavit of Zainab Jaffer, a director of the applicant company, deponed on 15th November, 2016. This being an application for review, it may serve to set out the applicant’s grievances against the ruling of Ochieng’ J in their own words:

“3. THAT I am advised by the Applicant’s Advocates on record whose advice I verily believe to be true that the Learned Judge has made fundamental mistakes and errors of fact in the said Ruling on the Applicant’s Notice of Motion Application dated 23rd March, 2016 (“the said Application”) which are apparent on the face of the record and which errors are so significant serious and material as to have a direct bearing on the Learned Judge’s reasoning findings and decision the detailed particulars whereof are as follows:-

i. The Learned Judge in paragraph 35 of the said Ruling made an error in finding that Paul Ngotho (the Arbitrator under Challenge in these proceedings) did not have an opportunity to be heard on the said Application whereas the true position is that the was duly served with the said Application and Hearing Notices and opted not to participate in the proceedings. In any event at no time was this a material issue before the Learned Judge nor did he raise it as a concern at any time in the proceedings prior to the filing of written Submissions by the parties which he ought to have done had it been a real concern;

ii. The parties having duly filed their written Submissions and the Court having confirmed the same on 9th June, 2016 the Learned Judge erroneously failed to consider the letter to both parties’ Counsel dated 15th June, 2016 from Paul Ngotho under copy to the Deputy Registrar of this Honourable Court the contents of which would have a direct and material bearing on the Learned Judge’s decision. In the said letter Paul Ngotho acknowledged the proceedings but declined to take part in them stating inter alia that “… I am fully aware of my statutory right to be heard…” and “… having read the parties’ pleadings, researched on the (sic) open to me and taken legal advice I choose not to take part in that particular application. The parties have given the Court enough material for the determination of the issues in that application…” Annexed hereto and marked “ZJ-2” is a true copy of the said letter.

iii. The Learned Judge in paragraph 24 of the said Ruling made an error in holding that the disqualification or the removal of the Arbitrator after he had delivered his Final Arbitral Award would not have any bearing on the proceedings which he held had been concluded and that the Applicant “…may have moved the court a little too late in the day…”. This is a direct contradiction to the contents of paragraph 31 of the said Ruling (quoting section 14(3) of the Arbitration Act) and paragraph 32 of the said Ruling where he holds that “… the applicant was entitled to move to the High Court to seek a determination on the application for the disqualification or the removal of the arbitrator…” which clearly provides that the removal of the Arbitrator can take place even after the Final Arbitral Award has been made in which case it would be rendered void;

iv. In paragraph 36 of his said Ruling the Learned Judge quotes section 14(8) of the Arbitration Act and finds in paragraph 37 of his said Ruling that “In effect the parties did not err when the arbitral proceedings went ahead, to conclusion, even when the applicant had notified the respondent and the arbitrator of its intention to challenge the arbitrator before the High Court…” but immediately thereafter in the final paragraph 38 of the said Ruling renders a decision that was directly contradictory to the said Statutory provision and finding by holding that “it was brought after the arbitrator had already given his final Arbitral Award and Costs Award. Therefore, there was nothing further that the arbitrator could be stopped from doing, as his work had come to an end”;

v. The Learned Judge made an error that is apparent on the face of the record in mistakenly holding in paragraph 38 of the said Ruling that there was “…nothing further that the arbitrator could be stopped from doing…” as a ground for dismissing the said Application as the said Applicant does not in fact seek to stop the Arbitrator from doing anything but rather seeks inter alia the Arbitrator’s disqualification as a result of which any Awards made by him would be rendered void under section 14 (8) which anticipates such circumstances;

vi. The Learned Judge made an error that is apparent on the face of the record by failing to recognize that the Arbitrator released the Final Award Costs Award and his Ruling on the challenge simultaneously thereby depriving the Applicant of the opportunity to move the High Court before the Final Award was released but that this does not invalidate the said Application in any event and the Arbitrator who is clearly conflicted is not able to defeat the

relevant statutory provision and the course of justice in this manner;

4. THAT the Learned Judge also made the following mistakes and errors of fact in the said Ruling which are apparent on the face of the record and which errors are so significant that they have a direct bearing on his reasoning and decisions:-

i. The Learned Judge in paragraph 10 of the said Ruling failed to recognize and appreciate from the Application the fact that Counsel for the Claimant in the Arbitral Proceedings Anthony Gross also served on the Panel of Mediators of SDRC together with Paul Ngotho;

ii. The Learned Judge at paragraph 11 of the said Ruling erroneously describes Paul Ngotho as being on the "Panel of Arbitrators" of SDRC whereas he was in fact a Member of the Panel of Mediators of SDRC;

iii. The Learned Judge in paragraph 12 of the said Ruling made an error in holding that "By virtue of being on the Board of SDRC, the advocate for the respondent was said to have been privy to and/or responsible for and/or involved in the appointment of Mr. Ngotho, as the arbitrator in these proceedings." This is factually incorrect. The factual position is that the Applicant states in Ground No. 2(e) of its said Application that "… As a Member of the Board of Directors of SDRC Claimant's Counsel was privy to and involved in Mr. Ngotho's appointment to the Panel of Mediators of SDRC which is accountable to the said Board…" [Emphasis my own]. Paragraph 13 (d) of the Supporting Affidavit contains similar wording;

