



Kampala International University v Housing Finance Company Limited (Miscellaneous Cause E564 of 2019) [2021] KEHC 105 (KLR) (Commercial and Tax) (16 September 2021) (Ruling)

Neutral citation: [2021] KEHC 105 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CAUSE E564 OF 2019
MW MUIGAI, J
SEPTEMBER 16, 2021**

BETWEEN

KAMPALA INTERNATIONAL UNIVERSITY APPLICANT

AND

HOUSING FINANCE COMPANY LIMITED RESPONDENT

RULING

PLEADINGS

APPLICANT’S APPLICATION TO SET ASIDE FINAL ARBITRAL AWARD

- 1 Through Certificate of Urgency, filed on 6th November 2019, the Applicant, Kampala International University, sought that the Final Arbitral Award made and published by the Arbitrator, Hon. Mr. Collins Namachanja, on 27th September 2019 be set aside or stayed.
- 2 The Applicant shall suffer irreparable damage and gross prejudice, if the Final Arbitral award is recognized and enforced on grounds;
- 3 That the Arbitral Tribunal lacked jurisdiction to open the dispute between the parties beyond the declared dispute and the Arbitrator exceeded his jurisdiction in seeking to declare claims outside the declared dispute
- 4 By an Amended Notice of Motion filed on 8th September 2020, the Applicant, now brought under Sections 35 (2) (a) (iv) & 35 (2) (b) (i) & (ii) *Arbitration Act* Section 3A 1A 1B Rule 1 CPR & Section 63 of CPA sought that the Final Arbitral Award of 17th September 2019 by the Arbitrator Hon. Mr. Collins Namachanja, be set aside.



- 5 The Applicant sought the following orders;
- a. That the Court declares the Arbitration unfair, unjust and contrary to the provisions of the Constitution and the law;
 - b. That the aforesaid award is illegal and void ab initio
- 6 The Applicant relied on the following grounds based on Supporting and Further Affidavits of Mr. Hassan Basajjabalaba & of 6th November 2019 & 25th August 2020, Mr. Joseph Kyazze of 25th August 2020;
- a. The Arbitrator in breach of Section 13 of the Arbitration Act and failed to disclose circumstances likely to give rise to justifiable doubts as to his impartiality or independence. As a result, the Applicant was denied a fair trial under the Constitution and Arbitration Act.
 - b. The Arbitral Award deals with a dispute not contemplated by the terms of reference to the Arbitrator. The Respondent had no locus standi to usurp the Agreement made between HFCK Ltd and the Applicant herein and to declare a dispute thereof and unlawfully passed itself off as HFCK another Company incorporated under Laws of Kenya.
 - c. The Arbitral award contains decisions on matters beyond the scope of the reference of Arbitration and in the premise the award was/is in favor of the Respondent herein for USD 12,767,508.33 with costs which is unlawful and void in all the circumstances. The Arbitrator, had no jurisdiction to make the aforesaid award and usurped the jurisdiction of the High Court of Kenya.
 - d. The Respondent unlawfully passed itself off as HFCK another Company incorporated under the Law of Kenya and had no privity of contract between the parties herein.
 - e. The Final Arbitral Award adversely affects independent 3rd Parties without their knowledge and consent.
 - f. The Final Arbitral Award was obtained by fraudulent misrepresentation and deception.

RESPONDENT’S APPLICATION TO RECOGNIZE AND ADOPT THE FINAL ARBITRAL AWARD

- 7 By Certificate of urgency and Chamber Summons by Respondent/Applicant Housing Finance Company Limited (HFC) filed on 10th December 2020, sought that the Final Arbitral Award of 17th September 2019 delivered by Hon. Arbitrator, Mr. Collins Namachanja be recognized and adopted as judgment of the Court and the Applicant is granted leave to enforce the Final Award as a decree of the Court.
- 8 The Applicant relied on the following grounds based on Supporting and Replying Affidavits of Ms Regina Kajuju Anyika of 9th December 2019 & Further Replying Affidavit of SC Mr. John M. Ohaga of 25th September 2020 as follows;
- a) A dispute arose between the parties over loan facilities advanced to the Respondent by the Applicant in 2014. Consequently, parties agreed that the



dispute should be resolved by Arbitration selected Mr. Collins Namachanja, Chartered Arbitrator as Sole Arbitrator as shown by Exhibit RKA- 1.

- b) The Hon Arbitrator, heard parties and determined the matter substantially in favor of the Applicant wherein the Counterclaim succeeded fully whilst the claim partially succeeded. The Final Award was that the Applicant/ Respondent, Kampala International University to pay the Respondent/ Applicant Housing Finance Company Ltd USD 12,767,508.33 within 30 days of the date of publication of the Award as exhibited by RKA-2; copy of the Final Arbitral Award.
- c) The Respondent filed the instant Miscellaneous Cause/Application HCMC 564 of 2019 seeking to set aside the Arbitral Award under Section 36 which is the same as Section 35 of Arbitration Act.
- d) To the Amended Notice of Motion of 8th September 2020, the Respondent/ Applicant deposed that at the inception of Arbitral Proceedings, the parties agreed on preliminary issues, applicable laws, rules and the terms of engagement and no preliminary objections were raised as to the Arbitral Tribunal's impartiality and/or jurisdiction and parties filed a joint list of agreed issues for determination.
- e) An Arbitral Tribunal is a decision-making body that has power to consider the evidence and make a finding. The Tribunal's finding binds the parties unless it offends Section 35 of the Arbitration Act. The Applicant /Respondent herein has not shown existence of any of the circumstances under Section 35 of Arbitration Act.
- f) The Applicant/Respondent failed to demonstrate an instance where the Tribunal exceeded its mandate and the Applicant's insinuation of bias on the part of the Tribunal is baseless, unsupported and made in bad faith.
- g) Section 13 of Arbitration Act can only be enforced under Section 14 of Arbitration Act and has since been overtaken by events since the Arbitral Tribunal is now *functus officio*.
- h) The Applicant/Respondent's Application [to set aside the Final Arbitral Award] is predominantly hinged on fact and supposed mistakes of fact made by the Tribunal. The Tribunal's findings on fact are final and the Court cannot interfere with the findings of fact.
- i) The Applicant/Respondent's prayer for stay of execution, there can be no stay of execution of the Arbitral Award until the Arbitral Final Award is enforced by the Court and should be considered upon application by the Respondent/ Applicant herein.

APPLICANT'S SUBMISSIONS

BACKGROUND

- 9 In 2010, KIU undertook the process of construction of University in Kitengela, Kajiado County and sought through HFCK USD 15,000,000 to part finance the construction. Due to the size of debt instrument HF agreed to syndicate the facility with another financial institution whom it harmoniously worked with previously to fund the balance of USD 5 million. The loan facility was



subject to 1st Charge over KIU's immovable properties, its escrow Account for receipt of income from the University and various guarantees and all agreed securities were executed in favor of HFCK.

- 10 HFCK did not syndicate the loan as agreed and disbursement of monies were not made timeously, as agreed and no disbursement was made of the last tranche. On account of the failure of HFCK to disburse the monies, KIU's development came to a halt and contractors deserted the site and KIU's losses continues to accumulate. The Applicant instructed its advocate on record then to file suit in Court for damages. In discussions/Correspondence by parties' advocates, they agreed to Arbitration.
- 11 The Arbitration proceedings culminated with Final Award published on 17th September 2019 the subject of the present proceedings.

Agreement to arbitrate the dispute

- 12 The Applicant submitted that there was no formal Arbitration Agreement as drawn and signed by parties prior to nomination of the Arbitrator. There was no agreement by parties to submit a claim by HFCK and/or HFC against KIU. The major aspect of the dispute related to an alleged breach by the Respondent of the Terms of the Loan facility Contract.
- 13 The Applicant submitted that by letters dated 29th September 2017 by the former Applicant's advocates were written to Respondent's advocates and the Applicant proposed that the dispute resolution should be through Arbitration.
- 14 The Respondent Advocate's letter of 3rd October 2017 in reply to the Applicant's letter which contained the proposal agreed to Arbitration and made proposal of the List of 3 proposed Arbitrators who included the Arbitrator herein.
- 15 On 4th October 2017, the Applicant's former Advocates agreed to the appointment of Mr. Collins Namachanja as sole Arbitrator. The Applicant's former Advocates attached a joint signed letter of Appointment addressed to the Arbitrator.
- 16 On 10th October 2017, Mr. C. Namachanja accepted the appointment and confirmed that he had no conflict of interest in the subject-matter and that neither of the parties was/is personally known to him.

Lack of jurisdiction

- 17 From the above, the present advocates of the Applicant submitted that there was no agreement to submit the dispute (s) to arbitrate in the Agreement to finance the construction. No formal Arbitration Agreement was drawn and signed by the parties prior to nomination of Mr. C. Namachanja as Arbitrator.
- 18 Secondly, the Applicant submitted that the Arbitrator had no jurisdiction to hear and determine the Counterclaim. There was no agreement in writing to submit a claim by HFCK and/or HFC against KIU. The joint letter referred to a breach which alleged by KIU failure by the lender to make advances in total sum of USD 15 million within agreed time frame, the delays in making advances made and the losses suffered by KIU in respect thereof.
- 19 Thirdly, the Applicant submitted that written Agreements between the parties and several securities were to be construed and enforced under Laws of Kenya and by Kenyan Courts.
Fourthly, that HFC has no cause of action against the Applicant as it is a stranger to the Agreement between the Applicant and its precursor HFCK. Therefore, HFC lacks privity of contract with the Applicant.

Alleged Arbitrator's misconduct/conflict of interest



- 20 The Applicant submitted that it discovered a close relationship between the Arbitrator and Respondent's Counsel and/or his law firm after the Final Award was published and through discussions with an advocate (s) who had doubts as to the Arbitrator's impartiality of the Tribunal.
- 21 The Applicant submitted evidence based on the following affidavits;
- a. Mr. Joseph Kyasse vide Supporting Affidavit of 25th August 2020 annexed the List of Board of Directors [which includes both the Arbitrator & Respondent's Counsel] of Nairobi Centre for International Arbitration (NCIA) established as a statutory Corporation by *Nairobi Centre for International Arbitration Act* No 26 of 2013.
 - b. The Applicant submitted that during the tenure from 2013 – 2019, the Directors met at regular meetings of Board of Directors of NCIA and at seminars, meetings and annual conclaves of the institution as exhibited by its website.
 - c. The Applicant submitted that as directors of NCIA, they were in breach of their fiduciary duty as they offered arbitration services in competition with NCIA instead of promoting Arbitration within the NCIA Court for Arbitration.
 - d. The Applicant submitted that the Respondent's Counsel and Arbitrator were/are both in breach of fiduciary duty to NCIA, as Directors of the NCIA, by offering Arbitration Services in competition with NCIA.
 - e. The Applicant alleged that the Arbitrator and Respondent's Counsel presided as an Arbitration Tribunal of 3 Arbitrators in Kenya Bureau of Standards vs Geochem Middle East Civil Application No 259 of 2018 in 2016. The Final Arbitral Award was set aside by the Court of Appeal as it was granted without jurisdiction.
 - f. The Applicant further submitted that the Respondent's advocate's law firm represented the Arbitrator in the suit that entailed divorce proceedings between the Arbitrator and his wife. The Applicant sought details from the parties of the divorce proceedings and the same were not availed.
- 22 The Applicant submitted that the above outlined instances depict a close relationship and association between Counsel for the Respondent & the Arbitrator and alleged that the Arbitrator failed to disclose that relationship. Instead the Applicant was left to make such discoveries in the fulness of time, yet it has no duty to investigate the Arbitrator.

LAW

- 23 The Applicant relied on the following legal provisions and case-law
- a. Article 10 (2) (c) of COK 2010; that binds all persons and state organs to national values and principles of governance that include; integrity, transparency and accountability
 - b. Article 50 of COK 2010 that provides every person the right to have any dispute that can be resolved by the application of law in a fair and public



hearing before a court or if appropriate another independent and impartial tribunal.

c. Article 159(3) of COK 2010 that provides;

Traditional dispute resolution mechanisms shall not be used in a way that

- (a) contravenes the Bill of Rights;
 - (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
 - (c) is inconsistent with this Constitution or any written law.
- d. Section 13 &14 Arbitration Act 1995 that provides for grounds and process for challenge of appointment and/or proceedings by Arbitrator.

CASE -LAW

24 The Applicant submitted the award is contrary to public policy and relied on the cases of; *Christ for all Nations vs Apollo Insurance Co Ltd* [2002] 2 E.A. 366 & *Evangelical Mission of Africa & Another vs Kimani Gachubi & Anor* HC Misc App 479 of 2014

25 The Applicant submitted that the Arbitrator lacked jurisdiction to hear and determine the Counterclaim as it was not part of the dispute and Defense by Response ought to have been as prescribed by Section 24 of Arbitration Act. The Applicant relied on the case of;

Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1, Hon. Nyarangi J. Court of Appeal held;

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

Articles on Disclosure

26 The Applicant submitted that there is a duty to disclose from the following Articles;

a. FINDLAW ATTORNEY WRITERS; What is an Arbitrator’s Duty of Disclosure?

The classical formulation of disclosure rule is found in CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES;

An Arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias.

b. AMERICAN ASSOCIATION OF ARBITRATORS; A.KELLY SC

Arbitrators for a case administered by an arbitral organization are required to provide full, complete disclosures of relevant conflicts,



contacts, relationships and interests to the lawyers parties and witnesses appearing before them, with sufficient detail (subject to any duties of confidentiality they may have as to other Arbitrations and mediations) to fully inform the parties' of potential conflict.

RESPONDENTS SUBMISSIONS

27 Setting Aside the Final Arbitral Award

Section 10 of *Arbitration Act* provides that except as provided by the *Arbitration Act*; no Court shall intervene in matters governed by this Act.

28 Section 35 of *Arbitration Act* sets out grounds for setting aside the Arbitral award and a party is legally bound to bring itself within the ground(s) of Section 35 of the Act.

29 The Respondent submitted that the Applicant premised its grounds on Section 35 (1) (2) & (3) of the Act and set out as follows;

- a. The Arbitral Tribunal dealt with a dispute not contemplated by, and not falling within the terms of reference to the Arbitration. The Arbitrator failed to consider contents of the Loan Application letter dated 2th October 2013 and the Applicant was directed to pay the judgment sum within 30 days.
- b. The Applicant challenges the Arbitrator's finding of fact whether the latter loan of USD 5 million constituted 'additional facility' or 'new facility'. The Arbitrator's finding that it was additional facility was contrary to the letter dated 28th October,2013.
- c. The Applicant alleged that the Arbitrator's award was /is induced by fraud, bribery, undue, influence or corruption.

The Arbitrator's admission of the letter of 29th January 2014,

The Applicant stated that the 'above statements by the Tribunal are based on an unsigned letter which has no letterhead....'

30 The Respondent submitted that Applicant's challenge on the Arbitral Tribunal's findings of fact, legally fall squarely within the competence of the Arbitrator as the master of facts as held in the following cases;

31 In *Kenya Oil Co. Ltd & Anor vs Kenya Pipeline Co* [2014] eKLR the Court of Appeal referred to *Geogas S.A. vs Trammo Gas Ltd (The Baleares)* which the Court L.J Steyn observed;

The Arbitrators are masters of facts. On an appeal the Court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of findings of fact of the Arbitrators. It is irrelevant whether the Court considers those findings of act to be right or wrong. It does not matter how obvious the mistake by the Arbitrators on issues of fact might be, or what scale of financial consequences of the mistake of fact might be. That is of course an unsurprising position. Afterall, the very reason why parties conclude an Arbitration Agreement is because they do not wish to litigate in Courts. Parties who submit their disputes to Arbitration bind themselves by agreement to honor the Arbitrator's award on the facts. The principle of party autonomy decrees that a Court ought to never question the Arbitrator's findings of fact.



See also

Kenya Tea Development Agency Ltd & Others vs Savings Tea Brokers Ltd (2015) eKLR;
Tersons Ltd vs Stevenage Development Corporation (1963)3 All ER 863 & *DB Shapriya & Co Ltd vs Bish International BV* (2003) 2 EA 404 Tanzanian High Court on the same issue.

- 32 In *Kenya Sugar Research Foundation vs Kenchuan Architects Ltd* Civil Case No 695 of 2012, the High Court held;

It is only when an erroneous proposition of law is stated in the Award that a Court can set aside the award or remit it to the Arbitral Tribunal for reconsideration on the grounds of such error of law apparent on the face of the record. The Court will not interfere with the Award unless some real injustice or substantial diversion from the law can be proved.

- 33 From the above case-law the Respondent submitted that the Applicant failed to plead or demonstrate an erroneous proposition of law on the face of Final Award. The Respondent further submitted that factual findings by the Arbitral Tribunal after considering pleadings, testimonies and documents submitted by parties during the Arbitration proceedings, the Court cannot interfere with these findings.

Arbitral Tribunal's Jurisdiction

- 34 On the Applicant's contention that the Arbitrator dealt with a dispute not contemplated by and not falling within the terms of reference of Arbitration. The Applicant asserted that the Tribunal failed to consider the letter dated 28th October 2013 in ordering payment of USD12,767,508.33 within 30 days as the parties did not make any reference to timelines within which the payment of the lumpsum of the full facility would be made.

- 35 To this claim, the Respondent submitted and relied on the following cases;

Evangelical Mission for Africa & Anor vs Kimani Gachuhi & Anor (2015) eKLR;

The law is that this ground deals with situations where the Arbitral Tribunal deals with a matter not set out by the parties in their pleadings or identified by the parties as an issue for determination or which was not referred to by the parties in their submissions because it was not within their contemplation.

See also *Equity Bank Limited vs Adopt -A - Light Ltd* [2014] eKLR where the High Court also referred to *Mabican Investment Ltd vs Giovanni Gaidi & 80 Others* (2005) eKLR on the same legal position on excess jurisdiction.

- 36 The Respondent submitted that the Applicant admitted that parties' filed a Joint List of Agreed issues for determination on 22nd May 2018 and the Arbitrator determined these agreed issues. Also, the Applicant drafted the Arbitration Agreement and set out the dispute to the Arbitrator;

Our client borrowed funds from the Respondent for construction of Campus in Nairobi. The facility that was proposed is USD 15 million. Our client has received several tranches of the requested facility. A dispute has emerged between the 2 parties arising from loan facility and parties desire you act as sole Arbitrator.

Therefore, the Respondent submitted the Final Award related to the joint issues for determination and were on or related to the Loan facility.



Was the Arbitral Tribunal biased or induced by fraud, bribery, undue influence or corruption?

- 37 To the Applicant's submissions that the Arbitral Tribunal was grossly biased against the Applicant on very many occasions on issues that could not reasonably and logically lead to such conclusions and failed to appreciate the evidence to justify its findings, the Respondent submitted that cogent evidence to demonstrate that the Tribunal was biased and/or induced by fraud, bribery, undue influence or corruption was not provided.
- 38 In *National Cereals & Produce Board vs Erad Supplies & General Contracts Ltd* (2014) eKLR Court of Appeal took the view that in order to arrive at the decision that the Arbitral award was induced or affected by fraud, bribery, undue influence or corruption, the Court must be guided by evidence.
- 39 In *PesaPrint Ltd vs Atticon Ltd & Anor Symphony Technologies Ltd & 2 Others; Baron Estates Ltd* (2019) eKLR, this Court observed;

The original jurisdiction to hear and determine allegations of fraud, bribery and/or corruption is not invoked as pleadings do not/did not disclose reasonable basis/grounds for such an inquiry.

Whether the Arbitral Award is contrary to public policy that Article 47 CoK 2010 was contravened?

- 40 In *Chania Gardens Ltd vs Gilbi Construction Co Ltd & Anor* (2015) eKLR the High Court observed;
- In this kind of misconduct, it is not enough to merely state that the Arbitrator is incapable of acting impartially in the arbitration. Cogent evidence is required to prove misconduct, and invariably the specific instances or matter constituting misconduct must be tabled before Court.....
- 41 See also; *Zadock Furniture Systems Ltd & Anor vs Central Bank of Kenya* [2014] eKLR that dealt extensively with Section 13 of the [Arbitration Act](#).
- 42 The Respondent submitted that in light of allegations by the Applicant against the Arbitral Tribunal under Section 13 of [Arbitration Act](#) ought to be raised as prescribed under the Act; before the Arbitrator first and the Court may stay proceedings as the process ensues before the Arbitrator.
- The Respondent submitted that the Arbitrator ought to be accorded an opportunity to be heard.
- 43 The allegation against the Arbitrator is not contemplated under Section 35 of [Arbitration Act](#) to set aside Arbitral Award.
- Therefore, the Court lacks jurisdiction to hear and determine the Applicant's claim against the Arbitrator on conflict of interest.

DETERMINATION

- 44 The Court considered pleadings, oral and extensive written submissions by parties through their Counsel and found the following issues for determination;
1. Interlocutory/Preliminary Question raised by Applicant on admissibility or expunction of the Further Replying Affidavit of 25th September 2020.
 2. Jurisdiction of Arbitral Tribunal to deal with the Counterclaim



3. Whether the dispute/claim by HFCK can legally be pursued by HFC?
4. Alleged Arbitrator's Conflict of Interest that caused bias and prejudice to the Applicant by denying them fair hearing which is against public policy of Kenya.
5. Whether Arbitral award was induced by fraud, bribery, undue influence or corruption.
6. Setting Aside or Recognition & Enforcement of the Final Arbitral Award

45 The court's jurisdiction is invoked vide Section 10 & 35 or 36 of *Arbitration Act* in consideration of whether to recognize and enforce or set aside the Final Award of 17th September 2019.

The Applicant complied with statutory timelines on filing application to set aside Arbitral Award; Section 35 (3) of *Arbitration Act*, a setting aside application may not be made 3 months from the date of publication & receipt of award. The Applicant filed the Application on 6th November 2019 and amended the Application on 8th November 2019.

The Respondent & Applicant filed the correspondence disclosing Arbitration Agreement and Final Award in compliance with Section 36 (3) of the Act.

1. **ORAL SUBMISSIONS OF 6TH MAY 2021 ON PRELIMINARY OBJECTION TO STRIKE OUT AFFIDAVIT.**

46 SC Mr. A. Rebelo raised Preliminary Objection to strike out the Further Replying Affidavit sworn by SC Mr. John M. Ohaga on 25th September 2020 on the following grounds;

- a) The Said Affidavit was/is drawn as if the proceedings are of an Interlocutory Application and yet the matter goes well beyond the permissible facts on which an advocate can make/swear an Affidavit.
- b) The Arbitration was carried out without regard of Article 10 & 50 of CoK 2010 and International and Kenyan Law Practice & Procedure on Arbitration.
- c) The Court needs to find out how much the Respondent [Advocate] was/is involved in this matter as in the said Affidavit he deposes;

“I have personal conduct of the matter and therefore duly authorized to swear this Affidavit.....”

47 The Applicant submitted that it is the client who instructs the Advocate, the Respondent is a limited liability Company and acts through the Board of Directors and pass resolutions. The Advocate is an agent of the client and not the principal. That, the Advocate is making a fundamental error that he was instructed in the matter and has every right to make any fact as it cannot be based on information and belief at the final stage. It is improper for an advocate to depose an affidavit on the issues of fact. Occasionally, an advocate may depose an affidavit to produce a document in his file but not to give his opinion unless he is an expert.

48 The Applicant further submitted that an advocate is competent in practice of law but not in stating facts as the facts are not within his personal knowledge. The Applicant contested the fact that the advocate made submissions on behalf of the party and raised points of law as issues of fact through the impugned Affidavit and thus prejudiced the Applicants.



49 Therefore, paragraphs 7,8, & 9 only should be retained, all the rest of the Affidavit should be struck off. The Applicant and relied on the case of *Simon Isaac Ngui vs Overseas Courier Services (K) Ltd* 1998 eKLR which referred to Halsbury Laws of England as follows;

Affidavits filed in the High Court must deal only with facts which the witness can prove of his own knowledge, except that in Interlocutory proceedings or with leave, statements as to a deponent's information or belief are admitted, provided sources and grounds thereof are stated.....

50 The Court in the above-cited case made reference to HCCC 3504 of 1993 *Kisya Investment Ltd & Others vs Kenya Finance Corporation Ltd* thus;

The Applicant's Counsel has deposed to contested matters of fact and said the same are true and within his knowledge information and belief. It is not competent for a party's advocate to depose evidentiary facts at any stage of the suit.

The Trial Court in Simon Isaac Ngui case supra went on thus;

By deposing to such matters the advocate courts an adversarial invitation to step from his privileged position at the Bar into the Witness box. He is Liable to be cross examined on his deposition. It is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into controversy as a witness. He cannot be both Counsel & Witness in the same case.

51 The Respondent, SC Mr. John M. Ohaga opposed the application to strike out the impugned Affidavit on the following grounds;

- a. The issue raised is not a Preliminary Objection, it is not a pure question of law either regarding the jurisdiction of the Court or Limitation of Actions or of an incompetent suit before Court.
- b. A Preliminary Objection can only be taken after facts are agreed/accepted which is not the case herein, the Preliminary Objection is used to take piecemeal bites at the other party's case.
- c. There is no legal Preliminary Objection before Court and the Court should consider the 2 Applications on record; one to set aside the Arbitral Award by the Applicant and the other Application to recognize and enforce the Arbitral Award by the Respondent.
- d. The Further Replying Affidavit of 25th September was filed in response to the Amended Notice of Motion by the Applicant.
- e. It is not possible to appreciate the content of the Further Replying Affidavit without considering the challenge to the recognition and enforcement of the Arbitral Award.
- f. A significant pillar of challenging the Arbitral Award is the personal attack on the Deponent, the Advocate which is based on the fact that he sits on the Board of Nairobi Centre of International Arbitration; a statutory body, with the Arbitrator who presided over the Arbitral proceedings.



- g. The stricture against Counsel getting into the arena of facts is when the matter relates to the dispute between parties but not a matter which deals with appointment of Arbitrator by the Advocate.

52 The Respondent relied on Order 19 Rule 6 of CPR 2010 that the grounds for striking out the affidavit are not categorized as required by law.

Order 19, rule 3(1) provides;

Matters to which affidavits shall be confined –

Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

Order 19, rule 6. Provides for;

Striking out matter;

The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.

53 The Court considered the rival submissions on the striking out of the Further Replying Affidavit. It is trite law that depositions of fact must be by knowledge and belief of the deponent and thus the party in a suit as deponent is best placed to depose facts regarding the dispute for resolution. The Advocate represents the client and presents the legal basis for redress in the dispute on behalf of the client.

54 However, in the instant case, the dispute between the parties was subjected to Arbitration proceedings that culminated to the Final Arbitral Award of 17th September 2019 and the Applications by the parties before the Court are for the Court to either recognize or enforce Arbitral award or set it aside. The grounds to set aside the Arbitral award outlined by the Applicant, among them is the alleged partial, biased and dependent arbitration process and outcome due to the Arbitrator's alleged conflict of interest situation based on non-disclosure of a relationship Respondent's Counsel.

55 From the above synopsis, clearly, the issue(s) before Court are beyond the parties' dispute as they have spilled over to questioning the professional conduct of the Arbitrator and Respondent's Counsel in the conduct of Arbitration proceedings. Legally, no person should be condemned unheard, the Respondent's advocate rightfully swore and deposed in the impugned Further Replying Affidavit in Reply to the Applicants Amended Notice of Motion facts personally known to him with regard to the process of appointment of the Arbitrator.

56 The Respondent's advocate also deposed facts regarding his appointment to the Nairobi International Arbitration Centre (NCIS) as one of the Directors of its Board where the Arbitrator herein also was appointed in answer to the allegations of conflict of interest raised by the Applicant in the Amended Notice of Motion. These averments are contained from paragraphs 7-16 of the Affidavit.

57 Paragraphs 1-2 are an introduction of the deponent, 4-5-6 are facts on why Counsel was deposing the said Affidavit. The facts regarding parties' dispute are deposed by Supporting & Replying Affidavit of Regina Kajuju Anyika Company Secretary & Head of Legal Services at HFC.

58 The Court finds that from paragraphs 17-29 of the Affidavit, are more of legal submissions rather than facts. However, the same submissions are outlined in detail in the Respondent's Supplementary



Submissions filed on 20th January 2021. The Applicant is not prejudiced as the legal submissions are also in the said Supplementary submissions.

- 59 Based on the statutory provisions and case-law cited above, the Court agrees that an advocate ought not to depose facts of the clients' dispute in Affidavits. However, in the instant matter herein, aspersions are cast on Respondent's Advocate's professional conduct and the deposition is of facts known to him as Counsel who was and is in conduct of the Respondent's legal proceedings.
- 60 For these reasons, I find the objection raised to strike out the Further Replying Affidavit is not justified as it has not been shown or proved to comply with Order 19 (6) CPR 2010 as either scandalous, irrelevant or oppressive to be struck out.

JURISDICTION OF ARBITRAL TRIBUNAL-

Jurisdiction of Arbitral Tribunal to deal with the Counterclaim

- 61 The Applicant raised the issue of the Arbitrator's jurisdiction to hear and determine the dispute on grounds that no formal Arbitration Agreement was drawn and signed by parties prior to nomination of the Arbitrator.
- 62 Secondly, that there was no agreement in writing to submit a claim by HFCK and/or HFC against KIU. A counterclaim of HFC was not capable of submission to arbitration as the written Agreements between the parties in letters dated 8th January 2014 & 4th November 2014 provide that this Agreement shall be construed and enforced under Laws of Kenya and by Kenyan Courts.
- 63 Thirdly, the securities provided for the Loan Facility vest jurisdiction to try a dispute in the High Court and where charges over land are involved the jurisdiction is to Environment & Land Court which has similar jurisdiction with the High Court.
- 64 Fourthly, that there is no privity of contract between HFC the successor of HFCK as the Agreement(s) were between HFCK & KIU.
- 65 The jurisdiction of the Arbitral Tribunal is set out by Section 4 of *Arbitration Act* in the following forms of arbitration agreement;
- (1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
 - (2) An arbitration agreement shall be in writing.
 - (3) An arbitration agreement is in writing if it is contained in—
 - (a) a document signed by the parties;
 - (b) an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or
 - (c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party



66 In line with the provisions of Section 4 (b) & (c) *Arbitration Act*; the Applicant through the Advocate on record then, by letter of 29th September 2017 wrote to the Respondent's advocate and in part reads thus;

It appears that despite the effort made, our respective clients cannot reach settlement and since time is of the essence, it is necessary to consider how to resolve the dispute.

Whereas our client is intent on filing process in the High Court

we are willing to recommend to our client to agree that the dispute be referred to arbitration and that the process be commenced within the next 7 days. If your client is agreeable, please inform us whether we should consider a single Arbitrator or whether each party should nominate an Arbiter and the nominees to appoint the 3rd Umpire who will act as Chairperson. Please confirm that in the event that the dispute is referred to Arbitration and commences as proposed hereinabove, your client shall not take any adverse step against our client pending resolution of the dispute.

67 The Respondent's advocate replied vide letter of 3rd October, 2017 which reads in part;

We confirm that our client is prepared to go to Arbitration in respect of the dispute that has arisen between parties. Our Client would prefer a single Arbitrator.

We confirm that our client will not take any adverse steps pending the resolution of the dispute provided an expedited timetable is adopted for the Arbitration and is complied with in good faith by both parties.

In anticipation of your Agreement to the foregoing, we would propose the following persons as nominees for appointment as Arbitrators.....

Please confirm that we should prepare a suitable Arbitration Agreement.....

68 By letter of 4th October 2017 by the Applicant through their Advocate they agreed as follows;

Our client is agreeable to the appointment of Mr. Collins Namachanja as sole Arbitrator in the dispute between our respective clients.

We attach a letter of appointment addressed to Mr Namachanja to notify him of the appointment. Please execute as necessary and dispatch the letter to him.

69 The Applicant's advocate's Letter of Appointment of 4th October 2017 was/is executed by advocates of both the Applicant and Respondent and reads in part as follows;

Our client borrowed funds from the Respondent for construction of a campus in Nairobi. The facility that was proposed is USD15 million. Our client has received several tranches of the requested facility. A dispute emerged between the two parties arising from the loan facility and parties desire you to act as the sole Arbitrator.....

We write to request you to confirm your willingness to act as the sole Arbitrator. The Arbitration shall be in Nairobi and regulated by the *Arbitration Act*.

In the event that you are willing to act as the sole Arbitrator, please confirm a meeting at your earliest convenience to set pace for trial for Arbitral process.



- 70 The above outlined letters exchanged between the Applicant and Respondent through their advocates confirm from their content that the parties opted to have their dispute resolved through Arbitration and engaged in how arbitration would entail as far as appointment of Arbitral Tribunal.
- 71 The parties through respective Counsel executed the Agreement in form of letter(s) as drawn by the Applicant's advocate by signatures of each party's advocate. In spite of the Applicant's right to file process in Court, the Applicant opted for Arbitration and agreed to the same in terms of Section 4 (3) (b) *Arbitration Act* as exhibited by exchange of letters, which provide a record of the agreement. Although, the parties did not provide for Arbitration Agreement/Clause in the parties' agreement(s), an arbitration agreement was executed through correspondence between their respective advocates to resolve the dispute through arbitration.

Jurisdiction of Arbitral Tribunal to deal with the Counterclaim

- 72 To the issue, that there was no agreement in writing to submit a claim by HFCK and/or HFC against KIU as the counterclaim of HFC was not capable of submission to arbitration, the Applicant submitted the written Agreements between the parties in letters dated 8th January 2014 & 4th November 2014 provide that this Agreement shall be construed and enforced under Laws of Kenya and by Kenyan Courts.

Section 17(2) of the *Arbitration Act* provides for;

Competence of arbitral tribunal to rule on its jurisdiction;

“A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.”

Section 17 (3) of the *Arbitration Act* provides;

A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

- 73 The Applicant filed Memorandum of claim dated 10th January 2018 and an Amended Memorandum of claim of 11th December 2018. The Respondent filed the Statement of Response and Counterclaim dated 31st January 2018 and the Claimant filed Reply to Response & Defense to Counterclaim dated 6th March 2018. The Respondent filed Reply to Defense to Counterclaim dated 12th March 2018. At Pg 269 of Applicant's Further Supporting Affidavit; The List of Agreed issues for determination dated 22nd May 2018 was agreed by parties and signed by the advocates for the parties. Issue 5 of the Agreed Issues for Determination was/is whether the Respondent is entitled to claims pleaded in the Counterclaim.
- 74 At the close of pleadings after 31st January 2018 and/or 12th March 2018, the Claimant had the opportunity to raise the issue of jurisdiction with/to the Arbitral Tribunal in line with Section 17 of *Arbitration Act*. An aggrieved party who fails to raise at the earliest opportunity a point of law or objection beyond the statutory period or with leave of the Arbitral Tribunal a certain reasonable time, is estopped and deemed to have acquiesced and submitted to the process and outcome of Arbitration process and waived their right to do so under Section 5 of *Arbitration Act*.



- 75 Parties to a dispute, their respective advocates and the Court or Arbitral Tribunal are bound by the pleadings filed. The Arbitrator herein was bound by pleadings filed by the parties as listed above.
- 76 This Court noted that in the Claimant's Reply to Response & Defense to Counterclaim dated 6th March 2018, no objection to the Counterclaim being filed was pleaded and/or Preliminary Objection raised on the Counterclaim. The position that the Courts & Tribunals are bound by pleadings is considered here-below;

PT Prima International Development v Kempinski Hotels SA and Others- Appeal [2012]
SGCA 35 where the court held that;

“It is therefore incorrect for [Prima] to argue that jurisdiction in a particular reference was not limited to the pleadings or that there was no rule of pleading that requires all material facts to be stated and specifically pleaded as would be required in court litigation. An Arbitrator must be guided by the pleadings when considering what it is that has been placed before him for decision by the parties. Pleadings are an essential component of a procedurally fair hearing both before a court and before a tribunal. I was therefore surprised that [Prima] argued that it was not required to plead material facts because this dispute was being adjudicated by an arbitrator.”

- 77 The totality of the pleadings filed with the Arbitral Tribunal and the submissions filed herein confirm that the issue of jurisdiction of the arbitral tribunal and /or the scope of the Tribunal's authority ought to have been raised first before the Arbitral Tribunal during arbitration proceedings. These issues or objections were not raised during the Arbitration proceedings and the Tribunal relied on the pleadings filed by the parties to hear and determine the dispute. The Applicant's assertion that there was no agreement in writing to submit the counterclaim of HFC is not borne out by evidence on record as the List of Agreed issues for determination dated 22nd May 2018 was agreed by parties and signed by the advocates for the parties. Section 3(7) of the *Arbitration Act* stipulates that where the Act refers to a claim, it also applies to a counter-claim, and where it refers to defense it also applies to a defense to a counterclaim. The Applicant did not challenge admissibility of the Counterclaim before the Arbitrator under Section 20 (2) & (3) of *Arbitration Act*.
- 78 The Applicant asserted that the Tribunal failed to consider the letter dated 28th October 2013 in ordering payment of USD12,767,508.33 within 30 days as the parties did not make any reference to timelines within which the payment of the lumpsum of the full facility would be made. The written Agreements between the parties in letters dated 8th January 2014 & 4th November 2014 provide that this Agreement shall be construed and enforced under Laws of Kenya and by Kenyan Courts. Thirdly, the securities provided for the Loan Facility vest jurisdiction to try a dispute in the High Court.
- 79 The Respondent vide letter of 8th January 2014 to the Applicant Letter of offer for Construction Loan Facility of USD 10,000,000 & Letter dated 4th November 2014 for Construction Loan Facility of USD 1,300,000 provided that Applicable Law is that this Agreement (s) shall be construed and enforced under the Laws of Kenya and by Kenyan Courts.
- 80 The Escrow Agreement of 28th March 2013 between Housing Finance Co Ky Ltd & Kampala International University Ltd at Clause 12 Jurisdiction & Governing Law is prescribed that any dispute between parties under the Agreement shall be settled by mutual agreement by parties if not by Courts of Law where the Lender's Head Office is situated.



- 81 Personal & Deed of Guarantee of 28th March 2013 & 4th April 2014 between Housing Finance Co Ky Ltd & Kampala International University Ltd at Clause 15.2 for USD 10,000,000; prescribes that the Lender shall be at liberty to enforce these Guarantees by acting or proceedings against the guarantor in the High Court of Kenya or elsewhere in its absolute discretion. Haba Group (Ug) Ltd & Housing Finance Co Ky Ltd Guarantee & Indemnity of 16th December 2014 for USD 11,300,000/- & Basahabalaba Hides & Skins Ltd & Housing Finance Co Ltd Guarantee & Indemnity of 16th December 2014 for USD 11,300,000; Clause 15.2 prescribes that the Lender shall be at liberty to enforce these Guarantees by acting or proceedings against the guarantor in the High Court of Kenya or elsewhere in its absolute discretion.
- 82 The Legal Charge of 28th March 2014 between Housing Finance Co Ky Ltd & Kampala International University Ltd at Clause 32 provides that the Charge shall be governed by and construed in accordance with the Laws of the Republic of Kenya.
- 83 The Legal Charge of 25th April 2014 between C.M. Construction Ltd (Contractor) & Kampala International University Ltd at Clause 29 provided that in the event of a dispute, a notice in writing shall be issued by aggrieved party to the other and remedial measure shall be effected in a period of not more than 14 days.
- 84 Assignment Agreement of Receivables between Kampala International University Limited (Assignor) & Housing Finance Co of Kenya Ltd (Assignee) of 16th December 2014 at Clause 13.2 prescribed that any dispute or difference between parties not resolved by mutual agreement shall be settled through Arbitration.
- 85 The dispute between parties as presented before the Arbitrator was on borrowed funds from the Respondent for construction of a campus in Nairobi. The Applicant received several tranches of the requested facility. A dispute emerged between the two parties arising from the loan facility. The issues for determination signed by advocates representing each party agreed to the issue of the counterclaim being one of the issues for determination. However, the issue regarding the servicing of the said loan facility and/or redemption of the facility, timelines for repayment and/or default clauses and processes were not subject to the Arbitration process.
- 86 The Arbitrator found and entered judgment for the Respondent for USD 12,767,508.33 arising from the Applicant's own admission of disbursement by Respondent in various tranches USD 10,000,000 - and USD 1,300,000 at Pg 299 Clause 11.3 (e) & Pg 300 of Applicant's Further Supporting Affidavit and interest as shown in the Letters of Offer at 9.5%.
- 87 Secondly, the Respondent's officer, Mr. Patrick Nyagaka Mogaka; 1st Witness' statement at Clause 78 & Pg 267 of Applicant's Further Supporting Affidavit deposed that 'as at 1st January 2018 the total outstanding amount due to HFC stood at USD13,817,270.87 and the same continues to attract interest and other associated charges'. True copy of the mortgage account statement is at Pg 348-355.
- 88 Therefore, although the issue of the dispute was the amount of loan facility and disbursement timelines which were to aid construction to expand and start university education in Kenya was intertwined with the loan facility already disbursed, however, the repayment, servicing of the facility and/or redemption was/is based on terms of the various contracts of the loan facility (ies) and the several securities executed by the parties. The Letters of Offer provides timelines for loan repayment(s) and securities were executed that could be called in due to default of repayment(s). These terms bind the parties' and cannot be legally varied by the Arbitral Tribunal and/or the Court.



89 The part of the Arbitral Final Award that includes that the amount outstanding of the loan facility shall be paid within 30 days cannot be enforced. The timeline of 30 days, was not an issue for determination before the Tribunal. The release of funds by the Respondent and/or indebtedness by the Applicant was the substance of the Counterclaim. However, the timelines regarding payment were not argued before the Tribunal and if enforced within 30 days it would be contrary to the various terms of contracts and securities executed by the Applicant & Respondent. With regard to the redemption of the facility or default and enforcement of any of the securities, the parties contracted that the choice of law is Kenyan Law and choice of forum is the High Court of Kenya. This Court finds that on the Respondent's counterclaim on the repayment of the outstanding loan by the Applicant is recognized but enforcement shall be subject to the parties' contracts and Applicant's securities to be determined in case of a dispute in the High Court.

Whether the dispute/claim by HFCK can legally be pursued by HFC?

90 Fourthly, that there is no privity of contract between HFC the successor of HFCK as the Agreement(s) were between HFCK & KIU. The Applicant submitted that there was no agreement in writing or correspondence or in pleadings to submit a claim by HFC on its own account or on behalf of HFCK. HFC could not make a claim against KIU for monies disbursed by HFCK which is another Independent Company.^{3rd} parties including KIU and the persons who provided securities are now affected by any internal arrangement and/or reorganization of HFCK.

91 The Respondent submitted on the issue of HFCK and not HFC being the proper party in these proceedings, that Housing Finance Company of Kenya (HFCK) as the contracting part described itself to include successors in title and assigns in the contracts/Agreement between HFCK & KIU and securities provided by 3rd Parties. HFC is a wholly owned subsidiary of HF Group Ltd as a result of restructure of HFCK in compliance with Central Bank of Kenya (CBK) Prudential Guidelines of 2013.

92 The Court confirms from the List of Documents filed by both Parties that include the letter of 8th January 2014 to the Applicant Letter of offer for Construction Loan Facility of USD 10,000,000 & the Letter dated 4th November 2014 for Construction Loan Facility of USD 1,300,000 which provide under Terms & Conditions of Offer Pg 221 & Pg 236 of Respondent's bundle as follows;

Housing Finance means Housing Finance Company of Kenya Limited, a mortgage Finance Company incorporated in the Republic of Kenya, whose address is care of Post Office Box Number 30088 Nairobi and includes its successors and assigns.

93 In the case of Civil Appeal 206 of 2008 *City Council of Nairobi & Wilfred Kamau Githua T/A Githua Associates vs Nairobi City Water & Sewerage Co Ltd* on privity of contract and contractual assignment the Court observed that there are instances where privity of contract maybe invoked;

The doctrine of privity of contract is that, as a general rule, at Common Law, a contract cannot confer rights or impose obligations on strangers to it, That is; persons who are not parties to it. The parties to a contract are those persons who reach an agreement and, whilst it may be clear in a simple case who these parties are, it may not be so obvious where there are several contracts, or several parties or both. For example, in the case of multilateral contracts; collateral contracts, irrevocable credits, contracts made on the basis of memorandum & articles of a Company; collective agreements, contracts with unincorporated association and mortgages, surveys and valuations.....



94 From the above, HFCK assigned its interest in the contracts of Letters of offer to HFC as contracted by parties and as spelt out in the above case, that mortgages among other contracts 3rd parties may enforce their rights.

CONFLICT OF INTEREST

Alleged Arbitrator's Conflict of Interest that caused bias and prejudice to the Applicant by denying them fair hearing which is against public policy of Kenya.

95 The Applicant through in-house Counsel Mr. Joseph Kyazze raised allegations of Arbitrator's misconduct and conflict of interest in that the Arbitrator failed to meet the standard of transparency fairness and lack of bias as protected by the Constitution & the Arbitration Act [as outlined above] and was contrary to public policy. The Applicant submitted that it discovered a close relationship between the Arbitrator and Respondent's Counsel and/or his law firm after the Final Award was published and through discussions with an advocate (s) who had doubts as to the Arbitrator's impartiality of the Tribunal. At a meeting with Senior Counsel, the Applicant was informed that there existed a close relationship between the Arbitrator & the Respondent's advocate.

96. The Applicant submitted evidence based on the following affidavit;

- a) Mr. Joseph Kyasse vide Supporting Affidavit of 25th August 2020 annexed copy of the List of Board of Directors of Nairobi Centre for International Arbitration (NCIA); during the tenure from 2013 – 2019, the Directors met at regular meetings of Board of Directors of NCIA and at seminars, meetings and annual conclaves of the institution as exhibited by its website.
- b) The Arbitrator and Respondent's Counsel presided as an Arbitration Tribunal of 3 Arbitrators in Kenya Bureau of Standards vs Geochem Middle East Civil Application No 259 of 2018 in 2016. The Final Arbitral Award was set aside by the Court of Appeal as it was granted without jurisdiction.
- c) The Applicant further submitted that the Respondent's advocate's law firm represented the Arbitrator in the suit that entailed divorce proceedings between the Arbitrator and his wife. The Applicant sought details from the parties of the divorce proceedings and the same were not availed.
- d) Respondent's advocate proposed the Arbitrator to be appointed.
- e) The Arbitrator failed to disclose his relationship with any of the parties; including the advocates and/or subject-matter.

97 The Respondent submitted vide the Further Replying Affidavit that Vide letter dated 29th September 2017 by Senior Counsel for the Applicant, he wrote to him and indicated that he was willing to recommend to his Client the Applicant to agree to the dispute to be referred to Arbitration. On receipt of the letter he sought instructions from his client the Respondent who agreed to a single Arbitrator. He replied to the Applicant these instructions and proposed 3 arbitrators for nomination including the Arbitrator herein. On 4th October 2017, the Applicant's through their advocate responded and chose the Arbitrator herein and drafted the letter of appointment of the Arbitrator and outlined the dispute. The contents of these letters are outlined above in this judgment for content and full effect. The Arbitrator was appointed by the parties through their respective Advocates to arbitrate the dispute.



98 The Respondent's Counsel submitted that the Arbitrator and himself were appointed as members of Board of Directors of Nairobi Centre for International Arbitration from 2013-2019 vide Gazette Notices 7860 & 5864.

99 The Respondent's Counsel submitted that this Court lacks original jurisdiction to hear and determine the challenge against the Arbitrator without the challenge being lodged with the Arbitrator and a decision reached by the Arbitrator on the challenge. In *Squisby Drinks Ltd vs Kevian Kenya Ltd* [2020] eKLR, the High Court affirmed that the Arbitrator had original jurisdiction to determine an application challenging Appointment [jurisdiction]

100 The Respondent submitted that Section 35 *Arbitration Act* does not envisage non-disclosure under Section 13 of the Act to be aground for setting aside and by virtue of Section 10 of the Act, the Court ought not to intervene and consider the contestations raised herein and relied on the case of *D. Manji Construction Limited vs C & R Holdings Limited* [2014] eKLR. The Applicant ought to have raised the objection or challenge under Section 13 & 14 of *Arbitration Act*, in default to do so, the right to do so was extinguished under Section 5 of *Arbitration Act*; the Applicant waived its right to raise the Challenge.

101 Section 13 of *Arbitration Act* prescribes Grounds for challenge as follows;

- (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.
- (2) From the time of his appointment and throughout the arbitral proceedings, an arbitrator shall without delay disclose any such circumstances to the parties unless the parties have already been informed of them by him.
- (3) 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.
- (4) A party may challenge an arbitrator appointed by him, or in whose appointment that party has participated, only for reasons of which he becomes aware after the appointment.

102 Section 14 of *Arbitration Act* provides for Challenge procedure as follows;

- (1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.
- (2) Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.....



103 The Applicant submitted that the Arbitrator failed to disclose the outlined possible interaction with Respondent's Advocate as members of Board of Directors of State Corporation Nairobi Centre for International Arbitration. The Applicant deposed that the Arbitrator was biased in conduct of the Arbitral proceedings and award. That the Final Award is contrary to public policy under Section 35 2 (ii) of Arbitration Act as the Arbitrator contravened Articles 10, 50 & 159 (3) of CoK 2010 by failure to disclose alleged conflict of interest in relationship to/with Respondent's Counsel contrary to Section 13 of Arbitration Act.

104 The Applicant submitted that it only discovered a close relationship between the Arbitrator and Respondent's Counsel and/or his Law firm Triple OK Law after Final award was published when in discussions with an advocate(s) its representatives were informed of the relationship aforesaid.

105 The Applicant submitted that the duty to disclose is emphasized in the following Articles on Arbitrators Duty of Disclosure; Findlaw Attorney Writers & by AAA-ICDR Senior Counsel A Kelly Turner as outlined above and 'On Professional Practice' by Tracey B. Frisch all sum up duty to disclose as follows;

An Arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality. For example, prospective Arbitrators should disclose any such relationships which they personally have with any party or its lawyer with any Co Arbitrator or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners or professional or business associates that can be ascertained by reasonable efforts.

106 To fortify its position, the Applicant relied on *Metropolitan Properties Co (FGC)Ltd vs Lannon & Others* [1968] referred to *R vs Sussex Justices Ex P Mc Carthy* [1923] All ER Rep 233 that held as follows;

It is not merely of some importance but of fundamental importance that justice should both be done and be manifestly seen to be done.

107 In *Evangelical Mission for Africa & Cindy Sanyu Okova vs Kimani Gachubi & Peter Mbutia Gachubi* Misc Appl 470 of 2014, the Court observed;

So ultimately, even if this Court will not question certain conduct activities or decision on Arbitral Tribunal, the Court must question the validity of its decisions and whether such a decision indeed renders justice to the parties. If An Arbitral Tribunal were never to be questioned on its decisions, and if prima facie their decision is not only wrong but also unjust, then such decisions can only be deemed to have been influenced unduly.....

This court has utmost responsibility to do justice, and must ensure that an Arbitral Tribunal exercises and discharges its judicial function properly. In light of this, this Court in appraising the Application before it, must accept that it indeed has a blank cheque and stands on an expansive and firm jurisprudential plateau to see to it and ensure it subjects the decision of the Arbitral Tribunal to searching test of conformity to all laws of the land especially the Constitution.

108 The Respondent reiterated that removal of the Arbitrator ought to be brought under Section 13 & 14 of Arbitration Act, as held in *Chania Gardens Limited vs Gilbi Construction Co Limited & Anor* [2015] eKLR before the Arbitrator and that only if circumstances exist that give rise to justifiable doubts as



to his impartiality and independence. Also, in *Zadock Furnitures Systems Limited & Anor vs Central Bank of Kenya* [2014] eKLR the Court held that the stringent & objective test is 2 fold as follows;

- a) The Court must find that circumstances referred to actually exist and those circumstances are not merely believed to exist and
- b) The said circumstances need to be justifiable. Justifiability is established by cogent proof of actual bias or prejudice.

109 From the detailed submissions by Counsel for Applicant & Respondent, this Court finds that parties to Arbitration proceedings ought to raise challenge(s) to the Arbitrator or Arbitral Tribunal on its appointment, jurisdiction or alleged bias or prejudice in its conduct and/or outcome during and after Arbitration proceedings. This position/procedure is exemplified by Section 13, 14 & 17 of *Arbitration Act*. The *Arbitration Act* envisages these issues shall be raised first before the Arbitrator or Arbitral Tribunal during the Arbitration proceedings and not raised for the 1st time in Court after the Final Award is published by Arbitrator or Arbitral Tribunal. See *Bellevue Development Company Limited vs Vinayak Builders Limited & Anor* [2014] eKLR; *Chania Gardens Limited vs Gilbi Construction Co Limited & Anor* [2015] eKLR supra & *Zadock Furnitures Systems Limited & Anor vs Central Bank of Kenya* [2014] eKLR supra.

110 In this instance, the issue of the Arbitrator's alleged misconduct in failing to disclose relationship to and with the Respondent's advocate which caused alleged bias and prejudice and cause miscarriage of justice was discovered and raised after the Final Award was published. The Applicant submitted that being an international arbitration they were not resident in Kenya and would not access such information as to inform them on appointment of Arbitrator. Had they known this information earlier, then they would not have appointed the Arbitrator.

111 The Court gleaned through the various document agreements and correspondence contained in bundles filed by the parties. It is apparent the Respondent had sufficient presence in Kenya from 2014 while negotiating and executing contracts and overseeing construction of the proposed University. The Applicants were ably represented by various law firms. To this fact of presence in Kenya, then they would have had ample time and access to information of the proposed list of Arbitrators to aid in appointment or to raise the issue of conflict of interest at the earliest opportunity before the Arbitrator.

Whether Arbitral award was induced by fraud, bribery, undue influence or corruption.

112 The claim is also based on Section 35 (2) (a) (vi) of *Arbitration Act* that provides that the making of the award was induced or affected by fraud, bribery, undue influence or corruption where there is conflict of interest bias or prejudice in Arbitration proceedings.

In *National Cereals & Produce board vs Erad Suppliers & General Contractors Limited* C.A.Civil Appeal 9 of 2012; the Appellant sought to have additional evidence produced on appeal. This was the Public Investment Committee Report that was adopted by National Assembly of 12th November 2013. The Appellant indicated that the Report contained new and important evidence that was necessary for fair and just determination of the appeal. The Court of Appeal rejected the application.

113 The Court of Appeal in the above-cited case took the view; relying on *Anne Mumbi Hinga vs Victoria Njoki Gathara* that an appeal would only lie in accordance with Section 39 of *Arbitration Act*; with prior consent of parties but even then, the appeal would be only on matters of law. The Court of Appeal held;

In the year 2009, under Act 11 of that year, the grounds for applying to set aside an award were expanded to include circumstances where the making of the Arbitral award was



induced or affected by fraud, bribery, undue influence or corruption. That amendment was done for a good reason; to enhance the credibility of the Arbitration process. In order to arrive at a decision whether an arbitral award was induced or affected by fraud, bribery, undue influence or corruption; the High Court must, in our view, be guided by evidence. For that purpose, it is open for the parties to present the evidence before the High Court and for the High Court to take and consider such evidenceand exercise original jurisdiction.

- 114 Whereas, the *Arbitration Act* mandates that a challenge of the Arbitrator ought to be raised 1st instance before the Arbitrator, as outlined in *Safaricom Ltd vs Oceanview Beach Hotel & 2 Others* No 327 of 2009; In *National Cereals & Produce board vs Erad Suppliers & General Contractors Limited C.A.* Civil Appeal 9 of 2012, it mandates that evidence of establishing that the Arbitral award was induced or affected by fraud, bribery, undue influence or corruption is presented by the Applicant to this Court to consider it under the original jurisdiction.
- 115 At the outset, this Court takes the view that the Applicant ought to comply with Sections 13,14 & 17 of *Arbitration Act*. Secondly, if Arbitrator's conduct is in question and this was not raised during Arbitration proceedings but under the claim prescribed under Section 35 (2) (a) (vi) of *Arbitration Act*, then the Application to set aside the Arbitral Award & to Recognize and Enforce the Arbitral Award ought to have been served to the Arbitrator and/or the Arbitrator joined as Respondent to these proceedings so as to comply with tenets of fair hearing and natural justice, that no party is condemned unheard.
- 116 Every person is protected in CoK 2010 by virtue of Article 27 of CoK 2010, each person is entitled to equal benefit and protection of the law and Article 50 of CoK 2010 to fair hearing in an impartial and independent Tribunal /Court. In the instant matter, there is no Affidavit of Service filed under Order 5 CPR 2010 to confirm the Arbitrator was served and is aware of the challenge against him in Court. The Court cannot legally issue order(s) for the Arbitrator to file response to the raised allegations against him, as the same ought to be considered 1st before the Arbitral Tribunal and secondly, there is no proof of service of the Applications to the Arbitrator.
- 117 All Judicial Officers and those who exercise judicial authority are bound by *Bangalore Principles of 2002* and *Judicial Service Code of Conduct & Ethics 2003* & Constitution 2010 which provide for 6 core values and establish standards of judicial conduct to guide judges and all that exercise judicial authority; Independence, impartiality, integrity, propriety, equality competence and diligence.
- 118 To consider the Applicant 's evidence on whether the Court may exercise original jurisdiction; the Court finds as follows; the jurisprudence on recusal /disqualification of Judge/Magistrate/Arbitrator/ any person who exercises judicial authority is settled;

In *R vs David Makali & Others* CA Criminal Application No 4 & 5 of 1995 stated;

I take the view that the Petitioner should establish such material facts as attend personal inclination or prejudice on the part of the judge towards a party on some extrajudicial reasons....The Applicant must therefore specifically set out facts constituting bias and prove them as such in order to establish real likelihood of bias for purposes of disqualification of the judge.....it is absolutely necessary that the party applying should lay all relevant material before court. The best way of delivering that requirement is by adopting a method that inherently enables some form of deposition and production of evidence.



119 *Chania Gardens Limited vs Gilbi Construction Co Limited & Anor* [2015] eKLR supra the Court referred to *Bremer vs Ets Soules* [1985] 1 Llyods L.R 160 where Mustill J held;

There are 3 material situations in which the High Court has power to remove an Arbitrator for misconduct under Section 23 of *Arbitration Act*,1950;

1. where it is proved that the Arbitrator suffers from what may be called 'actual bias'. In this case the complaining party satisfies the Court that the Arbitrator is predisposed to favor 1 party or conversely, to act unfavorably towards him for reasons peculiar to that party or to a group or of which he is a member. Proof of actual bias entails proof that the Arbitrator is in fact incapable of approaching the issues with the impartiality which his office demands.
2. Where the relationship between the Arbitrator and the parties or between the Arbitrator and the subject matter of the dispute is such as to create an evident risk that the Arbitrator has been or will in the future be, in capable of acting impartially. To establish a case of misconduct....., proof of actual bias is unnecessary. The misconduct consists of assuming or remaining in office in circumstances where there is manifest risk of partiality. This may be called a case of imputed bias.
3. Where the conduct of the Arbitrator is such as to show that questions of partiality aside, he is, through lack of talent, experience or diligence, incapable of conducting the reference in a manner which parties are entitled to expect.

120 Against the above standards of bias and /or prejudice by the Arbitrator, the Applicant advanced the following as evidence;

- a) The Arbitrator and Respondent's Counsel were appointed as members of Board of Nairobi Centre for International Arbitration and (NCIA)annexed the excerpt that shows the 2 members among 8 members of the Board. The Applicant annexed List of Directors as follows; Chairperson Mr. Arthur Igeria, Registrar /CEO Mr. Lawrence Muiruri Ngugi, Mr.John Ohaga, Ms Jacqueline Oyuyo Githinji, Ms Waigi Kamau, Mr.Peter Kihara Njuguna, Mr. Jimmy Mbalali Muyanja and Mr.Collins Namachanja all members of the Board of Directors of NCIA then. The Respondent annexed the Gazette Notices confirming appointments.
- b) That Arbitrator and Respondent's Advocate were appointed as members of Arbitral Tribunal with another member in hearing determination through Arbitration proceedings in Kenya Bureau of Standards vs Geo Chem Middle EastCivil Appeal 259 of 2018 and the award was set aside in Court of Appeal. The Arbitral Tribunal comprised of Mr.Collins Namachanja, Ms Njeri Kariuki & Mr.John Ohaga.
- c) That the Arbitrator's divorce proceedings, the Respondent's advocate and/or Law firm represented him.

121 The Applicant's source was deposed as having discussions with an advocate(s) after Final Award was published. The Applicant ought to have obtained sworn depositions /Affidavits on instances of bias and prejudice to the Applicant during the Arbitration proceedings. The Affidavits on record dwell on



- non-disclosure of previous appointments and engagements of the Arbitrator and the Respondent's advocate. The allegations of bias, prejudice have been during Arbitration proceedings were not specifically indicated to the Court.
- 122 Whereas there is a duty to disclose knowledge, involvement engagements with any of the parties, subject matter and/or advocates of the parties, the official appointments and gazette notices are public information and failure to disclose would not automatically amount to conflict of interest; unless the members have a more intricate social relationship with any of the parties or subject matter at hand. The Membership of Board of NCIA which is proved by documents presented, without any other fact or circumstance is not sufficient evidence of conflict of interest. This is because; as a Corporate Statutory Body, the NCIA day to day running is by the CEO and/or Chairman, Board Meetings would not be held daily and even then, attendance would not always have ALL members present. The interaction of members per se does not imply automatic social relationship between all or any members it has to be a matter of fact through evidence.
- 123 With regard to the Arbitral Tribunal composition in Kenya Bureau of Standards vs Geo Chem Middle East Civil Appeal 259 of 2018 that included the Arbitrator and Respondent's Counsel and another Arbitrator, the matter was heard and determined over a specified period. Even though the award was set aside in the Court of Appeal, the Respondent indicated that it was upheld on further appeal in the Supreme Court Petition 47 of 2019 -Geo Chem Middle East vs Kenya Bureau of Standards as shown by the case annexed to Respondent's submissions. Again, parties appointed to execute their legal and professional mandate as Arbitrators, cannot by and of itself without social relationship as friends, family members or being in situations of continuous and /or prolonged engagement be concluded that there would automatically be conflict of interest in subsequent engagements or appointments.
- 124 With regard to alleged Arbitrator's divorce proceedings, that Respondent's advocate and/or Law firm represented him; apart from stating so nothing further was provided; there was no Case Number parties names and /or certified proceedings or Ruling /Judgment of the Trial Court to confirm such proceedings and the parties present and the Court where and when and if such proceedings took place. More importantly, the advocates on record representing parties then so as to substantiate the allegation or claim. The Chartered Institute of Arbitrators (Kenya Branch) Rules of 1st December 2012 at Clause 9 prescribe that Each party shall have the burden of proving the facts relied on to support its claim or defense. In this instance, the Applicant failed to discharge the burden of proof.
125. Within the Legal profession, all advocates are registered in the Roll of Advocates and invariably are alumni of schools, universities and other institutions of higher learning. They are also registered members of legal organizations; Law Society of Kenya, etc. and by virtue of legal background are appointed, nominated or elected to various Boards, Committees, Tribunals, Commissions, Benches in Public Service, Private Sector and /or Academia to carry out legal and professional specified mandate. Therefore, if it is the only fact that members of the Legal profession have been appointed, nominated or elected to serve in an official capacity in any of the above positions automatically creates conflict of interest in subsequent Tribunals, Benches, Commissions etc. then that is not sufficient evidence. It cannot by and of itself without further/other tangible and cogent evidence of social relationship between the members be the legal basis for the Court to exercise original jurisdiction to hear and determine the question of whether the Final Award was induced or affected by fraud, bribery, undue influence or corruption.
- 126 It is possible for members elected or nominated or appointed to such positions to interact only to the extent of the legal and professional mandate with no social connection or interaction to vitiate fair hearing in a subsequent forum.



127 The International Bar Association (IBA) promulgated Guidelines on Conflict of Interest in International Arbitration which were adopted in 2014-2015 by IBA Council. These Guidelines contain General Standards regarding Impartiality, Independence and Disclosure and Practical Application of the General Standards. They are outlined hereinbelow the relevant parts;

128 The Guidelines offer practical influence and provide specific guidance to Arbitrators, Parties, institutions and Courts as to situations that may constitute conflicts of interest and /or should be disclosed.

The Lists are non-exhaustive and detail specific situations that depending on facts of a particular case would give rise to justifiable doubts as to Arbitrator's impartiality and independence.

Red List includes situations that depict serious situations of conflict of interest. In these circumstances, an objective conflict of interest exists from the point of view of a reasonable 3rd Party having knowledge of relevant facts.

Orange List consist of situations depending on the facts of a given case may in the eyes of the parties, give rise to doubts as to Arbitrator's impartiality and Independence.

Green List consists of no appearance and no actual conflict of interest exists from an objective point of view and there is no obligation to disclose but may do so on the basis of reasonableness.

129 Green List deals with among others; Clause 4.3 includes Contacts with another Arbitrator in the following instances;

- a. The Arbitrator has a relationship with another Arbitrator or with Counsel for one of the parties through membership of same professional association, social or charitable organization or social media network;
- b. The Arbitrator and Counsel for one of the parties have previously served as Arbitrators
- c. The Arbitrator teaches in the same Faculty, School as another Arbitrator who is Counsel to one of the parties
- d. The Arbitrator was a Speaker, Moderator or Organizer in one or more Conferences, Seminars or Professional or Social or Charitable Organization with another Arbitrator or Counsel to the parties.

130 From the IBA Rules the situation or circumstances in the instant matter of the Arbitrator's independence and impartiality in conduct of Arbitration, do not require mandatory disclosure.

131 The Arbitrator complied with Section 13 of *Arbitration Act* and disclosed that he did not have any conflict of interest with the parties to the dispute and the subject-matter vide letter of 10th October 2017 at Pg 280 of Applicant's bundle. The Arbitrator issued Interim Award No 1 of 3rd December 2018 where the Claimant/Applicant was granted leave to amend memorandum of claim after it closed its case. The Arbitrator determined the matter before him based on pleadings, submissions filed and evidence tendered. The dispute presented was of the Loan facility and its repayment was intricately connected to the dispute. These actions by the Arbitrator do not depict bias or prejudice due to non-disclosure of professional relationship and interaction with Respondent's Counsel.

132 This Court lacks jurisdiction to delve into the Arbitrators findings of fact except on grounds of Section 35,36 & 37 *Arbitration Act*. See; *DB Shapriya & Co Ltd vs Bish International BV*; [2003] 2 EA 404;



Kenya Oil Co Ltd & Anor vs Kenya Pipeline Co [2014] eKLR; *Mahan Ltd vs Villacare Ltd* [2019] eKLR; *Zakhem International Construction Ltd vs Quality Inspectors Ltd* [2019] eKLR;

Setting Aside or Recognition & Enforcement of the Final Arbitral Award

133 The Correspondences by the parties' Advocates outlined above confirm that the Applicant's advocates proposed Arbitration and sought from the Respondent's advocate withholding any precipitate action pending arbitration. The Applicant chose the Arbitrator from the list of 3 proposed Arbitrators by the Respondent's advocate. The Applicant's advocate drafted letter of appointment of Arbitrator and mapped out the dispute which the Respondent's advocate signed. There cannot be on the basis of the evidence on record and Applicant's conduct attribute bias and prejudice from Arbitrator to enable the Court exercise original jurisdiction on Final Award was induced or affected by fraud, bribery, undue influence or corruption.

DISPOSITION

From the above, the Findings of the Court are as follows;

1. The Applicant's Application to set aside the Final Award of 17th September 2019 is dismissed except where it partly succeeds only to the extent of the mode & process of execution of the Final Award as judgment of the Court.
2. The Respondent's application to recognize and adopt the Final Award of 17th September 2019 is upheld on condition the Counterclaim is executed in terms of the Letters of Offer of 8th January 2014 & 4th November 2014 and the executed securities and guarantees by the parties. Any arising issue or dispute shall be heard and determined by the High Court.
3. The issue of Arbitrator's jurisdiction ought to have been raised before Arbitral Tribunal first under Section 17 of *Arbitration Act*.
4. The issue of the Respondent as Successor of HFCK that contracted with the Applicant was/is prescribed by the executed documents of the parties listed above.
5. The allegations of conflict of interest against the Arbitrator, through non- disclosure and alleged bias and/or prejudice ought to have been raised first as challenge to the Arbitral Tribunal under Section 14 of *Arbitration Act*.
6. There was insufficient evidence or proof furnished by the Applicant that the Final Award was induced or affected by fraud, bribery, undue influence or corruption to make the Court invoke original jurisdiction and hear the matter.

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020).

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

SC REBELO FOR THE APPLICANT - PRESENT

MR. NYAMU OF NYAMU & NYAMU ADVOCATES FOR APPLICANT - PRESENT

MR. KICHE H/B FOR SC J. OHAGA OF TRIPLE OK LAW LLP FOR RESPONDENT - PRESENT



COURT ASSISTANT: TUPET

MR. NYAMU: We apply for leave to appeal the Court's decision and to have certified copies of the proceedings and the Ruling.

COURT: The Application for leave and right of appeal shall be filed and heard in any court within the Division. However, the certified copies of proceedings and Ruling shall be availed.

MR. KICHE H/B FOR SC OHAGA: We object to the Application for leave and right of appeal as the Supreme Court decision indicates that the application ought to be made in the Court of Appeal.

COURT:

1. The Application for leave and right of appeal shall be made formally before any court within the Commercial and Tax Division as the Court is on transit/transfer to Machakos High Court.
2. The Application for leave and right of appeal in light of recent Supreme Court jurisprudence may be made in the Court of Appeal.
3. All parties/Counsels shall obtain certified copies of proceedings and Ruling upon payment of requisite fees.

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE

