THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & OTIENO-ODEK JJA)

CIVIL APPEAL NO. 28 of 2013

BETWEEN

TRISHCON CONSTRUCTION COMPANY LIMITED.....APPELLANT

AND

MOHAMED SALIM SHAMSHUDIN.....1st RESPONDENT

DHANJI VELJI .....2nd RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya

at Nairobi (Muga Apondi , J.) dated 31st July 2012

in

Nairobi HCCC No. 200 of 2007)

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JUDGMENT OF THE COURT

1. At all material times to this suit, the 1st respondent, ***Mohamed Salim Shamshudin***, was the registered proprietor of Nairobi LR No. 330/274 situated along Gitanga Road in Lavington in the City of Nairobi (hereinafter referred to as the property). By an agreement dated 2nd June 2006, the 1st respondent contracted the appellant to construct thirty-two (32) luxurious apartments on the property.

2. The contract between the parties had, *inter alia*, the following express terms:

(a) The 1st respondent will pay the appellant a negotiated fixed sum of Ksh. 105,000,000/=.

(b) The appellant is to execute the construction works with diligence and within 15 months starting from 2nd June 2006 and ending on 2nd September 2007.

(c) In the event of major dispute between the parties, the two parties can jointly resolve the dispute through the Architect and an agreed arbitrator to whom both shall agree and share the arbitration costs equally.

(d) The appellant shall provide a performance bond and the construction works shall be as per the architectural and structural drawings and the detailed specifications attached to the contract.

3. The construction works commended as agreed; however, a dispute arose when the works had reached the third floor. The 1st respondent contends that the appellant breached the agreement in various ways amongst others:

(a) Failing and or neglecting to finish the show flat.

(b) Failing to undertake the construction works in a skillful and professional manner.

(c) Failing to finish the works within the agreed time frame.

(d) Undertaking the works in a manner that would endanger the lives of end users of the flats.

(e) Demanding payment for works not certified by the architect.

(f) Failing to pay construction workers on site leading to constant industrial unrest on site.

(g) Failing to provide adequate materials on site.

(h) Failing to adhere to the architect's instructions.

4. Owing to the foregoing breaches, by a Plaint dated 16th April 2007, the 1st respondent moved to the High Court seeking orders to compel the appellant, ***Trishcon Construction Company Limited,*** to hand over all keys, the site office and all architectural drawings relating to project. He also sought an injunctive order barring the appellant or its agents or servants from preventing the 1st respondent or his agents from entering and accessing the suit property or enjoying quiet possession thereof. He also sought an order restraining the appellant from entering the suit premises.

5. By a consent letter dated 19thApril 2007, presented in court on 20th April 2007 and recorded on 24th April 2007, the agreement between the parties for construction of 32 luxurious apartments on LR No. 330/274 was terminated, a joint inspection and valuation of the project, premises, materials and equipment on site was to be made and any dispute was to be referred to arbitration.

6. Subsequent to the consent order, once again a valuation dispute arose between the parties and the matter was referred to arbitration. The sole Arbitrator was ***Qs. Maisiba Samson Kirioba***. Before the Arbitrator, the claimant was listed as the 1st respondent ***Mr. Mohamed Salim Shamshudin*** and two respondents were ***Messrs Trishon Construction Co. Limited*** and ***Mr. Dhanji Velji***.

7. The Arbitrator in an award dated 26th May 2009 made the following final award:

"a) The claimant (Mr. Mohamed Salim Shamshudin) is liable to pay the respondents cost of tools detained of Ksh. 171,900/= or release the said tools forthwith.

b) The respondents (Trishon Construction Co. Limited and Mr. Dhanji Velji) are liable to pay the claimant Ksh. 11,926,713 which is the difference between the costs of completing the project works of Ksh. 16,281,035/=, professional consultancy fees of Ksh. 920,000/= and the amount due to the respondents for the work done and materials on site of Ksh. 5,202,522/= and the cost of the retained tools of Ksh. 171,900/=.

c) Each party was to bear its costs in the arbitration."

8. Aggrieved by the award, the appellant on 26th June 2009 moved the High Court for an order to set aside the award and for the court to remit the award to the Arbitrator for reconsideration on quantum of valuation of works.

9. The learned judge upon hearing, dismissed the application to set aside the award expressing as follows:

"In this particular case, it is apparent that after the 45 days had expired, the parties agreed to extend the period by a further 120 days to enable the sole arbitrator to file his award. When the arbitration process was not complete, it is apparent that the parties acquiesced in extending the period further….

It has not been denied that the consent order had stated that the dispute between the parties be resolved through arbitration. Besides the above, both parties had confirmed on oath the issues they wanted the arbitrator to deal with. Therefore, it would not be fair for any party to claim that the arbitrator did not have any mandate….

As far as the issue of publishing of the award secretly is concerned, I entirely agree with the respondent's counsel that it is an accepted practice that if a party does not pay its share of the fees, then the other party can pay the full fees and collect the award. Having carefully considered all the issues that were raised by the applicants, it is apparent they have not established any ground to allow this court to set aside the award. The upshot is that I hereby dismiss the applications since the same have no merits at all."

10. Aggrieved by the dismissal of its application to set aside the arbitral award, the appellant has moved to this Court citing, *inter alia*, the following grounds in its memorandum of appeal:

i. The judge erred and misdirected himself and failed to find the construction agreement dated 22nd June 2006 had been terminated by consent and could not have been a matter within the scope of arbitration within the meaning of ***Section 35 (2) (iv) of the Arbitration Act.***

ii. The judge erred in failing to find the Arbitrator dealt with a dispute not contemplated by the parties when he allowed the respondent to urge claims based on the terminated contract.

iii. The judge erred in failing to take into account the arbitration process was pursuant to an order of the court as provided in Order XLV of the Civil Procedure Rules and not under the Arbitration Act.

iv. The judge erred when he determined that the conduct of the parties after lapse of time was tantamount to an order of the court to extend time within which to file the award contrary to ***Order XLV Rule 8 (2) of the Civil Procedure Rules****; the judge erred in not considering any of the issues raised by the appellant in* ***Order XLV*** *aforestated.*

v. The judge erred in failing to consider and determine whether an arbitrator has legal authority to enjoin a third party to an arbitration.

vi. The judge erred in failing to consider and apply the decision in ***Nyangau -v- Nyakwara (1985) KLR*** *which was binding on the court; and the judge erred in applying the decision in* ***Kihuni -v- Gakunya (1986) eKLR.***

vii. The judge erred in failing to determine the allegations of misconduct levelled against the Arbitrator such as publishing the award secretly to the respondent before payment was made;

viii. The judge erred in failing to appreciate the judicial authorities cited and to consider that there were substantial issues of law raised by the appellant.

ix. The judge erred by delivering the ruling after a period of one year and two months and such delay is tantamount to an injustice.

11. The 2nd respondent filed a cross-appeal substantially repeating the grounds raised by the appellant in its memorandum. In cross-appeal, it is reiterated the arbitrator went beyond the scope of his mandate contrary to ***Section 35 (2) (iv)*** of the **Arbitration Act;** the judge erred in failing to find that the arbitral award dealt with a dispute not contemplated by the parties; the judge erred when he failed to consider the arbitrator had misconducted himself in secretly publishing the award to the 1st respondent; the judge erred when he made a finding that jurisdiction can be conferred upon an arbitrator by acquiescence and active participation when there is breach of an obligation to file an award within the time stipulated by court; and the judge erred in finding the arbitration was under the Arbitration Act and not pursuant to an order of the court.

12. At the hearing of this appeal, learned counsel ***Mr. S. K. Bundotich*** appeared for the appellant while learned counsel ***Mr. Andrew Wandabwa*** appeared for the respondent. Both counsel filed written submissions and list of authorities.