iv. The Learned Judge in paragraph 15 of the said Ruling made an error in holding that "The Applicant cited several instances to illustrate how the arbitrator treated its advocate "is… [sic]… a shabby manner…" The factual position as presented in the Application is that the Applicant was not represented by Counsel at the material time in the Arbitration and the mistreatment by the Arbitrator referred to by the Applicant was of the Applicant's directors;

v. The Learned Judge in paragraph 16 of the said Ruling made an error in holding that "… At other times the arbitrator is said to have intimidated or bullied the applicant's advocate…" The factual position as presented in the Application is that the Applicant was not represented by Counsel at the material time in the Arbitration and the mistreatment by the Arbitrator referred to by the Applicant was of the Applicant's directors;

5. THAT I am further advised by my Advocates on record which advice I verily believe to be true that the purported reasons for the dismissal of the said Application set out in paragraph 38 of the said Ruling are based on the said errors apparent on the face of the Record as set out above and are therefore fundamentally flawed and manifestly defective."

9. In oral submissions, Mr Amin argued that the letter marked "ZJ 2" annexed to the affidavit of Zainab Jaffer is a new piece of evidence justifying the review. Counsel further argued that **section 14(3)** of the **Arbitration Act** which underpins the application, provides that if the challenge to the arbitrator is unsuccessful, the challenging party may apply to the High Court within thirty (30) days to determine the matter. This provision gave the applicant a thirty (30) day window, which they complied with by filing their court challenge on 23rd March, 2016.

10. In addition, Counsel submitted that **section 14(8) Arbitration Act** kept open the window of challenge for the applicant, because it provides that:

"While an application under sub-section (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 award shall be void if the application is successful"

As such, Counsel asserted, if the arbitrator proceeds with the award whilst the challenge application is pending in court, the award may be voided if the review is successful. In essence, therefore, the thirty challenge day window cannot be pre-empted by issuance of a final award before the expiry of the statutory window period.

11. Accordingly, Counsel argued, the Judge erred when he ruled that upon issuance of the final award on 25th February, 2016, there was nothing the arbitrator could be stopped from doing, and that the filing of the application was an action ***"too little too late"***. It would result in the absurdity that mischievous arbitrators would, even after inordinate delay, merely rush to make an award to curtail challenges in avoidance of the statutory window. Counsel relied on **Grain Bulk Handlers Limited v Mistry Jadva Parbat & Company Limited [2016] eKLR** as a case in point, where the arbitrator had rushed to issue an award and the court ultimately removed the arbitrator and set aside the award.

12. The respondent opposed the application through the replying affidavit of Oscar Ogunde, a director of the respondent. In the affidavit, the respondent argued that the applicant is acting in bad faith as a last ditch attempt to frustrate, delay and circumvent the enforcement of the final award. Further, that the application for review is a backdoor attempt to appeal against the arbitrator's award, by circumventing the provision of **section 14(6)** of the **Arbitration Act** which declares finality in the decisions of the High Court and prohibits appeals thereon.

13. The respondent also argued that there is no error or contradiction apparent on the face of the record to warrant review. He contended that the application was an attempt to clothe the court with a jurisdiction it does not have for entertaining reviews. The present application is one such, aimed at trying to achieve a different outcome by the court.

14. In his oral submissions, Mr Njuguna for the respondent argued that the applicant is both purporting to review the Judge's ruling but also seeks to review the arbitral proceedings. He highlighted the point that the application is grossly incompetent and that the court has no jurisdiction to review an application said to be grounded on **section 14** of the **Arbitration Act**. His reason was that **section 10** of the **Arbitration Act** clearly stipulates that no court can intervene in matters governed by the Act except as expressly provided by the Act. Thus,

Counsel argued, a **section 14(6) Arbitration Act** decision by the court, being incapable of appeal, is also therefore not amenable to review by the court.

15. Mr Njuguna cited the Court of Appeal decision in **Kamconsult Ltd v Telkom Kenya Ltd & Another [2016] eKLR**, where the Court stated at paragraph 18 that the Arbitration Act does not provide for review of High Court decisions on questions of jurisdiction made pursuant to **section 17(6)** and that:

> **"…the omission [in the Act] to provide powers of review is not an inadvertent omission but a deliberate attempt to provide finality to litigation"**

16. Additionally, Counsel argued that the Civil Procedure Act and Rules do not apply to arbitration except where appropriate, and that this was not one of such appropriate situations. In this regard Counsel emphasised that the Arbitration Act is a complete code which does not import the Civil Procedure Rules except where appropriate. He drew support from the case of **Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR**, for this proposition.

17. In his response to the respondent's arguments on the court's lack of jurisdiction, Mr Amin asserted that the court has inherent original jurisdiction by virtue of **Article 165**, and any matter not excluded by the Constitution can come before the High Court as of right.

