IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, NAMBUYE & MAKHANDIA -JJA)

CIVIL APPEAL NO. 14 OF 2015

BETWEEN

SAMURA ENGINEERING LIMITED.....APPELLANT

VERSUS

DON WOODS LIMITED.....RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nairobi (**F. Gikonyo, J**.) Dated 30th September, 2014

in

H.C. Misc. Application No. 714 of 2012)

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JUDGMENT OF THE COURT

The appeal arises from the Ruling of the High Court **F. Gikonyo, J,** dated 30th September, 2014.

The background to the appeal is that, the appellant and the respondent entered into a standard building sub-contract dated 11th November, 2002 for the installation of a PAXB Machine and related equipment to the then proposed Kenya Pipe Line Company Limited headquarters at Nairobi Terminal for a contract amount of Kshs. 14,235,815. The contract contained an arbitration **Clause 35** which provided *inter alia,* that in the event of any dispute arising with regard to the execution of the sub-contract, the dispute would be referred for arbitration by an arbitrator mutually agreed upon by the disputing parties, failing which by an arbitrator appointed at the request of either party by the Chairman for the time being of the Architectural/Association of Kenya.

The appellant declared existence of a dispute between them and by a letter dated 14th July, 2008 when it drew the respondent's attention to their long outstanding claims and in particular, the respondent's letter dated 3rd June, 2008. It informed the respondent that it intended to invoke the arbitration process in accordance with clause 31 of the sub-contract. It therefore requested the respondent to submit themselves to the intended arbitration process, propose the name (s) of suitable person (s) to be appointed as an arbitrator for their (appellants) consideration in the next 14 days, failing which it (appellant) would invoke the default procedures under the sub-contract agreement on the appointment of an arbitrator.

The respondent's failure to respond to the appellant's aforementioned correspondence is what prompted the appellant to issue to the respondent a letter dated 6th August, 2008 expressing its displeasure at the respondent's failure to respond to its above correspondences; and intimating that it was going to apply to the Chairman Chartered Institute of Arbitrators (the Institute) to appoint an arbitrator to hear the dispute in accordance with **Clause 32.2** of the subcontract. The respondent did not also respond to this communication.

On 15th August, 2008, the appellant accordingly requested the Chairman of the Institute to appoint an Arbitrator for them in terms of **clause 31** of the sub-contract. The executive officer of the Institute replied to the appellant's letter vide their letter dated 18th August, 2008 informing the appellant that they could only accede to the appellant's request if there was a clause in the contract agreement mandating the Institute to so act. Second, that they had perused clause **31.2** enclosed in the appellant's letter of request and were satisfied that it gave them (the Institute) the mandate to act on the appellant's request, and on that account requested the appellant to remit to them the requisite fees of Kshs. 15,000.

In a letter dated 24th September, 2008, the Institute appointed **Mr. H.G. Nyakundi esq** as an Arbitrator for the dispute between the appellant

and the respondent. **Mr. Nyakundi** was accordingly advised by the institute to directly get in touch with the disputing parties over the issue. Vide a letter dated 30th September, 2008 referred to in the respondent's letter to **Mr. Nyakundi** of 13th October, 2008, **Mr**. **Nyakundi** invited the disputing parties to appear before him over the issue. In the respondent's letter of 13th October, 2008, the respondent indicated that they were the main contractors, while the appellant was the PABX sub-contractor for the proposed Headquarters Building for Kenya Pipe Line Company Limited; that the final account was prepared including a claim of Kshs. 20,530,876.00 in favour of the appellant; that the appellant did not sign the account because it disputed the amount; that on 24th September, 2007, valuation number 29 included this claim but due to the dispute by the appellant, the amount of claim was deducted from their valuation number 30 of 27th March, 2008 and retained by the client; that the amount of Kshs. 20,530,876.00 was with the client awaiting agreement of PABX Final Account including the claim by the appellant, and lastly, that the final account without the appellant's claim had been paid. On that account, the respondent informed the Arbitrator that the respondent did not therefore owe the appellant any money as all monies due to the appellant as certified by the consultants had been paid to the appellant; that the dispute was actually between the appellant and the consultants over the evaluation of the appellant's claim of Kshs. 20,530,876.00.

On 16th October, 2008, the respective disputing parties endorsed terms for conducting the arbitration proceedings with neither party raising objection to **Mr. Nyakundi** conducting the arbitration proceedings. It was not until the 4th of May, 2009 when the respondent in their submissions filed before **Mr. Nyakundi**, challenged his jurisdiction citing appellant's lack of compliance with the prerequites in **Clause 35** of the sub- contract agreement. **Mr. Nyakundi** heard the parties on the respondent's preliminary objection to his jurisdiction on merit and rejected it in a ruling delivered on 29th July, 2009, prompting the respondent to file HCCC No. 591 of 2009 (OS) (the OS), challenging **Mr. Nyakundi's** failure to sustain their preliminary objection. Simultaneously with the filing of the OS, the respondent filed an interim application seeking stay of the arbitral proceedings pending determination of **Mr. Nyakundi's** want of jurisdiction. The application was heard on merit and dismissed by **Koome, J** on 5th February, 2010, for reasons we shall revert to at a later stage of this Judgment, paving the way for the Arbitration proceedings to proceed to their logical merit conclusion resulting in an Arbitral Award granted and published in favour of the appellant on 22nd March, 2012. It read as follows:

