



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
MISCELLANEOUS CIVIL CASE NUMBER 882 OF 2011

D. MANJI CONSTRUCTION LIMITED.....CLAIMANT

Versus

C & R HOLDINGS LIMITED.....RESPONDENT

RULING

Application to set aside award

- [1] I have before me an application dated 5th December, 2011 which seeks the following orders:
- a. The Arbitral Award dated 5th September 2011 of Mr. Norman Mururu, Quantity Surveyor, F.C.I., Sole Arbitrator filed in this Honourable Court on 27th October 2011 be set aside.
 - b. Stay of Recognition and Enforcement and/or Execution of the said Award herein pending the hearing and determination of this Application.
 - c. In the **ALTERNATIVE**, the Honourable Court to give appropriate Directions/Orders and/or the said Award herein be reviewed and be decided by this Honourable Court.
 - d. Costs of this Application to be paid to the Respondent.

[2] The application is supported by the **Supporting Affidavit of Ravi D. Prinja** sworn on **5th December 2011** and filed in Court on the same date together with the voluminous Annexures thereto comprising of **Pages 1 – 827**. The other grounds in support of the application are as argued below.

[3] For ease of reference, the terms Applicant shall refer to the Respondent in the Arbitral proceedings and Respondent shall refer to the Claimant in the arbitral proceedings.

APPLICANT’S CASE

[4] The Applicant (employer) entered into a building contract (the Agreement)in writing with the Respondent (the Contractor) in the standard form published by The Joint Building Council, Kenya, April 1999 Edition, which both parties executed on 8th November 2005. The said contract was for the erection and completion of Office Block along Waiyaki Way, Westlands in Nairobi. The contract sum was

negotiated for **Kshs. 64,000,000.00**. The evidence is to be found at **Annexure “RDP 1”**.

[5] A dispute arose between and the parties herein. On 2nd May 2008, The Honourable Mr. Norman Mururu was appointed a Sole Arbitrator to determine the dispute. Pleadings were exchanged and the Arbitral Proceedings were concluded. The Arbitrator’s Final Award is dated 5th September 2011 and was collected on **12th day of September 2011** after payment of the Arbitrator’s fees by the parties. See **Annexure “RDP 3”**.

[6] The Applicant urged that under **Section 29 of the Arbitration Act 1995 and the Kenya Branch Arbitration Rules**, the Tribunal is bound to apply the Contract between the parties in adjudicating on matters before it that result from or are a consequence of the subject Contract. But, the Arbitral Award exceeded the scope of the mandate of the Arbitrator. The Arbitrator misapprehended both the contractual documents and the applicable contract law and failed to appreciate that the parties were bound by their contractual terms. Other major objections are that; the Award deviated from the claim before the tribunal; the computation of the Award was erroneous; the Award was against public policy for being contrary to the laws of contract. The Award was, therefore, a nullity.

[7] The Arbitral Award dealt 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 in that:

At page 4 Paragraph 3.2: Extension of Time

- a. “...to complete the story on Extension of Time, I must comment on the report prepared for the Respondent by QS Fredrick Ikiunga. For a start, I observe that Mr. Ikiunga had no direct knowledge of the construction activities on site having come on the scene long after construction was completed. His report is therefore a desk report only.”
- b. A further observation is that the delays are all attributed to the Consultants and none to the Contractor. Consultants being agents of the Employer, the Employer takes responsibility for their actions and omissions.

At page 5 Paragraph 4.0: Practical Completion and Damages for Delay

- a. Using this formula, liquidated damages for delay came to Kshs. $100,000 \times 4 \text{ weeks} = \text{Kshs. } 400,000/=$ which I award to the Respondent against the Claimant.

At page 6 Paragraph 5.0: Final Accounts

- a. Apparently, this version was accepted by the Architect enabling the Quantity Surveyor to convert it to a Final Account on 13th September 2007 in the sum of Kshs. 75,720,783.40.
- b. In other words, the steps taken to compile and conclude the final accounts were taken in conformity with the contract conditions.

At page 8 Paragraph 5.7: Report by QS Fredrick Ikiunga

- a. Regarding the re-measured work he had no quarrel with the way the Quantity Surveyor had dealt with that part of the work. He wrote:
- b. Regarding variations to the contract, Mr. Ikiunga was able to identify instructions for variations either from the Architect or from the Employer. In these instances, he had no objection to the Contractor being paid for the work.

At page 8 Paragraph 5.8: Report by QS Fredrick Ikiunga

- a. Regarding breakdowns and details of build-up of certain specific items it has been explained above that the Respondent contributed greatly to the state of affairs when he declined to settle outstanding professional fees.
- b. In the premises, the extension of time granted by the Architect was in accordance with the terms of the Contractor and is thus valid.

At page 10 Paragraph 6.3: Double Glazing

- a. In my findings, I start by observing that the contract did not call for a “guarantee” to be given by the contractor for the windows or for other elements of the structure, for that matter. To insist on one would therefore be unreasonable, in my view. In light of the detailed explanation of the process and qualities of the windows as installed and the satisfaction of the Architect, I too am of the opinion that the end product is not only satisfactory but that it exhibits qualities that go beyond those expected from double glazing. In result, I hold that no claim can stand against the Claimant in this respect.

At page 10 Paragraph 7.0: Performance of the Consultants

- a. At various times during the progress of the works, the Respondent expressed complaints regarding the performance of the Consultants.
- b. The general complaint was that the Consultants were not acting in the best interest of the Employer.

At page 11 Paragraph 7.0: Performance of the Consultants

- a. I have stated my views on the variations, extensions of time and the final accounts....”

At page 11 Paragraph 7.2: Occupation Certificate

- a. A misunderstanding had arisen earlier when the Structural Engineer had submitted a fee note based on an erroneous construction cost. He had used the figure of Kshs. 80 million instead of Kshs. 64 million. The Architect had failed to notice the error. This made Mr. Prinja livid. Even though the error was corrected and not repeated, he never forgave the Engineer and the Architect. In evidence, he repeated more than once that the Consultants had attempted to blackmail him into paying them money that was not due to them. He went as far as to term it a “**fraudulent scheme**”.

At page 12 Paragraph 7.3: Occupation Certificate

- a. So, to cut a long story short, even though the construction was finally completed to the satisfaction of all parties, developer included, that very important occupation certificate was never issued, even though as I write this award, the building is fully let and occupied. (It appears to me a very reckless step to take whereby the risks may outstrip by far any short term gains enjoyed by so doing).

At page 12 Paragraph 7.4: Occupation Certificate

- a. This notwithstanding, I must state that in the circumstances narrated above, I quite understand the attitude of the Consultants in not wanting to perform further tasks without payment of the balance of their fees. Under these circumstances, I must say that I have no sympathy with a developer who treated his Consultants the way he did and still expected additional services from them.
- b. The upshot of all this is that in my considered opinion and in the circumstances, the actions of the Consultants were justified thus rendering any claims against them by the Respondent invalid.

At page 13 Paragraph 8.0: Outstanding Payments to the Contractor (IPC No. 13)

- a. The Architect being satisfied with the valuation and the draft final accounts, he issued certificate for payment No. 13 (penultimate) on 12th September 2007 in the recommended valuation amount of Kshs. 7,584,434.50 and certified *“that the above amount is due to the contractor within 14 days of issue of this certificate”*.
- b. Again, an action entirely in conformity with the terms of the contract.

At page 13 Paragraph 8.1: Outstanding Payments to the Contractor (IPC No. 13).

At page 14 Paragraph 9.0: Final Payment

At page 14 Paragraph 9.1: Final Payment.

At page 15 Paragraph 10.0: Interest on unpaid Certificates

- a. The Claimant has claimed a rate of 18% p.a. In my assessment, a fair average lending rate during the relevant period of default would work out around 15% p.a. and this is the rate I award.
- b. Total interest comes to Kshs. 4,484,296.90+Kshs. 1,419,764.70 = Kshs. 5,904,061.60 which I award to the Claimant.

At page 15 Paragraph 11.0: Liquidated Damages

- a. I have found above at paragraph 3.0 that the time for completion was validly extended to 31st May 2007. Practical Completion was certified on 30th June 2007, leaving 4 weeks as culpable delay to be charged to the Contractor. The liquidated damages for this period amount to Kshs. 400,000/= as found at paragraph 4.0. above which I award to the Respondent.

At page 16 Paragraph 12.0: Rental Loss

- a. The first thing to note is that the culpable delay has been assessed at only 4 weeks (1 month and not 5 months). Two, the contract contains a remedy for delay in completion which remedy was negotiated by the parties in the form of liquidated damages.

At page 16 Paragraph 13.0: Cost of Finance

- a. The foundation for this claim is essentially the same as that for loss of rent. One additional work went to enhancement of the value of the property which was a direct benefit to the Respondent. Two, delays in completion have been exhaustively dealt with and the applicable liquidated damages awarded.
- b. The risk that the project may take longer, cost more in capital outlay and interest charges, is a risk which was, or should have been reasonably foreseen and adequately catered for in the liquidated damages calculation.

At page 20 Paragraph 17.1: Reasons wherefore I determine Award and direct that:

- a. The Respondent shall pay the Claimant **Kshs. 15,928,025.50** in full and final settlement of claims and counterclaims made in this arbitration.

[8] The Applicant objected to payment of certificates No. 13 and 14 due to outstanding works and lack of a proper breakdown of the final account. In any case, certificate No 14 could not have been due and payable until the Architect had issued certificate of making good defects. A certificate of making

good defects has not been issued to date and therefore the claimant is not entitled to interest as claimed. During the initial site meeting it was agreed that all variations would be counter signed by the Applicant. There are some variations as recorded that were not counter-signed by the Respondent. In other instances, costs were not agreed before the implementation of the variations. It is these variations that the Applicant is objecting to. The Award sum comprises of the certified sums claimed by the Claimant, and the interest accrued thereon. The Arbitrator seems to have penalized the Applicant even for the culpable delays caused by the Respondent during the adjournments at the hearing. The Costs should have been apportioned on a pro rata basis considering the Respondent was found to have delayed the project.

