**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCOMM MISC. NO. E250 OF 2021**

**IN THE MATTER OF THE ARBITRATION ACT, 1995**

**-AND-**

**IN THE MATTER OF AN APPLICATION UNDER SECTIONS 14(3) & 15 OF THE ARBITRATION ACT - CHALLENGE TO ARBITRATOR AND THE ARBITRATION ITSELF**

**-BETWEEN-**

**DIRECTLINE ASSURANCE COMPANY LTD...…….……..1ST APPLICANT**

**ROYAL MEDIA SERVICES LTD…..…………….………2ND APPLICANT**

**ROYAL CREDIT LIMITED………………………………..…3RD APPLICANT**

**SAMUEL KAMAU MACHARIA……………………………..4TH APPLICANT**

**PURITY GATHONI MACHARIA……………………………5TH APPLICANT**

**-VERSUS-**

**MR. PHILIP ALIKER………………………………………….1ST RESPONDENT**

**SUREINVEST COMPANY LIMITED……………………..…2ND RESPONDENT**

**STENNY INVESTMENTS LIMITED…………………..…3RD RESPONDENT**

**TRIAD NETWORKS LIMITED………………….……..…4TH RESPONDENT**

**AKM INVESTMENTS LIMITED…………………...…….5TH RESPONDENT**

**KEVIN DERMOT McCOURT………..…………………6TH RESPONDENT**

**JANUS LIMITED…………………………………...…………7TH RESPONDENT**

**GEOFFREY GORDON WERE RADIER…………………8TH RESPONDENT**

**JAMES KABERERE GACHOKA…………………………9TH RESPONDENT**

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**AND**

**IN THE MATTER OF**

**THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISCELLANEOUS APPLICATION NO. E509 OF 2022**

**SUREINVEST COMPANY LIMITED…………………….…1ST APPLICANT**

**STENNY INVESTMENTS LIMITED……………………..2ND APPLICANT**

**TRIAD NETWORKS LIMITED …………………………..…3RD APPLICANT**

**AKM INVESTMENTS LIMITED……………………………4TH APPLICANT**

**JANUS LIMITED ……………………………………….…5TH APPLICANT**

**VERSUS**

**ROYAL MEDIA SERVICES LIMITED…………………..1ST RESPONDENT**

**ROYAL CREDIT LIMITED……………………………….2ND RESPONDENT**

**SAMUEL KAMAU MACHARIA …………………………3RD RESPONDENT**

**PURITY GATHONI MACHARIA ………………………...4TH RESPONDENT**

**RULING NO. 3**

1. This Ruling is with respect to two applications. The first in time is **HCCOMM Misc. App. No. E250 of 2021.** For ease of reference and consistency, I will refer to the applicants in the said application and the respondents in **HCCOMM Misc. App. No. E509 of 2022**, as the applicants, although the latter application was filed by the respondents in **HCCOMM Misc. App. No. E250 of 2021**. The

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first application is the applicants' Amended Amended Notice of Motion application dated 24th June 2022 filed in **HCCOMM Misc. App. No. E250 of 2021,** pursuant to the provisions of Sections 7, 14(3), 15 & 17(6) of the Arbitration Act and Rule 3 of the Arbitration Rules, 1997, seeking orders *inter alia,* that this Court sets aside the Ruling delivered by the 1st respondent on 8th June 2021, in which he held that he had the jurisdiction to act as Arbitrator and to determine both the merits of the claims by the 2nd to 9th respondents and the applicants' counterclaims made under protest, Order No. 2 contained in Procedural Order for Directions No. 3 issued on 10th June 2021, through which the 1st respondent directed that issues of jurisdiction be determined together with the merits of the dispute and the Ruling and Orders made by the 1st respondent on 22nd June 2021, in which he dismissed the applicants' challenge to his competence, independence and impartiality as Arbitrator. The applicants also seek an order that the Court declares null and void and/or sets aside the Award made by the sole Arbitrator Philip Aliker, dated 8th June 2022 and delivered on 21st June 2022.

2. The application is premised on the grounds on the face of the Motion, and it is supported by a supplementary affidavit sworn on 27th June 2022 by Mr. Evans Nyagah, the 1st applicant's Principal Officer. Mr. Nyagah averred that the sole Arbitrator assumed jurisdiction on 8th June 2021, despite a pending challenge filed under Section 17(6) of the Arbitration Act, which upon filing, triggered an automatic stay under Section 17(8) of the said Act. He stated that the Arbitrator proceeded with hearings in January 2022, received submissions from the parties, and ultimately delivered an Award on 21st June 2022. Mr. Nyagah maintained that the Arbitrator lacked jurisdiction, as extensively argued in their submissions, including challenges to the validity of the arbitration clause, allegations of illegality and fraud in the claim, and reliance on established

authority. He emphasized that proceedings must cease where jurisdiction is absent.

3. Mr. Nyagah deposed that despite these arguments, the Arbitrator ruled against the applicants and issued orders that allegedly transferred possession and management of the 1st applicant's business to the respondents, in disregard of the statutory stay. He further stated that a request for stay of execution made to the Arbitrator on 23rd June 2022 was not granted. He contended that unless this Court intervenes, the applicants' statutory rights under Sections 17(6)-(8) of the Arbitration Act, as well as their constitutional rights to access justice and a fair hearing will be rendered nugatory. He asserted that the Arbitrator's actions offend the rule of law.

4. In opposition to the application herein, the 3rd respondent filed Grounds of Opposition dated 5th July 2022, raising the following issues –

    1) The main dispute between parties is between Shareholders and is about the shareholding and management of the 1st applicant; thus the 1st applicant cannot be a participant in these proceedings;
    2) The dispute between all parties had been referred to Arbitration by Court order issued in **HCCC E. 278 of 2019** by virtue of Article 82 of the 1st applicant's Articles of Association;
    3) The 1st to 5th applicants withdrew the said suit (above referred) and have since then filed several suits in various Courts seeking to stay the arbitration or remove the Arbitrator;
    4) Since the filing of this suit and application, the Arbitration process has been finalized and an Award has been delivered thus the prayers in the Notice of Motion were overtaken by events;

5) Subsequently the applicants seek to further amend the Notice of Motion seeking to stay the implementation and execution of the Arbitral Award, and seeking orders declaring the Award as null and void;

6) The Amended Notice of Motion is misconceived for the following reasons:

    i) Section 17(6) of the Arbitration Act 1995, does not apply as the Arbitration Act is clear that Section 17(6) of the Act only applies ***"where the arbitral tribunal rules as a preliminary question".***

    ii) Given the above there is no stay of the proceedings as per Section 17(8) of the Arbitration Act 1995.

    iii) There is no application as envisaged by Section 17(6) of the Arbitration Act, 1995, which is pending before this Court or any other Court between parties in this matter.

    iv) The Courts have determined this issue time and time again, where the issue of jurisdiction of an Arbitral Tribunal is determined together with the merits of the case, Section 17(6) does not apply. The 3rd respondent's list of authorities on this point shall be filed in due course.

7) The Amended application is therefore misconceived and an abuse of the Court process and the applicants do not have recourse under Section 17 of the Arbitration Act, as cited in the Amended Amended Notice of Motion;

8) The applicants have since the commencement of the Arbitration process attempted, without success, to derail the Arbitration process using various forum including the Amended application herein and a constitutional petition which was dismissed by this Court and they have

even filed an application in the Criminal Courts; there has to be an end to litigation;

9) To date, the applicants have not met their share of costs in the Arbitration yet they are applying to this Court to stay the Award (even if under a misconception of the law);

10) The Court should not allow the applicants to further prosecute anything relating to the Arbitral Award given that the bigger part of the expenses was occasioned by the applicants, yet they have declined to meet their share of costs; and

11) For the above legal reasons the 3rd respondent opposes the Amended Amended Notice Motion.

5. The 5th respondent in opposition to the instant application, filed a Notice of Preliminary Objection dated 4th July 2022, raising the following grounds –

i) This Honourable Court lacks jurisdiction to hear and determine the Amended Amended Notice of Motion;

ii) The said Notice of Motion is bad in law in that it offends the provisions of the Arbitration Act No. 4 of 1995;

iii) The application is an abuse of due process of the Court and the same ought to be struck off;

iv) The applicants have come to a Court of equity with dirty hands hence they do not merit the grant of the orders sought;

v) The application is scandalous, vexatious and merely aimed at annoying the 5th respondent; and

vi) The 5th respondent prays that the application filed herein be struck off with costs.

6. The 5th respondent also filed a replying affidavit sworn on 5th June 2022 by Ms Lisa Anyango Amenya, the 5th respondent's Director. Ms Amenya averred that Mr. Evans Nyagah is not the Principal Officer of the 1st applicant, as per the First Partial Award of 11th May 2022. She outlined that the applicants had previously instituted **Miscellaneous Application No. 172 of 2021,** seeking among other reliefs, to restrain arbitration proceedings, declarations on lack of jurisdiction, and orders regarding shareholding and company governance, but later withdrew the suit, leaving issues of costs pending. That subsequently, the applicants filed these proceedings along with multiple applications to amend their pleadings, which remain undetermined. She further averred that the applicants have filed several other suits in different Courts, including criminal, commercial, and constitutional matters, all allegedly aimed at obstructing the arbitral process, some of which have been withdrawn or dismissed for abuse of process. Ms Amenya contended that the impugned application offends the provisions of the Arbitration Act, rendering the Court to be without jurisdiction.

7. The 5th respondent thereafter filed a further affidavit sworn on 14th June 2023 by Ms Lisa Anyango Amenya, the 5th respondent's Director. She deposed that the orders being sought herein are untenable in law since the arbitral proceedings had already been concluded with a Final Award issued, rendering prayers for stay being overtaken by events. She asserted that the issue of stay is *res judicata*, having been determined by a competent Court, and that parallel enforcement proceedings have already been instituted in **High Court Commercial Miscellaneous Application No. E509 of 2022**.

8. She further stated that this Court lacks jurisdiction to declare the Arbitral Award null and void and that it cannot review or vacate its earlier orders made on 12th April 2021. Ms Amenya averred that the instant application is intended

to delay the resolution of the dispute between the parties herein, noting that the applicants actively participated in the arbitral proceedings and have also responded to enforcement proceedings. She asserted that the applicants have misapprehended the law, particularly in alleging that Section 17(8) of the Arbitration Act provides for an automatic stay.

9. In opposition to the instant application, the 2nd, 4th, 6th & 9th respondents filed Grounds of Opposition dated 22nd July 2022, raising the following issues –

    i) The application is an abuse of Court process for the following reasons:

        a) The applicants have consistently sought to stall or stop the arbitral proceedings through this action and other cases.

        b) The test for challenging Arbitral Award set out in Section 35 of the Arbitration Act has not been met.

        c) There is an application to strike out the entire action pending, and the proposed amendments would not cure the defects in the suit.

        d) The 1st applicant has launched a collateral attack on the attack on the First Partial Award published on 11th May 2022 in **E247/2022.**

        e) The application is an afterthought, the applicants having sought to set aside the Arbitral Award by filing **High Court (Commercial and Tax Division) Miscellaneous E469** which they withdrew on 28th June 2022.

        f) The application is intended to vex the respondents and this Court in view of the reckless and unfortunate statements made in the applicants' Advocate's email of 9th June 2021 produced at pages 762 to 764 of the exhibit annexed to the application.

    ii) There is no jurisdiction to intervene in the Arbitral proceedings in the circumstances having regard to Section 10 of the Arbitration Act.

iii) Section 17(8) is not applicable as the question of jurisdiction was not determined as a preliminary question in the arbitration. It was determined together with the merits of the claim and the counterclaim.

iv) Other grounds set out in the affidavit of Kevin McCourt sworn herein.

10. The 2nd, 4th, 6th, & 9th respondents also filed a replying affidavit sworn on 18th July 2023 by Mr. Kevin McCourt, the 6th respondent herein. Mr. McCourt averred that the applicants initially sought to terminate the Arbitral proceedings through an Originating Notice of Motion dated 9th April 2021, but that application has since been overtaken by events following the publication of both a Partial Arbitral Award on 11th May 2022 and a Final Award on 27th September 2022. He outlined the multiple applications filed by the applicants seeking to challenge the Arbitrator's jurisdiction, review Court orders, and stay arbitral proceedings, many of which have similarly been overtaken by events or determined by the Court. He stated that the instant application seeks to nullify and stay implementation of the Arbitral Award on grounds that the Arbitrator lacked jurisdiction, but contended that this position is legally flawed.

11. Mr. McCourt asserted that Section 17(8) of the Arbitration Act does not bar an Arbitrator from continuing proceedings or issuing an Award where a jurisdictional challenge has been filed. He averred that the applicants misconceived the process, as the Arbitrator directed that jurisdiction would be determined together with the merits, which was ultimately done in the Award. He contended that any challenge ought to have been brought under Section 35 of the Arbitration Act to set aside the Award, rendering reliance on Section 17(6)-(8) inapplicable. He referred to prior Court decisions, including Rulings in **High Court Commercial Suit No. E247 of 2022**, where the applicants' actions were deemed as a collateral attack on the Arbitral Award, and

**Constitutional Petition No. E003 of 2022**, which was dismissed for abuse of process.

12. In a rejoinder, the applicants filed a further affidavit sworn on 30th August 2023 by Mr. Julius Orenge, a member of the 1st applicant's Board of Directors. Mr. Orenge contended that the respondents' claim of majority shareholding is founded on an illegality arising from contravention of Section 23(4) of the Insurance Act, and that the arbitral process itself is tainted by lack of a valid Arbitration Agreement and procedural irregularities. He stated that the applicants' various applications challenging the Arbitrator's jurisdiction and seeking to stay or terminate the Arbitral proceedings were properly filed and remain pending, having not been heard prior to the issuance of the Arbitral Award. He asserted that under the proper interpretation of the Arbitration Act, the Court retains jurisdiction to determine all challenges to jurisdiction, the validity of the Arbitration Agreement, and the propriety of the Arbitral Award.

13. He deposed that the Arbitrator lacked jurisdiction *ab initio*, due to an invalid arbitration clause allegedly introduced unlawfully and involving parties who are not legitimate Shareholders, and also raises concerns about the Arbitrator's competence and impartiality. Mr. Orenge denied multiple averments made by the 6th respondent, including claims that the applicants failed to challenge the Arbitrator appropriately or that prior proceedings conclusively determined the issues in dispute. He asserted that certain Rulings relied upon by the respondents are under appeal and that material facts regarding such appeals have been deliberately withheld from the Court.

