



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 174 OF 2017**

**(FORMERLY MOMBASA ELC NO 286 OF 2017)**

**COAST APPAREL (EPZ) LIMITED.....PLAINTIFF**

**= VERSUS =**

**MTWAPA (EPZ) LIMITED.....1<sup>ST</sup> DEFENDANT**

**I & M BANK LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

**BACKGROUND**

1. On or about 1<sup>st</sup> August 2017, the Plaintiff, Messrs Coast Apparel EPZ Ltd moved to the Environment and Land Court in Mombasa and filed this suit praying for a number of orders and declarations to be made against each of the two Defendants herein. Contemporaneous with the filing of the Plaintiff, the Plaintiff filed under Certificate of Urgency a Notice of Motion application dated the same day seeking Orders that:-

- 1. (The) Motion be and is hereby certified as urgent, service thereof dispensed with in the first instance and (that it be) heard ex parte.**
- 2. Leave be and is hereby granted by this Court for the hearing of the Motion during the vacation.**
- 3. Pending the inter-partes hearing and determination of this Motion, or until further orders of the Court, this Court hereby grants a temporary injunction restraining the 2<sup>nd</sup> Defendant, I & M Bank Limited from paying or settling Payment Guarantee No. 021/COM/LG/0109/2016 to the 1<sup>st</sup> Defendant.**
- 4. Pending the hearing and merit determination of this suit, or until further orders of the Court, this Court hereby grants an injunction restraining the 2<sup>nd</sup> Defendant, I & M Bank Ltd from paying or settling Payment Guarantee No. 021/COM/LG/0109/2016 to the 1<sup>st</sup> Defendant.**
- 5. The costs of (the) Motion be in the cause.**

2. The said application was placed before the Honourable Justice C. Yano in Mombasa on the same day who upon consideration thereof granted orders in terms of Prayers 1, 2, and 3 thereof. In addition, the Learned Judge ordered that the file be transferred to Malindi as the subject matter was in his view within the jurisdiction of the Environment and Land Court at Malindi.

### **THE 1<sup>ST</sup> DEFENDANT'S APPLICATION**

3. On 9<sup>th</sup> August 2017, feeling aggrieved by the grant of the temporary orders of injunction by the Mombasa Court, the 1<sup>st</sup> Defendant filed the present application dated 4<sup>th</sup> August 2017 seeking orders that:-

- (a) The application be certified as urgent and (that it) be heard ex-parte in the first instance.*
- (b) The application be heard before the Plaintiff's application dated 1/8/2017 is heard and determined.*
- (c) The orders given on 2/8/2017 be discharged as a matter of right.*
- (d) This suit be dismissed with costs.*
- (e) The costs of this application be paid by the Plaintiff in any event.*

4. The 1<sup>st</sup> Defendant's application is supported by annexed affidavit of Alfeen Esmail, one of its Directors sworn on 4<sup>th</sup> August 2017. The application is premised on a number of grounds which may be summarised as follows:-

- (i) That the orders of injunction granted by the Mombasa Court were granted without jurisdiction and that the same ought to be discharged;**
- (ii) That this suit is res judicata. A previous suit by the same Plaintiff against the same Defendants being Malindi HCCC No. 12 of 2017 was struck out. The said suit was on the same subject matter and the Plaintiff's remedy thus lay in an appeal to the Court of Appeal and not by way of this fresh suit;**
- (iii) In a Ruling delivered by the Honourable Mr. Justice W. Korir on 27/7/2017 in Malindi HCCC No. 12 of 2017, the Court found that the dispute was a commercial dispute and hence the Environment and Land Court has no jurisdiction to hear and determine the same;**
- (iv) That it is a gross abuse of the Court process for the Plaintiff to rush to this Court and obtain ex-parte orders after similar orders granted in Malindi HCCC No. 12 of 2017 were dismissed and the entire suit was struck out;**
- (v) That this dispute arises out of an Agreement dated 15/11/2015. Clauses 8.4 and 8.5 of that Agreement required the plaintiff and the 1<sup>st</sup> Defendant to have any such dispute resolved through arbitration. The parties had therefore expressly ousted the jurisdiction of all Courts other than for purposes of interim conservatory orders pending the final award of the arbitrator;**
- (vi) That although the plaintiff had purported to terminate the agreement unilaterally an arbitration clause in any agreement survives the termination of any such agreement as arbitration clauses are designed to ensure that disputes between parties are resolved by arbitration and not in Court;**
- (vii) That the Plaintiff's suit is time barred after they refused to comply with the timelines provided in the arbitration clause. Again, the plaintiff cannot approach any Court for the**

**resolution of the substantive dispute before exhausting all processes in arbitration;**

**(viii) That in order to restore the parties to the same footing and to ensure that the plaintiff does not enjoy the second set of ex-parte orders, those new orders made ex-parte ought to be discharged as a matter of right;**

**(ix) That the plaintiff had on 8/6/2017 during the pendency of Malindi HCCC No. 12 of 2017, demanded payment of US Dollars 300,000/= from the 1<sup>st</sup> Defendant within 10 days failure to which they would file a claim in the High Court. In the said letter copied to the 2<sup>nd</sup> Defendant, the Plaintiff purported to cancel or revoke the guarantee. Having made the decision to sue for US Dollars 300,000/= , and to unilaterally revoke the same guarantee before that suit was concluded, the Plaintiff had no right to rush to this Court for ex-parte Orders and its conduct amounts to a gross abuse of the process of Court;**

**(x) That the Plaintiff has been forum shopping. The Plaintiff ought to have amended Malindi HCCC No. 12 of 2017 instead of waiting for that suit to be struck out and then filing the same claim in this Court; and**

**(xi) That this Court was misled into granting the ex-parte orders. The Plaintiff ought to have disclosed that the suit is time barred, that no Court can interfere in any dispute subject to an arbitration clause and that the subject matter of this suit is the same as in the previous suit.**

5. The said application filed under Certificate of Urgency was placed before me on 9<sup>th</sup> August 2017 whereupon I directed that the same be served for inter-partes hearing on 15<sup>th</sup> August 2017.

#### **THE PLAINTIFF'S CASE**

6. In a Replying Affidavit sworn by its Finance Officer Pankaj Mehta on 14<sup>th</sup> August 2017, the plaintiff is opposed to the discharge of the orders granted by the Court in Mombasa as sought by the 1<sup>st</sup> Defendant on a number of grounds.

7. It is the Plaintiff's case that they fully disclosed to the Court prior to the grant of the said Orders the existence of Malindi High Court Civil Suit No. 12 of 2017 and that it is therefore dishonest for the 1<sup>st</sup> Defendant to allege that they hoodwinked the Court by not disclosing the existence of the said proceedings. The Plaintiffs on their part accuse the 1<sup>st</sup> Defendant of avoiding to mention that they vehemently challenged the jurisdiction of the High Court in the said proceeding's contending that the High Court had no jurisdiction to deal with a matter concerning land, lease and rent.-

8. The Plaintiffs avers that the issue for determination in the said previous suit was limited to the narrow question of whether or not the payment the Bank Guarantee with which the suit was concerned should be preserved pending arbitration. Thus, according to the plaintiff, while the underlying Agreement between the parties touched on or related to the use and occupation of land, the question as to whether or not the said Guarantee should be preserved pending arbitration was a commercial dispute, meaning that the High Court was properly clothed with jurisdiction to hear and determine that limited or narrow issue as the Court itself agreed.

9. The plaintiff further avers that in as much as the parties to this current suit are the same as those in the previous suit, the causes of action are plainly different. It is their case that the cause of action in the High Court concerned the grant of an interim measure of protection under Section 7 of the Arbitration Act directed at the 2<sup>nd</sup> Defendant Bank. They did not touch on the substantive dispute arising from the breach of the main Agreement between the parties.

10. Further the plaintiff contends that even though the factual background founding the two suits is identical, the point of departure in the current proceedings is that during the pendency of the High Court

proceedings, the plaintiff commenced the arbitral proceedings by issuing the 1<sup>st</sup> Defendant with a Request for Arbitration Letter dated 8/5/2007. The 1<sup>st</sup> Defendant by a letter dated 26/5/2017 however categorically indicated that they would not participate in any arbitration. That then left the plaintiff with no option but to file the current suit. Accordingly, the Plaintiff/Respondent urges this Court to dismiss the 1<sup>st</sup> Defendant's application in its entirety for lack of merits.

## **ANALYSIS OF THE EVIDENCE AND THE LAW**

11. I have considered the 1<sup>st</sup> Defendant's application and the Replying Affidavit by the Plaintiff. I have equally considered the oral submissions made before me by the 1<sup>st</sup> Defendant/Applicant and the Plaintiff/Respondent. The 2<sup>nd</sup> Defendant neither filed any pleadings nor did they participate in the proceedings before this Court. Arising from the pleadings filed and the oral submissions made, three broad issues all touching on the question of the jurisdiction of this Court stand out in my view for determination. These may be framed as follows:-

*(a) Whether or not this Court has jurisdiction generally to entertain this suit;*

*(b) If the Court has jurisdiction, whether the matters canvassed in the Application before me are res judicata; and*

*(c) Whether the Orders sought by the 1<sup>st</sup> Defendant should be granted.*

12. I will accordingly proceed to look at the 1<sup>st</sup> issue framed as it is crucial and if the answer thereto is in the affirmative, I may proceed to consider the other two issues.

**(a) Whether or not this Court has jurisdiction to entertain this suit.**

13. As was stated by Nyarangi J.A. in the celebrated case of the ***Owners of the Motor Vessel "Lilian S" –vs- Caltex Oil Kenya Ltd (1989) KLR 1;***

*".....it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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."*

14. It is not contested that the plaintiff had previously filed Malindi HCCC No. 12 of 2017 in the Commercial Division of the High Court. The 1<sup>st</sup> Defendant then moved to Court vide a Notice of Preliminary Objection dated 31<sup>st</sup> April 2017 in which it contended inter alia, that the Commercial Division of the High Court had no jurisdiction to entertain the matter as it squarely belonged to the Environment and Land Court. In a Ruling delivered on 27<sup>th</sup> July 2017, the Honourable Justice Weldon Korir determined that the Court had jurisdiction to deal with the matter.

15. Relying on the said finding, Ms Muyaa Learned Counsel for the 1<sup>st</sup> Defendant urged this Court to find that the issue of jurisdiction had already been determined by the High Court Commercial Division and this Court therefore ought to down its tools as it lacked jurisdiction to handle the matter. On the other hand, Mr. Mogambi, Learned Counsel for the Plaintiff/Respondent maintained that this suit as presently pleaded fell squarely under the mandate of this Court as provided under Article 162(2) (b) of the Constitution and Section 13 of the Environment and Land Court Act.

16. In ***Garthwaite –vs- Garthwaite (1964) 2 ALL ER 233 and 244***, Diplock LJ (as he then was) defined jurisdiction in the following manner:-

*“In its narrow and strict sense, the jurisdiction of a validly constituted Court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or to any combination of these factors. In its wider sense it embraces also the settled practice of the Court as to the way in which it will exercise its power to hear and determine issues which fall within its “jurisdiction” (in the strict sense), or as to circumstances in which it will grant a particular kind of relief which it has jurisdiction (in the strict sense) to grant, including its settled practice to refuse to exercise such powers or grant such relief in particular circumstances.”*

17. Article 162 of the Constitution provides as follows;

*“162. (1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in Clause (2).*

*(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-*

*(a) Employment and Labour relations and*

*(b) The Environment and the use and*

*and occupation of, and title to land.*

*3. Parliament shall determine the jurisdiction and functions of the Court’s contemplated in Clause (2).*

*4. ....”*

18. On the other hand, Article 165 of the Constitution establishes the High Court and provides as follows:

*“165(1) There is established the High Court which*

*(a) Shall consists of the number of Judges prescribed by an Act of Parliament and*

*(b) Shall be organised and administered in the manner prescribed by the Act of parliament.*

*(2).....*

*(3).....*

*(4).....*

*(5) The High Court shall not have jurisdiction of the matters*

*(a) reserved for the exclusive jurisdiction of the Supreme Court under the Constitution, or*

*(b) falling within the jurisdiction of the Courts Contemplated in Article 162(2).*

19. Pursuant to the provisions of Article 162(2) (b) of the Constitution, Parliament enacted the Environment and Land Court Act 2011, which establishes the Environment and Land Court. In regard to jurisdiction, Section 13(2) of the Act provides as follows:-

*“13(2) in Exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes-*

(a) relating to environmental planning, and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) Any other dispute relating to environment and land.