18. With regard to the **Kamconsult** decision, Counsel urged that the ratio revolves around **section 17(6)** of the **Arbitration Act,** and that the case is therefore not relevant as a binding authority in this situation.

19. Counsel finally asserted that review is a constitutional right where there is a defect in the process, and a party is entitled to rely on an existing legislation that contains a relevant procedure of the High Court such as the Civil Procedure Act and Rules. Any other positionrejecting review would lead to absurdity. In addition, where legislation is silent on a matter such as review, the regular governing procedural rules apply. In any event, Counsel argued, the Arbitration Act does not in this case expressly oust the review jurisdiction of the High Court.

The Issues

20. Having heard the parties and considered the documents and authorities in support of their respective cases, only two issues appear to arise for determination by this court:

> a. Whether review of the court's ruling rejecting or dismissing a challenge under **section 14(5)** of the **Arbitration Act** is an available option for the applicant herein.
>
> b If review is an available option, whether the review sought herein succeeds on merit.

Whether the court's ruling on a challenge under section 14(5) of the Arbitration Act can be reviewed

21. The respondent's argument that the review applied for by the applicant has no legal underpinning emanates from their reading of the Arbitration Act. **Sections 14(5)&(6)** of the Arbitration Act provide as follows regarding the challenge in court to an arbitrator's decision for removal from his arbitral role:

> **"(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"**

In the present case the ruling by Ochieng' J rejected the applicant's challenge, and that should have concluded the challenge process as no appeal is permitted by the Act.

22. However, as the Act is silent on whether a review is possible, the applicant invoked the provisions of **Articles 165 159,** and **50(1)** of the **Constitution** read together with **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules**. The applicant's argument is to the effect that the High Court has unlimited inherent jurisdiction under **Article 165**. Thus, the court in exercising its judicial authority to give effect to that jurisdiction must be guided by the overarching principle under **Article 159(2) (c)** which requires it to promote alternative forms of dispute resolution, including arbitration. The court, Counsel contended, cannot therefore pre-empt any person who has a right under **Article 50(1)** to have any dispute that can be resolved by the application of law to be decided in a fair hearing before a court or another independent and impartial tribunal or body.

23. The applicant's above argument is enticing, but has certain inherent flaws discussed herein. There is no doubt that the Constitution requires courts to be guided by the principle of promotion of ADR including arbitration. However, the primeval and enduring fundamental principles of arbitration, accepted and practised worldwide over numerous centuries, hold that non mandatory arbitration is, firstly, an inherently complete mechanism of dispute resolution alternative to the state court litigation system; therefore, secondly, that intervention by courts in the arbitral process is extremely limited except where parties agree or the law so stipulates; thirdly, that its essence involves party autonomy, namely, that parties in appropriate cases can choose or ask someone to choose an independent third person or persons to arbitrate or adjudicate over their dispute using a process they mutually agree to; fourthly, that the parties agree that the decision of the third person(s) is binding on them; and finally, that the arbitrator is not bound by complex court litigation procedures and processes or the strict laws of evidence.

24. A word in respect of the last principle. In court litigation, the law of evidence – also known as the rules of evidence – which encompasses the rules and legal principles that govern the proof of facts in a legal proceeding, the quantum, quality, and type of proof needed to prevail in litigation, is paramount. In arbitration, strict application of the rules of evidence is obviated. **Section 2(1)** of the Kenya **Evidence Act** provides.

> **"This Act shall apply to all judicial proceedings in or before any court other than a Kadhis court, <u>but not to proceedings before an arbitrator</u>"** (underlining added)

Any hard-boiled litigation lawyer would find it intolerable to proceed with a hearing whose parameters are not circumscribed by the law of evidence. Such a trial could well be labelled unconstitutional for not providing adequate safeguards to an involved party, and that is understandable in a normal litigation. But this is one of the distinctions that underscore the difference in approach to dispute resolution between arbitration and litigation, and also the reason that any person can be an arbitrator who is able to abide by the rules of natural justice.

25. The **Arbitration Act, 1995** (revised 2012), of Kenya is an adaptation of the United Nations Commission on International Trade Law (UNCITRAL) **Model Law** on International Commercial Arbitration, adopted by the UN in 1985. According to the UNCITRAL website www.uncitral.org/ uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html, Kenya is among 74 states and 104 jurisdictions around the world in which legislation based on the Model Law has been adopted. Parties in commercial matters are amongst those that have traditionally accepted the use of arbitration as a regular dispute resolution mechanism. Arbitration has flexibility of procedure and hence control over costs, the option of choice of arbitrators with expertise in the subject-matter, and finality in the decision which avoids complex and lengthy court processes and procedures including, arguably, convoluted appellate processes.

26. It is in this light that **Section 2** of the **Arbitration Act** makes the Act applicable to both international *and* domestic arbitration. The significance of this is that the Act is intended to ensure, as far as possible, similar standards locally as are available in respect of international arbitration are brought to bear both in the practice and interpretation of the law of arbitration. Thus the need for a comparative law approach to our law cannot be gainsaid.

