REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

MISC APPLICATION NO. E1219 OF 2020

PETER OUMA ONYANGO.....APPLICANT

VERSUS

MATS KARLSSON.....RESPONDENT

RULING

Introduction

1. The factual matrix which triggered the instant application is essentially uncontroverted or common ground. The parties herein entered into a Joint Venture and Development Agreement dated **6th** day of December 2007 (herein after referred to as the agreement) in which they agreed to jointly incorporate a limited liability company to undertake a joint venture project. The intention was to acquire the parcel of land known as L.R. No. **7785/167** and to erect thereon **2** modern houses with a view to selling the same. The agreement clearly provided for obligations of each party.

2. In addition, Clause **10** of the agreement provided for a dispute resolution mechanism:-

> *"Any dispute arising out of this agreement shall be referred to a single mediator to be appointed by the Chairman for time being of the Dispute Resolution Centre on the application of any party in the event that the parties shall themselves fail to agree on the appointment within **21** days of the notification of a dispute by either party to the other. If the mediation shall be unsuccessful within a period of **3** months from the date of notification of a dispute by one party to the other, then the dispute shall be referred to a single arbitrator to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators of the United Kingdom Kenya Branch on the application of any party in the event that the parties shall themselves fail to agree on the appointment within **21** days of the notification of a dispute by either party to the other such arbitration to be conducted in accordance with the provisions of the Arbitration Act, 1995, or any statutory modification or re-enactment thereof for the time being in force."*

3. It is common ground that a dispute arose and the same was referred for arbitration. The Arbitral proceedings commenced from around March 2019. However, the appointed arbitrator recused himself on **9th** November 2020 after objections raised by the applicant. Another arbitrator was appointed and the parties herein filed their respective pleadings. However, the applicant who is the Respondent in the Arbitral proceedings approached this court vide an application dated **10th** November 2020 praying that this court halts the arbitration.

The application

4. The applicant's application is expressed under the provisions of Sections **1A, 1B** and **3A** of the Civil Procedure Act,[1] Order **51** Rule **1** of the Civil Procedure Rules, 2010, Sections **2 (4), 4 (1)**, 34 **(1) (3)**, **(5) & (6)** of the Limitation of Actions Act[2] and all other enabling provisions of the law. Mr. Peter Ouma Onyango (the applicant) prays that this court orders that the arbitration dispute between the parties herein ceases to have effect. He also prays that the costs of this application and the arbitration be paid by the Respondent.

The grounds relied upon

5. The applicant's core ground is that the subject arbitration is barred by the Limitation of Actions Act because the Respondent's cause of action accrued **6** years before the action was commenced. He maintains that there are no circumstances to justify extension of time and that this court has the power to stop the arbitration. His grounds are explicated in his supporting affidavit dated **10th** November 2020.

6. The nub of his supporting affidavit is that the Respondent's cause of action accrued on **28th**September 2010 and that the arbitration commenced on **15th**March 2019 when the Respondent's Advocates referred the dispute to the Chairperson of the Chartered Institute of Arbitrators of the United Kingdom, Kenyan Branch requesting for the appointment of a single arbitrator, close to **9** years after the Respondent's cause of action and right to arbitration accrued. He contends that at no time prior to the commencement of the arbitration did he acknowledge the Respondent's claim to justify the extension of time, hence, the arbitration is time barred.

The Respondent's Reply

7. Mr. Mats Karlsson, the Respondent swore the Replying Affidavit dated **19th** January 2021 in opposition to the application. The crux of his opposition is that the application is devoid of merit, untenable in law and an abuse of court process. He deposed that the parties herein entered into the subject agreement to develop the above cited land with a view of profiting from the same and sharing the income equally.

8. He deposed that inconformity with the agreement they incorporated Petromats Limited in which both parties were directors with equal shares. Further, it was an express term of the agreement that the said land would be sub-divided into two **(2)** equal parts, one to be transferred to the company, but in breach of the agreement the said parcel of land was registered in favour of the applicant.

9. Mr. Karlsson deposed that in performance of the agreement, the houses were constructed on Land Reference **7785/1418** (original **7785/167/1**) and Land Reference **7785/1419** (original **7785/167/2**) being a sub-division of Land Reference **7785/167,** and the construction was completed in 2014. He deposed that in observance of his obligations under the agreement, he contributed in excess of **Kshs. 4,548,975/=** which the applicant acknowledged.

10. Mr. Karlsson averred that the applicant entered into the joint venture agreement in respect of part of the property being Land Reference Number **7785/167**, which was registered in his favour, and he agreed to incorporate a company for the joint venture in which the parties herein are the directors. Additionally, he deposed that the applicant agreed to sub-divide the land into 2 parcels of land and he was to transfer one parcel in favour of the company. He deposed that the applicant received and acknowledge his contribution of **Kshs. 4,548,975/=** towards the project and he kept him informed on the ongoings and granted him access to the land.

11. He averred that the cause of action is not founded on contract but on recovery of land and *mesne* profits, hence it is not time barred because the cause of action accrued on **28th**September 2010, hence he is within the **12** years provided under the law. He deposed that he claims ½ share of the houses constructed in performance of the agreement and ½ of the rental income following breach of the contract. He deposed that he raised substantive issues for determination before the arbitrator each having a different limitation period under the law, namely: - (a) Claim for ½ share of the developed premises, which is recovery of land whose limitation period is **12** years; (b). Claim for ½ share of the rent from 2014 whose limitation period is **6** years; hence these **2** claims are not time barred. (c) Claim for refund of **Kshs. 4,548,975/=** with interest on commercial rates from the date of receipt till payment in full whose limitation period is **6** years, but it was revived by the applicant's acknowledgement in an e-mail dated **22nd** March 2020.

12. Mr. Mr. Karlsson averred that as per clause **10** of the agreement, they initiated arbitration proceedings vide the correspondence dated **12th** March 2019 which have been ongoing until the applicant challenged the arbitrator who later recused herself. He also deposed that the applicant in his defence before the Arbitrator never raised the issue of limitation either in his pleadings or orally, and that the said issue ought to have been raised and determined before that forum.

13. He averred that the subject agreement was in writing and signed by the parties and attested by an advocate in compliance with Section **3(3)** of the Law of Contract Act.[3]

14. Also, he averred that the applicant has made every effort to obstruct and delay the commencement and/or determination of the dispute by denying the existence of the subject agreement in his defence before the arbitrator and in previous correspondence yet in the instant application he relies on the same agreement. Further, following the recusal by the sole Arbitrator on **9th** November 2020, the Chartered institute of Arbitrators Kenya Chapter appointed another sole Arbitrator and notified the parties and that the applicant in his continued efforted to forestall the process has vowed not to participate in the arbitral process.

15. He deposed that the subject contract is an arbitration agreement and this court by virtue of Section **6** of the Arbitration Act[4] ought to dismiss the application and/or refer the issues in question to Arbitration. Lastly, he deposed that it is in the interests of justice and fairness that this application be dismissed with costs and that this court allows the dispute to be adjudicated through the dispute resolution mechanism provided in the subject agreement.

The applicant's supplementary affidavit

16. The applicant filed the supplementary affidavit dated **2nd** February 2021 in response to the Respondent's Replying affidavit. He deposed that the Respondent's claim in the arbitral proceedings is founded on breach of the subject Agreement, and that between **28th** September 2010 when the cause of action accrued to **15th**March 2019 when the arbitration commenced is over **9** years. He deposed that the Respondent's initial claim in September 2010 was for **Kshs. 5,013,286/=,** but between November 2010 to November 2014, he changed to a projected sum based on his alleged contribution.

17. He deposed that in 2019 after he completed construction, the Respondent's claim changed to **50%** ownership of the property and **50%** rent from 2014. Also, he deposed that the Respondent admitted that he (applicant) used his funds in the construction in addition to obtaining a bank loan for the same purpose. Also, he averred that the Respondent admitted that the subject Agreement provided among other things that his land was to be sub-divided into **2** portions one of which was to be transferred to the Company and not to the Respondent, and, that the subject Agreement was not for sale of land nor did it provide for the sharing of the land.

Applicant's advocates submissions

18. The applicant's counsel Mr. Kimata submitted that Section **34 (1)** of the Limitation of Actions Act provides that the Act applies to arbitrations as it applies to actions. He argued that Section **34 (5)** of the Limitation of Actions Act provides that where the court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration shall cease to have effect with respect to the dispute referred, the court may further order that the period between the commencement of the arbitration and the date of the order be excluded in computing the period of limitation prescribed for the bringing of an action or commencement of arbitration proceedings with respect to the dispute referred.

19. He also submitted that Section **34 (3)** of the Limitation of Actions Act also provides that for the purposes of the Act, an arbitration is taken to be commenced when one party to the arbitration serves on the other party a notice requiring him to appoint an arbitrator or to concur in the appointment of an arbitrator or, where the submission provides that the reference shall be to a person named or designated in the submission, requiring him to submit the dispute to the person so named or designated.

20. Further, Mr. Kimata submitted that section **34 (6)** of the Limitation of Actions Act provides that in relation to an arbitration under a written law, subsection **(3)** of the section has the effect as if the references to the submission were replaced by references to such provisions of the written law as relate to the arbitration. He also cited Section **4 (1)** of the Limitation of Actions Act and argued that it provides *inter alia* that actions founded on contract may not be brought after the end of 6 years from the date on which the cause of action accrued. Also, he referred to section **2 (4)** of the Limitation of Actions Act which defines a right of action to include among other things a reference to a cause of action.

21. Mr. Kimata submitted that Rule **11** of the Arbitration Rules 1997 provides that in so far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under the Rules. Additionally, he submitted that Section **2** of the Civil Procedure Act[5] defines the "Act" to include the rules. He cited Section **3A** of the Civil Procedure Act which provides the court's inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. He cited Order **51** Rule **1** of the Civil Procedure, Rules, 2010 which provides that all applications to the court shall be by motion and Order **51** Rule **10** Sub Rule **1** which provides that every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with the rule.

22. While acknowledging that the Arbitration Act is a complete code, Mr. Kimata argued that Rule **11** of the Arbitration Rules 1997 permits the application of the Civil Procedure Rules to arbitral proceedings under the Arbitration Act in so far as it is appropriate. (*Citing Glencore Grain Limited vs. TS.S.S Grain Millers Limited**[6]***). He cited Section **10** of the Arbitration Act which provides that courts shall not intervene in arbitral proceedings except in the situations specifically set out in the Act and argued that under section **34 (5)** of the Limitation of Actions Act the courts can intervene in arbitral proceedings in the **2** situations set out therein. He argued that the Arbitration Act does not contain provision relating to the procedure on limitation of arbitrations, hence, Rule **11** of the Arbitration Rules 1997, Section **34 (1)** and **(5)** of the Limitation of Actions Act, Sections **1A, 1B** and **3A** of the Civil Procedure Act and Order **51** Rule **1** of the Civil Procedure Rules, recourse to the Civil Procedure Rules including the Act and the Limitation of Actions Act is appropriate in order to fill in the gap under the Arbitration Act.

23. He argued that in *Glencore Grain Limited v TS.S.S Grain Millers Limited* (ibid) the court confirmed the application of of Rule **11** of the Arbitration Rules 1997 in invoking the application of the Civil Procedure Rules as well as the provisions of the Civil Procedure Act in arbitral proceedings where appropriate in circumstances not anticipated under the Arbitration Act in order to fill the gap thereby created. He also cited Order **51** Rule **10** which provides that no objection shall be made and no application shall be refused merely by reason of a failure to state the order, rule or statutory provision under which an application is made. He submitted that this court has jurisdiction to hear and determine the application.