13. The appellant in its written submissions rehashed background facts to the suit and arbitration between the parties. On whether the arbitration proceedings was pursuant to the agreement between the parties or court order, the appellant urged the arbitration was pursuant to a court order issued by Hon. Justice Kimaru on 20th February 2008; that the letter appointing the arbitrator clearly stated he was appointed pursuant to a court order; that since the arbitration was pursuant to a court order, the judge erred in relying on ***Section 35*** of the **Arbitration Act** in the determination of the dispute between the parties; the court order of 20th February 2008 directed the Arbitrator to file his award within 45 days; that the parties by consent extended the period to 120 days; that failure to file the award within the extended 120 day period meant that the award as filed was illegal; the judge erred in holding that lateness to file the award was not a ground for setting aside the award because he proceeded under the erroneous misapprehension the award was under the Arbitration Act and failed to appreciate the arbitral proceedings were under ***Order 45*** of the **Civil Procedure Rules**. The appellant submitted the arbitrators mandate expired after lapse of 120 days and the parties could not extend it by acquiescence or agreement; the award filed by the arbitrator was out of time and as such, it was a nullity. Counsel cited the case of **Nyangau vs. Nyakwra (1986) KLR 172; Mairi vs. Ngonyoro "B" & another (1986) 488** and **M-Link Communications Company Limited vs. CCK and Telkom (K) Limited (2005) eKLR** to support submission that an award filed outside the prescribed time is a nullity.

14. The appellant submitted the Arbitrator went on a frolic of his own and determined issues not within his mandate as per the consent order filed in court. Counsel urged the arbitrator went on frolic when he allowed the 1st respondent to file a fresh claim outside of the claim filed in the plaint in HCCC No. 200 of 2007; the arbitrator illegally enjoined the 2nd respondent, a director of the 1st respondent, as party to the arbitral proceedings; that the expected outcome of the Arbitration was to establish how much was due to the appellant but instead, the award contained findings against the appellant *to wit* the appellant was in breach of contract and liable to pay the 1st respondent the sum of Ksh. 16,381,035/= plus consultancy fee of Ksh. 920,000/= and that the Arbitrators award contravened ***Order 45 rule 3 (1)*** **of** the **Civil Procedure Rules.**

15. The appellant further submitted that the court erred in failing to find the construction agreement between the parties was no longer in force and could not form the basis of any arbitration proceedings; that by virtue of the consent order, both parties had abandoned their claims under the contract except for the claims itemized in the consent order; that the only right accruing under the consent order was for the appellant to have the value of its works ascertained so that it could be paid; that the 1st respondent did not reserve any right under the terminated contract to have any damages for breach of contract assessed and that as such, the 1st respondent could not after agreeing on termination of the contract, lodge a claim for damages for breach of contract.

16. The appellant took issue with the manner in which the award was published; that the judge erred and ignored the provisions of ***Order 45*** of the **Civil Procedure Rules** which require that where an award has been made, the persons who made it shall sign it and cause it to be filed in court together with any depositions and documents which have been taken and proved, and notice of the filing of the award shall be given to the parties. It is the appellant's contention the procedure for filing an award as stipulated in ***Order 45*** was not followed; that instead of complying with the ***Order 45***, the Arbitrator went ahead to call for payment of his charges from the parties before releasing the award to the 1st respondent instead of filing it in court.

17. The 1st respondent filed written submissions opposing the appeal. Upon rehashing the background facts, the 1st respondent submitted that

subsequent to the consent order being filed in court, the appellant carried out unilateral valuation of the works and materials on site and filed a Notice of Motion dated 15th May 2007 seeking judgment for the sum of Ksh. 16,889,032/70. Consequent, the 1st respondent moved the court under ***Section 6*** of the **Arbitration Act** to have the matter referred to arbitration. Upon hearing the parties, Kimaru, J. referred the matter for arbitration. By consent of the parties, the time for the Arbitrator to file his award was extended by 120 days; the extended period lapsed in August 2008 and despite the lapse, the parties continued to participate in the arbitration proceedings.