20. In light of the foregoing provisions it is now widely acknowledged that this Court and the High Court have distinct and separate jurisdictions. In Supreme Court **Petition No. 5 of 2015; Republic –vs- Karisa Chengo & 2 Others**, the Supreme Court, Commenting on the distinct jurisdictions of the two Courts observed that:-

***“It follows from the above analysis that although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the Statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2).”***

21. A perusal of the Ruling delivered by the Honourable Justice Korir on 27<sup>th</sup> July 2017 aforesaid (attached to the Applicant’s Affidavit and marked “PM 15”) clearly reveals that the Learned Judge was very much alive as to the distinct nature of the jurisdictions of this Court and the High Court. Analysing the provisions of Article 162(2) (b) of the Constitution, Section 13 of the Environment and Land Act, 2011 vis-a-vis the issue for determination before him, the Learned Judge opines at Paragraphs 26 to 28 thereof thus:-

*“26. The key words are environment, use of land, occupation of land and title to land. **Considering the facts placed before this Court**, the words relevant to this case are “use of land”. The jurisdiction of the Environment & Land Court flows from Article 162(2) (b) of the Constitution. There is no doubt that Section 13 of the Environment and Land Court Act is in Consonance with the Constitution.*

*27. The term “land use” refers to the management and Modification of the natural environment into settlements for human habitation that would include arable fields, pastures and forests. In short it is the use of the natural environment by people.*

*28. In my view the Constitution did not contemplate such a narrow definition and that explains the the intentional application of the word “use of land” and not “land use”. The term “use of land” would cover “land use” and other activities arising from utilization of land other than human settlement. I however, doubt that the jurisdiction is so expansive to the extent that anything that refers to land is the preserve of the Environment and Land Court.”*

22. The Learned Judge then went ahead to make it clear the proper context within which he considered the High Court to have jurisdiction on the matters before him. After analysing two separate cases in which other Courts have had to contend with the question of jurisdiction of this Court and the High Court, Justice Korir concludes on this aspect in Paragraphs 31 and 33 of his decisions as follows:

*“32. I agree with Havelock J and Chitembwe J (in the considered (decisions) that the mention of*

*the word land, rent or lease in a document is not of itself sufficient to confer jurisdiction upon the Environment & Land Court. **An examination must be carried out in order to establish if the issue falls within the jurisdiction of Environment & Land Court as conferred by the Constitution and Statute.** In my view, the question(s) for the determination of the Court will always give a guide as to where the jurisdiction should fall.*

33. *Turning to the facts of this case, I note that **the dispute herein** involve(s) the issuance of **interim protective measures** to the Plaintiff **in order to allow it to refer to an arbitral tribunal its disagreement with the 1<sup>st</sup> Defendant over a Constitutional matter.** **The questions of environment, use of land, occupation of land or title to land have not arisen in this matter.** In the circumstances, I find that this Court has jurisdiction to handle this matter.” (Emphasis added).*

23. Arising from the foregoing, it is clear to me that the High Court only dealt with an aspect of the dispute between the parties which it felt was clearly within its jurisdiction.

24. A perusal of the Agreement dated 17<sup>th</sup> November 2015 (annexed) to the Plaintiff’s application dated 1<sup>st</sup> August 2015 and marked (PM4) reveals that the purpose was to among other things, record the agreements reached between the plaintiff and the 1<sup>st</sup> Defendant in relation to construction, erection and development of the land identified by the plaintiff and the 1<sup>st</sup> Defendant by building godown and factory facilities and an administrative block as per the measures and specifications agreed upon and subsequent leasing of the factory after its completion. To a large extent therefore the Agreement between the parties relates to the use and occupation of the factory and other facilities that were to be constructed upon the land by the 1<sup>st</sup> Defendant.

25. However, while the underlying Agreement related to the use and occupation of land, the High Court found and rightly so in my view that the question as to whether or not the Bank Guarantee in question should be preserved pending arbitration was a commercial dispute and thus one which the High Court was clothed with jurisdiction to hear and determine,. As the Honourable Justice Weldon Korir observed, the Constitution could not have intended that anything that refers to land should be the preserve of the Environment and Land Court.