24. He maintained that the subject arbitration is time barred as it has been brought **6** years after the Respondent's cause of action and right to arbitration accrued. To buttress his argument, he cited *Allan P. Karanja Wathigo v C.M.C. Holdings Company Ltd* [7]for the proposition that the time stipulated in the Limitation of Actions Act, only begins to run from the date when the cause of action accrues which may or may not be the date when parties execute a contract or agreement. He argued that the Respondent's cause of action accrued on **28th** September 2010 when the Respondent's Advocates in a demand letter dated **28th** September 2010 to the applicant claimed that the applicant had failed to perform the terms of the subject agreement and therefore demanded payment. He submitted that under Clause **10** of the Agreement, arbitration should have commenced not later than **3** months after notification of the dispute by the Respondent to the applicant.

25. Mr. Kimakia submitted that the arbitration commenced on **15th** March 2019, close to **9** years from the date which the right to arbitration accrued. He argued that since the arbitration is founded on contract, the same could not be commenced after **6** years from the date on which the Respondent's right to arbitration accrued. He submitted that at no time did the applicant acknowledge the claim or perform part payment to justify extension of time. He dismissed the Respondent's argument that the claim is founded on recovery of land and maintained that the applicant's claim is founded on breach of the Agreement.

26. He argued that the Respondent's claim is founded on breach of the Agreement, and that the Respondent's initial claim in September 2010 was for the sum of **Kshs. 5, 013, 286/=,** but between November 2010 to November 2014, the claim changed to a projected/*pro rata* sum based on the Respondent's alleged contribution, and in 2019, after the applicant had completed the development, his claim changed to **50%** ownership of the applicant's property and **50%** rent from 2014. He dismissed the Respondent's claim as baseless. On whether applicant raised the issue of limitation before the Tribunal, he submitted that the said submission is tantamount to limiting the court's power to order an arbitration to cease to have effect that have not been prescribed by the law. Lastly, Mr. Kimakia submitted that allowing an arbitration which is barred by limitation of actions act to proceed would be highly prejudicial to and cause grave and irreparable injustice to the applicant as it would deprive the applicant the very protection the law was designed to give him.

Respondent's advocates submissions

27. Mr. Makau, the Respondent's counsel argued that this court's jurisdiction under Article **165** of the Constitution must be guided by the overarching principle in Article **159(2) (c)** which enjoins courts to promote alternative dispute resolution mechanisms including arbitration. He cited *Gooodison Sixty-One School Limited v Symbion Kenya Limited* [8]which held that arbitration which is consensual proceeds under the Arbitration Act and it emanates from an arbitration agreement in terms of section **4** of the Arbitration Act signifying the clear intent of the parties to resolve their disputes through arbitration, and their intent that should any proceedings be filed in court by any of the parties, the proceedings should be stayed by the court to enable arbitration to proceed as provided under Section **6** of the Act.

28. Mr. Makau submitted that the Arbitration Act provides both substantive and procedural law for the arbitration. He also argued that section **10** has the all-important provision that "Except as provided in this Act, no court shall intervene in matters governed by this Act." He submitted that the subject contract is an arbitration agreement as provided by section **4** of the Arbitration Act, and that the subject agreement provides for arbitration at clause **10.** He submitted that the agreement is in writing and is signed by both parties.

29. He submitted that where there is an arbitral agreement, the Arbitration Act governs the resolution of dispute as stipulated in clause **10**, hence, the arbitral tribunal has jurisdiction in such matters. He cited Section **6** of the Arbitration Act which provides that: - **(1)** A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

> *(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or*
>
> *(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."*

30. To buttress his argument, Mr. Makau cited *County Government of Kirinyaga v African Banking Corporation Ltd*[9] which reiterated the provisions of Section **6** of the Arbitration Act and held that the provision is mandatory subject to the limitation under the Act. He submitted that in the instant case the validity of arbitration agreement has not been challenged. He submitted that Clause **10** which provides for arbitration does not specify the matters to be referred to arbitration, but it states "any dispute arising out of the agreement…" Mr. Makau submitted that this court has no jurisdiction to intervene in this matter. He argued that the place and the law governing the resolution of disputes between the parties was set out in the agreement in writing and signed by both parties.

31. Mr. Makau submitted that the applicant in his defence at the Arbitration proceedings never raised the issue of limitation either in his pleadings or orally. He submitted that the said issue ought to have been raised and determined before the arbitral tribunal. He cited *Kenya National Highways Authority v Pride Enterprises Limited & another*[10] which underscored the provisions of Section **5** of the Arbitration Act which provides that: -

> *"A party who knows that any provisions of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object."*

32. Mr. Makau submitted that in the above case, the court was emphatic that a party should seize the earliest opportunity to raise his objections to arbitration and not to wait until the same is finalized before raising his objection. He argued that the reasons for an early registration of an objection to arbitration cannot be gainsaid in light of the objective of arbitration which is to resolve disputes with finality and in an expeditious manner. He argued that an early registration of an objection would have the effect of saving the parties the time and expenses attendant to an arbitral process.

33. Mr. Makau submitted that the applicant agreed to the arbitration and even participated in it since it was initiated on **12th** March 2019, hence he should be estopped from alleging that it is time barred. He argued that the objection should have been raised immediately the arbitration proceedings were initiated otherwise, the allegation amounts to an afterthought to further frustrate the arbitral process.

34. Mr. Makau submitted that the Respondent's cause of action is not founded on contract, but it relates to recovery of land as well as *mesne* profits and it cannot be deemed to be time barred. He argued that its common ground that the cause of action accrued on **28th** September 2010, hence, the claim was filed within the **12** years permitted by law. He relied on *Edward Moonge Lengusuranga v James Lanaiyara & another*[11]which defined cause of action to mean "a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings suit." He submitted that the agreement was a contract between the parties to acquire land **L.R. No. 7785/167** and erect thereupon a modern house for two families with a view to selling the house after completion and share the profits equally.