27. In the **Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006** annexed as part 2 to the amended Model Law, there is an explanation on the limited role of the courts in arbitration, thus:

> **"15. Recent amendments to arbitration laws reveal a trend in favour of limiting and clearly defining court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision <u>to exclude court jurisdiction</u> and prefer the finality and expediency of the arbitral process.**
>
> **16. In this spirit, the Model Law envisages court involvement in the following instances. A first group comprises issues of appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions that should be entrusted, for the sake of centralization, specialization and efficiency, to a specially designated court or, with respect to articles 11, 13 and 14, possibly to another authority (for example, an arbitral institution or a chamber of commerce). A second group comprises issues of court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures (articles 8 and 9), court-ordered interim measures (article 17 J), and recognition and enforcement of interim measures (articles 17 H and 17 I) and of arbitral awards (articles 35 and 36).**
>
> **17. Beyond the instances in these two groups, "no court shall intervene, in matters governed by this Law". Article 5 thus guarantees that <u>all instances of possible court intervention are found in the piece of legislation enacting the Model Law</u>, except for matters not regulated by it (for example, consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits), protecting the arbitral process from unpredictable or disruptive court interference is essential to parties who choose arbitration (in particular foreign parties)."** (underlining added)

28. Whilst the above commentary is not the official commentary of the UN on the Model Law, the reference to the Model Law is notable. Kenya adopted the Model Law in 1995, and domesticated it, by re-enacting it with minor amendments to suit our local circumstances as found in our present Act.

29. In my respectful view, therefore, where the Constitution obliges the courts to promote arbitration, what is urged is the promotion of arbitration within the context of its fundamental principles, without derogation from its core characteristics. Thus **Article 165** of the **Constitution** cannot be used, for example, to invoke a *carte blanche* jurisdictional intrusion of the courts into arbitral processes, riding on the back of original jurisdiction. Indeed, the promotion of arbitration means no more and no less than that the courts will promote arbitration – as practiced worldwide or as statutorily circumscribed – including promoting: party autonomy; a non-interventionist stance by the courts; ensuring that parties have the right, recognised by **Article 50** to a fair hearing by an independent and impartial arbitral tribunal of their choice; and intervention by the courts only as provided by the agreement of parties or by statute.

30. What do the statutes say? First it is important to note that in Kenya, there are two substantive routes under which arbitration may generally be commenced and employed as a dispute resolution mechanism. The first is arbitration through court as *court ordered* or court referred arbitration. It is commenced under Part VI, **"Special Proceedings"** of the **Civil Procedure Act** in **Section 59** and **Order 46** of the **Civil Procedure Rules**. **Section 59 CPA** provides:

> **"All references to arbitration by an order in a suit and all proceedings thereunder shall be governed in such manner as may be prescribed by rules"**

And **Order 46** of the relevant rules, the **Civil Procedure Rules** provides:

> **"Where in any suit the parties …agree that any matter in difference between them shall in such suit be referred to arbitration, they may at any time before judgment is pronounced apply to the court for an order of reference"**

31. This is the contextual framework of arbitration in Kenya by court order as stated by the Court of Appeal in **Kenya Shell Limited v Kobil Petroleum Limited Civil Appeal (Nairobi) No 57 of 2006** where the court said:

> **"Arbitration is one of several dispute resolution methods that parties may choose to adopt outside the courts of this country. The parties may either opt for it in the course of litigation under Order XLV of the Civil Procedure Rules or provide for it in contractual obligations, in which event the Arbitration Act, No 4 1995 (the Act) would apply and the courts take a back seat."**

32. For ease of characterisation, it may thus be safe to refer to arbitration when conducted under the provisions of special proceedings of court as *court-annexed arbitration.* In this type of arbitration under **Order 46**, the court has a more extensive involvement in the arbitral process, for example, setting the time for making the award (see rule 3(1)), issuing directions on the statement of a special case for the opinion of the court (see rule 12), and the court superseding the arbitration where the award is set aside (see rule 16(3)).

33. On the contrary, arbitration that is wholly consensual at *inception* proceeds under the **Arbitration Act.** Such arbitration emanates from an arbitration agreement entered into in a contract or other writing by the parties in terms of **section 4**, signifying the clear intent of the parties' to resolve their dispute through arbitration. It also signifies the parties' intent that should any legal proceedings be commenced in court by any of the parties the proceedings should be stayed by the court to enable arbitration to proceed as provided under **Section 6** of the Act. The Act provides for both the substantive and procedural law for the arbitration. Further, **section 10** has the all-important provision that:

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

The clear intention of the statute is that the court is to be involved in a consensual arbitration only under the limited circumstances prescribed in the Act or the Rules made under the Act.