18. Submitting on the contestation that both parties had abandoned their rights under the original construction agreement, the 1st respondent urged the rights of the parties had accrued prior to termination of the construction agreement and the rights continued to subsist post termination. Counsel cited **Chitty on Contract at page 393** thereof where it is stated that repudiation of contract by one party, even if accepted by the other, does not entirely abrogate the contract; it survives for purposes of measuring claims arising out of the breach. The 1st respondent urged that termination of a contract does not have the effect of making an arbitral clause ineffectual; the learned judge in ordering arbitration was enforcing the consent order entered into between the parties and not the original agreement that was mutually terminated and that ***Section 5*** of the **Arbitration Act** bars a party who omits to raise an objection arising out of derogation from an arbitration agreement from subsequently raising an objection to the arbitration.

19. The respondent urged the trial court correctly applied the dicta in **Kihuni vs. Gakunga (1986) eKLR** where it was held that parties cannot be heard to challenge issues referred to arbitration especially in a case where the parties and their respective advocates drew the issues.

20. On applicability of ***Order 45*** of the **Civil Procedure Rules,** the respondent submitted the consent order filed in court settled the suit in the terms set out in the consent; that subsequent to the consent, there was no pending substantive dispute before the court in respect of which the court could exercise its discretion under the provisions of ***Order 45*** of the **Civil Procedure Rules**; that upon the consent marking the suit settled, the trial court did not retain *seisin* of the dispute between the parties; that at no time did the parties cede jurisdiction to resolve their dispute in court and that at all times, any dispute between the parties was to be resolved through arbitration. The 1st respondent urged that the court order referring the dispute to arbitration arose from an application under ***Section 6*** of the **Arbitration Act**; the court expressly stated it was enforcing the intention of the parties to refer the dispute to arbitration; that throughout the arbitration proceedings, the parties treated the proceedings as being under the Arbitration Act and not ***Order 45*** of the **Civil Procedure Rules**; that the grounds that the appellant raised to set aside the arbitral award are grounds laid out in ***Section 35*** of the **Arbitration Act** and not ***Order 45*** of the **Civil Procedure Rules;** it was submitted the appellant acquiesced in the arbitral proceedings and cannot now renege; the appellant cannot approbate and reprobate; that what underpins the legality of the arbitration process is the consent of the parties; the fact that consent was made before the court did not give the court powers under ***Order 45*** of the **Civil Procedure Rules**.

21. As regards the joinder of Mr. Dhanji Velji, the 2nd respondent, it was urged that the material placed before the Arbitrator was correspondence between the 1st respondent and Mr. Velji and the bulk of payments were made to Mr. Velji personally; that clause "c" of the consent order expressly referred to Mr. Dhanji Velji where it was specifically stated that a joint inspection and valuation is to be done to determine the true and correct amount being claimed by Mr. Dhanji from Mr. Mohammed; that likewise clause "e" of the consent state in the event of any dispute between Mr. Dhanji and Mr. Mohammed Salim Shamshudin on the inspection and valuation report, the dispute be solved by arbitration.

22. Grounded on the foregoing clauses in the consent order, the 1st respondent submitted the 2nd respondent Mr. Dhanji Velji was the principal instructing party on behalf of the appellant and was the main party to the construction agreement and the resulting consent order correctly made him party to the arbitration proceedings. Counsel urged it was the consent order that made Mr. Dhanji a party to the arbitration.

23. Counsel further submitted that upon joinder of Mr. Dhanji Velji as party to the arbitration proceedings, the appellant filed Misc. Application No. 598 of 2008 challenging joinder of Mr. Dhanji. The application was dismissed and no appeal has been filed against the dismissal.

24. The 1st respondent submitted that the allegations of misconduct on the part of the arbitrator were not proved and have no merit; that all judicial authorities cited before the learned judge were considered. Counsel submitted that it is an adopted practice that any party may take up an arbitral award upon payment of any costs of the award that are still outstanding.