14. The second application was filed in **HCCOMM Misc. App. No. 509 of 2022** vide a Chamber Summons dated 6th July 2022 pursuant to the provisions of Section 36 of the Arbitration Act and Rule 9 of the Arbitration Rules, 1997. The

2nd, 3rd, 4th, 5th & 7th respondents seek orders for this Court to recognize and enforce the First Partial Award dated 11th May 2022 as a decree of the Court, and to grant leave for its enforcement, for the Court to direct the Officer Commanding Station, Central Police Station, or any other competent authority, to place and maintain the 2nd, 3rd, 4th, 5th & 7th respondents in possession of all offices, branches, and properties of Directline Assurance Company Limited, including the removal of any applicants, their agents, or servants who may resist vacating. The 2nd, 3rd, 4th, 5th & 7th respondents also seek orders directing relevant Police authorities across various jurisdictions in Kenya to assist in the retrieval and retention of the company's assets, including servers, computers, and books of account, wherever they may be located.

15. The 2nd application is premised on the grounds on the face of the Summons, and it is supported by an affidavit sworn on the same day by Ms Janice Theresa Wanjiku Kiarie, a Director of the 7th respondent company. Ms Kiarie averred that a dispute arose between the parties herein concerning the shareholding of Directline Assurance Company Limited, during which the applicants unlawfully took control of the company while the matter was still pending. She averred that the said action prompted the 2nd, 3rd, 4th, 5th & 7th respondents to file **High Court Civil Case No. E277 of 2019,** seeking interim protective measures pending Arbitration, while parallel proceedings were initiated in **HCCC No. E278 of 2019**. She contended that the latter suit was stayed by the High Court, and referred to Arbitration in accordance with Article 82 of the Company's Articles of Association.

16. Ms Kiarie deposed that following correspondence with the Chartered Institute of Arbitrators, Mr. Philip Bliss Aliker was appointed as Arbitrator in February 2021, and the matter proceeded to a full hearing in January 2022. That

subsequently, on 22nd June 2022, the Arbitrator published a First Partial Award dated 11th May 2022, declaring that the 2nd, 3rd, 4th, 5th & 7th respondents held 90.336% of the company's shares while the applicants held 9.66% of the shares in the company. She averred that the Arbitrator further found that the applicants had unlawfully taken possession of the company's premises at Hazina Towers and excluded the 2nd, 3rd, 4th, 5th & 7th respondents. Ms Kiarie asserted that the Award ordered the applicants to vacate the premises, return all company property and records, disclose financial dealings, and restrained them from interfering with the company's management, and that the Arbitrator dismissed the applicants' counterclaim.

17. Ms Kiarie stated that the delay in releasing the Award was occasioned by conservatory orders issued in a Constitutional Petition, which were later set aside. She claimed that despite the issuance of the Award and subsequent procedural directions, the applicants have failed to comply and have instead initiated multiple legal proceedings across various Courts, which according to the 2nd, 3rd, 4th, 5th & 7th respondents' Counsel, do not impede enforcement of the Arbitral Award. Ms Kiarie asserted that their attempts to effect a handover of the company's premises were met with resistance, threats, and obstruction, including attempts at physical intimidation. She contended that the applicants are mismanaging the company by removing records, failing to settle claims, exposing the company to execution proceedings amounting to approximately Kshs. 1 Billion, and making substantial payments to Advocates from company funds. She emphasized that unless the Award is enforced, the applicants will continue to run the company down.

18. In opposition to the 2nd, 3rd, 4th, 5th & 7th respondents' application, the applicants filed a replying affidavit sworn on 12th September 2022 by Mr. Evans Nyagah,

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the Principal Officer/Chief Executive Officer of Directline Assurance Company Ltd. He deposed that the applicants and respondents are Shareholders in the company, with the 1st to 3rd applicants holding shares in trust for the 4th applicant. He averred that the application herein seeks to enforce a purported Arbitral Award issued while there were pending proceedings challenging the Arbitrator's removal on grounds of bias and lack of integrity. Mr. Nyagah contended that any decision made by a biased Arbitrator is null and void.

19. He stated that under the Arbitration Act, enforcement of an Arbitral Award can only proceed after the Court has determined all pending applications, including those relating to jurisdiction and the Arbitrator's conduct, and as such, the instant application is premature and an abuse of the Court process. He expressed the view that the Court is *functus officio* regarding interim reliefs already declined and lacks jurisdiction to entertain the application herein, especially in light of the provisions of Section 17(6) & (8) of the Arbitration Act. Mr. Nyagah also claimed that the Arbitral Award is illegal for contravening the provisions of Section 23 of the Insurance Act by allocating shareholding beyond statutory limits. He asserted that the 2nd, 3rd, 4th, 5th & 7th respondents' affidavit contains disputed matters that are already subject to pending proceedings.

20. The applicants also filed a Notice of Preliminary Objection dated 10th July 2022 raising the following grounds –

    i) The 2nd, 3rd, 4th, 5th & 7th respondents are barred by Section 17(8) of the Arbitration Act in view of the fact that there are in **High Court Misc. civil Application No. E250 of 2021 Royal Media Services Ltd & others Vs Philip Aliker & others,** applications dated 11th June 2021, 9th July 2021 and 27th June 2022 challenging the competence of the

Arbitrator Mr. Philip Aliker and the jurisdiction to entertain the dispute between the applicants and the respondents in the said **High Court Misc. Civil Application No. E250 of 2021 Royal Media Services Ltd & others Vs Philip Aliker & others**.

21. The applicants thereafter filed a further affidavit sworn on $4^{th}$ September 2023 by Mr. Julius Orenge, a member of the Board of Directors of Directline Assurance Company Limited. He asserted that the $1^{st}$ to $3^{rd}$ applicants (respondents) hold shares as nominees of the $4^{th}$ applicant ($4^{th}$ respondent) in contravention of pre-emption rights and in a scheme intended to bypass statutory shareholding limits under the Insurance Act. He contended that the $2^{nd}$, $3^{rd}$, $4^{th}$, $5^{th}$ & $7^{th}$ respondents' supporting affidavit is part of a long-standing fraudulent scheme dating back to 2007, orchestrated to secure majority control of the company through nominee shareholding arrangements and misrepresentations regarding beneficial ownership. He stated that the applicants were excluded from company affairs based on false claims that their shares were held in trust, and that after statutory amendments capped shareholding in insurance companies, the $2^{nd}$, $3^{rd}$, $4^{th}$, $5^{th}$ & $7^{th}$ respondents recruited nominee shareholders to circumvent these limits.

22. He claimed that when the applicants challenged this arrangement, the $2^{nd}$, $3^{rd}$, $4^{th}$, $5^{th}$ & $7^{th}$ respondents manipulated the company's Articles of Association in 2017 to introduce an arbitration clause without proper notice or participation of all Shareholders, rendering the clause invalid. He asserted that the subsequent arbitration proceedings and resulting Award were therefore founded on an illegitimate and fraudulently introduced clause, and were conducted irregularly, including being initiated without proper invocation of the agreed procedure. He maintained that the Arbitral Award sought to be enforced is invalid as it arises

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from a flawed and biased process. He contended that the Arbitrator acted with partiality and in disregard of procedural fairness, including proceeding despite pending Court challenges and allegedly inviting claims improperly. Mr. Orenge asserted that the 2nd, 3rd, 4th, 5th & 7th respondents' actions are aimed at enforcing an Award that is under challenge and lacks legal force under the Arbitration Act.

23. In a rejoinder, the 5th respondent filed a supplementary affidavit sworn on 8th December 2023 by Ms Lisa Anyango Amenya, one of the Directors of the 5th respondent company. She confirmed that the 2nd, 3rd, 4th, 5th & 7th respondents have a pending application before the Court seeking enforcement of the First Partial Arbitral Award issued on 22nd June 2022. She averred that subsequent to that application, the Arbitrator delivered a Final Award on 27th September 2022, followed by a Correcting Memorandum on 27th October 2022. She emphasized the necessity of placing the Final Award before the Court, noting that it had not been issued at the time the enforcement application was filed. She asserted that the inclusion of the Final Award issued on 27th September 2022 and the Correcting Memorandum issued on 27th October 2022, it is essential for the Court to effectively and conclusively determine the real issues in dispute between the parties herein.