35. Mr. Makau cited section **7** of the Limitation of Actions Act which provides that an action may not be brought by any person to recover land after the end of **12** years from the date on which the right of action accrued or, if it first accrued to some person through whom he claims, to that person. He relied on *Benjamin Wachira Ndiithi v Public Service Commission & another**[12]*** for the proposition that, section **11** of the Limitation of Actions Act provides that a right of action to recover land by virtue of a forfeiture or breach of condition accrues on the date on which the liability to forfeiture was incurred or the condition broken. He submitted that the cause of action arose on or about the **7th** March 2012 when the applicant in breach of the terms of the said agreement sub-divided the property into two portions and registered Land Reference **7785/1419** (original **7785/167/2),** solely in his name in total disregard of the Respondent's interest. He submitted that since the Respondent's claim is for recovery of land, the **12** years are yet to lapse.

36. Mr. Makau cited *West Mount Investments Limited v Tridev Builders Company Limited**[13]*** which held that where the effect of default is to bar the right to arbitrate or obtain remedy in arbitration, then any arbitral forum constituted despite the default will lack jurisdiction, but where the effect is to extinguish the claim, then the arbitral tribunal, will be possessed with the jurisdiction to decide if the claim is barred. The court further observed that a strict interpretation is therefore to be adopted when construing a contractual time bar clause given that it has the potential of locking out a claim which statute has not time barred. He submitted that the applicant's default was aimed at extinguishing

and denying the Respondent his rights under the agreement hence the arbitral tribunal is possessed with the jurisdiction to decide whether the claim is time barred.

37. Mr. Makau submitted that the Respondent raised substantive issues for determination in the arbitral proceedings all of which have different time limits among them claim for ½ share of the developed premises, which amount to recovery of land the period within which to bring such a cause of action is **12** years; claim for ½ of the rent being received by the applicant from the properties from 2014 which claim ought to be brought within **6** years; an alternative claim for refund of the sum of **Kshs. 4,548,975/=** with interest at commercial rates from the date of receipt till payment in full which has a limitation period of **6** years, which claim was revived through acknowledgement by the applicant vide the e-mail dated **22nd** March 2020 marked as **'MK 6.'**

38. Mr. Makau submitted that the Respondent initiated the arbitral proceedings within the prescribed time, and that all the issues raised during the arbitral proceedings were within the timelines governed by law in the Limitation of Actions Act. He also submitted that the applicant has made every effort to obstruct and delay the commencement and/or determination of the dispute. Further, despite denying the existence of the joint venture agreement in his defence before the arbitral proceedings and previous correspondence, in these proceeding he relies on the same agreement.

Determination

39. It is basic law that the general approach on the role and intervention of the court in arbitration in Kenya is provided for in section **10** of the Act which provides that except as provided in the Act, no court shall intervene in matters governed by the Act. In peremptory terms, the section restricts the jurisdiction of the court to only such matters as are provided for by the Act. The section epitomizes the recognition of the policy of party's ?autonomy" which underlie the arbitration generally and in particular the Act.

40. The section articulates the need to restrict the court's role in arbitration so as to give effect to that policy.[14] The principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense. The Act was enacted with the key purpose of increasing party autonomy and minimizing court intervention.

41. The language of section **10** leaves no doubt that it permits two possibilities where the court can intervene in arbitration. *First* is where the Act expressly provides for or permits the intervention of the court. *Second*, in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. However, the Act cannot reasonably be construed as ousting the inherent power of the court to do justice especially. This position was appreciated by the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)**[15]* which observed that this judicial intervention can only be countenanced in exceptional instances. The Supreme Court stressed the need for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimises the scope for intervention by the courts.

42. The Supreme Court was emphatic that that Section **10** of the Act was enacted to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a court may intervene.[16] Therefore, parties who resort to arbitration, must know with certainty instances when the jurisdiction of the courts may be invoked. Under the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator, recognition and enforcement of arbitral awards, and other specified grounds such as where the arbitral tribunal rules as a preliminary question that it has jurisdiction.

43. Because the courts are requested to adopt, support and trigger the enforcement of arbitration awards, it is permissible for, and incumbent on, them to ensure that arbitration awards meet certain standards to prevent injustice.[17] However, by agreeing to arbitration, the parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else; and by agreeing to arbitration the parties limit interference by the courts to the grounds of procedural irregularities set out in the Act, and, by necessary implication, they waive the right to rely on any further grounds of review, "common law" or otherwise.

44. The objective of arbitration is to obtain the fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense. The second objective is the promotion of party autonomy (arbitration being a consensual process in that the primary source of the arbitrator's jurisdiction is the arbitration agreement between the parties). The third objective is the balanced powers for the courts: court support for the arbitral process is essential, the price thereof being supervisory powers for the court to ensure due process. True to the principle of party autonomy the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal's statutory duty to conduct the proceedings in a fair and impartial manner.

45. It is settled law that an arbitrator's jurisdiction derives from the parties' agreement. For an arbitrator to have jurisdiction, all the following must apply: - (i) There must be a binding agreement to arbitrate. In the instant case the validity or binding nature of the agreement is not under challenge. (ii) The arbitrator must have been validly appointed. There is nothing before me to assault the validity of the Arbitrators appointment. (iii) There must be a dispute that the parties had agreed to arbitrate. A reading of the diametrically opposed positions taken by the parties leaves no doubt that there exists a dispute between the parties.

46. Interestingly, the applicant is not challenging the jurisdiction of the Arbitrator to determine the issue of limitation of actions.Jurisdiction can be challenged by attacking the agreement's validity or on the tribunal's jurisdiction over the subject matters, among other challenges. Section **17** of the Act provides for the doctrine of *kompetenz-kompetenz*, a jurisprudential doctrine whereby a legal body, such as a court or arbitral tribunal, may have competence, or jurisdiction, to rule as to the extent of its own competence on an issue before it. The doctrine of *kompetenz-kompetenz* is enshrined in the UNCITRAL Model Law on International Commercial Arbitration and Arbitration Rules.[18] Article **16(1)** of the Model Law and article **23(1)** of the Arbitration Rules both dictate that "the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." The applicant ought to have raised his objections on limitation before the tribunal and allow it to rule on the issue.

47. It is also basic law that the plea for lack of jurisdiction should be raised before submitting the statement of defence. Where the issue is

that the tribunal has exceeded the scope of its authority, the plea must be raised as soon as the matter alleged to be beyond scope is raised during the proceedings. The tribunal decides the matter either as a preliminary question or in an arbitration award on the merits. Any party aggrieved by the ruling can apply to the High Court within **30** days to decide the matter. The High Court's decision is final and not capable of appeal.

48. Section **17** of the Arbitration Act is a wide provision conferring on the Arbitral Tribunal the power to rule on all jurisdictional issues pertaining to its own competence to adjudicate on the matter. However, for a better understanding of this provision, it is important to know what falls within the ambit of the Arbitral Tribunal's jurisdiction. It is important to note that there is no jurisdiction given to the Arbitral tribunal as a matter of right or inherence or by the statute. Rather, the jurisdiction of the Arbitral Tribunal is derived through the Arbitration Clause or Arbitration Agreement between the parties. The jurisdiction of an Arbitral Tribunal is, thus, determined in accordance with the Arbitration Agreement between the parties and subject to the supplementary provisions of the Arbitration Act. The key question here is whether a reading of the agreement between the parties leads to a conclusion that the issues raised by the applicant constitute a dispute within the meaning of the arbitration clause and whether the arbitral tribunal could determine the issue.

49. Earlier in this ruling I reproduced verbatim the arbitration clause. Without rehashing it, the clause is explicit that *"any dispute arising out of this agreement shall be referred to a single mediator….if the mediation shall be unsuccessful… then the dispute shall be referred to a single arbitrator… such arbitration to be conducted in accordance with the provisions of the Arbitration Act, 1995, or any statutory modification or re-enactment thereof for the time being in force."*

50. The arbitration clause talks of any dispute. A natura interpretation of this clause leaves no doubt that whether or not the claim is time barred is a matter falling squarely within the definition of a dispute as contemplated by the said clause. The last part of the arbitration clause extinguishes the applicant's attempt to invoke provisions of other statues. It is expressly clear that the "*arbitration to be conducted in accordance with the provisions of the Arbitration Act, 1995, or any statutory modification or re-enactment thereof for the time being in force."* The party's intent is clear. They desired any dispute to be governed by the Arbitration Act or any modifications or enactments to the act. This court cannot re-write the party's agreement entered voluntarily.

51. The other ground upon which the applicant's case collapses is that section **17 (1)** of the Arbitration Act specifies that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose— (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and (b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.

52. The word "including" in the above provision is indicative of the fact that the provision is inclusive in nature. Some of the factors considered to be within the jurisdiction of an Arbitral Tribunal are the existence or the validity of an Arbitration Agreement can be determined by the Arbitral Tribunal as per Section **17**. The existence and validity of the Arbitration Agreement is left to be determined by the Arbitral Tribunal, amongst other jurisdictional issues. If the subject matter of the dispute falls within the category of a non-arbitrable dispute, the Arbitral Tribunal has no jurisdiction to adjudicate the dispute and an objection can be raised under Section **17** stating that the subject matter of the dispute is beyond the jurisdiction of the Arbitral tribunal. Clearly, the applicant ought to have utilized this provision and argue that the dispute is non-arbitral on the alleged ground of limitation of actions. He did not do so. Instead in total affront to section **10** of the Arbitration Act he invoked this court's inherent jurisdiction under sections **1A, 1B** & **3A** of the Civil Procedure Act.

53. Simply put, the applicant invited this court to exercise its inherent powers and grant the orders sought. True, courts derive their power from the Constitution and the statutes that regulate them. The jurisdiction of each hierarchy of the courts is limited within the boundaries of the written law apart from the High Court which is sometimes said to have inherent jurisdiction to do things not specifically provided for. Historically, the high court, in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. Freedman C J M, citing I H Jacob *Current Legal Problems,* adopted the following definition of 'inherent jurisdiction: -'

> *". . . 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, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them…"*

54. Jerold Taitz, in his book, *The Inherent Jurisdiction of the Supreme Court* describes the inherent jurisdiction of the high court as follows: -

> *". . .This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court."*

55. I.H. Jacob in "*The Inherent Jurisdiction of the Court'* quoted by Jerold Taitz (supra) states:-

> *"[it] exists as a separate and independent basis of jurisdiction, apart from statute or Rules of Court ... It stands upon its own foundation, and the basis for its exercise is ... to prevent oppression or injustice in the process of litigation and to enable the court to control and regulate its own proceedings ... [it] is a necessary part of the armoury of the courts to enable them to administer justice according to law. The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers ... it operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice."*

56. The inherent jurisdiction of the high court has long been acknowledged and applied by courts. However, a court's inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have. In *National Union of Metal Workers of South Africa & others v Fry's Metal (Pty) Ltd* it was held: -

> "*While it is true that this Court's inherent power to protect and regulate its own process is not unlimited – it does not, for instance, "extend to the assumption of jurisdiction not conferred upon it by statute. . ."*

57. The wisdom flowing from the above references is; what can the High Court do, in exercise of its inherent jurisdiction, to achieve the desirable justice and practicality in the prayers sought in an application which the law does not specifically provide for? In this respect, it must be mentioned at the outset the inherent powers of the court are not an open licence for the court's exercise of unlimited discretion. It is invoked to effect procedural fairness between the parties where a statute falls short of doing so or where there is a gap in the law. The inherent power claimed is not merely one derived from the need to make the court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation. As stated above, the arbitration Act is specific at section **10** on the circumstances upon which the court can intervene in Arbitration proceedings. Additionally, the party's intent is manifest in the Arbitration clause. They consciously consented on the law to govern any dispute between them arising from their agreement. They had the freedom to decide they will be governed by the Civil Procedure Act, but they did not do so. The attempt to invoke this court's inherent jurisdiction on the face of such a clear provision in the Arbitration clause and section 10 of the Arbitration Act is misguided. In any event, as pointed out later, even the attempt to invoke the cited provisions of the Civil Procedure Act and the Limitation of Actions Act is not supported by the decision heavily relied upon by the applicant's counsel.

58. More important is the fact that the Arbitral Tribunal is a creature of the Arbitration Agreement between the parties. Therefore, the scope of the Arbitral Tribunal is determined in accordance with what is stated in the Arbitration Agreement. If the reference to Arbitration is on an issue that is not mentioned in the Arbitration agreement or falls beyond the bracket of disputes the parties have agreed to refer to Arbitration, an objection can be raised stating that the Arbitral Tribunal does not have jurisdiction to decide on the issue since it is beyond the scope of its authority. No such argument was presented in this case.

59. Dealing with similar issues as raised in this case in *Northwood Development Company Limited v Shuaib Wali Mohammed**[19]*** I observed that the issue whether limitation of actions can constitute a jurisdictional issue within the ambit of the Arbitral Tribunal or is an issue that is to be separately adjudicated by the Tribunal at later stages has been a grey area in arbitration litigation. The Supreme Court of India in *Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products*, (decided in 2018), held that the issue of limitation of actions is not a jurisdictional issue to be decided under Section **16** (the equivalent of our section **17**) of the Act and an order passed on the issue of limitation by the Arbitral Tribunal is to be construed as an interim award which is appealable under the Act. Subsequently, in November, 2019, however, the Supreme Court of India expressed a contradictory view in *Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited*, stating that the issue of limitation is an issue that has to be decided by the Arbitral Tribunal as a jurisdictional issue, and not by the judicial authority during appointment of Arbitrator at the pre-reference stage.

60. Additionally, in *Northwood Development Company Limited v Shuaib Wali Mohammed* after going through numerous court decisions in other jurisdictions and locally, and persuaded by the latter decision by the Supreme Court of India (supra), I was emphatic that back at home, it has been held that the Limitation of Actions Act applies to arbitrations with the same force it applies to litigation and that the issue of limitation of actions of the arbitration and the contractual limitation period usually arises as a preliminary point before the Arbitral Tribunal. In *Barlany Car Hire Services Limited v Corporate Insurance Limited*[20]the court agreed with the defendant that the clause imposing the contractual deadline was a condition precedent to a valid claim as was held in *H. Ford & Co. Limited v Compagnie Furness (France)**[21]*** where a clause to similar effect was upheld. The court quoted with approval the following: -

> "*Therefore, as the jurisdiction of the arbitrator was only given to him by the consent of the parties and the parties agreed that the arbitrator if appointed at all should be appointed within a certain time, it seems to me to follow that as that time has elapsed, neither party had power to appoint an arbitrator unless the other party consented."*

61. The court therefore upheld the defendant's argument that there was no longer any cause of action; that the matter was time barred and noted that no application had been made to extend the limitation period if that were possible. The court in response to the Plaintiff's suggestion that the matter was governed by section **4** of the Limitation of actions Act held that the law of Limitation of Actions Act merely gives a maximum time limit within which a suit may be brought. The court quoted the following passage from the Halsbury Laws in support: [22]

> "*The parties to an arbitration agreement may, if they wish, contract that no arbitration proceedings shall be brought after the expiration of some shorter period than that applicable under the statute."*

62. It is important to mention that the limitation upheld by the court in the above decision was provided in the arbitration agreement, hence, the holding that parties may in an arbitration clause provide a shorter period than provided under the Limitation of Actions Act. This distinction is useful because in the instant case, the arbitration clause did not provide for a limitation period, hence, the position that it ought to have been raised as a jurisdictional question before the arbitral tribunal.

63. I now address the next key question of how and when to object. As I observed in *Northwood Development Company Limited v Shuaib Wali Mohammed* the answer to the above question is that an objection to the jurisdiction of the Arbitral Tribunal is to be raised in the form of a plea to be presented before the Arbitral Tribunal. The plea must substantiate the brief facts and the grounds on which such an objection is being raised in a clear and precise manner. The time frame within which it should be raised before the Arbitral Tribunal is expressly provided under section **17 (2)** of the Act which 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, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.

64. The above position was upheld by the Supreme Court India in *M/s MSP Infrastructure Ltd v/s M.P. Road Development Corporation Ltd* which held that it is undoubtedly clear that an objection that the Arbitral Tribunal lacks jurisdiction must be raised before or at the time of submission of the Statement of Defence. However, I must hasten to point out that the Arbitral Tribunal may admit a plea of objection at a stage later than the stages mentioned above. An example is where the Arbitral Tribunal exceeds the scope of its authority in the course of the proceedings.

65. Section **17** elaborates on the time within which a plea objecting to the jurisdiction can be raised. The party making such a plea is strictly required to adhere to this time bracket. However, apart from the excepted circumstances mentioned in the said section, any objection that goes beyond the confines of section **17** mandates precludes the party from raising such an objection by means of waiver under Section **5** of the Act which enshrines the provision to waiving the right to object. It provides that a party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.

66. In *S.N. Malhotra & Sons v Airport Authority of India & Ors.*, the Delhi High Court dissected the anatomy of Section **4** (the equivalent of our section **5**) and stated that the said provision prescribes **4** pre-conditions to constitute a deemed waiver of the right to object. Applying those postulates to section **16** of the Indian legislation governing Arbitration, (the equivalent of our section **17**), the Delhi High Court held that there is deemed waiver of the right to object to the jurisdiction of the Arbitral Tribunal, if:- the Arbitral Tribunal is lacking or exceeding jurisdiction; either of the parties to the Arbitration Agreement has knowledge of such want or excess of jurisdiction; the party continues with the Arbitration proceedings without raising an objection to jurisdiction; the party raises an objection, with delay that is not justified; or after the submission of Statement of Defence, and non-participation in the proceedings..

67. In his statement of defence before the tribunal, the applicant did not plead the issue of limitation of actions act. As I held above, judicial decisions are in agreement that the plea of limitation can be raised as a jurisdictional question. The applicant's objection was not raised as required by section **17 (2)** which provides: -

> *(2) A plea that the arbitral tribunal does not have jurisdiction **shall** be raised not later than the submission 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*

68. It is instructive to note the use of the word *shall* in the above provision. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.[23]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[24] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

69. The Supreme Court of India pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

70. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote an obligation.[25] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[26] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

71. The above provision must be construed in light of the objects of the Act which permits court intervention only in circumstances permitted by the Act. I have addressed the question of waiver as provided in section **5** of the Act. It is my view that the applicant did not raise its plea on jurisdiction not later that at the time of filing his defense as provided by the above section.

72. The applicant's counsel placed heavy reliance on *Glencore Grain Ltd v TS.S.S Grain Millers Ltd.*[27] However, a reading of the said decision leaves no doubt that it does not support the applicant's case. For example, addressing the import of section **34(5)** of the Limitation of Actions Act, the court reproduced the section and proceeded to state: -

> *"23. Clearly that Section relates to only two situations, none of which have occurred here. The first, is where the court orders that an award be set aside, which has not occurred in this case. The second is where after commencement of an arbitration, if it ordered to cease to have effect with respect to the dispute referred. In these two situations only may the court order exclusion of time in computing the period of limitation."*

73. Commenting on **39 (5)** of the Limitation of Actions Act, the court stated: -

> *"Again, a proper interpretation of this section shows that it applies only where an arbitral award has been varied. Here there is no such claim of a variation of award. The provision is invoked to bolster the doctrine counsel referred to as "relation back". Unfortunately, counsel was not able to provide relevant authorities on the doctrine of relation back."*

74. I find useful guidance in *Sixty-One School Limited v Symbion Kenya Limited*[28] which succinctly expounded on the distinction between the two routes to arbitration under Kenyan law. It stated: -

> *"30. What do the statutes say" First it is important to note that in Kenya, there are two substantive routes under which arbitration may generally be commenced and employed as a dispute resolution mechanism. The first is arbitration through court as court ordered or court referred arbitration. It is commenced under Part VI, "Special Proceedings" of the Civil Procedure Act in Section 59 and Order 46 of the Civil Procedure Rules. Section 59 CPA provides: "All references to arbitration by an order in a suit and all proceedings thereunder shall be governed in such manner as may be prescribed by rules" And Order 46 of the relevant rules, the Civil Procedure Rules provides: "Where in any suit the parties …agree that any matter in difference between them shall in such suit*

be referred to arbitration, they may at any time before judgment is pronounced apply to the court for an order of reference"

31. This is the contextual framework of arbitration in Kenya by court order as stated by the Court of Appeal in Kenya Shell Limited v Kobil Petroleum Limited Civil Appeal (Nairobi) No 57 of 2006 where the court said: -

"Arbitration is one of several dispute resolution methods that parties may choose to adopt outside the courts of this country. The parties may either opt for it in the course of litigation under Order XLV of the Civil Procedure Rules or provide for it in contractual obligations, in which event the Arbitration Act, No 4 1995 (the Act) would apply and the courts take a back seat."

32. For ease of characterization, it may thus be safe to refer to arbitration when conducted under the provisions of special proceedings of court as court-annexed arbitration. In this type of arbitration under Order 46, the court has a more extensive involvement in the arbitral process, for example, setting the time for making the award (see rule 3(1)), issuing directions on the statement of a special case for the opinion of the court (see rule 12), and the court superseding the arbitration where the award is set aside (see rule 16(3)).

33. On the contrary, arbitration that is wholly consensual at inception proceeds under the Arbitration Act. Such arbitration emanates from an arbitration agreement entered into in a contract or other writing by the parties in terms of section 4, signifying the clear intent of the parties' to resolve their dispute through arbitration. It also signifies the parties' intent that should any legal proceedings be commenced in court by any of the parties the proceedings should be stayed by the court to enable arbitration to proceed as provided under Section 6 of the Act. ***The Act provides for both the substantive and procedural law for the arbitration****. Further, section 10 has the all-important provision that: "Except as provided in this Act, no court shall intervene in matters governed by this Act" The clear intention of the statute is that the court is to be involved in a consensual arbitration only under the limited circumstances prescribed in the Act or the Rules made under the Act.*

34. The similar provision in the Model Law to section 10 of the Arbitration Act on the extent of court intervention, is Article 5 which states as follows: "In matters governed by this Law, no court shall intervene except where so provided in this Law."(emphasis added)

75. I am afraid, the manner in which the applicant heavily relied on the provisions of the Civil Procedure Act ant Rules suggest that the applicant may be confusing arbitration and the Arbitration act which is consensual and in which court intervention is limited except in circumstances permitted under the act and Arbitration under section **59** of the Civil Procedure Act and Order **46** of the Civil Procedure Rules, 2010 which permit the court a higher latitude to intervene.

76. Despite my finding in the various issues discussed above, I will address the merits or otherwise of objection raised by the applicant in support of his bid to invite this court's intervention. The applicant's argument as I understood it is that the Respondent's claim was time barred. The applicant's objection was premised on section **4(1) (a)** of the Limitation of Actions Act which provides that actions founded on contract may not be brought after the end of 6 years from the date on which the cause of action accrued. Whereas this is a valid ground of law to defeat the claim, the argument ignores pertinent issues relating to the subject dispute and also express provisions of the Limitation of Actions Act. *First,* section **23 (3)** of the Limitation of Actions Act provides: -

(*3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment: (Emphasis added)*

77. *First,* the import of the above provision is that time begins to run from the date a debt is acknowledged or payment is made. The question whether or not the applicant acknowledged the debt as alleged by the Respondent but vehemently denied by the applicant is a question of fact which can only be resolved by way of evidence before the arbitrator. It cannot be determined summarily in the instant application without hearing evidence nor does it qualify to be an objection based on pure point of law because it requires evidence to be determined.

78. *Second,* it has been stated that other than the monetary claim, the other limp of the claim relates to land which has a limitation period of **12** years. To determine the diametrically opposed positions taken by the parties on this issue, it will be necessary to hear oral evidence which is a function of the arbitral tribunal and not this court.

79. Third, the issue of limitation was not pleaded in the defense before the tribunal nor does it arise by clear implication out of the pleadings. The general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination. It is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case.[29] The applicant cannot purport to introduce issues not raised before the tribunal in the instant application.

80. There is a clear distinction between jurisdiction and limitation of actions. Generally, jurisdiction refers to the legal authority of an adjudicatory body to decide a legal dispute and render a decision. It is the power to hear and determine a cause. Jurisdiction in law, is the authority of a court to hear and determine cases, the authority which a court has to decide matters that are litigated before it or take cognisance of matters presented in a formal way for its decision. Under each of these definitions, jurisdiction is conceived of granting to judicial fora the authority or competence to rule on a matter before them.

81. In their simplest form, jurisdictional challenges are those that call into question the competence of an adjudicatory body to exercise its adjudicatory powers on both the claimant and the claim. Decisions on jurisdictional questions normally have far-reaching effects, as they can potentially put an end to claims before they are heard on the merits. For instance, arbitration is a consent-based process; consequently, if a party challenges the existence of an arbitration agreement, the party is arguing that it did not consent to arbitration, which calls into question the competence of the tribunal to adjudicate the substance of the claim.

82. On the other hand, limitation of actions refers to the period of time in which a person has to file a case in court or a tribunal. The limitation defines time periods following the accrual of the right of action in which a litigant must assert his claim. The terms jurisdiction and limitation are totally different. Limitation only limits a party's right to institute a claim which is statute barred. Absence of jurisdiction connotes that the court or tribunal has no power to entertain the case. Flowing from the above discussion and the distinctions highlighted above between jurisdiction and limitation of actions, the conclusion becomes inevitable that the applicant's plea on limitation is unsustainable.

83. There is not contest that the subject agreement at clause **10** provided for a dispute resolution mechanism. The Respondent's case is that the applicant has deployed every effort to scuttle the arbitration process. The applicant is said to have objected to the first arbitrator. A second arbitrator has since been appointed. The applicant submitted to the jurisdiction and even filed a defense. Now the applicant has moved to this court citing matters he never raised in the defense.

84. Arbitration is not always straightforward or free from controversy as any party that considers an arbitration as contrary to its interest can capitalize on every opportunity to obstruct the appointment process, or to challenge arbitral tribunal once appointed. For example, a party may refuse to appoint an arbitrator in order to obstruct the process.[30] In such instances the crisis of arbitration is the ironical situation whereby parties who have consciously chosen arbitration in preference to litigation often resort to litigation for the court to determine matters they had clearly agreed shall be resolved by way of arbitration.

85. Within the limits of mandatory provisions of arbitration legislation, the parties are free to concoct their own procedural recipe. They can 'legislate' for liberality of procedure or for traditional methods: they can choose great formality or great informality: they can give to the tribunal a very wide jurisdiction or a very narrow one. Within the limits of the arbitration agreement and the governing statute, the arbitrator controls the procedure of the arbitration and is able to tailor the procedure to the needs of the particular dispute.

86. In conclusion, I am not persuaded that the issues raised herein fall within the scope of the limited instances permitted by the Arbitration Act under which a court can intervene in arbitral proceedings. In line with the principle of party autonomy, the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. The parties submitted to the arbitral process voluntarily. No objection was raised at the earliest opportunity including at the time of filing the defense. The attempt to raise the hurdle of limitation of actions Act belatedly offends section **17 (3)** of the Arbitration Act and the waiver hurdle created by section **5**.

87. In view of my analysis of the law, authorities, discussion and conclusions arrived at herein above, it is my finding that the applicant has not established any grounds for the court to interfere with the arbitral proceedings. The upshot is that the applicant's Notice of Motion dated **10th** November 2020 is unmerited. Accordingly, I dismiss the said application with costs to the Respondent

Orders accordingly

SIGNED AND DATED AT NAIROBI THIS 24TH DAY OF MARCH 2021

JOHN M. MATIVO

JUDGE

Delivered electronically via e-mail

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[1] Cap 21, Laws of Kenya.

[2] Cap 22, Laws of Kenya.

[3] Cap 23, Laws of Kenya.

[4] Act No 4 of 1995.

[5] Cap 21, Laws of Kenya.

[6] {2012} e KLR

[7] {2007} e KLR

[8] {2017} e KLR.

[9] {2020} e KLR.

[10] {2020} e KLR.

[11] {2019} e KLR.

[12] {2014} e KLR.

[13] {2017} e KLR.

[14] See Sutton D.J et al (2003), Russell on Arbitration (Sweet & Maxwell, London, 23rd Ed.) p. 293.

[15] {2019} e KLR.

[16] See paragraph **57** of the judgment.

[17] Redfern and Hunter Law and Practice of International Commercial Arbitration 4ed (Sweet & Maxwell, London 2004) at 65-6; Kerr "Arbitration and the Courts – The UNCITRAL Model Law" (1984) 50 Arbitration 3 at 4-5; London Export Corporation Ltd v Jubilee Coffee Roasting Co. Ltd [1958] 1 WLR 271 at 278

[18] Bantekas, Ilias. An introduction to international arbitration. New York. p. 109. ISBN 9781316275696. OCLC 917009113; Croft, Clyde Elliott; Kee, Christopher; Waincymer, Jeff (2013). A guide to the UNCITRAL arbitration rules. Cambridge: Cambridge University Press. p. 249. ISBN 9781107336209. OCLC 842929920.

[19] Misc. Civil Application No. E 1200 OF 2021.

[20] HCCC (Milimani) No. 1249 of 2000.

[21] [1922] 2 KB 797.

[22] Halsbury Laws of England, 4th Edition Vol. 2 Para. 515.

[23]*Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[24] Ibid.

[25] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[26] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[27] {2012} e KLR

[28] {2017} e KLR.

[29] See *Galaxy Paints Co. Ltd vs. Falcon Guards Ltd* [2000] 2 EA 385 and *Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others* Civil Appeal No. 37 of 2003 [2004] 2 KLR 183.

[30] Akseli O "Appointment of Arbitrators as Specified in the Agreement to Arbitrate" (2003) 20(3) Journal of International Arbitration 247-254.