[9] The Arbitral Award is clearly and plainly in conflict with the public policy of Kenya.

[10] The making of the Arbitral Award was induced or affected by undue influence in that the Award contains decisions which cannot be sustained and are contrary to the evidence adduced by the Applicant and then the outright rejection of the said documentary and oral evidence and submissions and legal authorities adduced by the Applicant in defence of the claim against it and in prosecuting its counter-claim.

[11] The Subject matter of the Arbitration is under threat as the Respondent has mischievously filed a Chamber Summons application dated 31st October 2011 and filed in Court on 1st November 2011 seeking to enforce the Arbitral Award sum of Kshs. 15,928,025.50 and the Arbitrator's fees of Kshs. 883,920.00 making a total of Kshs. 16,811,945.50. The mischief is in the fact that; First, it is premature application for the Award dated 5th September 2011 was collected on 12th day of September 2011 after payment of the Arbitrator's fees, and the Applicant, therefore, was to file the requisite application on or before 12th day of December, 2011, which it did. **The 3 months period** provided had not lapsed as to file its **Chamber Summons Application dated 31st October 2011 for enforcement** of the Arbitral Award as a Decree of the High Court. Secondly, the said application was never served upon the Applicant or its counsels for it to respond thereto. The Respondent served the Applicant's advocates with a Notice of the Reading of the Award and not of the said application. The said application is, therefore, brought in bad faith and is in conflict with the provisions of **Section 35 (3) of the Arbitration Act, 1995**.

[12] The Applicant being wholly aggrieved by the Arbitral Award has filed this application herein to move the High Court for appropriate relief; set aside the Arbitral Award as provided for under The Arbitration Act 1995 - for reasons, *inter alia*, of not being in conformity with the spirit and intendment of the **Arbitration Act, 1995**. The Honourable Arbitrator in the Final Arbitral Award in **Clause 17.2 and 17.3** directed that the Applicant should bear the costs of the Reference and shall bear the costs of the Award. The Applicant has, therefore, been unfairly denied Costs of the Reference and of the Award thereby occasioning substantial injustice.

[13] The Honourable Arbitrator erred in fact and in law by having failed to consider the substance of the dispute in accordance with the principles of justice and fairness, and that the award of costs and interest was a discretion injudiciously and capriciously exercised by the Arbitrator. The Honourable Arbitrator thereby made subjective decisions based on too many assumptions all against the Applicant. The Applicant will suffer irreparable prejudice and hardship and it will be in the interest of justice that the Honourable Court gives effect to the parties' intentions by deciding the matter in accordance with the Agreement between the parties and notions of natural justice. The points of law being raised are important and will substantially affect the rights of the parties and the outcome of the award. These are the very questions the tribunal was asked to determine, and, therefore, the Applicant is not raising a new legal argument. The Court must consider that it is just and proper for it to determine the question before it even when the parties had agreed to arbitration as the court has been given a discretionary power to carry out such controversial substantive review.

[14] The Award on the specific findings including the dismissal of the Counter-Claim and also on the issue of interest and costs contains on its face inconsistencies, contradictions and errors of fact on material issues and serious misinterpretations of the Contract Conditions and which offend the notions of justice in the construction industry and are contrary to public policy and which have occasioned a substantial miscarriage of justice. The Final Arbitral Award is patronizing and appears to reprimand the Applicant

for the stand it has taken in the arbitral proceedings as the Honourable Arbitrator failed to properly exercise his discretion.

[15] **Clause 30:** deals with Variations; **Clause 34:** deals with Payments. By **Clause 34.8** of the Contract, the Architect may, by a subsequent or supplementary certificate, make any correction, amendment or modification to any previously issued certificate and shall have the authority, if work is not carried out to his satisfaction, to omit or reduce the value of such work in any certificate. By **Clause 34.12** of the Contract, the Respondent may retain **10%** of the total value of the sums certified in the Payment Certificates. By **Clause 34.23:** Save as aforesaid, no certificate shall of itself be conclusive evidence that any Works, materials or goods to which it relates are in accordance with this contract.

[16] **Clause 36: deals with Extension of Time:** Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice of the causes of the delay to the Architect with supporting details showing the extent of delay caused or likely to be caused. Thereafter the Architect shall evaluate the information supplied by the Contractor and if in his opinion the completion of the Works is likely to be or has been delayed beyond the date for practical completion stated in the appendix to these conditions beyond any extended time previously fixed under this clause:

Clause 36.2: Then the Architect shall so soon as he is able to estimate the length of the delay beyond the date or time aforesaid, but in any case not later than thirty days after receiving the application for extension of time in the manner prescribed, make in writing a fair and reasonable extension of time for the completion of the Works.

Clause 36.4: The Contractor shall use constantly his best endeavours to prevent delay and shall do all that may reasonably be required of him to the satisfaction of the Architect to proceed with the Works.

Clause 36.8: All applications for extensions of time and all decisions on the same shall be copied to the Employer at the time of the application or decision, as the case may be.

[17] **Clause 41.0:** deals with **Practical Completion and Defects Liability.**

Clause 41.0: When in the opinion of the Contractor the whole of the Works are practically complete, he shall give a notice in writing to the Architect to that effect. The notice shall be accompanied by an undertaking to complete any outstanding work within a reasonable time or within such time as the Architect may direct.

[18] **Clause 43.0:** This Clause deals with **Practical Completion and Defects Liability.**

Clause 43.1: If the Contractor fails to complete the Works by the date for practical completion stated in the appendix to these conditions, or within any extended time fixed under Clause 36.0 of these conditions, and the Architect certifies in writing that in his opinion the same ought reasonably so to have been completed, then the Contractor shall pay or allow to the Employer a sum calculated at the rate stated in the said appendix as liquidated damages for the period during which the Works shall so remain or have remained incomplete, and the Employer may deduct such sum from any money due or to become due to the Contractor under the contract or recover the same from the Contractor as a debt.

[19] **Clause 45.0:** deals with **Settlement of Disputes.** All the **Clauses** of the Contract will also be relied upon by the Applicant for their full purport, meaning and scope.

[20] The Applicant submits that the contract terms and conditions and evidence were clearly and wholly misinterpreted by the Arbitrator regarding the determination and subsequent findings regarding: 1) PRACTICAL COMPLETION DATE especially the finding that; the Contract commencement and completion dates were 13th March 2006 and 15th January 2007 respectively; that some variations were agreed upon shortly after commencement of works; extension of Time to 5th February 2007 was

tentatively agreed in **Site Meeting Number 9** and subsequently confirmed in **Site Meeting Number 10** (see minute 2.1) [pages 251 to 253 of Annexure “RDP 1”] which reads “**main contractor confirmed having issued a revised program to Architect and this was accepted in principle on the understanding that main contractors would make every effort to bring the project back on schedule**”: 2) That the Applicant reluctantly accepted the extension of time to 5th February 2007. However, and notwithstanding this, the Claimant had not formally applied for extension of time, as required under the provisions of **Clause 36** of the Conditions of Contract [pages 36 to 38 of Annexure “RDP 1”]. **The Claimant did not adhere to its own programme of Works despite it’s own promises to do so. The Claimant vide it’s letter dated 20th March 2007 to the Architect stipulated yet another undertaking to complete by the completion date of 25th May 2007, but failed to adhere even to this date.**

[21] The Project Architect- David Beglin vide his letter dated 4th May 2007 to the Claimant [pages 433 of Annexure “RDP 1”] wrote as :

“... We are concerned that the date of completion of the building is postponed almost on a weekly basis without any formal communication regarding extension of time or stating what you are doing to bring the project to completion.

It is clear from the client’s letter that both practical and financial inconveniences are being suffered by the client due to none completion of the building and that potentially valuables tenants may be lost in the process...”.

The Project Architect- David Beglin yet again vide his letter dated 24th May 2007 to the Claimant [pages 437 of Annexure “RDP 1”] wrote as :

“... The client has asked us to advise you that the contract is imminent of exceeding the date by which you committed and the client fears further financial losses due to the inability of tenants to make a commitment regarding occupation of the building with a subsequent loss in rent...”

Kindly advise in writing the apparent disregard for the urgency in completing the project.....and the status of the domestic subcontract

From the writers observation of 21/5/2007 we see no reason why the building cannot be handed over 100% complete by the date specified by yourselves if the appropriate manpower is put on site.”

[22] **The Arbitrator’s findings** at page 5 Paragraph 4.0: Practical Completion and Damages for Delay is a complete misinterpretation of the issue of the damages for Delay. It is the Applicant’s contention that Administration and Management of extension of time has not been handled properly throughout the contract. **Clause 36** of the contract conditions sets out seventeen reasons that can be relied upon by the contractor to apply for extension of time. Evaluation for extension of time by the Architect can only be undertaken **within 30 days** after the occurrence of events listed in **Clause 36**. It would be noted that all applications for extension of time and all decisions on the same should be copied to the Employer (client) at the time of application or decision as the case may be. **Therefore, the Respondent contends that the contract completion date was extended to 5th February 2007. Having established the validly approved extension of time as 5th February 2007, the Claimant has to be charged liquidated and ascertained damages at the rate of Kshs. 100,000.00 per week or part thereof from 5th February 2007 to 30th June 2007, the practical completion date.** It should be noted that although the Practical Completion Certificate is dated 2nd July 2007, [page 447 of Respondent’s Annexure “RDP 1”] the Architect has erroneously stated that the practical Completion Date is 30th June 2005. Had the Arbitrator adhered to his duties as defined by the **Architect and Quantity Surveyors Act (Cap. 525, Laws of Kenya)** and as required under the duties and powers bestowed under the Contract Conditions, in

particular **Clause 43.1: Damages for Delay In Completion**, the Respondent contends that the issue of delay could have been properly, correctly and promptly dealt with.

[23] The Applicant further submitted that Mr. David Beglin then attempted to justify the Respondent's position vide Mr. David Beglin's letter dated 11th December 2007 to the Applicant and copied to the Respondent and the Project Quantity Surveyor **unequivocally stated**, *inter alia*, the following:

"...in our meeting of 6/12/2007 you suggested that the building was 4 months late...That out of the 4 months by which the building was late one of those month's would be justifiable by the main contractor due to alterations in the scope of work and late instructions regarding the design....."

The remaining 3 months are not capable of justification by this office as lead architects, and we therefore suggest that liquidated damages are awarded in your favour for these 3 months.

However in view of the relative financial hardships suffered by both parties we would recommend that both parties share the liquidated damages and a sum of Kshs 600,000/= is awarded in your favour from the liquidated damages and the balance due to the contractor would fall due under the terms of the contract...."

[24] The Applicant stated that the Project Quantity Surveyor vide letter dated 29th September 2007 to the Applicant clearly admitted that **" At the stipulated rate of Kshs. 100,000.00 per calendar week..., you would be entitled to recover an amount of Kshs. 429,000.00 inclusive of VAT from the Main Contractor as Liquidated Damages..."** It is the Applicant's humble submission that the Arbitrator was biased to the extent of being influenced in favour of the Professionals on the project considering that the Project Architect had failed to take into account his own figures of Liquidated damages in the Final Account despite clear and unambiguous admissions by both the Project Architect and the Project Quantity Surveyor that the Applicant is contractually entitled to deduct the Liquidated and Ascertained Damages from the sums payable to the Respondent, the issue of a Certificate of Delay notwithstanding. The Respondent will claim the Liquidated Damages against the Claimant as a debt (under the provisions of Clause 43.1 of the Conditions of Contract. **The Applicant submitted that the total amount to be charged to the Respondent due to delay in completing the works is 20.7 weeks x Kshs. 100,000.00 = Kshs. 2,070,000.00. The Arbitrator's findings** at page 6 Paragraph 5.0: Final Accounts is, therefore, erroneous as the final accounts were not taken in conformity with the contract conditions. There was a responsibility on the Arbitrator to demonstrate he had analyzed the evidence in support of the position arrived at. The Arbitrator did not consider the pleadings before him and thus failed to decide on terms of contract. Fairness would only have been achieved if the arbitrator had ordered for a breakdown of the sums arrived at in the Final Account to be availed before him, which the Honourable Arbitrator did not do. The consultants are reluctant to release it to C & R Holdings following the Applicant's claim that there are some discrepancies. It is worth noting for example that the prime cost sum for electrical installation is **Kshs. 3,600,000.00** but the final account is about **Kshs. 10,000,000.00** which is **78%** more than the prime cost sum. The Applicant did not sign the Final Account Sum as presented by the Project Quantity Surveyor for the reasons enumerated hereinabove, which are stated in the and Statement of Defence and Counter-Claim herein. It is beyond peradventure that the Respondent was at all material times aware of the issues raised by the Applicant on Certificate Number 13, the Occupation Certificate and the Final Account issues. There is doubt whether Certificate Number 13 and the Final Account were validly issued, and therefore payable in the sums certified to the Respondent.

[25] To that extent, the Arbitrator failed to decide the matter in terms of the Contract between the parties against the provisions of Section 29 of the Arbitration Act. The Applicant reads that the Arbitrator had a clear bias and failed to treat parties equally contrary to Section 19 of the Arbitration Act. The bias is demonstrated by the Arbitrator's total ignorance of the overwhelming oral and written evidence adduced by the Respondent. There was thus a complete misconstruction of the agreement amounting to an error of law. The Respondent further submits that the failure by the Arbitrator to consider all the pleadings was a fundamental and substantial error of law, and for which this Honourable Court should now intervene and set aside the Arbitral Award. The arbitrator's findings at page 7 Paragraph 5.7: at page 8 Paragraph 5.8:

were erroneous.

[26] The Applicant also contended that the Claimant had in fact abandoned the Project for four months because of working on another project in Kabete, with the same Consultants who were supposed to be acting for the Applicant on their Project at the time. The Applicant drew the Court's attention to the fact that the Claimant only produced copies of the Project Site Diary from 03/04/2006 period to 29/12/2006, **and conspicuously withheld material information relating to the period from 01/01/2007 to 30/06/2007 when the Claimant had abandoned the site and from the period - Defects liability period from 1/7/2007 to 31/12/2007. Despite this pertinent piece of evidence on the Respondent's poor performance on the project contributing to the Respondent's culpable delay, the Arbitrator did not consider this evidence nor did the Arbitrator make a specific finding regarding it. The subsequent award of damages on the liquidated damages is, therefore, erroneous as it reflects an entirely erroneous estimate or the Arbitrator proceeded on wrong principles or misapprehended the evidence in some material respect and so arrived at an erroneous decision.**

[27] The Applicant further averred that as at the time of handing over the Project on 31st June 2007, the following works were not completed by the Claimant:

- a. The Supply and Installation of double glazing ;
- b. Erection of the Lift Shaft;
- c. Canopy;
- d. Water Fountain Foundation;
- e. Fire Escape staircase;
- f. Two side doors in the Showroom were not replaced;
- g. The Generator was not properly installed or connected;
- h. The Transformer was not connected to the Main Electricity;
- i. The Drive-Way Cabro works was shoddy and was not even complete;
- j. The Old Electrical meter was still hanging around till October 2007;
- k. The Double Glazing Panels were faulty and water was leaking into the building after installation;

[28] The Arbitrator's findings At page 10 Paragraph 6.3: Double Glazing was erroneous as the Bills of Quantities clearly stipulate 6mm thick dark blue double glazing "**Stopsol**" glass or other equal and approved as per **the Specifications and Bills Quantities**. From the correspondence in the file the specification was changed but to – date, a letter of guarantee by the sub-contractor has not been submitted. Ordinarily, payment should have been deferred until the letter of guarantee was submitted. On the issue of double glazing, the Applicant relied on the letter at **page 527 of Respondent's Annexure "RDP 1"** from one of the prospective tenants Stalstek Systems dated 8th January 2007 to the Respondent states:

"We visited the site last week and noted that the windows do not have double glazing to protect us from the heavy noise to vehicular traffic..."

The glazing type also appears not to be able to shield the users from sunshine..."

[29] This evidence was not considered for it would have occurred to the Arbitrator that his finding that the double glazing was acceptable is not supported by the evidence adduced on this issue. The

Honourable Court should now delve deeper into the findings of the Arbitrator made in view of the evidence or materials that were before him. It is the Applicant's considered opinion, that the Arbitrator's wording and views of the impugned Paragraphs in his Award has cast doubt on the foundation of the Arbitrator's findings. The Arbitrator had been fully addressed by the parties on the nature of the alleged breaches or damages but he did not state those matters were pivotal in determining the matters before him. Paragraph 6.3: Double Glazing, is one example that the arbitrator went beyond the agreement between the parties and particularly Rule 8 of the Arbitration Rules of the Chartered Institute of Arbitrators of Kenya. The Arbitrator at that stage should have ordered the parties to produce other documents or to address him further on those pivotal matters of the breaches or damages.

[30] Looking at the findings of the arbitrator, the Applicant submitted that the Arbitrator decided matters outside his jurisdiction. He outwent the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary".

[31] The Arbitrator made a finding of the figure of KShs. 946,509.80 for cost of defects when no evidence was produced by either party of this abstract figure based purely on assumptions and contrary to the contract conditions between the parties. There is no clear legal basis for the discounts on damages that he liberally grants thereby shaking the foundation of the initial Award. No evidence supported his finding on interest rates. The interest rate applied by the Arbitrator is an abstract figure based purely on assumptions. No party submitted on or was invited to submit of the interest rate of 15%. The period charged up to 5th September 2011 is prejudicial to the Applicant for it was wrongly penalized to pay for interest when the Arbitral proceedings were delayed by the Respondent in seeking several adjournments necessitating delay in the Arbitral Hearing. The court is invited to the following principles of law:

"But even Steyn LJ conceded at page 231 that "what is a question of law in a judicial review case may not necessarily be a question of law in the field of consensual Arbitrations".

*We find the passage in **Edwards v Bairstow [1956] AC 14 at 36** more illuminating and persuasive.*

"I think that the true position of the Court in all these cases can be shortly stated. If a party or a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the Court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the Court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law".

[32] The Applicant contended that evidence was led to show that the Respondent vide it's letter dated 12th November 2007 to the Applicant expressly acknowledged the issue raised by the Respondent pertaining to the Certificate Number 13 issued on 12th September 2007 in the sum of Kshs. 7,584,434.50, the Final Account dated 13th September 2007, and which certified the Final Account in the sum of Kshs. 75,720,783.40. The attention of this Honourable Court is drawn to all interim payment certificates numbers 1 to 12- Certificate No. 12 dated 31st July 2007 showed Kshs. 64,000,000.00 as the contract value while interim payment certificate number 13 [Certificate No. 13

dated 12th September 2007 showed Kshs. 75,720,783.40 which is a substantial increase. The Project Quantity Surveyor was under not only a statutory obligation but also under a contractual obligation to submit to the Respondent from time to time a Financial Appraisal Report regarding the contract sum, and more importantly to include in all subsequent interim payment certificates the value of all valuations to the contract sum, and not to do so at the issuance of the penultimate interim payment certificate. Mr. Bashir Hajee gave no credible reason for his abdication of his professional duties as the Project Quantity Surveyor as a Valuer for failing to give the Applicant the Financial Appraisals despite repeated requests. Mr Bashir Hajee in his e-mailed letter dated 5th February 2007 to the Respondent expressly acknowledges the following:

“.....Obviously there are some misunderstandings... so that we can iron out the misunderstanding and clarify the figures to your satisfaction....”

And the Project Architect – David Beglin vide his letter dated 8th February 2007 to Mr. Bashir Hajee also agreed that :

“....certain items were been overtly and excessively overpriced...., and required justification to convince the client (the Respondent)...!”

[33] It is therefore averred by the Applicant that in view of the foregoing, there is no clear legal basis for the Arbitrator accepting the Final Account. The arbitrator then without any basis found that **the “Professionals were not blameworthy at all”** thereby shaking the foundation of the **Arbitral Award**. See **MERTON v LEACH**. It is clear in the light of the decision of the Court of Appeal in *Crouch* that an Arbitrator appointed under Clause 35 does not perform a purely arbitral function. The nature of his function, the Applicant thought, is most clearly put in a short passage at [1984] QB 671; 26 BLR 33-4 where Sir John Donaldson stated that:

“In principle the exercise by a Court of the powers conferred by the JCT Contract upon the Arbitrator appointed for the purposes of that Contract seems to me to involve the exercise of completely novel jurisdiction. The function of the Courts is to determine facts and to declare and enforce the contractual rights of the parties. It may be retorted that the same comment can be made about the functions of an Arbitrator, and this I would accept. However, the truth of the matter is, I think, that the Arbitrator appointed under a JCT Contract has a double function. He has first the right and the duty to review the Architect’s decisions (in which I include Certificates, Opinion, Requirements and Notices) and, if appropriate, substitute his own. Second, he has to declare the rights of the parties on the basis of the situation produced by his own revising activity. The latter is truly an Arbitrator’s function. The former is not”.

The case of **UNIVERSITY OF NAIROBI v N. K. BROTHERS LIMITED: CIVIL APPEAL NO. 309 OF 2002, COURT OF APPEAL AT NAIROBI** is also important on Clause 36, issuance of final certificates and interest rate payable in the event of default to pay in due time. In the present case, the Arbitrator’s findings at page 15 Paragraph 11.0: Liquidated Damages and that the Architect wrongly proceeded to issue the **Certificate of Retention** on 13th March 2008 without first issuing a **Certificate of Making Good Defects** as mandatorily required, and further abdicated his duties by erroneously issuing the Final Certificate No. 14 were contrary to what Mr. Beglin had said in his letter dated 8th October 2007 to the Applicant that:

“The building is now in a 6 months defects period from the date of practical completion. At the end of this period we will do a defects inspection and request the contractor to rectify defects accordingly. When this is done to our satisfaction a final certificate will be issued.”

According to the Applicant, the Arbitrator failed to set aside the **Certificate Number 14** as he was contractually empowered to do in the circumstance of this matter under **Clause 45.9**: This Clause deals with **Settlement of Disputes** and states as follows:

Clause 45.9: The Arbitrator shall, without prejudice to the generality of his powers, have powers to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given.

[34] The Applicant asks this Honourable Court to up-hold the following basic minimum principles of Arbitration practice and procedure which the Arbitrator did not uphold:

- **“The parties are entitled to assume that the tribunal will base its decision solely on the evidence and argument presented by them prior to the making of the award and if the tribunal is minded to decide the dispute on some other point, the tribunal must give notice of it to the parties to enable them to address the point”.**
- m. **“If the Arbitrator decides the case on a point he has invented for himself, he creates surprise and deprives the parties of their right to address full arguments on the case which they have to answer”.**
- **The Arbitration Act at Section 29 (5)** mandates the Arbitrator to decide the matter in accordance with the terms of the contract taking into account the usages of the trade applicable to the particular transaction.
- The Respondent submits that it is unable to say the award was truly faithful to that legal provision.

[35] The Arbitrator failed to consider the common law damages that are applicable as **alternative pleadings** to the liquidated damages Clause as he was legally empowered to do in the circumstance of this matter. **Clause 43.1:** This Clause deals with Liquidated damages and which clause was never applied by the Professionals to deduct the liquidated damages. The Applicant provided a tabular expression of the claim as below:

RENT LOSS

[SCHEDULE A]

15 th February 2007	- Kshs. 968,200.00
March 2007	- Kshs. 1,936,400.00
April 2007	- Kshs. 1,936,400.00
May 2007	- Kshs. 1,936,400.00
June 2007	- Kshs. 1,936,400.00
July 2007	- Kshs. 1,936,400.00
August 2007	- Kshs. 1,936,400.00
15 th September 2007	- Kshs. 968,200.00
	Kshs. 13,554,800.00

The Applicant is entitled to the said sum of Kshs. 13,554,800.00 which it claims from the Respondent as reimbursement for the cost of finance arising from a loan borrowed from the bank to finance the project, and paid interest on such borrowing. The Applicant has also suffered loss and damage and which it

claims as special damages. The Applicant claims the sum of **Kshs. 3,761,504.68** which is the figure that was given by **Mr. John Muriithi Gitahi (The Auditor)** - an Accountant with the firm of Anant S. Bhatt & Co. in his evidence. See the Arbitrator's findings at page 16 Paragraph 13.0: Cost of Finance that:

- a. The foundation for this claim is essentially the same as that for loss of rent. One additional work went to enhancement of the value of the property which was a direct benefit to the Respondent. **Two, delays in completion have been exhaustively dealt with and the applicable liquidated damages awarded.**
- b. The risk that the project may take longer, cost more in capital outlay and interest charges, is a risk which was, or should have been reasonably foreseen and adequately catered for in the liquidated damages calculation.

[36] According to the Applicant, despite overwhelming evidence on Financing Charges, the Arbitrator rejected the claim on entirely non-contractual reasons. The loans were borrowed specifically for the construction of the project and were time factored. The loan agreements for **Kshs. 65,000,000.00 at pages 557 to 567 of Respondent's Vol. 2; and for Kshs. 15,000,000.00 at pages 568 to 577 of Respondent's Vol. 2** were produced. Had the Respondent completed the works on time, the Applicant would not have had to pay for the interest penalties and which accumulated and increased subsequently, and for the further loan that the Applicant was compelled to borrow as a direct consequence of the delay by the Claimant in completing the project on time. At all material times, the Respondent and the Professionals were aware of the Applicant's specific borrowing and repayment schedules. Bank Statements [page 672 to 673 of Respondent's Vol. 2] including the Statement on the Financial Losses suffered by the Applicant dated 15th September 2010 and signed by Mr. A. A. Bhatt were produced before the Honourable Arbitrator on 3rd November 2010. A tabular expression of the additional documents in support of the claim by the Applicant before the arbitrator is as below:

No.	Date	Ref.	From	To.	Page
1.	15.6.2006	Loan of Kshs. 65 Million	Diamond Trust Bank	C&R Holdings	557-567
2.	3.5.2007	Loan of Kshs. 15 Million	Diamond Trust Bank	C&R Holdings	568-577
3.	7.5.2007	Letter	C&R Holdings	Diamond Trust Bank	578
4.	9.5.2007	Letter	C&R Holdings	Diamond Trust Bank	579
5.	Undated	Schedule	C&R Holdings		580
6.	13.4.2007	Letter	C&R Holdings	Beglin Woods	581
7.	30.4.2007	Letter	C&R Holdings	Beglin Woods	582

[37] The above claim was supported by the evidence of Mr. Ravi Prinja and **Mr. John Muriithi Gitahi (The Auditor)** - an Accountant with the firm of Anant S. Bhatt & Co. The basis of the computation was explained in meticulous detail and fervour by Mr. Gitahi. All back-up documents, the bank rates as applied to the computations were explained coherently and convincingly by Mr. Gitahi. Mr. Gitahi also gave evidence on the Additional Costs of **Kshs. 7,986,614.40** due to the additional loan of **Kshs. 15,000,000.00** borrowed by the Applicant, and Penalties in the sum of **Kshs. 116,833.37** on the consolidated loan.

[38] Further and in the alternative, and without prejudice to the other claims pleaded, the Applicant claimed the sum of Kshs. 2,070,000.00 + Kshs. 13,554,800.00 + Kshs. 3,761,504.68 + Kshs. 7,986,614.40 + Kshs. 116,833.37 making an aggregate sum of Kshs. 27,489,752.45 with interest thereon or any other reasonable sum the Honourable Tribunal may deem fit to award. The aforesaid circumstances entitled the Applicant to claim for Special Damages, and which was wrongly disallowed by the Arbitrator. The arbitrator at page 20 Paragraph 17.1 erroneously awarded the Respondent a sum of **Kshs. 15,928,025.50** in full and final settlement of claims and counterclaims made in the arbitration. The Applicants wrongly dismissed the Applicant's claims and wrongly awarded the Respondent. The Arbitrator meandered beyond his boundaries and of the contract between the parties, trade or usages applicable, it is safe to say he has exceeded his jurisdiction and gone beyond the contemplation of the parties. The court can disturb the Award where the Arbitrator proceeded on wrong principles or **"misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low"**.

[39] The Applicant gave a summary of its case: That it objected to payment of **Certificates No. 13 and 14** due to outstanding works and lack of a proper breakdown of the final account. In any case, Certificate No 14 could not have been due and payable until the Architect had issued certificate of making good defects. A certificate of making good defects has not been issued to date and therefore the claimant is not entitled to interest as claimed. The Applicant contended that the Arbitrator wrongly discarded evidence of Mr. Ravi Prinja without stating any reasons in his Award. Mr. Ravi Prinja had personal involvement in the Project, and during the initial site meeting it was agreed that all variations would be counter signed by the Applicant. There are some variations as recorded that were not counter-signed by the Applicant. In other instances, costs were not agreed before the implementation of the variations. It is these variations that the Respondent is objecting to. The Arbitrator seems to have penalized the Applicant for the culpable delays caused by the Respondent during the adjournments at the hearing. The Costs should have been apportioned on a **pro rata basis** considering the Respondent was found to have delayed the project. All the aforesaid circumstances show the Arbitral Award is clearly and plainly in conflict with the **public policy of Kenya**. Although public policy can never be defined exhaustively, it is established on proof of some element of illegality or injurious to the public good or something wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers are exercised. See the case of **DEUTSCHE SCHACHTBAU v SHELL INTERNATIONAL PETROLEUM & COMPANY LTD (1990) 1AC 295, COURT OF APPEAL**. It is the Applicants further contention that the making of the Arbitral Award was induced or affected by undue influence in that the Award contains decisions which cannot be sustained and are contrary to the evidence adduced by the Respondent and then the outright rejection of the said documentary and oral evidence and submissions and legal authorities adduced by the Respondent in defence of the claim against it and in prosecuting its counter-claim. The Subject matter of the Arbitration is under threat as the Respondent has filed but not served its Chamber Summons application dated 31st October 2011 and filed in Court on 1st November 2011 seeking to enforce the Arbitral Award sum of Kshs. 15,928,025.50 and the Arbitrator's fees of Kshs. 883,920.00 making a total of Kshs. 16,811,945.50. The Honourable Arbitrator erred in fact and in law for failing to consider the substance of the dispute in accordance to the principles of justice and fairness, and that the award of costs and interest was a discretion injudiciously and capriciously exercised by the Arbitrator. The Honourable Arbitrator thereby made subjective decisions based on too many assumptions all against the Respondent. The Applicant will suffer irreparable prejudice and hardship. The disputed points of law are not new legal arguments for they were raised before the arbitrator but he failed to determine them. Thus, the Arbitrator misconducted himself. The Arbitrator has made an error of law apparent on the face of the Award and in that regard **Section 17 (2) of The Arbitration Act, 1995** comes in to aid the Applicant as the said provision states **inter alia**, that it matters not that a party participated in the appointment of the Arbitrator. A party is not precluded from relying on the said statutory provision either to challenge the jurisdiction of the Arbitrator or to have the Arbitral Award set aside. The challenge to the arbitrator's Jurisdiction is not on the appointment procedure of the Arbitrator **per se** but on whether the Arbitrator had Jurisdiction to deal with the substantive issues. The court should invoke its discretionary to limit such controversial substantive review and set aside the award dated 5th September 2011 of Mr. Norman Mururu, Quantity Surveyor, F.C.I., Sole Arbitrator filed in this Honourable Court on 27th October 2011 or reasons above and **inter alia**, for not being in conformity with the spirit and intendment of the Arbitration Act, 1995. The Applicant also asks this Honourable Court to Order a Stay of

Recognition and Enforcement and/or Execution of the said Award pending the hearing and determination of this Application.

[40] The Applicant gave a detailed treatment of the question of jurisdiction. **That Jurisdiction cannot be conferred by default even where parties fail to raise the issue and proceeds with the arbitral process. The Tribunal itself can and ought to raise the issue or deal with it as envisaged under sections 17 (3) and 17 (5) of the Arbitration Act, 1995 once any party raises it at any point during the proceedings:** a position taken by the Court of Appeal in the case of **LALJI v LALJI & OTHERS (1998) LLR703 (CAK)** when it held *inter alia*:

- i. **The issue of Jurisdiction can be raised at any stage of the proceedings.**
- ii. **The Court can itself raise the issue of Jurisdiction during the hearing.**
- iii. **Failure to challenge a Court's Jurisdiction will not confer Jurisdiction if indeed the Court did not have Jurisdiction.**

[41] The Applicant beseeched the Honourable Court to follow the above judicial decision and find that the Tribunal had no Jurisdiction to deal subjectively with the issue of awarding interest, deduction of liquidated damages and dismissal of the Counter-Claim especially taking into account the Professionals express finding that the Respondent had delayed completion of the project, and failed to comply with the contract terms on completing the project on time. The Applicant feels that kind of finding will be in perfect harmony with the provisions of section 29 (5) and Rule 17 (2) of the C.I.Arb (Kenya Branch) June 1998 Edition which are applicable in this reference.

[42] The Applicant urges the Honourable Court to dismiss the Respondent's tenuous Replying Affidavit by Mr. Devshi Manji sworn on 23rd January 2012 and filed in Court on the same date for it comprises of allegations which are speculative, hearsay and not based on factual grounds. The source of the information or knowledge of the evidence thereof is not disclosed. There is no evidence adduced to support any contention of the Respondent. The annexures (documents) to the said Mr. Devshi Manji's Replying Affidavit should be expunged as the deponent has failed to identify the relevance of the documents to the Replying Affidavit. The Respondent has thrown some 403 pages of documents at this Honourable Court, and this Honourable Court is now expected to identify the documents and their relevance, if any, an exercise in futility. The documents should also be disregarded for they are for failing to properly mark them. Paragraphs 4, 5, 9, 10, 11, 12, 13, 14, and 15 and 20 of the said Mr. Devshi Manji's Replying Affidavit should be struck out as they offend the provisions of Order 19 Rule 3(1) of Civil Procedure Rules 2010, [CAP 21], Laws of Kenya, and are not confined to facts. What is startling is that the Applicant gave a specific answer to Paragraph 9 of Mr. Devshi Manji's Replying Affidavit sworn on 23rd January 2012 and filed in Court on the same date and stated that "DM1" contains documents which the Applicant has already produced in its Supporting Affidavit and gave the following catalogue of the identical documents:

- b. Pages 59 to 60 of the Respondent's "DM1" are identical to pages 325 to 326 of Applicant's "RDP 1".
- c. Pages 61 to 62 of the Respondent's "DM1" are identical to pages 402 to 403 of Applicant's "RDP 1."
- d. Pages 123 to 126 of the Respondent's "DM1" are identical to pages 223 to 226 of Applicant's "RDP 1."
- e. Page 151 of the Respondent's "DM1" are identical to page 356 of Applicant's "RDP 1."
- f. Page 321 of the Respondent's "DM1" are identical to page 481 of Applicant's "RDP 1."
- g. Page 331 of the Respondent's "DM1" are identical to page 493 of Applicant's "RDP 1."
- h. Pages 26 to 315 of the Respondent's "DM1" are identical to pages 1 to 50 of Applicant's "RDP 1."

1.”

[43] The Applicant stated that contrary to **Paragraphs 18, 19 and 20** of the Replying Affidavit: this application herein is not an abuse of the Court process as the Applicant is exercising its statutory right to apply in Court for relief; the application is not incompetent as it is statutorily permitted under the provisions of The Arbitration Act, 1995; and the fact that the Respondent participated in the Arbitral proceedings does not preclude the Applicant from invoking the provisions of The Arbitration Act, 1995 – including sections 19, 29 (3), (4), (5), 35 (1), (2) (a) (iv) and (vi), 35 (2) (b) (ii) and 35 (3), 37 (1) (a) (iv) and (vii), 37 (1) (b) (ii), and 39 (1) (b), 39 (3) (b) to seek interim relief and appropriate orders from this Honourable Court.

[44] Also, the Applicant did not see any necessity of filing a Supplementary Affidavit pursuant to leave of the Honourable Court granted on 26th January 2012 in response to the Respondent’s said Replying Affidavit as no new issues are raised, and the Respondent reiterates its earlier response (the contents of the Supporting Affidavit) herein to avoid repetition and to avoid wasting precious judicial time on issues already submitted to hereinbefore. In sum, the Arbitral Tribunal did not consider the Counter Claim justly and the Arbitral Award is manifestly in conflict with Section 19 of the Act and Rule 16 (c) 10 of the “CI Arb June 1998 Rules” which requires *equal treatment of parties* and *fair opportunity for each party to present its case regarding the cross claims*.

[45] On prejudice being occasioned on the Respondent, the Applicant is of the view that none will be so suffered by the Respondent as the Applicant provided through its bankers – Diamond Trust Bank Limited, a Bank Guarantee dated 20th February 2012 (Ref: CORP/349/MJ/SV/zk/2012), and filed in Court on 22nd February 2012 essentially securing the Arbitral Award Sum in the sum of Kshs. 16,811,945.50. The guarantee is security for the said sums pending the hearing and determination by the High Court of this Application herein and/or any further Orders of the Court. The *status quo* should, therefore, be maintained and/or preserved. The Honourable Court should invoke the mandatory provisions of Sections 1A and 1B of the Civil Procedure Act [CAP 21], Laws of Kenya and deal justly with the matter before it and uphold the principles enshrined and/or propounded in the **overriding objectives**. This Honourable Court should give effect to Article 159 (1) (d) of the Constitution of Kenya, 2010 and administer justice without undue regard to procedural technicalities.

[46] The Applicant cited elaborately the relevant provisions of the Arbitration Act and also passages of decided cases in support of its positions stated in the submissions. The Applicant was categorical that as a general rule, this court will not interfere with an award made by an arbitrator. However, there are certain instances when the court can intervene under **Section 35(2)(a)(iv)** of the **Arbitration Act**; where the arbitrator has exceeded his jurisdiction by determining a dispute not contemplated or not falling within the terms of reference to arbitration; or if it appears that the decisions contained in the award related to matters that were beyond the scope of reference to arbitration. Under **Section 35(2)(b)** of the **Act**, an arbitral award may be set aside if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Kenya or if the award is in conflict with the public policy of Kenya. The **Arbitrator was rewriting the contract between the parties**. There is real fear and apprehension that the Applicant’s legal rights will be adversely affected unless this Honourable Court intervenes immediately and orders the subject matter to be preserved.

RESPONDENT’S SUBMISSIONS

[47] The Respondent opposed the application dated 5th December 2011 seeking the setting aside of the Arbitral Award dated 5th September 2011. Section 35(1) of the Arbitration Act provides that recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under sections (2) and (3). By the application dated 5th December 2011 was filed this court had already allowed the application for recognition and enforcement of the Award as a Decree of the court. A decree to that effect has already been issued by this court. No leave to appeal has been sought by the Applicant and no appeal is pending to date. The Applicant was represented by counsel during the hearing of the application for recognition and enforcement of the award.

[48] The above position notwithstanding, the Respondent submitted that Section 35(2) of the Arbitration Act sets out the reasons on which an arbitral award can be set aside. The relevant provisions of this sub section are:

35(2) An arbitral award may be set aside by the High Court only if –

a. The party making the application furnishes proof –

(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 the provisions of this act from which the parties cannot derogate; or failing such agreement, was not in accordance with this act; or

b. (ii) the award is in conflict with the public policy of Kenya.

[49] According to the Respondent, the provisions of section 35 (2) (a) (iv) require the party applying to show what it is that was not contemplated by terms of the reference to arbitration. Paragraph 12 of the Supporting Affidavit of Ravi D. Prinja, sets out what the Applicant considers the award dealt with but was not a dispute contemplated by or falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration. It is imperative to look at the arbitration clause as contained under clause 45.0 of the contract entered into between the parties herein. My Lord Clause 45.0 states as follows:

45.0 Settlement of disputes

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

45.2 The arbitration may be on the construction of this contract or on any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this contract to the discretion of the architect, or the withholding by the architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation referred to in clause 34.0 of these conditions, or the rights and liabilities of the parties subsequent to the termination of the contract.

45.10 The award of such arbitrator shall be final and binding upon the parties.

[50] The issues being raised in paragraph 12 of the Supporting Affidavit should be looked at against the arbitration clause. On **Extension of time:** clause 36 of the contract provided for extension of time for the completion of the works. Clause 36.1 and 36.2 provides as follows:

“Upon it becoming apparent that the progress of the works is delayed, the Contractor shall forthwith give written notice of the cause of the delay to the Architect with supporting details showing the extent of the delay caused or likely to be caused. Thereafter the Architect shall

evaluate the information supplied by the Contractor and if in his opinion the completion of the works is likely to be or has been delayed beyond the date for practical completion stated in the appendix to these conditions or beyond any extended time previously fixed under this clause...” Clause 36.2 “Then the Architect shall as soon as he is able to estimate the length of the delay beyond the date or time aforesaid, but in any case not later than thirty days after receiving an application for extension of time in the manner prescribed, make in writing a fair and reasonable extension for time for the completion of the works”.

[51] The Respondent has annexed a bundle of documents to the replying affidavit sworn by Devshi Manji on 23rd January 2012 at pages 380 to 382 which show the Respondent wrote to the Project Architect informing him of the various issues which may affect the completion date for the project and that it will be requesting for an extension of time. At page 384 of the said bundle of documents the Respondent wrote formally requesting for the said extension of time from Mid February 2007 to end of March 2007. Again at page 388 of the said bundle of documents the Respondent wrote to the Project Architect requesting for extension of time to end of May 2007 for the reasons given in the letter dated 20th March 2007. On receipt of the applications by the contractor for extension of time, the Project Architect evaluated the said applications and having been convinced on the necessity, gave a fair and reasonable extension of time as mandated by the contract entered into between the parties. At page 468 of the Respondent’s bundle of documents is a letter from the Project Architect to the Project QS advising on the extensions of time granted to the Claimant herein.

[52] It is evident that the matters as dealt by the Arbitrator were within mandate and scope of the reference. On **Practical Completion and damages for delay:** it is the Respondent’s humble submission that the delays experienced in this project were caused by the following:

1. Variations to the contract;
2. Additional works;
3. Delay in issuing instructions or approving samples and or giving consent to works being carried out.

[53] The Respondent was not responsible for issuing variation orders or instructions on additional works or even approving samples and or giving instructions on these things. In the letter dated 29th September 2007 from the project QS to the Respondent herein which letter is reproduced at pages 496 and 497 of the Respondent’s bundle of documents, the Project QS at page 497 states as follows:

“Based on the Architects letter dated 27th September 2007...the validly extended date of completion was 31st May 2007 while the actual date of Practical Completion was 30th June 2007. This means that the delay in completion attributed to the Contractor is 30 days (4.29 weeks).

At the stipulated rate of Kshs 100,000.00 per calendar week or part thereof, you would therefore be entitled to recover an amount of Kshs 429,000 inclusive of VAT from the Main Contractor as liquidated and ascertained damages. This is however subject to full resolution of the last paragraph of the Architects above letter.

[54] Looking at the issue of extension of time as dealt by the Arbitrator in the award, one is not able to understand the Applicant’s problem thereto, unless perhaps it is its failure to understand the nature of the complaint.

[55] On the **Report by QS Fredrick Ikiunga on variations and re-measured works:** the contract provided for variations under clause 34. Clause 30.2 of the contract provided that the Architect may issue instructions requiring a variation and he may sanction in writing any variation made by the contractor otherwise than pursuant to an instruction of the Architect. The finding by the Arbitrator on the same cannot be said to have been made beyond the scope of the reference. Variations were sanctioned either by the Architect under powers donated to him by the contract or by the Applicant. Some of these variations

include:

- a. At page 235 of the Respondent's bundle of documents under item number 3.1 – Applicant (Client) requested architect to increase the floor to floor height of the ground floor to accommodate future additions of a mezzanine floor.
- b. At page 235 of the Respondent's bundle of documents under item 3.2 - Applicant (Client) requested architect and design team to allow for the development of the roof space into an attic space.
- c. Under item 3.5 at page 237 of the Respondent's bundle of documents, the Applicant (Client) herein confirmed instructions to architect to issue drawings to the Respondent confirming the height of the ground floor at 6m.
- d. Again at page 238 under item 10.1 and 10.2 the Applicant (Client) herein confirms the issue of the mezzanine and reconfiguration of the attic drawings, etc.
- e. Again at page 240 of the Respondent's bundle of documents under items 3.1 to 3.6 the issue of the mezzanine floor, attic etc comes up again. You will note the change of mind by the Applicant (Client) herein in all those meetings.
- f. At page 244 of the Respondent's bundle of documents under item 10.1 the Applicant (Client) herein approves variation to increase mezzanine height. The Claimant herein issues a revised program at page 248 indicating the practical completion date as 5th February 2007.
- g. At pages 384, 388 and 393 of the Respondent's bundle of documents is correspondence between the Project Architect and the Applicant (Client) confirming the issues of increase of height on the ground floor and introduction of the attic roof.
- h. Your Lordship at page 396 of the Respondent's bundle of documents is another letter showing further variations to the contract.

[56] The Respondent took the view of the foregoing as evidence that the issues of variations and re-measured works as dealt with by the arbitrator in the award are matters contemplated by or falling within the terms of the reference to arbitration.

[57] On **Double Glazing**: the Respondent submitted that the window sample that was provided for in this project complied with the contract and tender documents and that the same was approved by both the Architect and the Applicant (Client) herein. In site meeting of 25th September 2006 at page 260 of the Respondent's bundle of documents under item number 2.3 it is stated **“Window sample approved by architect”**. The Applicant (Client) approved the sample window as per the minutes under item 2.1 of the Respondents bundle of documents at page 271. The issue of single glazing or double glazing was also discussed between the Applicant (Client), the Claimant, the Project Architect and the Project QS and by a letter dated 18th January 2007 which is reproduced at pages 402 to 403 in the Respondent's bundle of documents answers the questions in respect to double glazing. Given this information, it is not possible for one to say that the finding by the arbitrator on the issue of double glazing went beyond the scope of the reference when the same was an issue before the arbitrator for determination. The contention by the Applicant (Client) has no basis.

[58] The Respondent submitted further that Section 35(2) (b) (ii) deals with an award being against public policy. Paragraph 16 of the Applicant's Supporting Affidavit avers as follows:

“THAT on the advice I have received from my advocates on record – Messrs. R. Billing & Co, and which advise I verily believe to be correct that the Arbitral Award is clearly and plainly in conflict with the public policy of Kenya”.

The term contrary to Public Policy has been considered in a number of cases. In the case of **CHRIST FOR ALL NATIONS v APOLLO INSURANCE COMPANY LIMITED, HCCC NO 477 OF 1999** Ruling, Ringera J. (as he then was) expressed himself as follows:

“I am persuaded by the logic of the Supreme Court of India and I accept the view that although public policy is a most broad concept incapable of precise definition, or that, as the common law judges of yonder years used to say, it is an unruly horse and when once you get

astride of it, you never know where it will carry you, an award could be set aside under Section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that it was either: (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality. The first category is clear enough. In the second category, I would, without claiming to be exhaustive, include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would, again without seeking to be exhaustive, include considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals.”

[59] The Respondent opines that the Applicant has not stated or shown how the award is contrary to public policy. It has not shown as to whether the same was induced by corruption or fraud or the same is founded on a contract contrary to public morals. The Respondent has totally failed to show the basis of its allegations. Likewise, the allegations of misconduct by the arbitrator in paragraph 31 of the Supporting Affidavit are unsubstantiated. It does not state or show how the Arbitrator misconducted himself. Did he fail to give any party an opportunity to present its case? Did he disrespect one party? Did he favour one of the parties? Those averments are hollow and have no basis whatsoever.

[60] The Respondent concluded that there should be an end to litigation and the Arbitration Act underscores that policy in Section 10. Further, under Clause 45.10 of the contract entered into between the parties the Award of the arbitrator shall be final and binding upon the parties. The parties contracted on the basis and understanding that once the dispute is referred to arbitration the findings of the said arbitrator shall be final and binding upon them. This court should not aid any party in deviating from their contractual obligations. In promoting the broad principles of finality of arbitral award, the court should dismiss the application dated 5th December 2011 with costs. The Respondent relied upon the judicial authorities in support of its submissions herein.

COURT’S RENDITION

Jurisdiction of court

[61] I am faced with an application under section 35 of the Arbitration Act-for setting aside an arbitral award. Courts have said time and again that the grounds set out under the said section are strict and circumscribes the jurisdiction of the court in setting aside an arbitral award. A party so applying must keep strictly within the grounds thereto. See a work of this court in the case of **MIDCO HOLDINGS LIMITED & SUMMIT TEXTILES (E.A.) LIMITED [2014] eKLR** that:

[36] Section 35 (2) of the Arbitration Act circumscribes the grounds upon which an arbitral award can be set aside, and an applicant seeking to set aside an arbitral award must bring himself strictly within the legal bounds of that section. See the case of TRANSWORD SAFARIS LTD. v EAGLE AVIATION LTD. & 3 OTHERS NBI MISC APPLICATION NO. 238 OF 2003, Nyamu J. (as he then was). The Applicants have advanced the following four grounds on which they seek the arbitral award to be set aside;

- a) That the arbitral award is contrary to public policy of Kenya**
- b) That the Honourable Arbitrator breached the rules of natural justice contrary to Article 50 of the Constitution of Kenya.**
- c) That the arbitral award went outside the contemplated dispute and/or failed to determine issues referred to the Arbitrator.**
- d) That the Arbitrator is guilty of misconduct.**

The grounds are perfect grounds for the setting aside of an award under section 35(2) of

the Arbitration Act. But, it is the applicant who carries and must discharge the burden of proving those matters he alleges to be grounds for setting aside the arbitral award in question.

[62] Section 35 of the Arbitration Act provides as follows:

35(2) An arbitral award may be set aside by the High Court only if –

a. The party making the application furnishes proof –

(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 the provisions of this act from which the parties cannot derogate; or failing such agreement, was not in accordance with this act; or

b. (ii) the award is in conflict with the public policy of Kenya.

GROUND FOR SETTING ASIDE

[63] The Applicant has urged the following grounds on which it seeks the arbitral award to be set aside, namely:

- a) The award exceeded the scope of the mandate of the arbitrator;
- b) The arbitrator misconducted himself, misapprehended the contractual documents, the contracts itself and the law of contract;
- c) The making of the award was induced or affected by fraud, bribery, undue influence or corruption;
- d) The award dealt 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;
- e) The award was against public policy of Kenya for being contrary to the laws of contract and grossly erroneous.

Public policy question

[64] I will start with the ground that the arbitral award is contrary to public policy of Kenya. The Applicant bears the burden of proving the arbitral award is contrary to public policy. I admit, just as *Ringera J* (as he then was) proclaimed, that public policy is most broad concept incapable of precise definition. But that does not mean it is an impossible ground. A successful Applicant should establish facts that the award is:-

- (a) Inconsistent with the Constitution or other laws of Kenya; or
- (b) Inimical to the national interest of Kenya; or
- (c) Contrary to Justice and Morality.

As *Ringera J* postulated, it is only the first category that is straight forward. The other two are not as straight forward, and neither the Court nor the Legislature can provide an exhaustive list of the elements or items that constitute; *inimical to the national interest of Kenya; or contrary to Justice and Morality*. It will all depend on the circumstances of the particular case, the facts being pleaded, and the evidence offered in support of those facts. However, public policy being an elastic ground it is would require cogent proof if an award is to be set aside on that account. Has the applicant herein met the threshold?

[65] The Applicant broadly stated that the award herein was contrary to the law of contract and the Arbitration Act. It also introduced another element; that its rights have been violated by the award. The Applicant stated that the arbitral tribunal misapprehended the applicable law of contract, and it seems from the submissions that the specific law which the arbitrator failed to appreciate or apply accordingly was the provisions of section 29 of the Arbitration Act as well as common law principles on contract and arbitration. According to the Applicant, section 29 of the Arbitration Act and the Kenya Branch Arbitration Rules, the arbitral tribunal is bound to apply the contract between the parties in adjudicating any dispute arising therefrom. The Applicant contended that the arbitrator herein did not apply the contract and decided matters which were not envisaged by the arbitration agreement. This matter will be dealt with more fully under the other ground that the award dealt with matters which were 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. But it is the only major argument which I can find as the essential core of the argument that the award was contrary to the law of contract hence, contrary to public policy. The applicant has cited some alleged erroneous decisions by the arbitrator on matters to do with completion date, double gauge windows, rate of interest awarded, final accounts, disregard of evidence, extension of time, only to mention but a few. As it will be borne out later, those arguments did not really show that the law was violated as they are matters which fall within the fallibility of every person who is exercising judicial or quasi-judicial authority. They also relate to the merits and factual appreciation of the case by the arbitrator; which again falls squarely on the competence of the arbitrator as the master of facts. See the case of **KENYA OIL COMPANY LIMITED & ANOTHER v KENYA PIPELINE COMPANY [2014] eKLR, MORAN v LLOYDS (1983) 2 ALL ER 200** and **DB SHAPRIYA & CO. v BISHINT (2003) 3 EA 404**, where there is judicial consensus that;

“All questions of fact are and always have been within the sole domain of the Arbitrator.....the general rule deductible from these decisions is that the court cannot interfere with the findings of facts by the Arbitrator.”

[66] The Applicant made statements at very high level of generalization that the Arbitrator was rewriting the contract between the parties and took into account matters outside the scope of the contract which then encapsulates real fear and apprehension that the Applicant’s legal rights will be adversely affected unless this Honourable Court intervenes immediately and orders the subject matter to be preserved. They even cited the overriding objective and Article 159 of the Constitution but without concrete proof how the award negates the Constitution. Such approach where the Constitution is cited and allegations of a possible breach of rights to fair trial because the arbitrator allegedly disregarded material evidence looks powerful, and by virtue of the carefully chosen words used may create a false impression that there is a serious constitutional issue at stake. There was absolutely no proof of violation of rights or law and not specific rights or provisions of the law which were cited and proved as having been transgressed upon by the arbitrator or the award as made. As such, the award could not be said to be contrary to public policy. That ground fails.

Fraud, bribery, undue influence or corruption

[67] The Applicant has made accusations of bias by the arbitrator towards one party and against the other. Those allegations fall under the above ground and should be supported by cogent evidence of bias or that the arbitrator made the award on extraneous grounds rather than the facts of the case and the law. The threshold is high. The Applicant has even tied this ground to the one on public policy and that is absolutely correct because where fraud, bribery, undue influence or corruption is proved against the arbitrator, it is a matter of public policy for it runs contra to sanctification of judicial or quasi-judicial

process which he should serve faithfully and diligently. The Applicant herein reads bias from what he calls "strong words used" by the arbitrator such as "...**Under the circumstances, I must say I have no sympathy with a developer who treated his consultants the way he did and still expected additional services from them...or A further observation is that...the delays are all attributed to the Consultants and none to the Contractor**". The Applicant combined the "strong words" by the arbitrator with the other erroneous decisions the Applicant thought are apparent on the record to reach the conclusion that the arbitrator was biased against it. The words used by the arbitrator must be seen within the entire context of the case; the evidence adduced and the evaluation by the arbitrator. But when they are looked at outside the context, a false impression may be created that they are strong. I have looked at the evidence before the arbitral tribunal and the manner he evaluated each piece of evidence adduced. I am convinced the arbitrator was possessed of enough material to conclude on the demeanor of the Applicant in the manner he did. In law, there is nothing wrong with the court to observe and record its findings on the demeanor of a party or witness in a judicial proceeding. Even if I was to consider the tenor and character of the words used by the arbitrator in relation to the Applicant, they are such that they cannot sustain a claim of bias. The question of bias has been sufficiently decided by the courts and the threshold which need be attained by the person claiming it has been set. For instance I am content to cite the rendition in the case of **BGM HCCRA NO 144 OF 2011 [2014] eKLR** that:

[8] A claim of bias or prejudice...against a judicial officer is a grave juridical issue as it imputes a serious charge on the conduct of the officer. The Appellants have raised it as ground 1 and posit that the prejudice resulted into injustice to the Appellants. Such ground should be raised where evidence is readily available on record, for it requires strict and specific proof. The court had occasion to consider impleading of bias in an appeal in the case of HIGH COURT OF KENYA AT MERU CRIMINAL APPEAL NO 238 OF 2010 (MAKAU & GIKONYO JJ) and stated as follows:

We have perused the judgment and the entire record of the trial court; we have not found anything which suggests bias on the part of the trial magistrate. Bias in its legal connotation entails prejudice on the part of the trial magistrate that he decided the case on extraneous factors rather than the law. Black's Law Dictionary, 7th Edition clearly sets out that Bias entails:-Inclination, prejudice; Judge's bias usually must be personal or based on some extrajudicial reasons. And further it states that Prejudice entails:-A preconceived judgment formed without a factual basis, a strong bias. No wonder the law requires that the facts constituting bias must be specifically alleged and established. It is a kind of allegation which requires the counsel making it to first establish presence of bias that can be proved, and then make a conscientious decision to raise the matter only where proof is readily available. The law is tailored that way, in recognition of the fact that an allegation of bias imputes a serious charge on the integrity of the trial court and the propriety of the proceeding. The word bias assumes a particular legal meaning in any judicial proceeding and it should not, therefore, be used just loosely. It is most desirable that care should be taken before making a submission such as the one made herein. We say no more on that issue. The ground fails.

[9] In line with the above observation, I too do not find anything which would suggest an open prejudice by the trial magistrate against the Appellants. It is desirable that, when a judicial officer exhibit open bias or prejudice against a party in a proceeding, as is being claimed in this appeal, the Appellants should make an application in the original proceedings for the trial magistrate to recuse herself, rather than wait for the same trial court to complete the trial only to raise it during the appeal. Except where the record is so soiled in a manner that prejudice could easily be discernible, I do not think a ground of appeal based on alleged bias or prejudice would be an easy one for the appellate court to determine as it would be by the trial court. I say these things because this court is a court of record. Ground 1 fails and is rejected.

[68] On the basis of the applicable test, the allegation that the strong words used denote bias is unproved and it fails as a ground to set aside the award herein.

Consideration of matters outside the reference

[69] The Applicant submitted that award considered matters outside the reference or the arbitration agreement. The contract herein is one of construction and such contract involves and indeed it provided for issue to do with completion date, extension of time, variations, approval of changes, issuance of certificates, final accounts and so on. Paragraph 12 of the Supporting Affidavit of Ravi D. Prinja, sets out what the Applicant considers the award dealt with but was not contemplated by or falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration. The wording of the arbitration clause 45.0 of the contract is useful before we look at the terms of the agreement especially in relation to the matters complained of. Clause 45.0 states as follows:

45.0 Settlement of disputes

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

45.2 The arbitration may be on the construction of this contract or on any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this contract to the discretion of the architect, or the withholding by the architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation referred to in clause 34.0 of these conditions, or the rights and liabilities of the parties subsequent to the termination of the contract.

45.10 The award of such arbitrator shall be final and binding upon the parties.

[70] The arbitration clause is wide enough to cover any dispute or difference that may arise on **any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this contract to the discretion of the architect, or the withholding by the architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation referred to in clause 34.0 of these conditions, or the rights and liabilities of the parties subsequent to the termination of the contract.**

[71] Extension of time for completion of the works is provided for in clause 36 of the contract. See Clause 36.1 and 36.2 below:

“Upon it becoming apparent that the progress of the works is delayed, the Contractor shall forthwith give written notice of the cause of the delay to the Architect with supporting details showing the extent of the delay caused or likely to be caused. Thereafter the Architect shall evaluate the information supplied by the Contractor and if in his opinion the completion of the works is likely to be or has been delayed beyond the date for practical completion stated in the appendix to these conditions or beyond any extended time previously fixed under this clause...” Clause 36.2 “Then the Architect shall as soon as he is able to estimate the length of the delay beyond the date or time aforesaid, but in any case not later than thirty days after receiving an application for extension of time in the manner prescribed, make in writing a fair and reasonable extension for time for the completion of the works”.

[72] Evidence was produced before the arbitral tribunal on the request for and grant of extensions of time of completion of the works. Although the Applicant submitted that the documents annexed to the Replying Affidavit of Devshi Manji sworn on 23rd January 2012 and filed in Court on the same date, what is startling is that it confirmed those documents had already been produced and were identical to

those annexed to its Supporting Affidavit. They gave a complete catalogue of the identical documents. I will, therefore, refer to the said documents as appropriate. See annexures to the replying affidavit sworn by Devshi Manji on 23rd January 2012 at pages 380 to 382. The Project Architect was fully informed of the various issues which may affect the completion date for the project and formal applications were made for the extensions. See also annexures at page 384 and 388 of the said Supporting Affidavit. On receipt of the applications by the contractor for extension of time, the Project Architect evaluated the said applications and having been convinced on the necessity, gave a fair and reasonable extension of time as mandated by the contract entered into between the parties. See also page 468 of the bundle of documents a letter from the Project Architect to the Project QS advising on the extensions of time granted to the Claimant herein.

[73] That issue arose as a dispute within the contract and was squarely a matter for determination by the arbitrator. It was within the scope of the arbitration and the reference.

[74] On Practical Completion and damages for delay: the cause of the delays was formed part of the reference and was accordingly litigated and decided upon by the arbitrator. The causes of delay as presented by the parties before the tribunal included:

4. Variations to the contract;
5. Additional works;
6. Delay in issuing instructions or approving samples and or giving consent to works being carried out.

[75] Without deciding on the merit and facts of this case as that is the preserve of the arbitrator and this court should as much as possible restrain itself from disturbing the findings of facts by the arbitrator, I can discern that the issue as to who was responsible for the delays was placed before, and was determined by the arbitrator. It is, therefore, indefensible for the Applicant to argue that the arbitrator decided on extraneous matters. Variations and re-measured works were also matters provided for in the contract provided clause 34 and Clause 30.2 of the contract. The whole process of issuing instructions requiring a variation and approval of the variation is provided for in the contract and any dispute or difference on that aspect cannot be said to have been beyond the scope of the reference; Or its determination by the arbitrator to have been beyond his jurisdiction. From the record, some of the variations include: 1) increase of the floor to floor height of the ground floor to accommodate future additions of a mezzanine floor; 2) development of the roof space into an attic space; 3) revised program indicating the practical completion. The arbitrator considered and determined the issues of variations and re-measured works which cannot be matters not contemplated by or not falling within the terms of the reference to arbitration.

[76] The issue of Double Glazing and approval of Window sample by architect” was also a matter of the contract and was covered under the arbitration agreement. Its determination by the arbitrator is, therefore, not a beyond the scope of the reference.

[77] In sum, all the arguments by the Applicant that the arbitrator dealt with matters not contemplated by or not falling within the scope of the reference are unfounded and I do not understand why it has consistently made that claim. The ground fails.

Arbitrator’s jurisdiction

[78] In light of the above holdings, the court is in a position to tackle the hotly contested issue on the jurisdiction of the arbitrator. The arbitrator draws its mandate and jurisdiction from the contract. I have found that the issues that were before him and he determined, fell within the scope of the reference and the agreement of the parties. Without administering any sudden shock, I hold that he had jurisdiction to preside on the dispute herein. I should, however, state as in the case of **NATIONAL OIL CORPORATION LTD V PRISSCO LTD [2014] eKLR** that:

[28] The statutory act of reserving the authority to determine objections to the Arbitral

tribunal, aims at paying due deference to and serving as a mark of recognition of arbitration as a recognized mechanism for Alternative Dispute Resolution (ADR); by preventing the Court from usurping the jurisdiction of the Arbitral tribunal and allowing the arbitral tribunal to exercise its jurisdiction without court interference. The basis of that approach draws from the doctrine of Kompetenz Kompetenz which is replicated in most jurisdictions which have adopted the UNICITRAL Model Law on Arbitration. The Kenyan Arbitration Act follows after the UNICITRAL Model Law on Arbitration. See a work of. Nyamu JA, (as he then was) sitting in the Court of appeal in the case of SAFARICOM LIMITED V. OCEAN VIEW BEACH HOTEL LIMITE & 2 OTHERS (2010) eKLR where he held:-

“Although the English Arbitration Act 1996 is not exactly modeled on the Model law unlike our Act, I fully endorse the principles as outlined in the CHANNEL CASE (supra) because they are in line with the arbitral tribunal’s jurisdiction as set out in section 17 of the Arbitration Act of Kenya. The Section gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national Court to rule on the jurisdiction of an arbitral tribunal except by way of an appeal under Section 17(6) of the Arbitration Act as the Commercial Court in this matter purported to do. In this regard, I find that the superior court did act contrary to the provision of Section 17 and in particular violated the principle known as “competence/competence” which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this means is “compliance to decide upon its competence” and as expressed elsewhere this ruling in German it is “Kompetenze/Kompetenz and in France it is “competence de la competence”. To my mind, the entire ruling is therefore a nullity and it cannot be given any other baptism such as “acting wrong but with jurisdiction”.

[79] Therefore, unless it is shown that the arbitrator veered off the course cut out for him by the law as his jurisdiction; courts of law should hesitate to interfere with the award. The issue of jurisdiction should be raised at earliest time possible before the arbitral tribunal and should be followed through by an appeal under Section 17(6) of the Arbitration Act if a party feels so strongly about it. In all other cases, the national court should develop great deprecation against claims of lack of jurisdiction of the arbitrator in applications to set aside the award unless it is shown the arbitrator dealt with matters not contemplated by or not falling within the reference to arbitration. In this case, the arbitral tribunal had jurisdiction on the matters before it and the award herein cannot be faulted on the ground of lack of jurisdiction. In the circumstances of this case I am unable to say:

“...the umpire decided matters strikingly outside his jurisdiction. He outwent the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of provisions of the contract to the contrary”. See the case of ASSOCIATED ENGINEERING COMPANY v GOVERNMENT OF ANDRA PRADESH & ANOTHER [1991] R.D.S.C.C 153 (1992 AIR 232 15TH JULY 1991).

The arbitrator remained on course. The ground fails.

Arbitrator’s misconduct

[80] I am left with one major issue of misconduct of the arbitrator to decide on. The findings of the court herein above rule out misconduct in the sense of the law. The arbitrator did not act contrary to the law or the contract. He was not biased or incompetent. I find that the arbitrator is not guilty of misconduct as alleged. The ground fails.

Claim application for recognition and enforcement premature

[81] The Applicant argued that the application for recognition and enforcement of the award is premature for it was filed before the three month's period assigned to the filing of an application to set aside the award under section 35 of the Arbitration Act had expired. The Respondent, on the other hand, argues that the Applicant through its counsel participated in the application for recognition and enforcement of the award. Also, they argued, the application to set aside came after the recognition and enforcement of the award had already been ordered. The latter submission is true. My reading of the provisions of section 35, 36 and 37 of the Arbitration Act, reveals the following: there is no any express requirement that an application for recognition and enforcement of the award should await the expiry of the period prescribed in section 35 for applying to set aside the award or prohibition for an application for recognition to be made before the expiry of the time prescribed in section 35. The striking similarities of the grounds for setting aside an award under section 35 and 37 of the Arbitration Act may have some indents in resolving the question that has been raised. And as I stated in the case of **NATIONAL OIL CORPORATION OF KENYA v PRISCO LIMITED [2014] eKLR** both sections 35 and 37 of the Arbitration Act are not in conflict with one another; they simply provide opportunity to the person against whom an award has been made to apply for its setting aside. Section 37(2) of the Arbitration Act provides a twinning of an application for the setting aside an award, and that for the recognition or enforcement of the award. But it also deliberately provides on how the court should resolve the said applications; adjourn the application for setting aside if it thinks fit, and may also ask for the security where an application for recognition has been filed too. I do not think, therefore, there is anything pernicious in applying for recognition or enforcement of an award before the three months provide under section 35 has lapsed. Except, and I stated this also in the **NOCK case (supra)**; the application for recognition or enforcement of the award should always be made inter partes and served on the party against whom the award is made. I only hope there will be a legislative reconciliation between the rules and the Act on that requirement. The court observed that the application for recognition or enforcement of the award had been served on the Applicant herein and the fact that Mr Billing sent a representative (Mr Muriuki) who held his brief on 29.11.11 confirmed that position. I observe that the Applicant only sought for stay of the recognition or enforcement of the award. And in light of the decision I have made on the application to set aside the award, I order the recognition and enforcement of the award. The award shall be enforced as the order of the court. I should, however, state that where an application for the setting aside of the award is made under section 35 of the Arbitration Act prior to the one for enforcement, priority should be given to the one for the setting aside and once the issues of setting aside are resolved, it becomes much easier for the court to deal with the enforcement of the award. The approach I have prescribed will yield practical as well as substantive advantages.

ORDERS

[82] The upshot is that the application dated 5th December, 2011 is dismissed with costs to the Respondent.

Dated, Signed and delivered in open court at Nairobi this 14th July 2014

F. GIKONYO

JUDGE