34. The similar provision in the **Model Law** to **section 10** of the **Arbitration Act** on the extent of court intervention, is **Article 5** which states as follows:

> **"In matters governed by this Law, no court shall intervene except where so provided in this Law."**

The official commentary on this Article by the UN Secretary-General is contained in **A/CN.9/264 (reproduced in the Yearbook of the United Nations Commission on International Trade Law, 1985, Volume XVI, United Nations publication) p112.** The commentary is as follows:

> **"1. This article relates to the crucial and complex issue of the role of courts with regard to arbitrations. The Working Group adopted it on a tentative basis and invited the Commission to reconsider that decision in the light of comments by Governments and international organizations. In assessing the desirability and appropriateness of this provision, the following considerations should be taken into account.**
>
> **2. Although the provision, due to its categorical wording, may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of courts. It merely <u>requires that any instance of court involvement be listed in the Model Law. Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the Model Law.</u> The resulting certainty of the parties and the arbitrators about the instances in which court supervision or assistance is to be expected seems beneficial to international commercial arbitration.**
>
> **3. Consequently, the desired balance between the independence of the arbitral process and the intervention by courts should be sought <u>by expressing all instances of court involvement in the Model Law</u> but cannot be obtained within article 5 or by its deletion. The Commission may, thus, wish to consider whether any further such instance need be included, in addition to the various instances already covered in the present text. These are not only the functions entrusted to the Court specified in article 6, Le. the functions referred to in articles 11 (3), (4), 13 (3), 14 and 34 (2), but also those instances of court involvement envisaged in articles 9 (interim measures of protection), 27 (assistance in taking evidence), 35 and 36 (recognition and enforcement of awards)."** (underlining added)

35. Thus, where the Model Law requires court intervention, the Law so provides so specifically. Similarly with the Arbitration Act, where court intervention is desired or anticipated, provision is made for it.

36. The intent of arbitration under the Act is further that the arbitration award is final and binding on the parties, unless the parties agree otherwise (see **section 32A**). Accordingly, in the majority of limited occasions where the court is entitled under the Act to intervene in arbitration – through an application made to court – and to make a decision in respect of such application, by and large the court's decision is generally stated as final and not subject to appeal (see for example **sections 12(8), 14(6), 15(3), 16A(3), 17(7)** and **section 32B(6))**.

37. In addition, the parties have overall power to agree on any matter and on any aspect of the arbitration. To this intent, the Arbitration Act is strewn with phrases such as ***"unless the parties otherwise agree"*** and ***"unless otherwise agreed by the parties"*** and ***"the parties are free***

to agree". All these provisions underline the high premium placed on party autonomy and consensus in arbitration and the importance of finality of the arbitral process. Indeed, so important is party autonomy and the requirement for consensus that even where a question of law arises in a domestic arbitration, there is no automatic recourse to the courts since **Section 39** of the **Arbitration Act** provides that such recourse is possible only if ***"the parties have agreed"***.

38. With that background on the essence of arbitration, it is debatable whether the court's decision in this case under **section 14** of the **Arbitration Act** can plausibly be reviewed, as urged by the applicant. In my view, the applicant's reliance on **Articles 50, 159** and **165** of the **Constitution** to achieve a review, is untenable as there is nothing in them to suggest that those articles do in fact require promotion of arbitration outside of its fundamental character and essence. Because **Section 14** of the Act is itself silent on the question of review, the applicant suggests that the **Civil Procedure Act** and **Rules** must necessarily be applicable for justice to prevail. In this regard, the applicant invoked the court's inherent jurisdiction under **Section 3A** of the **Civil Procedure Act**.

39. The provisions for review are in **section 80** of the **CPA** which the applicant cited, and **Order 45 Rule 1 CPR** which the applicant did not expressly cite. The question that arises is whether, in the absence of any review provision in the Arbitration Act, the Civil Procedure Act and Rules apply. As earlier noted, **Section 14(6)** of the **Arbitration Act** prohibits an appeal from a decision of the High Court on a challenge to the arbitrator. The Applicant instead invoked the review provision in **Section 80(1)(b)** of the **CPA**, which states:

> **"Any person who considers himself aggrieved –**
>
> > **a. by a decree or order from which an appeal is allowed this <u>by this Act, but from which no appeal has been preferred; or</u>**
> >
> > **b by a decree or order from which no appeal is allowed this <u>by this Act</u>,** ***may apply for review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit"*** (underlining added)

40. It is clear that the sort of review contemplated under the CPA must be a review in respect of which the CPA itself allows an appeal but where one has not been preferred, or where the CPA itself does not allow an appeal. Unless either of these two conditions can be shown in respect of the review sought by the applicant, review cannot be available. In the present case, the applicant has not referred to any provision of the CPA which either allows or prohibits an appeal from the decision of the court in respect of a challenge under **section 14** of the **Arbitration Act**. On the contrary, what we have is a provision prohibiting appeal in the Arbitration Act and absence of a provision allowing review.

41. In this case, is the review requested one in which **"no appeal is allowed by this Act"**, namely, the CPA? I note that the CPA has provisions in **Section 75** touching on appeals from orders in, inter alia, court-annexed arbitration, but nothing is stated there concerning appeals in respect of consensual arbitrations. **Section 66** of the CPA provides:

> **"Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, <u>an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court</u> to the Court of Appeal"** (underlining added).

42. From the foregoing, it seems plain enough that, in general, all decrees and orders of the High Court are subject to the appellate jurisdiction of the Court of Appeal, except where the CPA itself so prohibits. The instances where the prohibition is made in the CPA are set out in it and do not include decrees or orders made in respect of consensual arbitration. So, clearly, an appeal in respect of **section 14** of the Arbitration Act would, but for the prohibition contained in **section 14(6)** of the **Arbitration Act,** be allowed by the CPA.