25. We have considered the grounds of appeal, submissions by counsel and the authorities cited. A ground of appeal that need determination upfront is whether the judge erred in dealing with the matter as proceedings under the Arbitration Act or whether the proceedings should have been under ***Order 45*** of the **Civil Procedure Rules**. It is the appellant's contestation that the arbitration proceedings were conducted pursuant to a court order and as such, the arbitration was under ***Order 45*** and not under the **Arbitration Act.**

26. We have considered the consent order recorded on 24th April 2007. The relevant excerpts of the consent at paragraphs 3, 4 and 5 stipulate as follows:

> ***"[3] That a joint inspection and valuation of the project premises, materials, equipment on site be conducted by two qualified Quantity Surveyors appointed by Mr. Dhanji of Trischon Construction Company Limited and Mr. Mohammed Salim Shamsudin to determine the true and correct amount being claimed by Mr. Dhanji from Mr. Mohammend Salim Shamsudin….***
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> ***[4] That in the event of any dispute between Mr. Dhanji and Mr. Mohammed Salim Shamsudin on the inspection and valuation report the said dispute be solved by arbitration with the arbitrator being appointed by the advocates for both parties herein failure to which the arbitrator shall be nominated by the Chairman of the Association of Architects of Kenya.***
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> ***[5] The suit be marked as settled with no order as to costs."***

27. We have also examined the ruling by Kimaru, J. dated 20th February 2008 where the learned judge stated: *"In the premises therefore, this court will enforce the arbitration clause in the said consent order."*

28. Guided by paragraph 4 of the consent as agreed to by the parties and as enforced by the ruling by Kimaru J; we are satisfied that the arbitration proceedings conducted in this matter was by consent of the parties. It is the parties who consented to arbitration; the parties vide their consent marked the suit before the trial court as settled. Upon the suit being marked as settled, the court was no longer seized of any dispute between the parties. Any emerging dispute ensuing from inspection and valuation was transferred to arbitration by consent of the parties. In light of this, we are satisfied the arbitration proceedings were not conducted pursuant to the provisions of the Civil Procedure Act and Rules. Consequently, we find ***Order 45*** of the **Civil Procedure Rules** was inapplicable in this matter. We are fortified in this finding as we note both the appellant and the respondent persistently refer to provisions of the Arbitration Act in their submissions and contestation before the High Court and this Court.

29. Another ground urged by the appellant is that the sole arbitrator erred in enjoining the 2nd respondent, Mr. Dhanji Velji, as a party to the arbitration proceedings. A reading of paragraphs 3 and 4 of the consent order clearly shows that Mr. Dhanji was pivotal to determination of the dispute between the parties. Through the consent order, the parties themselves made Mr. Dhanji party to the arbitration proceedings. How else could paragraph 4 of the consent be interpreted? Paragraph 4 refers to a dispute between Mr. Dhanji (2nd respondent) and Mr. Mohammed Salim Shamsudin (1st respondent). Our reading of the paragraph shows the disputing natural persons are the 1st and 2nd respondents. It is the dispute between these two natural persons that was *inter alia* referred to arbitration. Accordingly, we are of the considered view that the arbitrator did not err in enjoining the 2nd respondent to the arbitration proceedings. We further note that the appellant in **Miscellaneous Application No. 598 of 2008** challenged the joinder of Mr. Dhanji to the arbitration proceedings. The application was dismissed and no appeal has been filed against the dismissal. Failure to appeal on this issue effectively disposed of the matter which we now find was conclusively determined by the trial court. On the issue of joinder of Mr. Dhanji, estoppel by law operates against the appellant.

30. An additional ground urged by the appellant is that the judge erred in failing to find that the arbitrator made an award outside the scope of his mandate. It is the appellant's contestation that the scope and mandate of the arbitrator was defined by paragraph 3 of the consent order which stipulated that a joint inspection and valuation of the project premises, materials, equipment on site be conducted to determine the true and correct amount being claimed by Mr. Dhanji from Mr. Mohammend Salim Shamsudin. It is the appellant's submission the Arbitrator was to determine the true and accurate amount owed by the 1st respondent to the appellant; the Arbitrator had no mandate to determine if the appellant owed the 1st respondent any monies; the Arbitrator had no mandate to consider and award the 1st respondent any damages for breach of contract. In this context, the appellant submitted the Arbitrator went on a frolic of his own and admitted an amended Statement of Claim lodged by the 1st respondent claiming damages for breach of contract. It was urged the Arbitrator should neither have admitted the amended Statement of Claim nor considered the claim for damages for breach of contract.

31. In considering the appellant's contestation that the Arbitrator exceeded the scope and mandate of his work, the trial judge cited the decision of this Court in **Kenya Shell Limited vs. Kobil Petroleum Civil Application No. 39 of 2004** where this Court stated *"parties cannot challenge issues which they themselves have referred to arbitration."* The learned judge further established that the parties in the instant appeal had confirmed on oath before the Arbitrator that the issues they had raised in their respective pleadings were matters that they had mandated the Arbitrator to arbitrate upon.

32. On our part, we have considered the appellant's submission on the mandate of the Arbitrator. The scope and extent of mandate of an Arbitrator is an issue determined and fixed by contract between parties. In this case, the contract between the parties is the consent order recorded in court on 24th April 2007. In **Jiwaji vs. Jiwaji [1968] E.A. 547**, the predecessor of this Court held that *"where there is no ambiguity in an agreement it must be construed according to the clear words used by the parties."* In **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd and another (2002) EA 503** it was stated:

> **"…A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved…"**

33. In the instant appeal, we cannot re-write the scope and mandate of the Arbitrator beyond what the parties provided for in the consent order and as affirmed on oath before the Arbitrator. The appellant is beseeching us to interpret and re-write the scope and mandate of the Arbitrator. This we decline to do. This is a matter that was left to the parties. There is no evidence on record showing the parties did not affirm on oath before the arbitrator that he was to treat the pleadings filed as the basis of claim by each party. There is also no evidence on record alluding to or proving coercion, fraud or undue influence in the proceedings before the Arbitrator. For these reasons, we find the ground that the Arbitrator acted outside the scope of his mandate has no merit.

34. In arriving at our decision, we have borne in mind dicta in **Alghussein Establishment vs. Eton College (1991) 1 All ER pp 267,** where it was held

> **"The principle that in the absence of clear express provisions in a contract to the contrary, it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party… to avoid his obligations under the contract ….."**

35. A further ground urged by the appellant is the judge erred in failing to determine the allegations of misconduct levelled against the Arbitrator such as publishing the award secretly to the respondent before payment was made. In considering and determining the alleged misconduct by secretly releasing the award, the trial court expressed itself as follows:

> **"It is apparent both applications have relied heavily on Section 35 of the Arbitration Act No. 4 of 1995. …..On the issue of publishing the award secretly, I entirely agree with the respondent's counsel that it is an accepted practice that if a party**

does not pay its share of fees then the other party can pay the full fees and collect the award."

36. In **Williams vs. Wallis & Cox [1914] 2 KB 478,** Lush, J said at page 484:

> **"Misconduct is not necessarily personal misconduct. If an arbitrator for some reason which he thinks good declines to adjudicate upon the real issue before him, or rejects evidence which, if he had rightly appreciated it would have been seen by him to be vital, that is, within the meaning of the expression, "misconduct" in the hearing of the matter which he has to decide, and misconduct which entitled the person against whom the award is made to have it set aside.**

37. In the instant matter, the appellant in faulting the trial judge's conclusion submitted that the judge would have reached a different finding if he addressed his mind to the provisions of ***Order 45*** of the **Civil Procedure Rules** particularly ***rule 10 (A) (2)*** which stipulates on the date and at the time of the award, the award shall be read by the registrar to such of the parties as are present. The essence of the appellant's contestation is ***Order 45 rule 10 (A) (2)*** was not complied with.

38. We have already made a determination that the arbitration proceedings before the Arbitrator was not conducted pursuant to the provisions of the Civil Procedure Rules. *Ipso facto*, the appellant's contestation on non-compliance with ***Order 45*** of the **Civil Procedure Rules** has no merit since the Rules were inapplicable to the arbitral proceedings.

39. On the issue of nullity of the arbitration award on account of lapse of the 120-day period extending the mandate of the Arbitrator, we have analyzed the reasoning of the learned judge who held that it was not in dispute the consent order had stated the dispute between the parties be resolved through arbitration; and that it was obvious both parties had actively participated in the arbitration well after lapse of the 120 days.