24. The two applications were canvassed by way of written submissions which were highlighted on 3rd & 4th December 2025.

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25. The applicants' submissions were filed on 29th October 2023 by the law firm of Kamau Kuria & Company Advocates. The 2nd, 4th, 6th & 9th respondents' submissions were filed by the law firm of Hamilton, Harrison & Mathews on

28th November 2023 and the 3rd, 5th & 7th respondents' submissions were filed on 11th December 2023 by the law firm of Kairu & McCourt Advocates.

26. Dr. Kamau Kuria (SC), learned Counsel for the applicants submitted that following the invitation of 23rd February 2021, the 2nd respondent, represented by the law firm of Kairu & McCourt Advocates, confirmed the existence of a dispute to be adjudicated upon, prompting the 1st respondent, who had not been validly appointed under Article 82 of the Memorandum and Articles of Association of the 1st applicant or under Section 16 of the Arbitration Act, to convene a preliminary arbitral meeting and invite parties to propose dates. He contended that this unilateral action contravened the provisions of Section 19 of the Arbitration Act, which mandates equal treatment of parties and a fair opportunity to present one's case, as the applicants had previously raised concerns about bias in letters dated 12th & 18th March 2021.

27. Dr. Kamau Kuria (SC), argued that despite the applicants' objections, the 1st respondent proceeded with the meeting on 16th March 2021 and issued Procedural Order No. 1, effectively reconstituting the parties by converting certain respondents into claimants and former claimants into respondents, and directing service of statements of claim without addressing whether the arbitration had been lawfully terminated by the Applicants' withdrawal on 17th February 2021. Senior Counsel submitted that the applicants immediately protested through letters and filed a Challenge to the Competence of Arbitration and the Arbitrator under Sections 13, 14 and 15 of the Arbitration Act on 22nd March 2021, asserting that the 1st respondent's impartiality and independence were compromised, and that the arbitration conducted was unlawful.

28. He contended that the 1st respondent disregarded the doctrine of *functus officio*, as enunciated by the Supreme Court in **Odinga v Independent Electoral &**

 

**Boundaries Commission** [2013] KESC 8 (KLR), by reviewing and overturning his own prior decision of 16th March 2021 to determine jurisdiction separately from the merits, by issuing Procedural Order No. 3 on 10th June 2021 to consolidate jurisdiction and merits' issues, and dismissing the applicants' challenge to his competence. Counsel asserted that the 1st respondent's conduct demonstrates bias, dishonesty, and professional incompetence, evidenced by his failure to recognize that the Arbitration was terminated by operation of law, disregard for Sections 15 & 16 of the Arbitration Act regarding termination and appointment of Arbitrators, and improper engagement in formulating disputes and defining parties, contrary to the principle established by the Court of Appeal in **Independent Electoral and Boundaries Commission v Mule & 3 others** [2014] KECA 890 (KLR).

29. Dr. Kamau Kuria (SC) stated that by proceeding without hearing submissions on the legality of his appointment, the termination of arbitration, or the existence of a valid Arbitration Agreement, the 1st respondent violated the provisions of Section 19 of the Arbitration Act, embodying natural justice, and rendered his decisions null and void, as supported by the finding in **R v Lambert** [1957] EA 575 and **DLG v Laing Investments (Bracknell) Ltd** 60 BLR 112. Senior Counsel further stated that on 22nd June 2021, the 1st respondent issued a Ruling asserting impartiality and competence despite overwhelming evidence of bias and prior judicial findings of incompetence, disregarding provisions in the Memorandum and Articles of association and statutory law under the Insurance Act governing valid Shareholder status and Arbitration procedures. He contended that the Arbitration proceedings initiated without lawful authority violated the provisions of Article 82 of the Memorandum and Articles of association of the 1st applicant, Sections 15, 16 &

19 of the Arbitration Act, and fundamental principles of natural justice, thus the resulting Award is unenforceable and contrary to public policy.

30. Senior Counsel submitted that the 1st respondent disregarded their objection to the holding of Arbitral proceedings, as reflected in the supplementary affidavit of Mr. Evans Nyagah. Senior Counsel claimed that the meeting of 16th March 2021 resulted in Procedural Order No. 1, which dictated the sequence and timing of submissions while redefining parties' roles and failed to address whether the Arbitration had been terminated by withdrawal. Further, that the applicants' letters of 18th March 2021 highlighted the 1st respondent's partisanship, noting that he acted as an Advocate for the respondents, rather than as an impartial umpire, while the respondents' representatives focused solely on Shareholding disputes rather than proper procedure under Article 82 of the Memorandum and Articles of association of the 1st applicant.

31. It was submitted by Senior Counsel that following the rejection of a stay of proceedings on 12th April 2021, the applicants filed under protest, replies to the respondents' statements of claim, asserting that Article 82 of the Memorandum and Articles of association of the 1st applicant did not constitute a valid Arbitration Agreement and that certain entities were not valid Shareholders under the said Memorandum and the Insurance Act. He explained that the trial before the Arbitrator between 10th & 14th January 2022 involved evidence in support of the applicants' defence, while an Amended Challenge to the competence of Arbitration and Arbitrator was filed on 15th May 2021. He stated that the applicants further challenged Procedural Direction No. 3 and the Ruling of 8th June 2021, asserting that the 1st respondent had predetermined the outcome of jurisdictional and merit issues, thereby violating the rules of natural

justice, the *functus officio* doctrine, and the Arbitral framework established in the Memorandum and Articles of association of the 1st applicant.

32. Senior Counsel highlighted multiple alleged acts of incompetence, dishonesty, and bias by the 1st respondent including failure to recognize that the Arbitration had terminated by operation of the law, disregard for statutory requirements under Sections 15, 16 & 19 of the Arbitration Act, improper redefinition of parties and issues, and refusal to hear submissions on termination or jurisdiction, while proceeding with the Arbitration. Senior Counsel argued that these acts manifest professional incompetence, as the Arbitrator failed to follow procedural law, disregarded natural justice, and imposed his own formulation of disputes. He submitted that the 1st respondent's unilateral procedural decisions on 16th March, 17th February & 23rd February 2021 allowed arbitration to proceed solely for the benefit of certain respondents while ignoring the legality of his appointment and termination of Arbitration. He asserted that the 1st respondent's decisions and Awards are null and void, and that the Rulings delivered on 22nd June 2021 must be set aside.

33. Mr. Kiragu Kimani (SC), learned Counsel for the 2nd, 4th, 6th & 9th respondents submitted that the application herein has been overtaken by events, following the publication of the Arbitral Award and the Ruling of Okwany J., on 13th October 2022, which recognized W. G. Wambugu & Company Advocates as being properly on record for AKM Investments Limited. He argued that the applicants' attempts to disrupt the Arbitration, culminating in the application herein seeking to nullify or stay the Awards published by the 1st respondent, constitute an abuse of the Court process. Senior Counsel cited the Supreme Court cases of **Geo Chem Middle East v Kenya Bureau of Standards** [2020] KESC 1 (KLR) and **Synergy Industrial Credit Ltd v Cape Holdings**

**Ltd** [2020] KECA 223 (KLR), and submitted that under the Arbitration Act, the Court's role is supervisory, with intervention permitted only under circumstances specifically provided for in the Act.

34. He stated that Section 10 of the Arbitration Act limits the Court's jurisdiction, while Section 32A of the Act affirms that Arbitral Awards are final and binding, with recourse only under the Act. Mr. Kimani Kiragu (SC) argued that the applicant's position was that the Arbitrator lacked jurisdiction and was incompetent, but noted that the issue regarding the 1st respondent's jurisdiction was addressed in the Partial Award on 11th May 2022, with the 1st respondent ruling that all Shareholders had assented to the 2017 Articles of Association, thereby affirming jurisdiction. He cited the Court of Appeal case of **Anne Mumbi Hinga v Victoria Njoki Gathara** [2009] KECA 466 (KLR) and the case of **University of Nairobi v Nyoro Construction Company Limited & another** [2021] KEHC 380 (KLR), and also referred to the provisions of Section 17(5) & (6) of the Arbitration Act, which provide for the mechanism for challenging a jurisdictional ruling. Counsel argued that that the applicants did not follow the said mechanism, as they instead mischaracterized the procedural orders and sought judicial intervention outside the statutory framework.

35. Senior Counsel submitted that the applicants' claims of bias or incompetence lack merits as Section 14 of the Arbitration Act requires a challenge to an Arbitrator to be made within 15 days of such awareness, which the applicants failed to do, as evidenced in the Arbitration record. He cited the cases of **UAP Provincial Insurance Company Ltd v Joseph Muriuki Kenyatti & another** [1998] KEHC 229 (KLR) and **Shree Haree Builders Limited v Bazara Alex Tabulo & another** [2018] KEHC 9191 (KLR), to confirm that mere allegations

of bias without cogent evidence are insufficient, and that a Tribunal has the discretion to manage proceedings fairly. Mr. Kiragu Kimani (SC) highlighted that the applicants' pattern of litigation, spanning multiple Judges and cases, demonstrated a deliberate strategy to circumvent Arbitration, waste judicial resources, and prevent majority Shareholders from accessing the company. He emphasized that prior dismissals, including **High Court Commercial Suit E247 of 2022** and **Petition E003 of 2022**, establish that these were collateral attacks on the Arbitral Award and abuse of process.

36. Ms Ndumia, learned Counsel for the 3rd, 5th & 7th respondents relied on the Supreme Court case of **Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch** [2019] KESC 11 (KLR) and submitted that this Court lacks the jurisdiction to entertain the application herein, as the intervention of the Court in Arbitral matters is limited and strictly circumscribed by Statute. She referred to the case of **University of Nairobi v Nyoro Construction Company Limited & another** (supra), and argued that the application herein brought under Sections 7, 14(3), 15 & 17(6) of the Arbitration Act, neither invoked the proper statutory provisions for setting aside an Award under Section 35 of the Arbitration Act, nor was jurisdiction determined as a preliminary question, as instead, the Arbitral Tribunal addressed jurisdiction together with the merits of the dispute. She asserted that any challenge on the Arbitrator's jurisdiction ought to have been brought under the provisions of Section 35 of the Arbitration Act, rendering the instant application incompetent.

37. Counsel contended that the applicants' request to remove the Arbitrator and to nullify the Award under Sections 14(3) & 15 of the Arbitration Act, is similarly misconceived. She maintained that the procedural record shows no challenge to

the Arbitrator's competence was properly raised before the Tribunal, and the applicants failed to comply with directions to file a written challenge. She relied on the case of **AKN & another v ALC and others** [2015] SGCA 18 and asserted that Courts cannot entertain appeals on the merits of Arbitral decisions, and that intervention is limited to process failures or decisions beyond the scope of the Arbitration Agreement. Ms Ndumia further relied on the case of **Chania Gardens Limited v Gilbi Construction Company Limited & another** [2015] KEHC 6202 (KLR), and submitted that the applicants have presented no credible evidence of bias in the impugned Arbitration proceedings.

38. She further submitted that allegations relying on **the Mistry decision** are unrelated and do not demonstrate actual or perceived bias, as procedural matters, such as arbitration fees or scheduling, cited by the applicants as evidence of bias, are routine and do not satisfy the stringent standard for removal. Counsel urged this Court not to set aside the Arbitral Award, as the applicants failed to invoke the provisions of Sections 35 & 37(b)(ii) of the Arbitration Act regarding public policy, rendering the instant application defective and legally incompetent. She highlighted that the applicants' conduct throughout the Arbitral and Court proceedings, stating that it reflected a deliberate strategy of forum shopping and abuse of process, having filed multiple applications and suits, including **HCCC No. E003 of 2022, HCCC No. E247 of 2022**, and a **Succession Case No. E691 of 2018**, for the purpose of delaying the resolution of the dispute. She submitted that these actions underscore a pattern of vexatious litigation, as noted in the High Court Rulings on the said cases.

39. In a rejoinder, Dr. Kamau Kuria (SC) submitted that the instant application seeks the setting aside of the 1st respondent's decision of 10th June 2022 and for

 

the Arbitral Award to be declared null and void. He emphasized that the provisions of Section 17 of the Arbitration Act go hand in hand with the provisions of Section 35 of the Arbitration Act.

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40. The 3rd, 5th & 7th respondents' submissions were filed on 11th December 2023 by the law firm of Kairu & McCourt Advocates, whereas the applicants' submissions were filed by the law firm of Kamau Kuria & Company Advocates on 17th January 2024.

41. Ms Ndumia, learned Counsel for the 3rd, 5th & 7th respondents stated that the Arbitral process culminated in a First Partial Award dated 11th May 2022 (released on 22nd June 2022) and a Final Award, including costs, issued on 27th September 2023. She cited the provisions of Sections 36 & 37 of the Arbitration Act and further submitted that the 3rd, 5th & 7th applicants have fully complied with the statutory requirements by providing certified copies of the Partial Award, Final Award, and the Arbitration Agreement contained in the company's Articles of Association, as supported by multiple affidavits on the record. To buttress these submissions, Counsel relied on the Supreme Court case of **Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch** (supra) and the case of **Samura Engineering Limited v Don-Woods Company Limited** [2014] KEHC 5423 (KLR).

42. She contended that the applicants have failed to discharge their burden under Section 37 of the Arbitration Act to demonstrate any valid ground for refusal of enforcement of the Arbitral Award. She argued that the applicants' objections, centered on alleged bias, invalidity of the Arbitration clause, and pending proceedings in **HCCC No. E250 of 2021** are either misplaced, procedurally

defective, or constitute an impermissible attempt to re-litigate issues conclusively determined by the Arbitral Tribunal. She maintained that the allegations of bias are unsubstantiated and lack evidentiary support, drawing parallels with the holding in the case of **Castle Investments Company Limited v Board of Governors - Our Lady of Mercy Girls Secondary school** [2019] KEHC 8208 (KLR), where similar claims were rejected for want of proof.

43. Ms Ndumia asserted that the applicants' reliance on the provisions of Sections 13, 14 & 17 of the Arbitration Act is misconceived, as no proper challenge to the Arbitrator's jurisdiction or appointment was pursued in accordance with statutory procedure. She argued that any such challenge ought to have first been determined by the Arbitrator, as affirmed by the Court in the case of **Chania Gardens Limited v Gilbi Construction Company Limited & another** (supra). She submitted that no preliminary jurisdictional ruling was made to trigger the statutory stay provisions.