> ***"(1) That within thirty days from the date of this award, the respondent shall pay to claimant the sum of Kenya shillings thirty-five million Eight Hundred and fifty-nine thousand Eight Hundred and Forty-seven only (Kshs. 35,859,847.00) being the principal sum claimed plus interests as above in full and find settlement of all matters referred to me in this Arbitration, and***
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> ***(2) That the costs of this Award, which I tax and settle at the sum of Kenya shillings two Million Seventy-Five thousand nine hundred and thirty-six only (Kshs. 2,075,936.00) shall be paid in the proportion of twenty percent (20%) by the claimant and eighty (80%) by the respondent and if the claimant shall have paid the portion of the respondent, or any part of such costs, the respondent shall reimburse to the claimant the sum so paid within thirty (30) days from the date of this Award. If the respondent shall have paid the portion of the claimant the converse shall be the case, and***
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> ***(3) that eighty (80%) of the costs of the claimant in this Arbitration shall be borne and paid by the respondent within thirty (30) days from the date of this Award and if not agreed to be taxed by me."***

The respondent filed an application to set aside the Arbitral Award which was heard and dismissed on 21st November, 2012, paving the way for the appellant to file the chamber summons dated 23rd November, 2012 seeking to enforce the Arbitral Award. The appellant's application for enforcement of the Arbitral Award was filed, heard and allowed exparte on 5th February, 2013. The appellant extracted a decree dated 13th February, 2013, pursuant to which they issued directions to **Kindest Auctioneers** to sell the respondent's property to recover the Judgment sum of Kshs. 43, 968,583.00.

The respondent filed a notice of motion dated 8th March, 2013, substantively seeking orders: that the Judgment entered herein and the resultant decree together with all consequential orders be set aside. The application was supported by grounds on its body, a supporting and a further affidavit deposed by **Donald K. Mwaura** together with annextures thereto. It was opposed by a replying affidavit deposed by **Mungai Ngaruiya** on 15th March, 2013 on behalf of the appellant together with annextures thereto. The application was canvased by way of written submissions resulting in the impugned ruling.

The trial court assessed and analyzed the record and made observations thereon *inter alia* that, the appellant had failed to furnish to court a duly authenticated original Award and the original Arbitration agreement or duly certified copies of the two documents, in compliance with the mandatory prerequisite in **section 36(2)** of the Arbitration Act; that the said provision is couched in mandatory terms and in the absence of an express court order authorizing a departure from the above mandatory procedure, non-compliance vitiated the appellant's right to enforce the Arbitral Award; that, a reading of **sections 35,36** and **37** of the Act in conjunction with **Rules 4,5,6** and **9** of the Arbitration Rules left no doubt in the trial court's mind that the applicant as the beneficiary of an Arbitral Award was obligated to give notice of the filing of the Arbitral Award to the respondent specifying the court Registry in which the Arbitral Award had been filed and then file an affidavit of service to that effect; that section 35 of the Act is not a claw-back provision and lastly, that the respondent's right to be heard provided for in section 37 of the Act was not rendered otiose just because the respondent against whom the award was sought to be enforced did not invoke that procedure.

The trial court then rendered itself *inter alia* as follows: -

> ***(1) …… the arbitration agreement is the one dated 11th November, 2002 and its Clause 35, provided for arbitration and the appointment of the Arbitrator. The appointing authority was to be "the Chairman for the time being of the Architectural Association of Kenya." But, it turned out that the Arbitrator was appointed by the Chartered Institute of Arbitrators (Kenya Branch) upon representations by the respondent. Several things are suspect. The letters dated 14th July, 2008 and 6th August, 2008 cited clause 31 and 31.2, respectively as the enabling provisions for the appointment of an arbitrator. The letter dated 15th August, 2008 again insisted that clause 31 of the agreement is the basis for the appointment of the arbitrator. Things got convoluted; a copy of the said clause, not the arbitration Agreement, was supplied to the Chartered Institute of Arbitrators***

(Kenya Branch). The respondent was advised through the letter dated 16th August, 2006 from Armstrong and Duncan to request the "appointing authority stated in their contract" to make the appointment of an Arbitrator. Contrary to that advice, the respondent insisted on the appointment being made by the Chartered Institute of Arbitrators (Kenya Branch). The Chartered Institute of Arbitrators (Kenya Branch) was alive to the fact that it can only appoint an arbitrator where it is the named appointing authority in the Arbitration Agreement and the letter dated 18th August, 2008 is clear on that….. one thing is clear; that the Arbitration clause 35 designated the appointing authority to be "the Chairman for the time being of the Architectural Association of Kenya" and not the Chartered institute of Arbitrators (Kenya Branch). Also, the Clause 31 or 31.2 cited by the respondent as the Arbitration Agreement was non-existent. The law is very clear that appointment of arbitrators is in accordance with the agreement of the parties or, failing any agreement by the parties, in accordance with the Arbitration Act which is the law of Kenya……. The appointment herein was contrary to the Arbitration Agreement and the law and is, therefore, a potent ground to set aside the award arising out of such impugned arbitral proceedings. The said violation of the law is not atoned for because the party complaining submitted itself to or participated in the arbitral proceedings or paid the arbitrator's fee. Annexture marked as "MN TWO" secured to the respondent's replying affidavit dated 15th March, 2012 is not sufficient given the express deprecation of the entire exercise that was exhibited by the Applicant in all the efforts it employed to get justice on the matter. The arbitral proceedings was not consensual or sanctioned by law. Its legitimacy has been put to question. Thus, the entire proceedings is null and void. I so declare them……...