43. I revert now to the argument in this case on the reference by Counsel to the relevance or otherwise of the **Kamconsult** case to the present case. I agree with Mr Amin that the ratio in the **Kamconsult case** concerns **section 17** of the **Arbitration Act**. Paragraph 8 of the court's decision clarifies that where the court states that:

> **"…the only issue for determination is whether the High Court is vested with powers to review its decision and/ or orders made pursuant to Section 17(6) of the Arbitration Act".**

44. The court in the **Kamconsult case** analysed **Section 10** of the Act, and considered the **Anne Mumbi case** which concluded that:

> **"A careful look at all the provisions of the cited in the heading in the application and invoked by the appellant in the superior court 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"**

By parity of reasoning, I consider that the Court of Appeal's position on the exclusion of intervention provision of **section 10** of the **Arbitration Act** vis-a-vis the application of the **Civil Procedure Rules**, cuts across the rationale of the **Arbitration Act**.

45. In **Kamconsult,** the Court of Appeal also referred to the case of **Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR** and to Mwera JA's statement that:

> **"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…."

46. The Court in **Kamconsult** concluded that:

> **"However, the Arbitration Act does not provide for review of High Court decisions made pursuant to Section 17(6) of the Act, and therefore under Section 10 of the Act the High Court has no jurisdiction to intervene and confer upon itself the powers to review its decision. As was held in the above two cases [Anne Mumbi and Nyutu Agrovet], a rule cannot override a substantive law. Sections 3A, 63e and 80 of the Civil Procedure Act are also not applicable pursuant to Section 10 of the Arbitration Act"**

In light of these cases, I am in full agreement with the Court of Appeal's decision that review of the High Court's decision does not lie. I would apply the Court of Appeal's reasoning to this application under **section 14** of the **Arbitration Act.**

47. An analysis of the Rules under the Arbitration Act fortifies my conclusions above. As earlier stated, **section 10** of the Act prohibits general intervention by the courts in matters governed by the Act, *"except as provided in the Act"*. To this end, the Act makes statutory provision for the exceptional situations when the court can intervene. In addition, the Act provides for the making of rules by the Chief Justice under **Section 40.** The **Arbitration Rules** were made in 1997, and **section 40** provides that they are made, inter alia, for:

> **"(a)…**
>
> **(b)...**
>
> **(c)….**
>
> **(d) generally <u>all proceedings in court under the Act</u>."** (underlining added)

48. Clearly, the intention of the Act and Rules was to make provision for all proceedings conducted in court under authority of the Arbitration Act. This obviates the presumptive need for reliance on any other statutory provisions or rules beyond those in or under the Arbitration Act for the conduct of court processes involving consensual arbitration.

49. A close perusal of the Rules discloses that they make provision for applications to court under the Act in respect **sections 6** and **7** (rule 2); under **sections 12, 15, 17, 18, 28 and 39** (rule 3); under **section 35** (rules 6 & 7); and under **section 36** (rule 9). However, it is important to note that there are no Rules provided under the Act for court proceedings in respect of **section 14** – which is the provision that brings the applicant to court – **section 16A**, **section 28**, and **section 32B** of the Act. In my view, this is an error of omission in the Rules, to which attention should be drawn to the Chief Justice for rectification.

50. To the extent of this gap, I am in agreement with Mwera, JA's position in the **Nyutu Agrovet case**, that the Arbitration Act is not in its entirety a complete code excluding any other law applicable in civil-like litigation.

51. However, **Rule 11** of the **Arbitration Rules** provides:

> **"So far as is appropriate, the Civil Procedure Rules shall apply to <u>all proceedings under these Rules</u>"** (underlining added)

This rule applies the Civil Procedure Rules, where appropriate, only to proceedings under the Arbitration Rules. And since the Arbitration Rules do not provide for **section 14** proceedings, I take it that the Civil Procedure Rules are inappropriate for application to **section 14** applications. This leaves us in a quagmire regarding the applicable procedure for **section 14** applications challenging the mandate of the arbitrator as to his impartiality and independence, or as to composition of the tribunal. Under **section 14(6)** the court's decision on such matters is final and not subject to appeal.

52. It seems to me that a prudent and proper approach is to consider how other applications that may lead to the termination of the mandate of an arbitrator are dealt with under the Act and Rules, and to adopt a similar approach for challenge decisions under **section 14**. The first is in **section 12** where a defaulting party may apply to court to set aside the appointment of a sole arbitrator by a non-defaulting party. Under **section 12(8**) the court may make a decision which is final and not subject to appeal. Similarly, under **section 15(1)** an arbitrator's mandate may be terminated, but if there is a dispute on any ground of termination, the court's decision thereon is final and not subject to appeal. In both cases under **sections 12** and **15,** the applicable rule is **Rule 3** of the **Arbitration Rules**. I see no harm in, and would not hesitate to apply, the same rule to **section 14** applications.