44. Counsel contended that the alleged invalidity of Article 82 of the Company's Articles of Association and other factual disputes were fully canvassed and determined during Arbitration, and cannot now be reopened under the guise of opposing enforcement. She argued that once compliance with the provisions of Section 36 of the Arbitration Act is established, the burden shifts to the applicants, which burden has not been met.

45. Dr. Kamau Kuria (SC), learned Counsel for the applicants traced the dispute between the parties herein to the incorporation of Directline Assurance Company Ltd in 1998, and submitted that the applicants were original Shareholders, and a 2005 restructuring introduced the 5th & 7th respondents as majority Shareholders. He argued that the company's Articles of Association

contained a pre-emption Clause requiring existing Shareholders to be given priority before shares could be transferred to outsiders. He submitted that from 2007, the late John Gichia Macharia and Janice Theresa Wanjiku Kiarie excluded the applicants from management and falsely claimed that the applicants' shares were held in trust for Mr. Macharia without any formal declarations.

46. Senior Counsel further stated that following the 2009 amendment to Section 23(4) of the Insurance Act, which capped shareholding in insurance companies at 20-25%, the 5th & 7th respondents devised a fraudulent scheme to circumvent the law by introducing the 1st to 3rd applicants (respondents) as nominee Shareholders to hold excess shares in trust, thereby unlawfully retaining control of the company in violation of both Statute and the pre-emption provisions. Dr. Kamau Kuria (SC) stated that the applicants only discovered of the existence of these trust arrangements in 2019, prompting the filing of **HCCC No. E278 of 2019**, which was subsequently referred to arbitration. He indicated that the resulting Arbitral Award allocated 90.336% of the company's shares to the 2nd, 3rd, 4th, 5th & 7th respondents, including 70.336% attributed to the 5th respondent through direct and nominee holdings.

47. He relied on the case of **Christ for All Nations v Apollo Insurance Co. Ltd** [2002] 2 EA 366 and contended that the said allocation is illegal and unenforceable as it contravenes the provisions of Section 23(4) of the Insurance Act and is therefore contrary to public policy under Section 35(2)(b)(ii) of the Arbitration Act. Senior Counsel cited the Court of Appeal case of **Kibaki & another v Mathingira Wholesalers Company Ltd & 6 others** [2018] KECA 699 (KLR), and submitted that the purported shareholding structure is invalid for non-compliance with the company's Articles of

Association. He argued that the failure to honour pre-emption rights renders the 2nd, 3rd & 4th respondents' shareholding invalid. In asserting that the 2017 Resolution introducing the Arbitration Clause (Article 82) is void because it was passed without notice to all Shareholders, he relied on the case of **Elkana Mukundi Gatimu & another v John B.M. Muya & another** [2013] KEHC 5433 (KLR).

48. He referenced the case of **Mapis Investment (K) Limited v Kenya Railways Corporation** [2006] KECA 344 (KLR), in challenging the legality of the Arbitration itself and maintained that no valid Arbitration Agreement existed and that the Arbitral process was fundamentally flawed. He asserted that the Arbitrator lacked jurisdiction because the Arbitration Clause was invalid and in any event, the procedure for commencing Arbitration under both Article 82 of the company's Memorandum and Article of association and Section 16 of the Arbitration Act were not followed after withdrawal of the earlier suit. Counsel argued that the Arbitrator, Mr. Philip Aliker, was not qualified to act due to prior judicial findings of bias and incompetence in the case of **Mistry Jadva Parbat & Company Limited v Grain Bulk Handlers Limited** [2016] KEHC 502 (KLR).

49. Dr. Kamau Kuria (SC) relied on the case of **Zadock Furnitures Systems Limited & another v Central Bank of Kenya** [2014] KEHC 2163 (KLR), which set out the test for bias as being whether circumstances give rise to a reasonable apprehension of lack of impartiality. He also relied on **the East African Court Case No. 1 of 2006 - Anyang Nyongo & others v Attorney General of the Republic of Kenya,** in in the East African Court of Justice, for the principle that decisions made by a disqualified Adjudicator are null and void. On the issue of public policy, the applicants maintained that enforcement

of the Arbitral Award would sanction an illegal shareholding structure in violation of the Insurance Act and therefore offend the provisions of Section 35(2)(b)(ii) of the Arbitration Act.

**ANALYSIS AND DETERMINATION.**

50. I have considered the two applications filed herein and affidavits filed in support thereof. I have also considered the Notices of Preliminary Objection, Grounds of Opposition, replying and further affidavits filed by the applicants and the respondents, as well as the submissions filed and highlighted by Counsel for the parties. The issues that arise for determination are-

    i) **Whether this Court has the requisite jurisdiction to entertain the applications herein;**
    ii) **Whether the Arbitral Tribunal was properly constituted and had jurisdiction;**
    iii) **Whether the Arbitral proceedings were conducted in accordance with the law;**
    iv) **Whether the Arbitral Award is liable to be set aside; and**
    v) **Whether the Arbitral Award is enforceable under Section 36 of the Arbitration Act.**

51. The applicants and the 5th respondent in opposing the applications herein, filed Notices of Preliminary Objection. It is trite that Preliminary Objections ought to raise pure points of law. They should be argued on the assumption that all the facts pleaded by the other side are correct. They cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The Court in the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd** [1969] EA 696, set out what constitutes a Preliminary Objection in the following words –

> ***So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.***

52. In the said case, Sir Charles Newbold P., stated as follows-

> ***… the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.***

53. See also the case of **Oraro v Mbaja** [2005] KEHC 3182 (KLR), on what constitutes a valid Preliminary Objection, wherein the Court held as follows**-**

> ***I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary***

> ***objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that "where a Court needs to investigate facts, a matter cannot be raised as a preliminary point." This legal principle is beyond dispute, as there are divers (sic) weighty authorities carrying the message.***

54. Having considered the issues raised by the applicants and the 5th respondents in the Notices of Preliminary Objection, they raise both points of law and factual issues. They are as such not valid Notices of Preliminary Objections as pert he above authorities. The legal issues raised in the said Notices have been addressed in this Ruling as they were also addressed in the affidavits filed by the respective parties.

**Whether this Court has the requisite jurisdiction to entertain the applications herein.**

55. On the issue of jurisdiction, the Court in the case of **Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd** [1989] KLR 1, held that -

> ***…Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.***

56. In Arbitral proceedings, the High Court cannot intervene except as provided for in the Arbitration Act, under Section 10 which states that –

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

57. The respondents' position is that the applicants' application filed in **HCCOMM Misc. App. No. E250 of 2021** offends the provisions of Section 10 of the Arbitration Act, as it invokes the provisions of Sections 7, 14, 15 & 17(6) of the Arbitration Act, which do not confer jurisdiction upon this Court to set aside an Arbitral Award, which jurisdiction is exclusively vested under Section 35 of the Arbitration Act. They argued that the only statutory gateway for such relief is Section 35 of the Arbitration Act, which the applicants failed to properly invoke.

58. The applicants on the other hand, asserted that the provisions of Section 17(6) - (8) of the Arbitration Act must be read with the provisions of Section 35 of the Arbitration Act. They averred that their challenge to the Arbitrator's jurisdiction and the Arbitrator's conduct entitles this Court to intervene, even post-award. The applicants contended that their applications challenging jurisdiction were filed prior to the Arbitral Award and remain undetermined, thus preserving this Court's jurisdiction.

59. Section 17(6) of the Arbitration Act permits recourse to the High Court only where the Arbitral Tribunal determines the issue of jurisdiction as a preliminary question. When the Tribunal addresses jurisdiction alongside the substantive merits of the dispute, any challenge can only be brought before the High Court under Section 35 of the Arbitration Act, after the Arbitral Award has been rendered. In my considered view, such a challenge cannot be maintained post-award, outside the statutory framework provided for under Section 35 of the Arbitration Act.

60. The record shows that the Arbitrator expressly directed through Procedural Order No. 3, that jurisdiction would be determined with the merits of the claim before him, and ultimately, he did so in the Partial and Final Awards. In view of

the said circumstances, this Court agrees with the respondents that the provisions of Section 17(6) of the Arbitration Act were not triggered.

61. In light of the above, this Court finds that the applicants' invocation of the provisions of Sections 17(6) - (8) of the Arbitration Act is misconceived, as the proper avenue for challenging the Partial and Final Awards issued by the Arbitrator was under Section 35 of the Arbitration Act, subject to its strict conditions and timelines. This Court further finds that the prayer seeking to declare the Partial Award as null and void falls outside the framework of the provisions of Section 35 of the Arbitration Act and amounts to an impermissible collateral challenge to the Arbitral Award, outside the exclusive statutory framework provided for under Section 35 of the said Act.

62. In regard to the enforcement proceedings brought in the application filed in **HCCOMM Misc. App. No. E509 of 2022**, this Court finds that its jurisdiction was properly invoked under the provisions of Section 36 of the Arbitration Act, subject only to the limited grounds for refusal under Section 37 of the Arbitration Act.

63. Accordingly, this Court holds that since its jurisdiction is limited and circumscribed under Section 10 of the Arbitration Act, the application in **HCCOMM Misc. App. No. E250 of 2021**, is incompetent in view of the fact that it seeks to set aside the Arbitral Award outside the confines of Section 35 of the Arbitration Act.

**Whether the Arbitral Tribunal was properly constituted and had jurisdiction.**

64. The applicants' challenge to the Arbitral Tribunal's jurisdiction was anchored on grounds that the Arbitration Clause under Article 82 of the 1st applicant's

Articles of Association was invalidly introduced, the arbitration proceedings were not properly commenced, the Arbitrator was not validly appointed and that the dispute involved illegality and fraud, thus falling outside the Arbitral Tribunal's jurisdiction.

65. The respondents on the other hand contended that the Arbitration Clause forms part of the 1st applicant's company's Articles of Association and binds all Shareholders. They stated that the High Court in **HCCC No. E278 of 2019**, referred the dispute between the parties herein to Arbitration, thereby affirming the aforesaid Arbitration Clause. They further stated that the Arbitrator was duly appointed through the Chartered Institute of Arbitrators and that the Tribunal expressly determined the question of its jurisdiction in the Award.

66. The doctrine of *kompetenz-kompetenz*, as provided for under Section 17(1) of the Arbitration Act, states that –

> ***The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose -***
>
> ***a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and***
>
> ***b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.***

67. The import of the above provisions is that they empower an Arbitral Tribunal to rule on its own jurisdiction. As stated before in this Ruling, that determination, where made together with the merits of the dispute before the


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Tribunal, is only challengeable pursuant to the provisions of Section 35 of the Arbitration Act.

68. On the issue of validity of the Arbitration Clause, the applicants' argument is grounded on alleged procedural impropriety and illegality in the amendment of the 1st applicant's Memorandum and Articles of association. Those contestations however constitute substantive issues that fell squarely within the Arbitral Tribunal's mandate and were duly determined in both the Partial and Final Award.

69. In addition, the challenge to the Arbitrator's appointment and impartiality falls within the provisions of Sections 13 & 14 of the Arbitration Act, which require prompt invocation within strict timelines. On perusal of the documents filed by the parties herein, this Court is satisfied that the respondents have demonstrated, and the record demonstrates that no compliant challenge was lodged and prosecuted within the timelines prescribed under the Arbitration Act.

70. Given the said circumstances, this Court is satisfied that the Arbitral Tribunal was properly constituted, and its assumption of jurisdiction cannot be impeached at this stage outside the statutory framework. It is therefore apparent that the applicants' objections amount to an impermissible attempt to re-open and re-litigate issues conclusively determined by the Arbitral Tribunal.

**Whether the Arbitral proceedings were conducted in accordance with the law.**

71. The applicants' case is that the Arbitrator was biased and lacked impartiality, and that he denied them a fair hearing. They also contended that he improperly redefined the parties and issues before him, and disregarded objections and

pending Court applications. The respondents took the opposite position that the Arbitral proceedings were conducted in accordance with the provisions of Section 19 of the Arbitration Act which states that –

> ***The parties shall be treated with equality and each party shall subject to section 20, be given a fair and reasonable opportunity to present his case.***

72. From the documents available on record, it is evident that the applicants actively participated in the Arbitral proceedings by filing pleadings and presenting evidence. It is now well settled that the legal threshold for establishing bias is high and there must be a reasonable apprehension of bias, supported by cogent evidence. Mere dissatisfaction with procedural Rulings does not suffice. From the record, this Court notes that other than alleging bias on the part of the Arbitrator, no cogent or credible evidence has been adduced to support the said allegations. This Court is therefore satisfied that the allegations of bias are not only unsupported but also belated.

73. Although the record shows that the applicants participated in the Arbitral proceedings under protest, they nonetheless filed written submissions and adduced evidence. The record further shows that the Arbitral Tribunal issued procedural directions applicable to all the parties before it. It is this Court's finding that the question of jurisdiction and merits, while contested by the applicants, falls within the Arbitral Tribunal's procedural discretion.

74. In light of the foregoing, this Court is satisfied that no sufficient basis has been established to demonstrate any breach of natural justice, bias, or procedural impropriety on the part of the Arbitral Tribunal. In the circumstances, this Court finds that the Arbitral proceedings were conducted within the Arbitral Tribunal's lawful discretion.

**Whether the Arbitral Award should be set aside.**

75. A Court's jurisdiction in arbitration matters is limited to the extent provided for under the Arbitration Act, particularly under Section 10 of the Arbitration Act. This limitation arises from the principle that the Arbitral Tribunal's findings of fact and interpretation of the contract are generally final, subject only to the limited grounds under Sections 35 and 37. This Court cannot therefore entertain claims of factual or legal error by the Arbitrator or interfere with such findings. This position is anchored on the provisions of Section 32A of the Arbitration Act which states that -

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

76. The aforesaid position was articulated by the Supreme Court in the case of **Geo Chem Middle East v Kenya Bureau of Standards** (supra), where the said Court quoted Ochieng J's holding in the High Court in a case involving the same parties, as follows -

> ***It is not the function nor mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the court was called upon to determine whether or not to set aside and award … if the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the court would be sitting on an appeal over the decision in issue. In light of the public policy of Kenya, which loudly pronounces the intention of giving finality to arbitral awards, <u>it would actually be against the said public policy to have the Court sit on appeal over the decision of the arbitral tribunal.</u>*** (Emphasis added).

77. The Court's jurisdiction to set aside an Arbitral Award is provided for under Section 35 of the Arbitration Act. Section 35(2) of the Arbitration Act provides for grounds under which an Arbitral Award may be set aside. It states that –

***An arbitral award may be set aside by the High Court only if -***

***a) the party making the application furnishes proof –***

***i) that a party to the arbitration agreement was under some incapacity; or***

***ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or***

***iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or***

***iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or***

***v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot***

***derogate; or failing such agreement, was not in accordance with this Act; or***

***vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;***

***b) the High Court finds that -***

***i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or***

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

78. The import of the above provisions is that an Arbitral Award may only be set aside on specific grounds, including incapacity or invalidity of an Agreement, lack of proper notice, excess of jurisdiction and conflict with public policy. Upon examination of the Arbitration Act, this Court notes that under Section 37, similar grounds apply for the refusal of enforcement of an Arbitral Award.