(2) …… the fact that OS 591 of 2009 was dismissed "for want of prosecution" does not deny the Applicant the opportunity afforded in section 37 of the Arbitration Act to challenge the adoption and enforcement of the award. And a successful applicant may have the recognition or enforcement refused or the award set aside or suspended. Needless to say the said OS 591 of 2009 was not even decided on merit……...

(3) In the circumstances of this case, it is safe to conclude that the arbitral tribunal as constituted fell afoul of the law and justifies invocation of section 37(1) (a) (v) of the Arbitration Act; that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of Kenya being the state where the arbitration took place. Accordingly, such an award under section 37(1) (a) (vi) of the Arbitration Act has not yet become binding on the parties and the arbitral award published on the 22nd day of March, 2012 is hereby set aside. As a consequence, the recognition or enforcement of the said award is hereby refused by the Court. Parties are at liberty to initiate appropriate arbitral proceedings in accordance with their Arbitration Agreement dated 11th November, 2002. It is so ordered."

The appellant was aggrieved and filed this appeal citing eight (8) grounds of appeal. It is the appellant's complaint that the learned Judge of the High Court erred in law and in facts:

(1) In holding that the entire arbitral proceedings were null and void when what was before him was an application seeking an order for setting aside judgment and decree issued on 13th February, 2013.

(2) In settling aside the arbitral award when there was no application under section 35 of the Arbitration Act granting the court jurisdiction to do so.

(3) In finding that the respondent still had the opportunity to challenge the arbitral proceedings notwithstanding the dismissal of OS 59 of 2009 when the issue of jurisdiction had been heard and determined by justice Koome and Justice Mabeya in Civil Case Number 59 of 2009 (OS).

(4) In failing to determine that the respondent had waived its right under section 5 of the Arbitration Act.

(5) By determining issues and granting reliefs that were not prayed for in the application dated 8th March, 2014.

(6) In failing to find that the respondent ought to have appealed against the rulings of Justice Mabeya instead of filing the application dated 8th March, 2013 after the arbitral award had been adopted.

(7) In failing to recognize that the respondent ought to have challenged the arbitral award within three months from the date of publication.

(8) In conferring himself jurisdiction which he did not have.

The appeal was canvased by way of written submissions adopted and highlighted by learned counsel for the respective parties. Learned counsel **Mr. Kamotho R.G**. holding brief for **Mr. Njomo** leading **Brandy Wanja** appeared for the appellant, while learned counsel **Mr. Byron Okinyo** appeared for the respondent.

Supporting the appeal, the appellant relied on the High Court decision in **Atlas Copco Customer Finance Ltd versus Polarize Enterprises Limited Civil Case No. 32 of 2013; Pashito Holdings Limited and another versus Paul Nderitu Ndungu and 2 others Civil Appeal Number 138 of 1997;** and **Rafiki DTM (K) Ltd versus Julius Ng'ang'a Mbugua [2015] eKLR** and faulted the trial court for: improperly issuing orders not prayed for by the respondent thereby denying the appellant of an opportunity to respond to them before any adverse conclusion could be drawn against them; faulting the arbitral process for the alleged failure by the appellant to furnish a duly authenticated or certified Award and arbitral agreement which omission even if it existed should have been limited to setting aside of the Award and not to be used as basis for nullifying and setting aside of the entire Arbitral process.

Supporting ground 2 of the appeal, the trial court was faulted for the failure to appreciate that Misc. Application No. 714 of 2012 filed by the

appellant, seeking enforcement of the Arbitral Award became spent the moment the order for enforcement of the Arbitral Award was granted. It was therefore erroneous for the trial court to reopen it, receive, entertain and then sustain the respondent's application for setting aside of the order for enforcement of the Arbitral Award.

Supporting grounds 3 and 8 of the appeal, the trial court was faulted for disregarding the doctrine of *res judicata* and entertaining further challenge to the validity of the arbitral process on the basis of **Mr. Nyakundi's** want of jurisdiction to conduct the arbitral proceedings determined and reflected by **Koome, J.** Second, in failing to appreciate that section **14(6)** of the Act is couched in mandatory terms that a decision of the High Court rendered under the said provision is final and is not subject to appeal.

Supporting ground 4 of the appeal, the trial court was faulted for contravening **section 5** of the Act by failing to appreciate that the respondent having submitted themselves to the arbitral process were deemed to have waived their right to subsequently object to the said arbitral proceedings. Second, that the court became *functus officio* on the issue of **Mr. Nyakundi's** want of jurisdiction or otherwise, the moment the respondent failed to appeal, firstly, against **Koome, J's** order declining to stay the arbitral proceedings; and secondly, against the order declining to reinstate the OS dismissed for want of prosecution.