53. In light of all the foregoing, I am not persuaded that the review provisions under **Section 80** of the **CPA** and under **Order 45** of the **CPR** apply for review in respect of the court's decision under **section 14** of the **Arbitration Act**. I so find and hold and, accordingly, the application for review herein fails.

54. But in the event that I am wrong, and should review be available to the applicant, the next question is: if review is an available option, does the review sought herein succeed on merit?

Whether a review of the court's decision sought herein succeeds on its merits

55. I now consider the alternative situation that review is available, and hereby proceed to review the decision of Ochieng' J, on the grounds in the applicant's application supported by the affidavit of Zainab Jaffer, earlier set out. I deal with the applicant's grounds in the order in which they appear in the said affidavit.

56. One of the prayers which was sought by the applicant in its application for review, was:

> **"4. That this Honourable Court be pleased to grant the Orders sought in the applicant's Notice of Motion Application dated 23rd March 2016"**

I now analyse the applicant's complaints regarding the ruling of the Learned Judge, on the presumption that review is an available option.

57. Paragraph 35 of the ruling is asserted to contain an error in that the Judge based his decision on the fact that the Arbitrator was not given an opportunity to be heard on the application. In paragraph 38, the Judge stated that the challenge application before him failed because:

> **"b) The arbitrator could not be condemned without being accorded an opportunity to be heard.…"**

The applicant exhibited to the affidavit of Zainab Jaffer a letter dated 15th June, 2016, marked "ZJ2" from the arbitrator stating, inter alia, that:

> **"…I am fully aware of my statutory right to be heard …and having read the parties' pleadings …and taken legal advice I choose not to take part in that particular application."**

58. I have perused the application of 23rd March which was before the Ochieng' J., and note that the arbitrator's said letter was not part of that application. As such, the learned Judge would have had no way of knowing that the arbitrator had had an opportunity to elect whether or not to participate in the challenge proceedings. The applicant's counsel argued that this was not a material issue for consideration at the time and the learned Judge had not raised it as such. It is, however, clear that **section 14(4)** of the **Arbitration Act** entitles the arbitrator to be given an opportunity to be heard and it was for the applicant to plead or point out as much, since the learned Judge could not ignore the statutory provision. The failure of the applicant to provide that letter or information on it at the hearing before the learned Judge does not satisfy the test for review in terms of **Order 45 Rule (1)**, as this does not constitute new evidence which was not available to the applicant at the time of making the application. In **Shah v Dharamshi [1981] KLR** the court held that:

> **"For an application for review to succeed the evidence must not only be new but the applicant must prove that he did not have them in his possession at the time and could not have obtained it despite due diligence"**

59. Pararaph 24 of the ruling is impugned as containing errors in that the learned Judge found that the applicant moved the court *"a little too late in the day"* and held that the removal of the arbitrator after he had delivered the final award would have no bearing on the proceedings. This, the applicant asserts, contradicted paragraphs 31 and 32 of the ruling which cited the clear provision of **section 14(3)** of the **Arbitration Act** to the effect that the challenge in court must be filed within thirty days and that the arbitrator can be removed even after the final award has been made.

60. The challenge application was filed on 23rd March, 2016, which is clearly within thirty days after delivery of the arbitrator's ruling thereon on 25th February, 2016. The challenge application was therefore on time irrespective of any further proceedings taken by the arbitrator. My understanding of **section 14(8)** of the **Arbitration Act** is that once a challenge application has been filed and is pending, the parties and the arbitrator may:

> **"…commence, continue and conclude any arbitral proceedings, but no award in such proceedings shall take effect until the application is decided and such award shall be void if the application is successful".**

61. Accordingly, I agree with Mr Amin's interpretation of the law: that the application was not a little too late in the day because of delivery of the final award. Section 14(8) of the Act is clear that the application survived the arbitrator's final award and the coming into effect of the award would have to await the determination of that application. In that sense, if the application was successful, the award would be void. However, it is also clear that this is a ground of appeal and not one for review, as it is not a mistake or an error on the face of the record within the purview of **Order 45(1) CPA**. There is a string of authorities on this point. For example, in **National Bank of Kenya Ltd v Njau [1995-98] 2 EA**, the court held:

> **"The error or omission must be self-evident and should not require elaborate argument to be established. It will not be a sufficient ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review"**

62. The ruling of the learned Judge is also criticised as containing errors on its face and contradicting itself in paragraphs 36, 37 and 38. The criticism is that the learned Judge, after quoting **section 14(8)** of the Act in paragraph 36 of his ruling, and finding in paragraph 37 that the parties:

> **"In effect did not err when the arbitral proceedings went ahead to conclusion even when the applicant had notified the respondent and the arbitrator of its intention to challenge the arbitrator before the High Court….";**

he then contradicted himself by holding in paragraph 38 of the ruling that the application:

> **"…was brought after the arbitrator had already given his final Arbitral Award and Costs Award. Therefore, there was nothing further that the arbitrator could be stopped from doing, as his work had come to an end".**

The applicant argued that in fact its application was not to stop the arbitrator from doing anything, but, inter alia, to disqualify and remove him from his office, so the proceedings could start *de novo*. These arguments are discernible in the application.

63. As I see it, the law is clear that a final award terminates arbitral proceedings as provided in **section 32A** of the **Act.** It is therefore arguable that once the award was delivered the arbitrator became *functus officio*, a position taken by the learned Judge. It is also clear that, as earlier noted, **section 14(8)** suspends the coming into effect an award if there is a pending challenge application. Prima facie, both positions are not mutually exclusive, and I consider, again, that this is a matter of interpretation and is for appeal rather than review.

In the **National Bank case**, the court made the following statement which is apt for this case:

> **"In the instant case, the matters in dispute had been fully canvassed before the Learned Judge who made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of the law, it could be a good ground for appeal and not for review. An issue hotly contested cannot be reviewed by the same court which had adjudicated upon it"**

64. Paragraphs 10 and 11 of the ruling are impugned for failing to appreciate that the arbitrator and Mr Gross, counsel for the respondent herein, both served on the Panel of Mediators of Strathmore Dispute Resolution Centre, and not, as indicated in the ruling, on the Panel of Arbitrators. Further, paragraph 12 is criticised for stating that Mr Gross:

> **"By virtue of being on the Board of SDRC…was said to be privy to and/or responsible for appointing Mr Ngotho as arbitrator"**

The applicant argued that this was factually wrong, as the application had clearly indicated that Mr Gross was a member of SDRC's Board and:

> **"…was privy to and involved in Mr Ngotho's appointment to the Panel of Mediators of SDRC which is accountable to the Board"'**

65. Here, the Learned Judge clearly got the facts here wrong. In the application, before him, the arbitrator was indicated as being on the Panel of Mediators and not that of Arbitrators. In my view, even if the same were corrected, I do not see that there would be any substantive effect on the outcome of the Judge's ruling, as he did not make any holding on the basis of the erroneous fact that the arbitrator was on the panel of arbitrators.

66. The applicant also alleges errors in respect of paragraphs 15 and 16 of the ruling where the Learned Judge held, respectively, that:

> **"The Applicant cited several instances to illustrate how the arbitrator treated its advocate is…(sic)….a shabby manner…."**
>
> and that:
>
> **"…At other times the arbitrator is said to have intimidated or bullied the applicant's advocate…"**

In fact, according to the applicant, the factual position was that the applicant was not represented by Counsel at the material time and it was in fact the applicant's directors that were being mistreated by the arbitrator.

67. I have perused the application which was before the Learned Judge. In Raphael Nourafchan's affidavit dated 22nd March, 2016, the exhibit marked "RN 3" at page 13 contains emails from Mr Nourafchan, dated December 22, 2014, and another at page 34 dated March 11, 2015, which indicate respectively:

> at page 13 :
>
> **"….You have stated that the Respondent has the right to appoint new counsel, if and when desired….<u>Our former counsel was relieved</u> due to due to misrepresenting our interests and misinforming the Tribunal…."**
>
> and at page 34 :
>
> **"As we put on record during our preliminary meeting, one of the reasons <u>our former counsel was relieved of his duties</u> was due to misrepresenting our interests and misinforming the Tribunal on numerous matters including incorrectly stating that our witness statements were prepared or that we had no witness statements….".** (underlining added).

68. Further, I have seen in Exhibit RN3 page 52, a ruling by the arbitrator dated 22nd March, 2015, which at paragraph 26, addressed the issue of representation of the Respondent as follows:

> **"26. The Respondent has stalled twice previously due to the Respondent's failure to submit witness statements <u>while the Respondent was represented by a lawyer</u> and on 30th January 2015 when it had no lawyer…."** (underlining added).

69. Clearly, there is evidence that at some stages of the arbitral proceedings, the applicant (respondent in the arbitration) was represented by counsel. On other occasions, there was no representation. In light of this, the alleged error of the Learned Judge in finding that it was counsel who was intimidated or bullied rather than the applicant's directors does not, in my view, shake the gravamen of the Judge's appreciation of the difficulty faced by the respondent in its representation. The essence of that difficulty was that the applicant's representative at the arbitral proceeding was allegedly bullied or intimidated resulting in their feeling that there was partiality on the part of the arbitrator. I would therefore not interfere with the ruling on that point.

70. In conclusion, on the issue as to whether review the court's decision is merited, on the whole I am not persuaded to disturb the Learned Judge's ruling for the reasons stated. Accordingly, I find and hold that, on its merits, the review would have been unsuccessful.

Disposition

71. The upshot of my determination herein is that on the question whether a review of the Learned Judge's ruling lies, I find and hold that there is no provision for review of a Judge's ruling under section 14 of the Arbitration Act.

72. Further, even had review been an available option, and having analysed the Learned Judge's ruling, I do find on the merits of the application that the review is unsuccessful.

73. For all the foregoing reasons, the application is dismissed with costs to the respondent.

74. As there is on record an application for setting aside the award, the same should now proceed for hearing.

75. Orders accordingly

Dated and Delivered at Nairobi this 2nd Day of May, 2017

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RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

1. ……….……………………...for the Respondent/Applicant

2. ………………………………for the Respondent /Claimant

Court Clerk……………..……....