40. Comparatively, in the Indian case of **Jayesh H. Pandya & Anr. vs. Subhtex India Limited & Others [2008 (5) Mh. L.J. 749,** it was observed:

> **"Parties to an arbitration agreement are entitled to stipulate the time within which an arbitral award is to be rendered. In the present case, the time which was prescribed was four months. In such a case, however, where a party intends to assert a rigid adherence to the time prescribed by the arbitration agreement, it must at the earliest opportunity make its intention known to ensure compliance with a rigid standard as to time." "… To hold otherwise would be to encourage a lack of candour on the part of parties in their dealings before the Arbitrator." (See contrary decision in M/S Hindustan Wires Limited vs Mr. R. Suresh on 4 April, 2013).**

41. Unless provided to the contrary by statute, the mandate, jurisdiction and timelines for arbitration is determined by the parties. The jurisdiction of an arbitrator is not akin to jurisdiction of a court of law or statutory tribunal where parties by consent or acquiescence cannot confer jurisdiction. In arbitration proceedings, jurisdiction is generally conferred by consent of the parties.

42. In the instant matter, the parties had not only consented to arbitration, they extended the timeline to conclude the arbitration proceedings from 45 to 120 days and upon lapse of the 120 days they actively participated in the arbitration proceedings. In our mind, no prejudice has been occasioned to any party on account of expiry of the 120 days. Further, no party intimated that time is of essence. We abhor the notion that a party can resort to technicalities to defeat the cause of justice. In the absence of intimation by either party that the extended time was of essence, we find no fault on the part of the learned judge when he held that active participation in the arbitration proceedings after lapse of the 120 days was an acquiescence to extension of the timeline for the arbitrator. Accordingly, we find no reason to fault the learned judge's conclusion that the lapse of 120 days cannot render null and void the Arbitrator's award.

43. A ground urged in this appeal is the judge erred in failing to consider and apply the decision in **Nyangau vs. Nyakwara (1985) KLR** which was binding on the court; that the judge erred in applying the decision in **Kihuni vs. Gakunya (1986) eKLR** that the judge erred in failing to appreciate the judicial authorities cited and to consider that there were substantial issues of law raised by the appellant.

44. We have considered these grounds of appeal. In **Nyangau vs. Nyakwara (1985) KLR** Platt, JA stated:

> ***"To avoid doubt, it should perhaps be mentioned that there are differences of procedure under Order XLV of the Civil Procedure Rules and the Arbitration Act (cap 49)." Hancox JA in his ruling expressed "As regards the point raised in the first ground of appeal, namely that the arbitrator embarked on the hearing and gave his evidence well after the time agreed between the parties had elapsed, I agree that there should have been a written agreement to extend the time in accordance with order XLV rule 8." I am not, however, persuaded that the hearing of the arbitration over nine months after the reference, in which, as Mr Mainye, for the respondent said, both parties participated fully, went to the root of the arbitrators' authority, and was a matter of jurisdiction."***

45. Persuaded by the reasoning of Platt and Hancox JJA, the ground of appeal that the learned judge erred and ignored the decision *in* ***Nyangau vs. Nyakwara*** *(supra)* has no merit. We note the r*atio decidendi* in ***Nyangau vs. Nyakwara*** *(supra)* is not grounded on the issue of want of jurisdiction on the part of the arbitrator in delivering his award outside the stipulated timelines. We have held that ***Order 45*** of the **Civil Procedure Rules** is inapplicable to this matter and accordingly, the dicta and decision in ***Nyangau vs. Nyakwara*** (*supra)* is distinguishable and inapplicable to this case.