In support of ground 7 of the appeal, the appellant submitted that the respondent's right to object to the Arbitral Award became spent three (3) months from the date of publication of the Award which fell on 22nd March, 2012.

On the totality of the above submissions, the appellant prayed for the appeal to be allowed, the impugned orders, set aside and substituted with an order dismissing the respondent's application dated 8th March, 2013 and filed on 11th March, 2013 with costs to the appellant.

Opposing the appeal, the respondent submitted that **section 17(1) (a)** provides explicitly that an arbitration clause forming part of a contract is treated as an agreement independent of the other terms of the contract; that although, **Section 17 (2)** provides that a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, it does not preclude a party who has submitted himself to an arbitral process from subsequently raising a plea of want of Jurisdiction in an arbitral tribunal.

To buttress the above submissions, the respondent relied on the High Court decision in the case of **Boniface Waweru versus Mary Njeri & Another HC Misc. Application No. 639 of 2005 (UR)** and **Misc. Civil Application No. 719 of 2004** for the holding *inter alia,* that jurisdiction is the first test in the legal authority of a court or tribunal and its absence disqualifies the court or tribunal from determining the issues in controversy as between the parties before it.

Also relied upon is the decision of the Supreme Court of India in the case of **Associated Engineering Co. Versus Government of AndBraPradesh & another [1991] 4SCC93 (AIR 1992SC.232)** for the holding *inter alia*, that an Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. Second, that an Arbitrator who acts in manifest disregard of the contract acts without jurisdiction as the arbitrator's authority is derived from the contract but governed by the Arbitration Act. Third, that a deliberate departure from the contract amounts not only to manifest disregard of the arbitration authority and misconduct but may also be tantamount to *malafide* action. Fourth, that a conscious disregard of the law or the provisions of the contract from which the arbitrator derives his authority vitiates the award.

On the binding nature of the arbitration clause in a contract, the respondent relied on the High Court case of **Kenya Shell Limited versus Kobil Petroleum Limited [2006] eKLR,** in which **section 29 (5)** of the Act was construed and applied and submitted that an arbitral tribunal is obligated to determine the dispute in accordance with the terms of the particular contract; that the only arbitration **Clause** in the sub-contract was **Clause 35**, and which provided explicitly that the only appointing authority for an arbitrator to hear any dispute arising under the said sub-contract was the Chairman for the time being of the Architectural Association of Kenya. The trial court cannot therefore be faulted for faulting the appellant firstly, for going against the clear provisions of **clause 35** of the agreement especially when they did not deny executing the same and was therefore binding on them. Secondly, for misleading the institute and causing them to purport to appoint **Mr. Nyakundi** as an arbitrator by citing a wrong and nonexistent clause as the basis for that authority. The appellant's conduct, amounted to fraud and was therefore amenable to **section 37 (1) (a) (v)** of the Act procedures.

In opposition to grounds 1,2 and 7 of the appeal, the respondent relied on the High Court case of **National Oil Corporation of Kenya Limited versus Prisko Petroleum Network Limited** (Supra) and submitted that since **section 36(2)** of the Act is couched in mandatory terms, the appellant's failure to annex both the Arbitral Award and the agreement containing the arbitral clause or certified copies of the said documents was fatal to the appellant's application for enforcement of the Arbitral Award and was therefore rightly vitiated by the trial court.

In opposition to grounds 4 and 5 of the appeal, the respondent relied on the same case of **National Oil Corporation of Kenya Limited versus Prisko Petroleum Network Limited** (supra) and submitted that the respondent did not waive their right to object to the arbitral process as they raised a preliminary objection to **Mr. Nyakundi's** want of jurisdiction at the earliest opportunity and upon being overruled by **Mr. Nyakundi,** they filed the OS smulteniously with an interlocutory application for seeking stay of the arbitral proceedings; that upon being overruled by **Koome, J,** on the application for stay, the respondent was left with no other option but to participate in the arbitral proceedings; that in terms of **section 17(2)** of the Act , the respondents participation in the said arbitral proceedings up to their logical conclusions did not disentitle them to the right to challenge that process subsequently.

In opposition to ground 6 of the appeal, the respondent conceded that they filed an OS challenging **Mr. Nyakundi's** jurisdiction but it was subsequently dismissed for want of prosecution. The interlocutory application filed simultaneously with the OS seeking stay of the arbitration proceedings was also declined by **Koome, J**. The issue of **Mr. Nyakundi's** want of jurisdiction was therefore never finally determined on merit by **Koome, J** as erroneously contended by the appellant.

On *res judicata*, the respondent relied on the ingredients for sustaining a plea for *res judicata* as set out in **section 7** of the Civil Procedure Act Cap 21 Laws of Kenya (CPA) and submitted that since the issue of **Mr. Nyakundi's** jurisdiction was not determined on merit by any of the High Court Judges who handled matters arising from the arbitration process conducted by **Mr. Nyakundi,** the doctrine of *res judicata* did not apply to prevent the trial court nor this Court from revisiting that issue and ruling on it.