79. In urging this Court to set aside the impugned Arbitral Award, the applicants rely on grounds of an alleged invalid Arbitration Agreement, bias on the Arbitrator's part, illegality of the shareholding structure and violation of the Insurance Act. The respondents in opposition to the applicants' application to set aside the impugned Arbitral Award submitted that none of the statutory thresholds have been met. They instead asserted that the applicants are attempting to reopen the merits of a dispute that had already been fully canvassed and determined by the Arbitral Tribunal.

80. Upon perusal of the applicants' grounds for setting aside the Arbitral Award, it is manifest that save for the issue of public policy under Section 35(2)(b)(ii) of the Arbitration Act, the remaining grounds either fail to meet the evidentiary threshold required under Section 35 of the Arbitration Act or amount to an

impermissible invitation for this Court to sit on appeal and re-evaluate the merits of the Arbitral Award.

81. In the case of **Bomas of Kenya Limited v Standard Investment Bank Limited** (Civil Application E456 of 2021) [2023] KECA 544 (KLR) (12 May 2023) (Ruling), the Court of Appeal in discussing the import of Section 35 of the Arbitration Act held as follows –

> ***By agreeing to arbitration, the parties limit interference by courts to the grounds set out in Section 35 of the Act. By necessary implication they waive the right to rely on any further grounds of review, 'common law' or otherwise. Section 35 (1) of the 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 subsection (2).***

82. Public policy was extensively discussed in the case of **Christ for All Nations v Apollo Insurance Co. Ltd** [2002] 2 E.A 366, where Ringera, J (as he then was), held that-

> ***Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality.***

83. When it comes to public policy, illegality must be clear, fundamental, and proven. The applicants' allegations regarding shareholding caps and nominee arrangements were contested factual matters, which were addressed by the Arbitral Tribunal. In light of this Court's earlier finding, that allegations of bias

were unsubstantiated, this Court finds no basis for invoking Section 35(2)(b)(ii) on public policy grounds. I am therefore not satisfied that the said claims meet the high threshold required to invalidate an Arbitral Award on grounds of being contrary to public policy.

84. It is now well settled that an Arbitral Award cannot be said to be contrary to public policy just because it is against one party. In the case of **Christ for All Nations v Apollo Insurance Co. Ltd** (supra), the Court stated as follows-

> ***Justice is a double-edged sword. It sometimes cuts the plaintiff and at other times the defendant. Each of them must be prepared to bear the pain of justice's cut with fortitude and without condemning the law's justice as unjust … in my judgment this is a perfect case of a suitor who strongly believed that the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Arbitration Act.***

85. In the circumstances of the applicable law and the affidavit evidence adduced, this Court is not satisfied that the applicants' claims on shareholding caps and nominee arrangements meet the high threshold required to invalidate the Arbitral Award in issue, on grounds of being contrary to public policy.

86. This Court therefore finds that the applicants have failed to establish any of the statutory grounds under Sections 35 & 37 of the Arbitration Act to warrant the setting aside of the Arbitral Award.

**Whether the Arbitral Award is enforceable under Section 36 of the Arbitration Act.**

87. Recognition and enforcement of Arbitral Awards is provided for under Section 36 of the Arbitration Act, which states that –

> 1) ***A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.***
> 2) ***An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.***
> 3) ***Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—***
>     a) ***the original arbitral award or a duly certified copy of it; and***
>     b) ***the original arbitration agreement or a duly certified copy of it.***
> 4) ***If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.***
> 5) ***In this section. the expression "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General***

***Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.***

88. Section 37 of the Arbitration Act provides that recognition or enforcement of an Arbitral Award may only be refused in limited and specific circumstances. At the request of the party against whom the award is invoked, the High Court may decline enforcement where that party demonstrates any of the following grounds: incapacity; an invalid arbitration agreement; lack of proper notice or inability to present its case; excess of jurisdiction; improper composition of the Tribunal or procedure; that the Award is not binding or has been set aside or suspended; or that it was procured through fraud, bribery, corruption or undue influence.

89. Additionally, the Court may refuse enforcement on its own motion if it finds that the subject matter is not arbitrable under Kenyan law or that enforcement would be contrary to public policy. Section 37 further allows the Court to adjourn enforcement and order security, if proceedings to set aside or suspend the Award are pending elsewhere. The effect of the said provisions is that refusal of enforcement is exceptional and confined to the statutory grounds captured foregoing provisions of the Arbitration Act.

90. It is not in contest that the applicants (referred to as respondents in both applications) in **HCCOMM Misc. App. No. 509 of 2022** have produced certified copies of the Partial and Final Arbitral Awards. They have also provided the Arbitration Agreement in compliance with the provisions of Section 36(3) of the Arbitration Act.

91. Once compliance has been established, the burden shifts to the opposing party under Section 37 of the Arbitration Act to demonstrate why the Arbitral Award should not be recognized and enforced as a decree of the Court.

92. This Court notes that while an application seeking to set aside the impugned Arbitral Award was filed in **HCCOMM Misc. App. No. E250 of 2021**, this Court has already determined that the said application is not merited and that the applicants therein have failed to establish any of the statutory grounds under Sections 35 & 37 of the Arbitration Act, thereby failing to discharge the burden of proof.

93. In the premise, this Court is satisfied that the impugned Partial Arbitral Award is valid and enforceable pursuant to the provisions of Section 36 of the Arbitration Act and to the extent of the Correcting Memorandum dated 8th June 2022.

94. In the result, the Amended Amended Notice of Motion application dated 24th June 2022 filed in **HCCOMM Misc. App. No. E250 of 2021** is not merited, whereas the Chamber Summons dated 6th July 2022 filed in **HCCOMM Misc. App. No. 509 of 2022** is merited.

95. The additional prayers sought by the respondents for the assistance by the Police to enforce compliance of the Court orders that have been made herein cannot be granted at this point in time, since there is no evidence of non-compliance by the applicants.

96. I make the following final orders –

   i) **The application dated 24th June 2022 filed in HCCOMM Misc. App. No. E250 of 2021 is hereby dismissed;**

   ii) **The First Partial Arbitral Award dated 11th May 2022, as read with the Correcting Memorandum dated 8th June 2022, is hereby recognized as binding and is adopted as a decree of the Court**

**pursuant to Section 36 of the Arbitration Act. Leave is hereby granted for its enforcement; and**

iii) **Costs for both the applications dated 24th June 2022 and the one dated 6th July 2022 shall be borne by the applicants in HCCOMM Misc. App. No. E250 of 2021. For the avoidance of doubt, costs shall be borne by Directline Assurance Company Ltd, Royal Media Services Ltd, Royal Credit Ltd, Samuel Kamau Macharia and Purity Gathoni Macharia.**

It is so ordered.

**DATED, SIGNED** and **DELIVERED** at **KIAMBU** on this **8TH** day of **MAY 2026. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of-**

Dr. Kamau Kuria (SC) for the applicants

Mr. Victor Wasonga h/b for Allen Gachuhi for the 1st respondent

Mr. Kiragu Kimani (SC) for the 2nd, 4th, 6th and 9th respondents

Ms Ndumia for the 3rd respondent

Ms Jan Mohamed SC for the 7th respondent and h/b for Mrs. Wambugu for the 5th respondent

No appearance for the Interested Party

Ms Julia – Court Assistant.