26. In the suit before this Court, the plaintiff alleges that the 1<sup>st</sup> Defendant is in breach of the Agreement between the parties. That Agreement as we have seen hereinabove relates to the use and occupation of land. It is the Plaintiff’s case that arising from the said breach it has suffered substantial damage whose remedy lies in this Court. In my mind, while certain aspects of the dispute between the parties herein may, as was the case in Malindi HCCC No 12 of 2017, be commercial in nature, the substantive dispute between the parties herein relates to a breach of contract that touches on the use and occupation of land.

27. Under Article 162(2) (b) of the Constitution and Section 13(2) of the Environment and Land Court Act, 2011, this Court has jurisdiction to hear and determine disputes relating to the use and occupation of land. Accordingly, I find and hold that this matter is properly before this Court and the objection to the Court’s jurisdiction lacks merit.

#### **b) Whether the matters being raised in this matter are res judicata**

28. Closely related to the issue of jurisdiction of the Court is the element of whether or not the matters canvassed by the plaintiff herein are barred under the doctrine of res judicata. Section 7 of the Civil Procedure Act describes the doctrine in these terms:-

##### *“7. Res Judicata*

*No Court shall try any suit in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*

29. From the foregoing and as was stated in *Karia & Another –vs- The Attorney General & Others (2005) 1 EA 83*, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that former suit should be by the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly, that the Court or tribunal before which the former suit was litigated was competent and determined the suit or issue finally.

30. Re judicata is therefore essentially a principle that bars subsequent proceedings involving the issue that has been finally and conclusively decided by a competent Court in a prior suit between the same parties or their representatives. On the authority of *Halsbury's Laws of England (4<sup>th</sup> Edition, Vol. 16 paragraph 1527-1529)*, in deciding what questions of law and fact were determined in the earlier Judgment, the Court is entitled to look at the Judge's reasons for his evidence and is not restricted to the record.

31. As we have seen herein above, a perusal of the Honourable Justice Korir's decision reveals that the Honourable Judge dealt with only a specific aspect of the matter, which was placed before him at the time. The reasoning posited at paragraph 33 of the Ruling bears repeat here. The Learned Judge states:-

*"33. Turning to the facts of this case, I note that the dispute herein involve(s) the issuance of interim protective measures to the plaintiff in order to allow it to refer to an arbitral tribunal its disagreement with the 1<sup>st</sup> Defendant over a construction matter. The questions of environment, use of land, occupation of land or title to land have not arisen in this matter....."*

32. Evidently, the Learned Judge did not finally and conclusively deal with the dispute currently before this Court. In the matter before me, the plaintiff claims that the 1<sup>st</sup> Defendant is in breach of the Agreement between the parties. That Agreement deals with the question of use and occupation of land which the former court alluded to but which it found had not arisen before it at the time. That former Court would not have been competent to deal with this present aspect of the dispute as the same falls squarely within the jurisdiction of the Environment and Land Court. The contention that this matter is res judicata therefore also fails.

### **(c)Whether the Orders sought by the 1<sup>st</sup> Defendant should be granted**

33. At paragraph 33 of the Plaint filed herein, the Plaintiff prays against each of the Defendants specifically as follows:-

*(a) As against the 1<sup>st</sup> Defendant, a Declaration that the 1<sup>st</sup> Defendant was in fundamental breach of the Agreement between the parties dated 17/11/2015 together with any subsequent valid variations thereto.*

*(b) As against the 1<sup>st</sup> Defendant, a further Declaration that the plaintiff was consequently entitled to terminate the said Agreement and to retain the Bank Guarantee in accordance with the provisions of clause 5.4 of the Agreement.*

*(c) As against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, a Declaration that following formal termination of the Agreement by the Plaintiff via the letter dated 8/6/2017 and the retention of the said Guarantee in accordance with the provisions of Clause 5.4 of the Agreement, the 1<sup>st</sup> Defendant is not entitled to the settlement of the Payment Guarantee No 021/CM/0109/2016 and that the 2<sup>nd</sup> Defendant Bank is not, in the circumstances legally bound to pay it.*

*(d) As against the 2<sup>nd</sup> Defendant, a permanent injunction restraining the 2<sup>nd</sup> Defendant Bank from settling Payment Guarantee No. 021/COM/LG/0109/2016 by paying the amount guaranteed thereunder to the 1<sup>st</sup> Defendant in view of the formal termination of the Agreement and retention of the Guarantee by the Plaintiff in line with the provisions of Cause 5.4 of the Agreement.*

*(e) As against the 2<sup>nd</sup> Defendant, a mandatory injunction to compel the 2<sup>nd</sup> Defendant forthwith cancel the said Guarantee and return it to the Plaintiff duly cancelled.*

*(f) As against the 1<sup>st</sup> Defendant, Judgment for the Plaintiff for monthly delay damages in line with the provisions of the Agreement.*

34. In the application before me, the 1<sup>st</sup> Defendant has urged that the orders granted on 2<sup>nd</sup> August 2017 (they were actually granted on 1<sup>st</sup> August 2017) be discharged as a matter of right and that the entire suit herein be dismissed with costs. The first reason for making those prayers is the contention that this Court lacks jurisdiction to entertain the suit. Secondly, the 1<sup>st</sup> Defendant has asserted that the matters raised herein are barred under the doctrine of res judicata. Arising from my findings herein above, the two reasons have no basis and this suit is properly before the Court.

35. The third reason for seeking the discharge of the Orders is the argument that it is a gross abuse of the Court process for the plaintiff to have obtained ex-parte orders and to have engaged the Defendants in intense litigation in Malindi HCCC No.12 of 2017 and having lost the application and the entire suit; they have now rushed to this court and obtained other ex-parte Orders. It is the 1<sup>st</sup> Defendant's contention that they ought to have been heard before the said orders were granted.

36. The dispute between the parties both in Malindi HCCC No. 12 of 2017 and in this suit arises out of an agreement dated 15<sup>th</sup> November 2015. At Clause 8.4 and 8.5 of that Agreement, the plaintiff and the 1<sup>st</sup> Defendant had agreed that any dispute resulting from the Agreement would first be resolved through arbitration. In that Agreement, the parties purported to expressly oust the jurisdiction of all courts other than for purposes of interim conservatory orders pending the final award of the arbitrator. Indeed according to the Agreement, the award of such an arbitrator was intended to be final and not subject to any appeal in Court.

37. The complaint by the 1<sup>st</sup> Defendant in regard to the interim orders granted herein must be seen in light of the rigid Court process which the parties sought to avoid when the parties were still in talking terms in favour of an alternative dispute resolution mechanism.

38. In reference to the arbitration clause, the 1<sup>st</sup> Defendant accuses the plaintiff of refusing to comply therewith within the timelines provided in the Agreement. At the same time, the 1<sup>st</sup> Defendant maintains that having failed to act within the 30 days timeline given in the Arbitration Clause in the Agreement, the Plaintiff's suit is time barred as the plaintiff cannot approach any Court for the resolution of the substantive dispute before exhausting all processes in arbitration.

39. On their part, the Plaintiffs asserted that they had, during the pendency of the High Court proceedings commenced the arbitral proceedings by issuing the 1<sup>st</sup> Defendant with a Request for Arbitration Letter dated 8<sup>th</sup> May 2017. The 1<sup>st</sup> Defendant had however through a letter dated 26<sup>th</sup> May 2017 categorically indicated that they would not be participating in any arbitration. Subsequently, by a letter dated 8<sup>th</sup> June 2017, the plaintiff had proceeded to terminate the contract and the only resort now available to the plaintiff is in the Court of Law for the remedies outlined hereinabove.

40. I have looked at the letters referred to which letters were exchanged by the parties during the pendency of the High Court proceedings and it is evident that both parties to the Agreement were clearly getting frustrated by the positions each one of them took in regard to the Agreement. Indeed it was the position of the plaintiff herein that having rejected the request for arbitration as per their letter of 26<sup>th</sup> May 2017, the 1<sup>st</sup> Defendant cannot turn around and base their arguments on the fact that the Plaintiff had delayed in referring the matter to arbitration and thus the resultant suit is now time-barred through effluxion of time.

41. Clause 8.4 and 8.5 of the Agreement stipulates as follows:-

*“8.4 Any dispute, controversy or claim arising out of or relating to this Agreement or termination hereof (including without prejudice to the generality of the foregoing, whether as to its interpretation, application or implementation) shall be resolved by way of consultation held in good faith between the parties. Such consultation shall begin immediately after one party has delivered to the other written requests for such consultation. If within fifteen (15) Business Days following the date on which such notice is given the dispute cannot be resolved amicably, the dispute, controversy or claim shall be submitted to arbitration in accordance with Clause 8.5.*

*8.5 Should any dispute controversy or claim as is referred to in Clause 8.4 arise between the parties and the consultation process referred in Clause 8.4 shall have not resolved such dispute, the dispute shall upon application by any party be referred for arbitration to a person acceptable to the parties or if the parties cannot agree on the Appointment of such persons within a period of thirty (30) days from the date of such application, then the dispute shall be referred to arbitration by a single arbitrator to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch upon the written requests of either party. The appointment of the arbitrator shall be final and binding on the parties. The arbitration shall take place in Mombasa and the language of arbitration shall be English. The arbitration shall be conducted in accordance with the rules or procedures for arbitration under the Arbitration Act, 1995 as amended by the Arbitration(Amendment) Act 2009. The decision of the Arbitrator shall be final and binding on the parties and may be made an order of a Court of competent Jurisdiction. Notwithstanding the foregoing, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from a Court in Kenya of competent jurisdiction pending final decision or award of the arbitrator.*

42. It is clear to me that when they put their signatures to the Agreement the parties herein had initially intended to find an amicable solution to their disputes or at the very least have the same resolved by way of arbitration. Indeed at Paragraph 2 of their letter dated 8<sup>th</sup> May 2017 in which they sought to declare notice of the dispute and to call for arbitration, the Plaintiff admits that even the issue of termination of the Agreement as they purported to do vide their subsequent letter of 8<sup>th</sup> June 2017, was subject to the resolution by the Arbitrator.

43. In choosing at the very initial stage to resolve the dispute by way of arbitration, the parties must have intended to take advantage of its processes as opposed to the rigid and many times long and tortures Court process. In the resultant anger and frustration following perceived breaches of the Agreement, both parties sought to throw away a process which in my view would resolve what essentially a Commercial dispute is in much faster and in a less complicated way.

44. Article 159 2 (b) of the Constitution enjoins this Court to be guided by the principles, that promote alternative forms of dispute resolution including reconciliation, mediation and arbitration. Under Section 1A of the Civil procedure Act, this Court is required to give effect to the overriding objectives of the Act which are to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Section 20 of the Environment and Land Court Act in fact provides for the application of Alternative Dispute Resolution (ADR) mechanisms and empowers this Court to adopt and implement appropriate mechanisms for a just and expeditious disposal of matters. Indeed under Section 20(2) of the Act, this Court ought to stay proceedings where ADR is a condition precedent to any proceedings before the Court until such conditions are fulfilled.

45. The parties herein had by their own Agreement provided for arbitration as a way of resolving their dispute. In the unique circumstances of this case, I think it is only fair and just that the Court encourages the parties to pursue the mode of settlement they agreed upon before they disagreed and sought the Court’s intervention on what as I have said above is essentially a commercial dispute.

46. Accordingly and in the interest of justice and fairness, I hereby make the following orders:-

(a) The dispute arising from or relating to the Agreement between the Plaintiff and the 1<sup>st</sup> Defendant dated 17<sup>th</sup> November 2015, should be subjected to the dispute resolution procedures set

out in Clause 8.4 and 8.5 of the said Agreement.

(b) Either party to the dispute may submit the matter immediately to arbitration by a person acceptable to both parties. If the parties cannot agree on the appointment of such a person within a period of 30 days from the date hereof, the Deputy Registrar of this Court shall refer the matter to the Chairman of the Chartered Institute of Arbitrators, Kenya Branch who shall then proceed to appoint an arbitrator in the manner provided under Clause 8.5 of the Agreement dated 17<sup>th</sup> November 2015 as amended.

(c) Payment of the Bank Guarantee No. 021/COM/LG/0109/2016 is hereby stopped pending the determination of the dispute between the parties.

(d) All proceedings herein are hereby stayed pending the said arbitration.

(e) Each party to bear their own costs.

**Dated, signed and delivered at Malindi this 11<sup>th</sup> day of October, 2017.**

**J.O. OLOLA**

**JUDGE**