On account of the totality of the above submissions, the respondent urged us to dismiss the appeal and affirm the trial court's decision.

In reply to the respondent's submissions, **Mr. Kamotho** reiterated that issue of **Mr. Nyakundi's** want of jurisdiction was finally determined by **Koome, J**. The trial court therefore exceeded its mandate when it *suo motu* revisited the issue and used it as basis for nullifying the entire arbitral proceedings. The order resulting from the trial court's wrong exercise of its Jurisdiction should neither be counternanced nor allowed to stand.

This is a first appeal arising from the exercise of discretion by the trial court in granting the impugned order. Our mandate when determining as to whether the trial court exercised its discretion judiciously when granting the impugned order is as was set out in **United India Insurance Company Limited versus East African Underwriters Kenya Limited [1988] KLR 898** which we fully adopt. The guiding principle is that we can only interfere with the exercise of that discretion if we were satisfied that the trial court misdirected itself in law, misapprehended the facts, took account of considerations which it should not have taken into account, failed to take into account considerations of which it should have taken into account, or that its decision albeit a discretionary one is plainly wrong.

We have considered the record, the rival submissions and principles of law relied upon by the respective parties in support of their opposing positions, in light of our mandate set out above. The issues that fall for our determination are as follows:

(1) Whether the trial court misapprehended the correct facts of the case before it.

(2) Whether the trial court not only misapprehended but also misapplied the law to the facts and therefore arrived at a wrong conclusion on the matter.

(3) Whether the trial court erroneously exercised its discretion and granted a relief not applied for by the respondent.

On the alleged misapprehension of the correct facts on which the appeal is anchored, it is not in dispute that the sub contract agreement executed by the respective parties to this appeal contained clause 35 as the arbitration clause. The clause provided explicitly that, in the event of any dispute arising over the performance of any of the terms of the executed sub-contract agreement, the same would be referred for determination by an arbitrator appointed mutually by both contracting parties, failing which the aggrieved party would approach the Chairman for the time being of the Architectural Association of Kenya to appoint an arbitrator for them.

The appellant declared a dispute between them and the respondent and vide its letter dated 14th July, 2008, invited the respondent to nominate an arbitrator to arbitrate over the dispute. When the respondent failed to respond to the appellant's letter of 14 th July, 2008, the appellant approached the Chairman of the Institute seeking arbitration services, resulting in the sequence of events we have already described above.

We have perused **Clause 31** and find that it deals with surety bond for the due performance of the contract, while **Clauses 31.2** or **32.2** are nonexistent. When confronted with the respondent's assertions that the appellant's conduct of citing a non-existent clause as the enabling clause under which the institute appointed **Mr. Nyakundi** as the Arbitrator was meant to mislead the institute, and therefore amounted to fraud, the appellant did not controvert that issue. Neither, did they exhibit the content of the nonexistent clause in the form in which it was when forwarded to the institute as basis for the institutes appointment of **Mr. Nyakundi** as an arbitrator to confirm that it was in tandem with the enabling arbitration clause provided for in the contract. The trial court cannot therefore be faulted for the finding that, on the facts on the record the appointment of **Mr. Nyakundi** stood vitiated for the failure to comply with the prerequisites in **clause 35** of the sub-contract.

With regard to raising objection to **Mr. Nyakundi's** want of jurisdiction or otherwise to conduct the arbitration process, it is not disputed that, parties appeared before **Mr. Nyakundi** on 16th October, 2008 in obedience to his letter of 30th September, 2008 inviting them to settle the terms for conducting the arbitration process. They appeared and endorsed pre-prepared terms for conducting the arbitration proceedings without either party raising objection to **Mr. Nyakundi**'s appointment on want jurisdiction or otherwise to conduct the arbitration proceedings. The respondent however subsequently, raised a preliminary objection to **Mr. Nyakundi**'s jurisdiction in its submissions filed before the Arbitrator dated 4th May, 2009. As already highlighted above, **Mr. Nyakundi** heard the preliminary objection on merit and overruled it in a ruling delivered on 29th July, 2009. The respondent filed the OS challenging **Mr. Nyakundi's** failure to sustain its preliminary objection. Simultaneously with the filing of the OS, the respondent filed an application for stay of the arbitral proceedings pending determination of the OS. The interlocutory application was declined by **Koome, J** paving the way for the arbitral proceedings to proceed to their logical conclusion, resulting in the Arbitral Award published on 22nd March. The OS was subsequently dismissed for want of prosecution, while the application to revive the OS was dismissed on merit.

All the above sequence of events, were aptly captured by the trial court in its appraisal of the record. We therefore find nothing on the record to suggest that the trial court misapprehended any aspect of the facts of the case as set out by the respective parties in their opposing pleadings and submissions.

As to what transpired in court, the disputing parties' first encounter with the court process was vide the OS filed by the respondent against the appellant, simultaneously, with a chamber summons seeking stay of the arbitral proceedings pending determination of the OS. This is the application that gave rise to the ruling of **Koome, J** delivered on 5th February, 2010, declining to grant the application for stay of the arbitration proceedings for the reasons that the integrity, competence and independence of **Mr. Nyakundi** were not in issue, notwithstanding, that he had not been appointed in tandem with the prerequisite in **clause 35** of the sub-contract. Second, it had taken the respondent six (6) months to raise objection to the arbitral proceedings. Third, granting the orders sought would have occasioned inordinate delay in setting up the arbitration mechanism.

On the mandate of the Court, **Koome, J,** stated clearly that what had been invoked was a discretionary jurisdiction and on that account, exercised her discretion and declined the relief for the reasons already highlighted above.

In light of what we have highlighted above as the reasons **Koome, J** declined to stay the arbitration proceedings, there is no doubt in our minds that the trial court correctly arrived at the conclusion that **Koome, J** in the order declining to stay the arbitration proceedings, never made a definitive finding on **Mr. Nyakundi's** want of jurisdiction or otherwise to conduct the arbitration proceedings on the dispute between the respective parties herein. The issue was therefore not *res judicata.* The trial court properly revisited it, interrogated it and made findings therein.

On the enforcement of the Arbitral Award, it is our observation that the appellant neither at the trial nor before this Court disputed the respondent's assertion and as affirmed by the trial court, that its application for enforcement of the Arbitral Award dated 23rd November, 2012 was never served upon them. Second, that the appellant only annexed to the affidavit in support of the said application a copy of the Arbitral Award and schedule of costs and not either originals or certified copies of the Arbitral Award and the agreement containing the arbitral clause.

Rule 4(3) of the Arbitration rules required the appellant as the party seeking to enforce the award to serve the application on all the participating parties within seven (7) days of such filing. **Rule 5** on the other hand, required the appellant to give notice to the respondent as to the registry in which the application had been filed and the date on which the Arbitration Award was filed. The record is explicit that the appellant never complied with the above prerequisite. The trial court cannot therefore be faulted for vitiating the appellant's application for enforcement of the Award for non-compliance with the above mandatory procedures.

As for the respondent's application dated 8th March, 2013, we agree with the appellant's contention that all that it prayed for were orders for stay of enforcement of the decree pending the hearing and determination of the application *inter partes* and the setting aside of the Judgment entered therein, the resultant decree together with all consequential orders. We also agree that, the above position notwithstanding, the trial court vitiated the entire arbitral process and gave reasons already highlighted above and to which we shall revert to at a later stage in this Judgment.

In light of the assessment and reasoning set out above on what transpired at the various stages of court proceedings giving rise to this appeal, we find no evidence of any misapprehension of the facts on the record by the trial court as to what transpired before the trial court became seized of the matter and the conclusions reached by those courts at the various stages of court proceedings as already highlighted above.

Turning to the appreciation and application of the law to the facts relied upon by the respective parties in support of their opposing positions, **Section 5** of the Act deems a party who knowing that a provision under the arbitral agreement has not been complied with and yet proceeds with the arbitration without raising objection to such noncompliance without undue delay, or within the time limited for taking such an action deemed to have waived the right to subsequently object to such process.

The overriding words in the said section are:

> ***"….and yet proceeds with the arbitration without stating his objection to such noncompliance without undue delay or, if a time limit is prescribed within the time limit provided……..".***

Our construction of **Section 5** of the Act is that it is not a stand-alone provision. It has therefore to be read in conjunction with **section 13(3)** of the Act which provides for challenge to the mandate of an arbitrator. It provides as follows:

> ***"An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so."***

In light of the wording of the above provisions, the doctrine of waiver can only be invoked to defeat the respondent's right to object to the appointment of **Mr. Nyakundi** as an arbitrator as at the point in time when they raised objection to his jurisdiction if it can be demonstrated that they did not do so without undue delay, considering that **section 13(3)** does not give time lines within which to raise such an objection. Neither did the pre-prepared terms for conducting the arbitration proceedings prepared by **Mr. Nyakundi** and endorsed by the respective parties.

Applying the above threshold to the record, we adopt what we have already highlighted above on the sequence of events that led to the respondent raising objection to **Mr. Nyakundi's** jurisdiction and adopt the same for purposes of drawing out our conclusions on this issue. It is therefore our finding that neither the arbitral **Clause 35** in the sub-contract agreement, nor **Mr. Nyakundi's** schedule of terms for conducting the arbitral proceedings provided for the time limit within which a party could raise objection on want of jurisdiction. Neither **section 5** nor any other provisions in the Act defines what is meant by "**without undue delay".** Neither was any case law cited either to the trial court or now before us on that point. **Koome, J** correctly observed that the respondent's complaint came six months after the onset of the arbitration proceedings. In the absence of either **section 5** or any other provisions of the Act or case law defining what amounts to "without undue delay", the trial court cannot be faulted for holding that the respondent was entitled to complain, especially when there was evidence of flagrant flauting of **clause 35** by the appellant.

On the binding nature of the sub-contract, it was correctly found that **the** appellant had not contended that **Clause 35** was not binding on them. In **National Bank of Kenya Ltd versus Pipe Plastic Samkolit (K) Ltd & another [2011] eKLR**, the Court was categorical that it is only in rare circumstances that equity steps in to release a party from a bad bargain. See also **Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR,** for the holding *inter alia* that:

> ***"it is not the business of Courts to rewrite contracts between parties. Second, Parties are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved."***

The above being the legal position, the trial court cannot be faulted for holding that the appellant was obligated to comply with the prerequites set in the arbitration clause especially when it is undisputed that it is the party that set the ball rolling for the initiation of the arbitration proceedings. In the absence of any demonstration that the appellant was not bound by the arbitral Clause, we find no error in the trial court's finding that the arbitration clause was binding on the appellant. Second, that the same had been flouted by the appellant. Third, that the respondent had not waived its right to object to **Mr. Nyakundi's** want of jurisdiction notwithstanding, participation in the arbitral proceedings upto their logical conclusions. Fourth, that the respondent participated in the arbitration proceedings upto their logical conclusions only after their objection had been overruled, first by **Mr. Nyakundi** and secondly by **Koome, J.**

It is also evident from the record that the respondent also invoked **Section 14** of the Act which deals with challenge to proceedings, upon receiving the ruling of the arbitrator dated 29th July, 2009. As already observed above, the respondent timeously filed the OS on 14th August, 2009 within the thirty (30) days stipulated for therein. Under **subsection 6** thereof a decision by the High Court made under this provision is final. Having ruled above that the ruling of **Koome, J** of 5th February 2010 dealt with the issue of stay of arbitral proceedings only notwithstanding, the learned Judge's observations on matters touching on want of jurisdiction or otherwise of **Mr. Nyakundi,** it is our reiteration that the trial court correctly held that subsection 6 does not apply to the circumstances of this appeal as the issue of **Mr. Nyakundi's** want of jurisdiction or otherwise was never finally determined by any competent court of law.

The finding of the trial court is further fortified by **section 17(2)** of the Act, which provides as follows: -

> ***"A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submissions of the statement of defence. However, a party is not precluded from raising such a plea because he has appointed or participated in the appointment of an arbitrator."***

Having ruled above that the issue of **Mr. Nyakundi's** want of jurisdiction or otherwise was not ruled upon in the OS, for reasons already given above, we reiterate our earlier finding that the issue of **Mr. Nykundi's** want of jurisdiction or otherwise was amenable to a subsequent revisit. The respondent revisited and raised it in support of its application dated 8th March, 2013, to which the appellant responded. The trial court cannot therefore be faulted for revisiting that issue and making a pronouncement thereon as highlighted above.

This above position is further supported by **Section 29 (5)** of the Act which provides as follows:

> ***"In all cases, the arbitral tribunal shall decide in accordance with the terms of the particular contract……."***

The provision is in tandem with the holding in the case of **Pius Kimaiyo Lang'at versus Co-operative Bank of Kenya** (supra), that parties are bound by the terms of their contract. We therefore find sound basis in the trial court's finding that the respondent's objection to the appointment of **Mr. Nyakundi** as an arbitrator in contravention of the prerequisites in Clause 35 of the agreement is well founded in the said contract.

Turning to recourse to a court of law for reliefs, **Section 35** of the Act makes provision for recourse to the High Court for relief arising from an arbitral process. **Section 35(1),**

(2) (a) (v) provides as follows:

> ***35.(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the awards under subsection (2) and (3).***
>
> ***(2) An arbitral award may be set aside by the High Court only if-***
>
> ***(a)…….***
>
> ***(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……."***

Applying the above threshold to the rival positions on this issue, it is our finding that the appellant was bound to comply with the condition precedent in the arbitration **Clause 35** at the time of the initiation of the Arbitral proceedings especially when they failed to furnish any explanation as to why: firstly, there was noncompliance with the arbitration clause. Second, why a wrong arbitration clause was cited, extracted and served on the Institute to facilitate the appointment of an arbitrator. Third, why they did not take into consideration the Institute's express and clear instructions in the Institute's letter in response to the appellant's request for that service that the institute would only accede to the appellant's request if the terms of the agreement under which the dispute arose named them as the appointing authority. The trial court was therefore entitled to fault the appellant's conduct throughout the entire arbitration proceedings.

With regard to enforcement procedures, **Section 36(3)** of the Act on the other hand provides for enforcement of an arbitration award. It provides as follows:

> "***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;***

(b) The original arbitral agreement or a duly certified copy of it."

It is not disputed that the appellant did not comply with the above provision for the failure to furnish neither, the original nor certified copies of both the Arbitral Award and the contract agreement. The trial court cannot therefore be faulted for holding that the appellant was in breach of this provision as well especially when the appellant has merely asserted.

On *res judicata*, the principles that guide sustenance of a plea of *Res judicata* and which we fully adopt were succinctly restated by the Court in the case of **NJue Ngai versus Ephantus Njuru Ngai & another [2016] eKLR** as follows:

> ***[13] What is res judicata and when does it apply "The Latin of it is simply "a thing adjudicated". But it has overtime received extensive judicial interpretation in various jurisdictions of the globe which we shall not be tempted to explore here.***
>
> ***Suffice it to adopt the definition in Black's Law Dictionary, Ninth Edition, as:***
>
> > ***(i) An issue that has been definitively settled by judicial decision;***
> >
> > ***(ii) An affirmative defence barring the same parties from litigating a second lawsuit on the same claim or any other claim arising from the same transaction, or series of transactions and that could have been-but was not- raised in the first suit.***
>
> ***[14] In the case of Ukay Estate Ltd & Another Vs. Shah Hirji Manek Ltd & 2 others [2006] eKLR (supra), cited by the appellant, Waki, JA stated as follows:***
>
> > ***"The doctrine is not merely a technical one applicable only on records. It has a solid base from considerations of high public policy in order to achieve the twin goals of finality to litigation and to prevent harassment of individuals twice over with the same account of litigation. Put another way, there must be an end to litigation and no man shall be vexed twice over the same cause."***
>
> ***[15] The principle is captured in section 7 of the Civil Procedure Act as follows:***
>
> > ***"7 No court shall try any suit or issue in which the matter directly and substantially in issue has been 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 court."***

Applying the above threshold to the rival positions herein on this issue, we reiterate our earlier finding that the order of **Koome, J** of 5th February, 2010 was limited to declining to stay the arbitral proceedings for reasons we have already stated above, none of which touched on the merit of **Mr. Nyakundi's** want of jurisdiction. That issue was to be revisited during the determination of the OS, which was however, dismissed for want of prosecution and the application to revive it was also dismissed.

Turning to the last issue, it is not disputed that the respondent's application dated 8th March, 2013 neither invoked the **section 37** of the Act procedures nor sought an order for the nullification of the arbitral process. The trial court however, after analyzing the record arrived at the conclusions and for the reasons given in the trial court's assessment and reasoning of the record, that the entire process was flawed, and on that account, vitiated it.

As to whether the trial court exceeded its jurisdiction or otherwise, it is our finding that, the trial court was seized of the matter as a court of law and justice. It was not expected to perch itself on the judicial fence, hold arms a *kimbo* and apparently grant no remedy for all the flaws that had not only been highlighted, by it in the process of analyzing the record but also ruled upon based on sound basis both on the facts and law as already highlighted above. It is our finding that in the absence of any request to do so from the respondent, the trial court was entitled to invoke its policing authority to remedy any flagrant flouting of both the law and procedures governing the litigation before it and also for ends of justice to be met to both parties litigating before it and for purposes of preserving the dignity of the court. Being a High Court, it could have recourse to the inherent power of the court enshrined in **section 3A** of the CPA which provides as follows:

> ***3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."***

In the case of **Equity Bank Limited versus West Link Mbo Limited [2013] eKLR**, Musinga, JA was categorical that the ***inherent power is the authority possessed by a court implicitly without its being derived from the constitution or statute....."***

In **Kenya power & Highlighting Company Limited versus Benzene Holdings Limited t/a Wyco Paints [2016] eKLR**, the Court stated *inter alia* that:

> ***The jurisdiction of the court which is comprised within the term inherent" is that which enables it to fulfill itself, properly and effectively, as a court of law. The overriding features of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise***

control over the process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process....In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

.....

This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice."

The trial court could also invoke the overriding objective principle enshrined in **section 1A** & **B** of the CPA, whose principal aim is to facilitate the just, expeditious, proportionate and affordable resolution of case governed by the Act by inter alia, efficiently using the available judicial and administrative resources to discharge its mandate while at the same time, bearing in mind the need for the timely disposal of the proceedings at costs affordable by the respective parties seeking justice before court.

The purpose of the overriding objective principle is firstly, to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. Secondly, to embolden the court to be guided by a broad sense of justice and fairness. Thirdly, to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective. See the case of **City Chemist (NBI) Mohamed Kasabuli** suing for and on behalf of the Estate of **Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR. 199/2008).**

There is also the non-technicality principle in **Article 159 (2 (d)** of the Kenya Constitution 2010 which enjoins courts of law to render substantial justice as opposed to upholding technicalities.

In **Raila Odinga and 5 others versus IEBC & 3 Others** [2013] eKLR, the Supreme Court stated that:

"The essence of Article 159 of the Constitution is that, a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case".

In **Lemaken Arata versus Harum Meita Lempaka & 2 others eKLR**, it was stated that:

"the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice".

Lastly in **Patricia Cherotich Sawe versus IEBC & 4 others [2015] eKLR,** it was stated that:

"Article 159 (2) (d) of the Constitution is not a panacea for all procedural short falls as not all procedural deficiencies can be remedied by it."

Applying the above threshold on the invocation and application of the inherent power of the Court, adherence to the overriding objective principle of the Court and the observance of the non-technicality principle in **Article 159 (2) (d)** of the Constitution leaves no doubt in our minds that the trial court did not exceed its jurisdiction by setting aside the award in the circumstances.

Lastly, on the allegation that HCCC Misc. Application No. 714 of 2012 became spent upon issuance of the enforcement order, no rule of law or case law was cited to support that proposition. On the contrary, the file was still alive as the execution process was still ongoing. The respondent was therefore entitled to seek relief to forestall the completion of the execution process using the same file.

The upshot of the above assessment and reasoning is that we find no merit in the appeal. It is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 20th day of December, 2019.

E.M. GITHINJI

.....

JUDGE OF APPEAL

R.N. NAMBUYE

.....

JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.