46. A noteworthy ground urged in this appeal is the judge erred by delivering his ruling after a period of one year and two months and such a delay is tantamount to injustice. The old adage justice delayed is justice denied rings a bell. Fresh justice is sweetest. In his 1980 book, *A Book for Judges*, Justice John Owen Wilson expressed: "Litigants expect, and rightfully expect, that the judge will soon relieve then from the agony of uncertainty that prevails until judgment is delivered. That is not to say that it is better to be quick than right.... The aim is to be both quick and right."(See **Wilson, John Owen, *A Book for Judges* (Ottawa: Supply and Services Canada, 1980), page 77-79).**

47. In **Bond vs. Dunster Properties Ltd and others [2011] EWCA Civil 455, [2011] All ER (D) 248 (Apr)** it was expressed that delay in handing down a ruling or judgment will not automatically render the ruling or judgment a nullity, but may affect whether an appeal court is prepared to interfere with findings of fact. Arden LJ expressed:

> ***"The extraordinary delay in handing down judgment in the instant case clearly called for an apology and, if any existed, an explanation of the mitigating circumstances. However, so far as the court was aware, there had been none. There was no statutory rule which provided that a judgment had to be delivered within a specified time. It had to be delivered within a reasonable time and what was a reasonable time might well vary according to the complexity of the legal issues, the volume and nature of the evidence and other matters. There could also be factors which made it necessary for the court to deliver judgment more speedily than would otherwise be the case, e.g., where urgent steps needed to be taken, or the case involved the welfare of a child, or where a party was in the final stages of terminal illness. The situations in which longer than usual was necessary for writing judgments should be out of the norm and they should be limited to special cases and the delay should be justified. There might be delays which occurred for which the judiciary were not responsible, e.g., where an unrepresented party was unable to comply with some requirement of the court without which the court could not proceed to judgment.***
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> ***The function of the court on hearing an appeal was not to impose sanctions or to investigate the reasons why the delay had occurred. The function of the court on appeal was to consider whether any of those findings of fact should be set aside and a retrial ordered. Findings of fact were not automatically to be set aside because a judgment was seriously delayed. As in any appeal on issues of fact, the court had to ask whether the judge was plainly wrong. That high test took account of the fact that trial judges normally had a special advantage in fact-finding, derived from their having seen the witnesses give their evidence.***
>
> ***However, there was an additional test in the case of a seriously delayed judgment. If the reviewing court found that the judge's recollection of the evidence was at fault on any material point, then (unless the error could not be due to the delay in the delivery of judgment) it would order a retrial if, having regard to the diminished importance in those circumstances of the special advantage of the trial judge in the interpretation of evidence, it could not be satisfied that the judge had come to the right conclusion. That was the keystone of the additional standard of review on appeal against findings of fact. To go further would be likely to be unfair to the winning party. That party might have been the winning party even if judgment had not been delayed. (Emphasis supplied. See also Privy Council decision in Cobham v Frett [2001] 1 WLR 1775, [2001] All ER (D) 2481)."***

48. In the Kenyan context, the decision in **Johnson M. Mburugu vs. Fidelity Shield Insurance Co. Ltd. – C.A. No.105 of 2003 [2006] e KLR** and **Nyagwika Ogora alias Kennedy Kemoni Bwogora vs. Francis Osoro Maiko – C.A No.271 of 2000** (unreported) are relevant. In both cases, delay in delivery of judgment did not vitiate the ruling.

49. In this matter, the appellant has not demonstrated to our satisfaction that delay in delivery of the ruling by 14 months on the part of the learned judge occasioned a miscarriage of justice or that there was an erroneous recollection of facts by the judge. The appellant has also not demonstrated that any finding of fact made by the judge was erroneous due to delay in delivery of the ruling. Bare allegations that the 14-month delay is tantamount to an injustice does not suffice. The appellant should go further and prove on balance of probability the alleged injustice or misapprehension of facts occasioned by the delay. Guided by the comparative judicial decisions cited as well as failure by the appellant to demonstrate that the delay occasioned misapprehension or erroneous findings of fact, we find delay of 14 months as a ground of appeal in this matter has no merit.

50. We note the cross-appeal lodged by the 2nd respondent reiterated the grounds in the memorandum of appeal. In entirety, we have considered all other ground in the memorandum of appeal and cross-appeal and find they have no merit.

51. Accordingly, the final order of this Court is both the appeal and cross-appeal have no merit and are respectively hereby dismissed with costs.

Dated and delivered at Nairobi this 22nd day of March, 2019

E. M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR