REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION
HCCMISC /E007/2020

EASY PROPERTIES LIMITED…….....APPLICANT

-versus-

EXPRESS CONNECTIONS LIMITED…….....RESPONDENT

CONSOLIDATED WITH

HCCMISC /E003/2020

EXPRESS CONNECTIONS LIMITED …….....APPLICANT

-versus-

EASY PROPERTIES LIMITED …….....RESPONDENT

RULING

Introduction

1. This ruling determines two applications, namely, the application dated **4th** November 2020 filed by Express Connections Limited, i.e., **HCC ARB/E003/2020** and the application dated **28th** December 2020 filed by Easy Properties Limited, i.e., **HCC ARB/E007/2020,** The common thread between the two applications is that they arise from the same arbitral proceedings which culminated in the final arbitral award dated **22nd** October, 2019 and the award on costs dated **5th** October 2020 rendered by Hon. Arbitrator, Advocate, Allen Waiyaki Cichui.

2. The point of divergence is that the two applications seek diametrically opposed orders. Whereas **HCC ARB/E003/2020** seeks an order that the said award be recognized, adopted

and enforced as a judgment of this court, **HCC ARB/E007/2020,** seeks a raft of prayers among them, an order that the said awards be set aside in their entirety.

3. On **9th** February 2020, I directed that the two applications be consolidated and that the pilot file remains **E007** of 2020. I also directed that the Notice of Preliminary Objection filed by the Respondent against Arb No. **007** of 2020 be deemed to be part of its objection to the application. For the sake of brevity and ease of reference, **HCC ARB/E007**/2020 shall herein after be referred to as the **1st** application and the applicant **M/S Easy Properties Limited** shall where the context so permits be referred to as the **1st** applicant. In the same vein, **HCC ARB/E003/2020** shall hereinafter be referred to as the **2nd** application. The applicant **M/s Express Connections Limited** shall where the context so permits be referred to as the **2nd** applicant. I will first address the **1st** application.

The 1st application

4. The **1st** applicant, M/s Easy Properties Limited seeks orders that the Final Award and the Award on Costs be set aside in their entirety. It also prays for an order that this court certifies under Article **165 (4)** of the Constitution that the application raises substantial questions of law and refer the matter to his Lordship the Chief Justice to empanel a bench of an uneven number of not less than three judges to hear the matter. Additionally, it prays for an order that the matter or the relevant parts thereof be heard *de- novo* before the Environment and Land Court. Lastly, it prays for orders that the court grants any other or further relief as this court may deem fit to preserve the integrity of law and due process in the Final Award. Prayers **(1)** & **(2)** of the application are spend.

5. The is founded on the grounds that the arbitration proceedings were complex and incapable of being handled by a sole arbitrator sufficiently. Further, owing to the complexity of the matter, the arbitrator dealt with matters beyond his jurisdiction and not contemplated by the arbitration clause. Additionally, the **1st** applicant states that the process was unduly influenced because there existed a conflict of interest between the representative of the respondent Mr. Ngotho and Engineer Scott an expert relied upon by the tribunal. It also states that the Arbitral proceedings were conducted in a manner that did not conform to fundamental concepts of fair hearing, justice and equality.

6. Further, the **1st** applicant states that the Arbitrator went against public policy as the decision did not take into account various legal and financial obligations on the subject property by the respondent. It also states that the award affects rights, obligations and duties of persons and or entities who were not party to the arbitration proceedings. Lastly, the **1st** applicant states that the Arbitral award does not reflect fairness and justice.

The 2nd applicant's Notice of Preliminary Objection

7. The **2nd** applicant, M/s Express Connections Limited filed a Notice of Preliminary objection objecting to the **1st** application on the following grounds, namely; that the application was filed outside the three months limit contrary to section **35(3)** of the Arbitration Act; that this court's jurisdiction to set aside an award is limited to matters provided under section **35** of the Arbitration Act and any other intervention by the court is expressly prohibited by Section **10** of the Act; that the application offends section **5** of the Act to the extent that the applicant proceeded with the arbitration without stating his objection and is therefore deemed to have waived the right to object; and, that the application offends rule **36(1)** of the Arbitration Rules, 2015.

8. The **2nd** applicant also states that the application offends section **17 (2)** of the Arbitration Act; that the applicant cites issues which were raised by the applicant in *Easy Properties Limited v Express Connections Limited* which was dismissed therefore the issues are *res judicata* since no appeal was preferred against the ruling dated **21st**February 2019. Additionally, the applicant has not sought extension of time, hence, the application offends sections **35** and **32A** of the Arbitration Act and Rules **29(16)** and **(17)** of the Arbitration Rules, 2015. Lastly, that the application is bad in law, fatally and incurably defective and amounts to an abuse of the court process.

The 1st applicant's Replying affidavit

9. The **1st** applicant filed the Replying affidavit of Pamela Bwari Buruchara, its director in response to the Notice of Preliminary Objection. The crux of the affidavit is that the final award was delivered to its advocates on **17th** July 2020, while the award on costs dated **5th** October 2020 was delivered on to its advocates on record in October 2020, hence time

began to run from the said date. Additionally, that the two awards constitute the final award; hence, the application complies with section **35** of the Arbitration Act. Further, that the Arbitrator compelled them to proceed with the arbitration without their engineer's witness evidence; and that the award went beyond the scope of the arbitration agreement.

The 2nd application

10. The **2nd** applicant, M/s Express Connections Limited, vide its application dated **4th** November 2020 prays that the Final Award delivered by Hon. Arbitrator, Advocate, Allen Waiyaki Cichui on **22nd** day of October, 2019 be recognized and adopted as a judgment of this court. It also prays that this court recognizes and adopts the award on costs award made by Hon. Arbitrator, Advocate, Allen Waiyaki Gichui on **5 th** day of October, 2020. Further, it prays for leave to enforce the Final Award as a decree of this court. Lastly, it prays that the costs of the application be borne by the **1st** applicant.

11. The grounds relied upon are listed on the face of the application and explicated in the supporting affidavit of Mary Wangari Mwangi, the **2nd** applicant's director dated **4th** November 2020. Essentially, the grounds are that it is necessary for this court to adopt the award before it is enforced; that it is in the interests of substantive justice that the court accedes to the request; that it is now over a year since the Final Award was delivered and the applicant is yet to enjoy the fruits of the Award. Additionally, the overriding objective of the arbitral proceedings is to ensure expeditious resolution of disputes between parties; that its security risks being sold by its bank on account of a loan for purchasing the property; and, that no prejudice will be suffered by the **1st** applicant.

The 1st applicant's Replying affidavit

12. In opposition to the **2nd** application, the **1st** applicant filed the Replying affidavit of Pamela Bwari Buruchara, its director dated **16th** December 2020. The nub of the affidavit is that the application is defective for want of authority to swear court papers; that the application is full of falsehoods and it is intended to mislead the court by claiming that the award made and delivered in 2019; that the award dated **22nd**October 2019 was delivered to its advocates on **17th** July 2020; and the award on costs was delivered to its advocates on **5th**October

2020. Further, that the award does not does not comply with the mandatory provisions of the law; that the **1st** applicant has been prejudiced; that the dispute affects third parties who were not before the arbitrator; and, that the award on costs is excessive given that the person representing the **2nd** applicant is not an advocate. In addition, the **1st** applicant states that the arbitrator on several occasions declined to admit witnesses and dismissed evidence presented by the **1st** applicant; that the arbitrator relied on the evidence of Engineer Peter Scott to make an adverse determination against the **1st** applicant yet the evidence affirmed that the building was properly constructed.

13. Further, that the clause referring the disputes did not contemplate a conveyance dispute and remedies, and, that the order cancelling the charge registered over the subject property and revoking the leases thereto is a confine of the jurisdiction of the Environment and Land Court. Also, the subject dispute is complex and it involves interests in land including third party interests. Additionally, that the award touched on matters which were beyond the scope of reference to arbitration. The **1st** applicant also states that the Arbitrator did not afford all the parties a level playground and was during the entire proceedings, inclined towards the **2nd**applicant nor did the expert Engineer declare the existence of conflict of interest between the Representative of the **2nd**applicant and Engineer Scott who sits on the same arbitral tribunals hence the expert's opinion on the matter was unduly influenced as the expert witness Eng. Scott was not neutral.

14. Further, that the arbitral award is contrary to public policy by failing to consider all the legal and contractual obligations of third parties and by directing for the cancellation of conveyance entries which cancellation affects third parties that are not party to the arbitration proceedings. Also, that the award will cause the applicant to be unjustly and unfairly enriched from the loss of the **1st** applicant and if the decree is enforced, the execution will cause the **1st** applicant great loss and injustice.

The 2nd applicant's further affidavit

15. The **2nd**applicant filed the further replying affidavit of Mary Wangari Mwangi dated **19th** January 2021. The substance of the affidavit is that the **1st** applicant's affidavit was filed outside the time frames stipulated by the court, that the applicant filed certified copies of

the awards in the e-filing portal, and that if so ordered, it will avail the originals. Further, that the deponent has authority to swear the affidavits. Additionally, that the period to set aside an award under section **35(3)** is mandatory; that the **1st** applicant never preferred an appeal against the dismissal of their application in *Easy Properties Limited Versus Express Connections Limited*[1] hence issues raised about its witness are *res judicata*. Lastly, that an application to set aside an award must be premised on the grounds set out in section **35 (2)** of the Act which also sets out the time frame for making such applications at section **35 (3)** of the Act.

The 1st applicants' submissions

16. The **1st** applicant submitted that the application meets the threshold under section **35** and by extension section **37** of the Arbitration Act. It submitted that under section **35** an applicant is required to bring forth the grounds within a period of three months while under section **37** the party challenging the award can set forth the grounds at the stage where an application for enforcement under section **36** has been made which is usually outside the three months period. Flowing from the foregoing argument, the **2nd** applicant opined that it has been afforded a two-front opportunity to challenge the award. One, under section **35**, and, two, under section **37** to demonstrate grounds upon which this court should refuse to recognize or enforce the award.

17. It argued that the arbitral award dealt with a dispute not contemplated by the parties and/or outside the terms of reference to arbitration. The **1st**applicant also argued that there was no dispute regarding the conveyance, hence, it was not necessary for the arbitrator to delve into the said issue. To buttress its argument, it reproduced the Final Award and argued that the sole arbitrator delved into matters which were not contemplated by the parties and also prescribed remedies outside the terms of reference. It argued that the arbitrator despite acknowledging that there existed no dispute as far the conveyance was concerned proceeded to create his own dispute and prescribe his own remedies including remedies which can only be given by the Environment and land Court. It cited *Associated Engineering Company v Government OJ Andhra Pradesh & another*[2] cited in *Airtel*

[1] {2019} e KLR.
[2] {1991} R.D.S.C 153 a 992 AIR 232 -15th July 1991.

Networks Kenya Limited v Nyutu Agrovet Limited in which the court faulted an arbitrator for deciding matters outside his jurisdiction. The **1st** applicant faulted the arbitrator for considering a mortgage facility arguing that it fell outside the terms of the reference to arbitration which warrants intervention by this court on grounds that the ruling was *ultra vires*. It relied on *Airtel Networks Kenya Limited v Nyutu Agrovet Limited.*

18. The **1st** applicant submitted that the award was arrived at under undue influence because the arbitrator relied on the evidence of Eng. Peter Scott who rendered an independent expert opinion, yet, the said expert sits in the same committee within the arbitration fraternity with Mr. Paul Ngotho who acted for the **2nd** applicant. It argued that as a result of the foregoing, the impartiality of Eng. Scott was dented on grounds that there was likelihood that his report will appear to be biased. It submitted that Mr. Paul Ngotho did not declare this proximity to the arbitrator and or parties and cited *R v Metropolitan Magistrates and Others, Ex Parte Pinochet Uganda (NO.2)*[3] and *Kimani v Kimani*[4] in which the Court of Appeal allowed an appeal on grounds that the presiding judge had exhibited bias against women in general. It faulted the arbitrator for relying entirely on the Engineers' report.

19. Additionally, the **1st** applicant submitted that the award is contrary to public policy. It relied on *Christ for all Nations v Apollo Insurance Co. Ltd*[5] which held that an award could be set aside under section **35(2) (b) (ii)** for being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality. Buttressed by the above decision, the **1st**applicant argued that the award was arrived at in violation of Article **162 (2) (b)** of the Constitution and Section **13** of the Environment and Land Court Act[6] which bestows the original jurisdiction on Land matters to the Environment and land court. It argued that the arbitrator awarded remedies which are tantamount to cancelling titles and ordering discharge of a charge registered at the behest of party who was not party to proceedings which issues are only preserved for the land court.

[3] {1999}1 A11 ER 577 al page 586.
[4] (1995-1998} Vol. I EALR page 134.
[5] {2002} 2 E.A 366.
[6] Act No. 19 of 2011.

20. The **1st** applicant also argued that the sole Arbitrator violated Article **50(1)** of the Constitution on the right to a fair hearing on two fronts; first he denied Kenya Commercial Bank Ltd a right to be heard in so far their interest in the property as per the charge registered on the property; two the arbitrator cancelled titles without according the parties any opportunity to canvass the issue in the appropriate forum and also by denying it an opportunity to call a key witness despite demonstrating justifiable reason why the witness could not attend the hearing when it was scheduled. Consequently, it submitted that the was in conflict with public interest. Further, it argued that the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case.

21. The **1st** applicant also argued that by dint of Article **162 (b)** of Constitution and section **13** of the Environment and land Court act the dispute was incapable of being conclusively dealt with under arbitration.

22. Regarding the application for enforcement, it submitted that the same does not comply with the mandatory provisions of section **36 (3)** of the Act because the original award was not certified nor was a duly certified copy of the same availed and the arbitration agreement or a duly certified copy was not included. It relied on *Victoria Furniture's Limited v Zadock Furniture Systems Limited.*[7]

23. Regarding the prayer under Article **165 (4)** of the Constitution, it cited *Chunilal v Mehta vs Century Spinning and Manufacturing Co*[8] (infra) which defined a substantial question of law. It argued that the matter revolves around the jurisdiction of an arbitrator as provided under the arbitration Act and usurpation of power and/ or jurisdiction bestowed independently upon the Environment and Land Court both by statute and the Constitution, hence, there exists a constitutional question to establish whether indeed an Arbitrator under the Arbitration Act can hear a dispute touching on Environment and Land where the Constitution has specifically granted original jurisdiction to the land court. It argued that the ensuing decision will have a wide effect to the general public who are the consumers of Arbitral proceedings. It also argued that in equal measure the court is called to render

[7] {2017} e KLR.
[8] AIR -1962 SC 1314.

itself on the applicability of section **35** of the arbitration Act which sets out timelines for a party challenging an award and the provision of section **37** which has no timelines but stipulate similar grounds for challenging an award as set out under section **35.** It argued that the two sections create a legal conundrum.

The 2nd applicant's submissions

24. The **2nd** applicant argued that the **1st** applicant's assertion that it took delivery of the Final Award on **18th** July 2020 is for all intentions is legally inconsequential because computation of time is based on Notice of Award by the arbitrator and thereafter parties, at their discretion, pick the award subject to payment of the requisite fees. It argued that the applicant refused to pay the arbitrators fees.

25. Additionally, it submitted that the **1st** applicant's advocate participated in the arbitration proceedings and he did not raise any preliminary objections to some of the issues no being raised, such as the arbitrator's capacity, jurisdiction and nature of dispute, hence, it cannot be allowed to raise such challenges at this stage. It argued that the grounds cited are frivolous, vexatious and baseless.

26. Regarding the allegations of biasness, it referred to paragraph **12** of the award and submitted that the **1st** applicant was given more than four chances to avail the alleged witness (Engineer Gatune) but it failed. It argued that the **1st** applicant filed *Easy Properties Limited v Express Connections Limited*[9] seeking orders on the said witness which was dismissed with costs and no appeal was preferred against the decision. It argued that the application to set aside the Award is a non-starter as it was lodged outside the 3-month timeline provided under section **35(3)** of the Arbitration Act.

27. Additionally, the **2nd** applicant submitted that the application seeking to enforce the award is anchored at section **36** of the Arbitration Act. It cited *Lalji Meghji Patel Co. Limited v Nature Green Holdings Limited*[10] and *Tanzania National Roads Agency v Kundan Singh Construction Limited*[11] and *Castle Investments Company Limited v Board of Governors*—

[9] {2019} e KLR.
[10] {2017} e KLR.
[11] {2013} e KLR.

Our Lady of Mercy Girls Secondary school[12] in support of the proposition that the recognition and enforcement of arbitral awards is governed by Sections **36** and **37** of the Act. Section 36 confirms the binding nature of domestic arbitral awards and requires a party seeking enforcement of such awards to avail to the court either the original arbitral award and the original arbitration agreement or their certified copies. It submitted that both the certified copies of the arbitral award and the original arbitration agreement have been annexed as "MWM 1 AND MWM 2' respectively.

28. Further, the **2nd** applicant submitted that the **1st** applicant was well aware of the delivery of the Final Award in 2019, and that through its advocate on record it participated in the arbitration proceedings. It argued that the computation of the timelines is based on notice of Award by the arbitrator and thereafter parties, at their discretion, pick the Award subject to payment of the requisite fees. It argued that the **1st**applicant failed to pay the requisite fees and therefore the arbitrator or the **2nd** applicant cannot be faulted. It submitted that time starts to run immediately the notification is sent to the parties whether they pay the arbitrator's fees or not. To buttress its argument, the **2nd** applicant cited *National Housing Corporation v Custom Genera/ Construction Limited* [13]which held that "…consistent with the object of the Act, the only logical interpretation of section **35(5)** of the Act is that an application to set aside must be made within 3 months from the date the award is received and for this purpose, the date of receipt is the date which the parties are notified of the award. Once the parties are notified of the award it is within their power to collect it. The arbitral tribunal has discharged its obligation of delivery once it avails the signed copy of award. Failure of the parties to collect it does not delay or postpone the delivery." It argued that in the instant case the award was received on **18th**November 2019 when the parties were notified by the Arbitrator that it was ready for collection, hence, the Notice of Motion dated **26th** March 2020 having been filed outside the **3** months prescribed period in section **35(3)** of the Arbitration Act is incompetent. The **2nd** applicant also cited *Lantech (Africa) Limited v Geothermal Development Company*[14] in which the court stated:

> *"... delivery happens when the arbitral tribunal either…releases or makes available for collection a signed copy of the award to the parties. In this regard therefore, our courts have held that the actual receipt of the signed copy of the award by the party is not necessary and*

[12] {2019} e KLR.
[13]{2021} e KLR.
[14] {2020} e KLR.

that the Award is deemed to have been received by the parties when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection because it is on that date that the tribunal makes the signed copy available for collection by the parties."

29. Additionally, it cited *University of Nairobi v Multiscope Consultancy Engineers Limited*[15] which held that: -

"24. This has to be contrasted with the Kenyan situation where statute does not require the arbitral tribunal to dispatch or send a signed copy to each party. For that reason, delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. Actual receipt of the signed copy of the award by the party is not necessary. So that when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the award because it is on that date that the tribunal makes the signed copy available for collection by the parties.

Once the arbitral tribunal notifies the parties that the award is ready for collection upon payment of fees and expenses, then delivery will have happened as it is upon the parties to pay the fees and expenses. This is because the only obligation of the arbitral tribunal is to avail a signed copy of the award, of course subject to payment of fees and expenses which is an obligation of the parties.

The tribunal having discharged that obligation, then delivery and receipt of the signed copy of the award is deemed because any delay in actual collection can only be blamed on the parties. Default or inaction on the part of the parties does not delay or postpone delivery. "

30. The **2nd** applicant argued that the **1st** applicant's failure to collect the award since 2019 after it was notified of the same is inconsequential.

31. Also, the **2nd** applicant argued that the application to set aside the award is a non-starter as it was lodged outside the 3-month timeline under section **35(3)** of the Act, and that it lacks merit and should be dismissed with costs. It cited *Nyutu Agrovet Limited v Airte/ Networks Kenya Limited;Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*[16] and *Synergy Industrial Credit Limited v Cape Holdings Limited*[17] in which the Supreme Court

[15] {2020} e KLR.
[16] {2019} e KLR.
[17] {2019} e KLR.

stated that section **35** of the Arbitration Act should be interpreted in a way that promotes its purpose, the objectives of arbitration law and the purpose of an expeditious yet fair dispute resolution legal system.

32. It also cited *Hewa Fund LLP v Katchy Kollections Limited* [18]in which the High Court reiterated an application under section **35** of the Act must adhere to the 3-month timeline, as set out therein and Rule **7** of the Arbitration Rules, 1995 and *Anne Mumbi Hinga v Victoria Njoki Gathara*[19] in which the court held that Section **35** of the Act bars any challenge of the award even for a valid reason after **3** months from the date of delivery of the award. Also, it relied on *University of Nairobi v Multiscope Consultancy Engineers Limited* [20]which citing authorities held that in order to comply with **Section 35(3)** an application to set aside an arbitral award may not be made after **3** months have elapsed from the date notice had been received that the arbitral award was ready for collection. Additionally, the **2nd** applicant cited *Pesa Print Limited v Atticon Limited another; Symphony Technologies Ltd 2 others (Interested Parties); Barons Estates Limited (lntended Respondent)*[21] in which the court stated that the timeline for filing application to set aside the Arbitral award is **3** months from the date of receipt of the Final Award from the Arbitrator.

33. It also argued that the applicant, through its advocate participated in the arbitration proceedings, and did not raise any preliminary objections to some of the issues, such as the arbitrator's capacity, jurisdiction and nature of dispute, so, it cannot be allowed to challenge at this stage. It cited *Chania Gardens Limited v Gilbi Construction Company Limited another*[22] which held that it had no original jurisdiction to hear and determine a challenge relating to the impeachment of an arbitral tribunal's jurisdiction. Additionally, it cited *West Mount Investments Limited v Tridev Builders Company Limited* [23]in which the court upheld the principle of *kompetenz kompetenz*, as provided by section **17** of the Arbitration Act. It cited *Desnol Investments Limited v EON Energy Limited* [24]in which the court upheld section

[18] {2018} e KLR.
[19] {2009} e KLR.
[20] {2020} e KLR.
[21] {2019} e KLR.
[22] {2015} e KLR.
[23] {2017] e KLR.
[24] {2019]} e KLR.

5 of the Arbitration Act in respect of the waiver of the right to object and argued that the said estops the **1st** applicant from bringing the application to this court.

34. Lastly, the **2nd** applicant underscored the need for courts not to intervene in arbitration proceedings save as provided under the act and cited *Gooodison Sixty-One School Limited v Symbion Kenya Limited* [25]in which the court stated that the purpose of non-intervention is *inter alia* to promote party autonomy and a right to fair hearing by an independent and impartial arbitral tribunal of their choice. Additionally, it cited *County Government of Nyeri v Eustace Gakui Gitonga*[26] in which the Court upheld section **10** of the Act. It also cited *Anne Mumbi Hinga v Victoria Moki Gathara*[27] for the proposition that public policy stands for enforcement of arbitral awards and the principle of finality.

Determination

35. A useful starting point is to recall the often-repeated uncontroverted statement of the law that the general approach on the role and intrusion of the court in arbitration proceedings 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. The said section limits the jurisdiction of the court in absolute terms to only such matters as are provided for by the Act. The section embodies the recognition of the policy of party's "autonomy" which underlie the arbitration generally and in particular the Act.

36. Section **10** enunciates the need to control the court's role in arbitration so as to give effect to that policy.[28] The principle of party autonomy is recognized as a critical precept 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. Simply put, the Act was enacted with the key purpose of increasing party autonomy and minimizing court intervention.

[25] {2017} e KLR.

[26]{2019} e KLR**.**

[27]{2009} e KLR.

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

37. Section **10** permits two possibilities where the court can intervene in arbitration. *One* is where the Act expressly provides for or permits the intervention of the court. *Two,* in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. Perhaps I should hasten to state that the Act cannot reasonably be construed as ousting the inherent power of the court to do justice. As was explicated by the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party),*[29] this judicial intervention can only be countenanced in exceptional instances. Even then, the Apex Court underscored 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.

38. The Apex Court stated 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. There is a need for courts when considering applications for confirmation or setting aside of arbitral awards to adhere to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimizes the scope for intervention by the courts. It follows that parties who resort to arbitration must know with certainty instances when the jurisdiction of the courts may be invoked. Such instances under the Act 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.
39. Since 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.[30] 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.

[29] {2019} e KLR.

[30] 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

40. This court in *Northwood Development Company Limited v Shuaib Wali Mohammed* [31] stated that "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 should be 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 should be 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."

41. Having underscored the limited scope of court interference in arbitration proceedings, I will now examine the grounds cited by the **1st** applicant. However, I will first address the application for certification under Article **165 (4)** of the Constitution.

42. The application for certification under Article **165(4)** of the Constitution collapses not on one but several fronts. *First*, it is not one of the permitted grounds under the act upon which a court can intervene in arbitration proceedings. Arbitration is a consensual process in that the primary source of the arbitrator's jurisdiction is the arbitration agreement between the parties. The parties elected and agreed on the mode of dispute resolution. It follows that the **1st** applicant cannot run away from the binding arbitration clause by attempting to constitutionalize the dispute.

43. *Second*, even if the **1st** applicant were to surmount the above hurdle (which it cannot), the issues raised in this case do not fall within the intendment of Article **165(4)** of the Constitution which *reads "any matter certified by the court as raising a substantial question of law under clause **(3) (b)** or **(d)** shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice."* Article **165 (3) (b)** reads "jurisdiction to determine the question whether a right or fundamental freedom in the Bill

[31] Misc. Civil Application No. E 1200 of 2021.

of Rights has been denied, violated, infringed or threatened." There is nothing before me to bring the instant dispute within the ambit of the said provision.

44. In addition, Article **165 (3) (d)** provides *"jurisdiction to hear any questions respecting the interpretation of this Constitution including the determination of-*

    i. *The question whether any law is inconsistent with or in contravention of this Constitution;*
    ii. *The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*
    iii. *Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*
    iv. *A question relating to conflict of laws under Article 191*.

45. A reading of the above Article leaves no doubt that the issues raised in the **1st** application do not by any stretch of imagination fall anywhere near or within the scope of the above provisions. It follows that the attempt to invoke the provisions of Article **165(4)** of the Constitution is not only a tall order, but also its highly misguided.

46. *Third*, the **1st** application does not raise any constitutional questions at all. The question of what constitutes a constitutional question was ably explicated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others*[32] in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak*[33] notes that: -

    "The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of ... the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State…, the interpretation, application and upholding of the Constitution are also constitutional matters? So too..., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the

[32] {2002} 23 ILJ 81 (CC)
[33] {2001} (1) SA 912 (CC)

jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction."[34]

47. The following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. These classifications are not discreet and there are inescapably overlaps, but the groupings are nonetheless useful hypothetical tools to organize an analysis of the nature of constitutional matters arising from the cases before the court.

48. The **1st** application does not raise any constitutional questions at all. The issues raised can be determined by applying the governing statute. This court abhors the practice of parties trivializing the Constitution by converting every issue in to a constitutional question and filing suits/applications disguised as constitutional questions/issues when in fact they do no not fall anywhere close to constitutional questions.

49. *Fourth,* even if I were to be persuaded that the application falls under the ambit of Article **165(4)** of the Constitution-and I have held that it does not- (which is the only constitutional provision which expressly permitting the constitution of a bench of more than one High Court judge), the applicant must pass the hurdle erected by the said Article. Article **165(4)** requires that for the matter to be referred to the Chief Justice under the said provision, the High Court must certify that the matter raises a substantial question of law in the instances listed in the said Article. The determination of the above issues is a judicial one. The court is obliged either on its own motion or on an application of the parties to the case to identify the issues which in its view raise substantial questions of law. Therefore, the mere fact that a party is of the view that the matter falls under Article **165(4)** does not necessarily bind the court to certify the matter. As was held in *Community Advocacy Awareness Trust & Others v The Attorney General & Others*[35] :-

"The Constitution of Kenya does not define, 'substantial question of law.' It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine the matter."

[34] 2001 (1) SA 912 (CC)

[35] High Court Petition No. 243 of 2011.

50. In *Chunilal Mehta v Century Spinning and Manufacturing Co*[36]the Supreme Court of India, after considering a number of decisions on the point, laid down the following test for determining whether a question of law raised in the case is substantial question of law or not: -

> *"...The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."*

51. A point of law which admits more than two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law it must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case.[37] An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter.[38] It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any *lis*.[39]

52. The Supreme Court of India in *Hero Vinoth v Seshammal*[40] stated that a question of law having a material bearing on the decision of the case (that is a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not

[36]Supra
[37] See Santosh Hazari vs. Purushottam Tiwari {2001} 3 SCC 179
[38] Ibid
[39] Ibid
[40] {AIR} 2006 SC 2234

covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue.

53. From the above decisions, the following tests for determining whether a matter raises substantial question of law are discernible. **(a)** whether the issue directly or indirectly, it affects substantial rights of the parties, or **(b)** whether the question is of general public importance, or **(c)** whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the highest court of the land, or **(d)** the issue is not free from difficulty, or **(e)** it calls for a discussion for alternative view.

54. The above tests offer proper guidelines and an insight in determining whether or not a matter raises "a substantial question of law" for the purposes of Article **165(4)** of the Constitution. The court may also consider whether the matter is moot in the sense that the matter raises a novel point; whether the matter is complex; whether the matter by its nature requires a substantial amount of time to be disposed of; the effect of the prayers sought in the case and the level of public interest generated by the case. These however are mere examples since the Article employs the word "includes." Accordingly, the list cannot be exhaustive and the courts are at liberty to expand the grounds as occasions demand.

55. The court must adopt an all-inclusive approach to the matter at hand. The mere fact that one factor is found to exist does not automatically qualify the matter for certification under Article **165(4)** of the Constitution.[41] The issue is not merely to do with complexity or difficulty of the case in the views of the applicant but ought to be one that turns on cardinal issues of law or of jurisprudential moment.[42] The mere fact that a matter is novel or jurisprudentially challenging does not *ipso facto* elevate it to a substantial question of law for the purposes of Article **165(4)** of the Constitution.[43]

56. Although the Constitution permits certain matters to be heard by a numerically enlarged bench, that is an exception to the general legal and constitutional position and it is an option that ought not to be exercised casually. There is a difference between question of law and substantial question of law. It is not a mere question of law but a substantial question of

[41] *Wycliffe Ambetsa Oparanya & Others v Director of Public Prosecutions & Others*, H.C. CON. PET. NO. 561 of 2015.
[42] Ibid
[43] Ibid

law that is required. In order to be "substantial" it must be such that there may be some doubt or difference of opinion or there is room for difference of opinion. If the law is well-settled by the Supreme Court, the mere application of it to particular facts would not constitute a substantial question of law.

57. Applications under section **35** of the Arbitration Act have been the subject of judicial pronouncements in this country by all the Superior Courts including the Supreme Court. The application before me does not raise any substantial questions of law nor does it raise any novel issues of law which have never been determined before by our courts. The prayer for certification under Article **165(4)** is totally unmerited.

58. I now turn to the grounds founded on section **35** of the Arbitration Act. Under Section **35(1),** recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections **(2)** and **(3).** This implies that the court will not act in such matters unless an aggrieved party invites it to do so.

59. Subsection **(2)** sets out the grounds upon which the High Court will set aside an arbitral award. The grounds which the applicant must furnish proof for the arbitral award to be set aside are: incapacity of one of the parties; an invalid arbitration agreement; Lack of proper notice on the appointment of arbitrator, or of the arbitral proceedings or where the applicant was unable to present its case; where the award deals with a dispute not contemplated by or one outside the terms of reference to arbitration or matters beyond the scope of reference; where the composition of the arbitral tribunal or the arbitral procedure was contrary to the agreement of the parties except where such agreement was in conflict with provisions of the Act and the parties cannot derogate from such; or where fraud, undue influence or corruption affected the making of the award. Apart from the above, the High Court may also set aside arbitral awards where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the award is in conflict with the public policy of Kenya.

60. The Act limits the time frames within which the disgruntled party may lodge their applications with the High Court for setting aside of arbitral awards. Section **35(3)** of the Act provides that where three months have lapsed since the award was entered the court

will not entertain any applications to set the same aside. This limitation may serve to prevent such applications to be made in bad faith and also to ensure that such decided matters are put to rest. This was the holding in *Nancy Nyamira & Another v Archer Dramond Morgan Ltd*[44] which held that: - "...Given the objectives of the Arbitration Act stated above, it is important that Courts enforce the time limits articulated in that Act – otherwise Courts would be used by parties to underwrite the undermining of the objectives of the Act." By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else.[45] By agreeing to arbitration, the parties limit interference by courts to the ground set out in section **35** of the Act.

61. The law provides a time limit for initiating setting-aside proceedings of three months from the date on which the party making that application had received the arbitral award, or if a request had been made under section **34** from the date on which that request had been disposed of by the arbitral award. There ample decisions by our superior courts including the cases cited by the **2nd** applicant holding that for the purposes of section **35 (3),** time begins to run from the time the parties are notified that the award is ready. It was argued that despite being notified that the award was ready, the **1st** applicant failed to pay the arbitral fees. The **1st** applicant having failed to pay the arbitral fees or to collect the award upon being notified cannot now argue that time begins to run from the time it received the award. It follows that the **1st** application was filed outside the stipulated period of three months. On the ground, the **1st** application collapses because it was filed out of time.

62. The other ground cited by the applicant is that the arbitrator dealt with matters not contemplated by the arbitration clause. The argument here as I understand it is that the arbitrator delved into issues relating to the conveyancing and also the mortgage and discharge of charge. This argument is founded on section **35 (2) (a) (iv)** of the Act which provides that the arbitral award may be set aside if the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only

[44] {2012} e KLR.
[45] They may even reduce the level of procedural fairness by, e g, agreeing that the arbitrator may decide the matter without hearing them.

that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside.

63. It is a principle of common law that a final award must deal with all the issues put to the tribunal. A final award that does not do so is imperfect. This does not mean that arbitrators must deal with each individual item separately but they must take each item into consideration in arriving at their conclusion. The essential function of an arbitrator, indeed a judge, is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain alive. At this juncture is apposite to reproduce the arbitration clause. It reads: -

> **15.7.**
> *Should <u>any dispute arise between the Parties with regard to the interpretation, rights, obligations and/or implementation of any one or more of the provisions of this Agreement</u>, the Parties shall in the first instance attempt to resolve such dispute by amicable negotiation. Should the negotiations fail to achieve a resolution within Fifteen (15) days, either Party may declare a dispute by written notification to the other, whereupon such dispute shall be referred to arbitration under the following terms: -*

64. The **1st** applicant's argument that the award included matters not contemplated by the above clause fails on several fronts. *First*, is primarily a question of interpreting the above clause to get its real meaning and intention of the parties. Contractual interpretation is, in essence, simply ascertaining the meaning that a contractual document would convey to a reasonable person having all the background knowledge that would have been available to the parties. Lord Neuberger in *Arnold v Britton*[46] explained that the courts will focus on the meaning of the relevant words used by the parties 'in their documentary, factual and commercial context,' in the light of the following considerations: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the contract; (iii) the overall purpose of the clause and the contract; (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and (v) commercial common sense; but (vi) disregarding subjective evidence of any party's intentions.

[46] Arnold v. Britton [2015] UKSC 36.

65. In 2019, Professor A. Burrows QC usefully summarized the modern approach to contract interpretation in the following terms in *Federal Republic of Nigeria v JP Morgan Chase Bank NA*,[47] Professor A Burrows QC: -

> *"The modern approach is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. But the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain."*

66. The courts have established that in order to determine the relevant context of the contract, the wider context (outside of the contractual document itself) is admissible and typically ruled that they will adopt a broad test for establishing the admissible background. The 'background' to a contract includes 'knowledge of the genesis of the transaction, the background, the context and the market in which the parties are operating.'[48]

67. Other important points to note regarding the courts' approach to contractual interpretation include: - (a) the courts will endeavor to interpret the contract in cases of ambiguity in a way that ensures the validity of the contract rather than rendering the contract ineffective or uncertain;[49] (b) the courts will strictly interpret contractual provisions that seek to limit rights or remedies, or exclude liability, which arise by operation of law; and (c) where a clause has been drafted by a party for its own benefit, it will be construed in favour of the other party (the contra proferentem rule). This last principle has limited applicability in cases involving sophisticated commercial agreements where a contract has been jointly drafted by the parties or where the parties are of comparable bargaining power.[50] The arbitral clause reads *should any dispute arise between the Parties with regard to the interpretation, rights, obligations and/or implementation of any one or more of the provisions of this Agreement.* I have and re-read the Final Award, the pleadings before the

[47] Federal Republic of Nigeria v. JP Morgan Chase Bank NA [2019] EWHC 347 (Comm), paragraph 32, approved by the Court of Appeal in JP Morgan Chase Bank NA v. Federal Republic of Nigeria [2019] EWCA Civ 1641, paragraphs 29, 73 and 74.
[48] Merthyr (South Wales) Ltd v. Merthyr Tydfil CBC [2019] EWCA Civ 526).
49 Tillman v. Egon Zehnder Ltd [2019] UKSC 32.
[50] See Persimmon Homes v. Ove Arup [2017] EWCA Civ 373.

Arbitrator and the Arbitration clause. Have no doubt in my mind that the Arbitration Clause is wide enough to cover the matters cited by the **1st** applicant. Put simply, the said matters fall within the arbitration clause. This court cannot re-write the parties' preferred choice. In *Fili Shipping Co Ltd v Premium Nafta Products and Others [On appeal from Fiona Trust and Holding Corporation and others v Primalov and others*,[51] Lord Hoffmann, delivering the speech with which all their lordships concurred, said: -

> *"In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are inclined to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction." (Emphasis added).*

68. In *Fiona Trust* (supra), (which the House of Lords upheld in Fili Shipping), decided in the English Court of Appeal, Longmore LJ, delivering the court's unanimous judgment, said:

> *"As it seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words "arising out of" should cover "every dispute except a dispute as to whether there was ever a contract at all."*

And

> *'One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen.'*

And

> *'If there is a contest about whether an arbitration agreement had come into existence at all, the court would have a discretion as to whether to determine that issue itself but that will not be the case where there is an overall contract which is said for some reason to be invalid, eg for illegality, misrepresentation or bribery, and the arbitration is merely part of that overall contract. In these circumstances it is not necessary to explore further the various options canvassed by Judge Humphrey Lloyd QC since we do not consider that the judge had the discretion which he thought he had."*

[51] [2007] UKHL 40; [2007] Bus LR.

69. *Second*, judicial decisions have engraved the extent of court intervention in arbitration, a position best captured in *Ann Mumbi Hinga v Victoria Njoki Gathara*[52] which held that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Act or as previously agreed in advance by the parties.

70. *Third*, the term 'exceeding his powers' requires little by way of elucidation and the following statement by Lord Steyn says it all:-[53]

> *"But the issue was whether the tribunal "exceeded its powers…this required the courts… to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have…"*

71. As was held in *Cf Bull HN Information Systems Inc v Hutson*[54] "to determine whether an arbitrator has exceeded his authority . . . courts "do not sit to hear claims of factual or legal error . . ." . . . and "[e]ven where such error is painfully clear, courts are not authorized to reconsider the merits of arbitration awards. . ." The term acting outside the scope of his mandate must be understood in context. It is illogical to suggest that the parties intended to adopt a separationist approach whereby they would distil and take some disputes to the land court and reserve other for the arbitrator. Had they so desired, they would have provided so in the arbitration clause.

72. *Fourth,* to exceed one's powers does not go to merit but to jurisdiction. The **1st** applicant is now citing merit grounds as if prosecuting an appeal. It ought to have raised the jurisdictional ground before the arbitrator if at all he exceeded his jurisdiction.

73. *Fifth*, in any event, before considering the attack on the arbitrator on the ground that he misconceived the nature of the inquiry and his duties or exceeded his powers, it is necessary to determine the nature of the inquiry, the arbitrator's duties, and his powers. The arbitration clause clearly provides that *"any dispute…."* Section **35 (2)** of the Act requires in peremptory terms that an application to set aside an arbitral award can only be allowed if the party making the application furnishes proof of the grounds provided therein. The

[52] {2009} e KLR.
[53] *Lesotho Highlands Development Authority v Impregilo SpA* {2005} UKHL 43 para 24.
[54] 229 F 3d (1st Cir 2000) 321 at 330.

applicant's grounds are not supported by any iota of evidence. They are mere allegations and an evident misreading of the Final Award.

74. *Sixth*, the Arbitrator was required to determine the dispute between the parties, including disputes relating to the interpretation of the agreement and disputes of a legal, financial and technical nature, the procedural rules to apply and the laws of the Republic governing the agreement. In this regard the Arbitrator had to choose between two opposing contentions. In short, the arbitrator had to (i) interpret the agreement; (ii) apply the Kenyan law; (iii) construe the contract terms, and (iv) consider all the admissible evidence.

75. *Seventh*, the arbitrator had, according to the terms of reference, the power (i) not to decide an issue which he deemed unnecessary or inappropriate; (ii) to decide any further issues of fact or law, which he deemed necessary or appropriate; (iii) to decide the issues in any manner or order he deemed appropriate; and (iv) to decide any issue by way of a partial, interim or final award, as he deemed appropriate.

76. Even if the arbitrator had either misinterpreted the agreement, failed to apply the law correctly, or had regard to inadmissible evidence, it does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. In my view, it only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To adapt the words of Hoexter JA:[55]

> *"It cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court."*

77. I have in several decisions stated that the power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to

[55] Administrator, South West Africa v Jooste Lithium Myne (Edms) Bpk 1955 (1) SA 557 (A).

determine what evidence was admissible, rightly or wrongly.[56] The argument that the arbitrator over relied on the expert evidence of the Engineer Scott is totally misguided because errors of the kind mentioned have nothing to do with him exceeding his powers. If at all he erred, these are errors committed within the scope of his mandate. To illustrate, an arbitrator in an arbitration has to apply the law but if he errs in his understanding or application of the law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.

78. In fact, a reading of the Award leaves no doubt that the arbitrator understood clearly that his duty was to interpret the agreement and that he had, in this regard, to choose between the conflicting contentions tendered by the parties. He understood particularly well that he had to determine the meaning of the contract with reference to its true construction and that he could only have regard to admissible evidence.

79. In *Telcordia Technologies Inc v Telkom SA Ltd*[57] the Supreme Court of Appeal of South Africa stressed the need, when courts have to consider the confirmation or setting aside of arbitral awards, for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimizes the scope for intervention by the courts. A perusal of the pleadings and submissions before the Tribunal and the annexures, and the award leave no doubt that the arbitrator remained within the ambit ordained to him by the reference to arbitration. It follows that the argument that the Arbitrator went outside his mandate collapses. In *Mahican Investment Limited v Giovani Gaid & 80 Others* it was held: *In order to succeed (in showing that the matters objected to are outside the scope of the reference to arbitration) the applicant must show beyond doubt that the Arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute."*

80. It follows the argument that the arbitrator erred by determining matters falling within the jurisdiction of the Environment and Land Court as contemplated under Article **162 (2) (b)** of the Constitution and section **13** of the Environment and Land Court Act collapses. This

[56] *Armah v Government of Ghana* [1966] 3 All ER 177 at 187 quoted in Anisminic Ltd v Foreign Compensation Commission [1969] 1 All ER 208 (HL) at 223D-F.
[57] [2006] ZASCA 112; 2007 (3) SA 266 (SCA); 2007 (5) BCLR 503 (SCA) at para 4.

is because the arbitrator's jurisdiction flows from the arbitral clause. The parties were at liberty to limit his jurisdiction in the arbitral clause, but in their wisdom, they vested in the arbitrator wide jurisdiction by using the words *"any dispute…"* which may arise under the agreement. The **1st** applicant cannot run away from the natural meaning of an agreement it voluntarily signed nor can this court assist it to evade consequences of a binding agreement.

81. Next, I will address the question raised by the **2nd** applicant's counsel that the **1st** applicant's grounds are barred by section **5** of the Act. The **1st** applicant raises grounds which go to the jurisdiction of the arbitrator. It argues that the dispute is not capable of being determined by arbitration. Simply put, it questions the arbitrator's jurisdiction to determine matter it argues are a preserve of the court. To buttress this argument, it cited Article **162 (2) (b)** of the Constitution and section **13** of the Environment and Land Court Act. This argument is attractive. However, that is how far it goes. The argument collapses on the ground that section **17(3)** of the Act provides that "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." Section **5** of the Act provides for waiver of right to object: -

> ***5. Waiver of right to object***
>
> *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.*

82. The **1st** applicant never raised the issue that the arbitrator digressed into matters outside the scope of the Arbitration. The **1st** applicant's counsel did not raise the said issues before the arbitrator. Section **17 (2)** provides that "A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, 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)** provides that "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."
83. The applicant cannot now purport to raise jurisdictional issues he ought to have raised before the tribunal. The applicant is simply caught up by the provisions of sections **5** and

17(3) of the Act. He ought to have raised the objections (if it had any) before the arbitrator. The arbitrator is competent to determine his own jurisdiction. Also relevant is sections **17 (6), (7) b (8)** which provide: -

(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.

(7) The decision of the High Court shall be final and shall not be subject to appeal.

(8) While an application under subsection (6) is pending before the High Court the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided and such award shall be void if the application is successful.

84. The emphasis here is that even where an aggrieved party has applied to the High Court, the arbitral proceedings may commence, continue and conclude the arbitral proceedings even though the award cannot take effect until the High Court determines the application. This provision underscores the key goal of arbitration which is expeditious resolution of court cases and the need to protect and preserve party autonomy.

85. The other ground cited by the applicant is that the award is against public policy. This argument is founded on the alleged violation of Article **165 (2) (b)** of the Constitution and section **13** of the Environment and Land Court Act. One of the grounds for the court to reject the award enforcement is if the award is violation of 'public policy.' In fact, arbitrability and public policy are closely related. Arbitrability relates to the legality of an arbitration agreement or process, while public policy refers to the laws or standards that either the agreement or the award might contravene.[58]

86. Arbitrability and public policy thus overlap in arbitration practice. A violation of public policy, may render an agreement in arbitrable.[59] Courts often refer to "public policy" as the basis of the bar.[60] Thus, if the court feels that an issue falls in the scope of public policy, the court may intervene only, to protect the benefit of the public.

[58] 3 Julam D M Lew, Loukas A Mistelis and Stefan M Kroll, Comparative International Commercial Arbitration, Kluwer Law International, 32 (2003).
[59] Id
[60] 4 Laurence Shore, Defining "Arbitrability": The United States vs. The Rest of the World, New York Law Journal, 15 (2009).

87. Generally, public policy is used to describe the imperative or mandatory rules that parties cannot exploit.[61] Public policy is outside and beyond the scope of arbitration and stays within exclusive judicial jurisdiction, and it also can be the obstacle to the arbitration of certain disputes. The concept of public policy often is used to describe the imperative rules of each country. Public policy serves as the rationale on which a domestic court may refuse the enforcement of an arbitral award, which is contrary to the laws or standards of the court's jurisdiction. If the court feels that enforcement of an award would violate the basic notions of morality and justice, the court may vacate such award.[62]

88. Domestic public policy is expressed by legislative enactments, constitutional constraints, or judicial practice within individual states.[63] Hence, public policy is a legal principle founded on the concept of public good. It can be used to protect the morale of a country or justify a court's intervention where an agreement is considered harmful to the public welfare. Even though such public policy will disturb only one part of community, the court should weigh the whole of the community in applying public policy considerations if the it believes that such actions may impact their own public good and morale. Public policy has three distinct levels: domestic, international, and transnational.[64] Domestic public policy is when only one country is involved in arbitration, the parties come from the same country, and thus the laws and standards of that country's domestic public policy apply. Domestic public policy generally is seen as being the fundamental notions of morality and justice determined by a national government to apply to purely domestic disputes within their jurisdiction. These mandatory rules of public policy are found in a State's laws and are designed to protect the public interests of that State, not of any particular private individual or entity.

89. The main case regarding public policy in England is *Deutsche Schachtbau-und Tiefbohrgesellschafl MB.H (D.S.T.) v Ras Al Khaimah Nat'l Oil Co. (Rakoil).*[65] In this case, the court reasoned that in order for an English court to set aside the award on the public policy defense, the claiming party must prove that there is "some element of illegality or

[61] Pierre Lalive. Transnational (or Truly International) Public policy and International Arbitration, : Comparative Arbitration Practice and Public Policy Arbitration ICCA InternationalArbitration Congress, 261(1987).
[62] 3 Bockstiegel, K., Public Policy and Arbitrability, Comparative Arbitration Practice and Public Policy Arbitration: ICCA International Arbitration Congress, 179(1987).
[63] Parsons & Whitmore Overseas Co. v. Societe Generale de L' Industrie du Papier, 508 F.2d 969, 974 (2d Cir 1974).
[64] Kelllleth Michael Curtin.. Redefining Public Policy in International Arbitration o/Mandatory National Laws, 64 DEF. COUNS. J., 271, 275, 281 (1997).
[65] Deutsche Schachtbau-und Tiefbohrgesellschaft MB.H (D.s. T.) v. Ras Al Khaimah Nat 'I Oil Co. (Rakoil). 2 Lloyd's Rep. 246, 254 (K.B.)(1987).

that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.[66] In addition, it was not contrary to public policy of England if the arbitrator used common principles underlying the laws of the various nations to govern contractual relations, especially when the parties failed to specify which system of law would apply. The English court confirmed that it had to violate a particular existing justified interest of the English public to be a public policy exception.[67]The court must see that such recognition and enforcement of award may endanger the interest of the state's citizens by executing its public authority. Thus, any public policy exception that cannot show clearly how the recognition and enforcement could damage the interest of state's public will not be considered as a bar to recognize or enforce the award.

90. A review of all the grounds propounded by the applicant in support of the plea that the award or portions thereof offend public policy leave me with no doubt that the applicant has not satisfied the tests laid down in the above cited case. *First,* as hele earlier, the parties are very clear in the arbitration clause as to the nature of the disputes contemplated. *Second,* as earlier stated, it is absolutely absurd to suggest that the parties intended a section of the dispute to be taken to court, yet they never so stated in the agreement. *Third*, by voluntarily consenting to the preferred dispute resolution method, the party's freedom of choice must be respected. It is not enough to recite a Constitutional provision or a statutory provision or an enactment as has happened in this case and suggest that the award offends public policy without appreciating the express intention of the parties. The party alleging breach of public interest must prove beyond doubt how the recognition and enforcement of the award would damage public good or how it would be clearly injurious to the public good or, that possibly, that the enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.

91. The **1st** applicant's argument ignores the fact that Arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that

[66] Ibid
[67] Alexander J. Belohlavek, Arbitration, Order Public and Criminal Law: Interaction of Private and Public International and Domestic Law, 1347 (2009),

is binding on the parties. The applicant's argument flies on the phase of this basic principle of Arbitration. The arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are to be determined. The applicant cannot now purport to rewrite the contract by attempting to free itself from the arbitration outcome which is binding upon the parties by hiding behind the concept of public policy. The arbitrator is chosen, either by the parties, or by a method to which they have consented. Arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time that the arbitrator is appointed.

92. It was alleged that the award affects rights of parties not before the Tribunal, namely Kenya Commercial Bank Limited by determining issues touching on the discharge of the charge and alleged cancellation of the Title. I have read the Final Award as enumerated at paragraph **229 (A)** to **(H).** The argument that the Award/orders made fall outside the arbitration or affect third parties is totally untrue, unsustainable and a clear misunderstanding of the arbitration clause and the said orders.

93. The **1st** applicant argued the Final Award was a breach of Article **50** of the Constitution. To me, the test is whether, the award falls within the reference to arbitration. The attempt to drag other parties who are no parties to the arbitration agreement is misdirected and aimed at evading the real meaning, intention and scope of the arbitration clause. It is a back door attempt aimed at inviting this court to overturn the award as if it is hearing an appeal. I decline the said invitation.

94. The other ground cited by the **1st** applicant is the alleged undue influence and bias. These allegations are founded on an alleged relationship of the expert witness with the person who represented the **2nd** applicant in the proceedings. This allegation also forms the basis of the alleged bias against the arbitrator. The **1st** applicant has not demonstrated how the expert witness unduly influenced the decision. The record shows that the **1st** applicant was accorded an opportunity to avail its witness but failed to do so. The test of reasonable

apprehension of bias was stated by Trevelyan J in the case of *John Brown Shilenje vs Republic*[68] as:-

> *"Reasonable apprehension in the applicants or any right-thinking person's mind that a fair trial might not be heard before the magistrate. Mere allegations will not suffice. There must be reasonable grounds for the allegations''*

95. The test for establishing a Judge's impartiality is the perception of a reasonable person, this being a 'well-informed, thoughtful observer who understands all the facts' and who has examined the record and the law and thus 'unsubstantiated suspicion of personal bias or prejudice' will not suffice.'[69] The Supreme Court of Canada explained that "the contextual nature of the duty of impartiality" enables it to "vary in order to reflect the context of a decision maker's activities and the nature of its functions."[70]There are many similar judicial pronouncements, which stress that the bias rule is context sensitive. At the same time, however, the courts have adopted a single test to determine applications for bias --that of the fair minded and informed observer.[71] This fictitious person provides a vessel in which the courts can impart as little or as much knowledge as is required to provide context. In many cases, the courts imbue the fair minded and informed observer with remarkably detailed knowledge and considerable understanding and acceptance of decision-making. This approach begs the question of whether the fair minded and informed person is a neutral observer or little more than the court in disguise.

96. The Supreme Court of Kenya in *Hon. Lady Justice Kalpana Rawal v Judicial Service Commission & Anther*[72] citing Professor Groves M. in "The Rule Against Bias"[73] stated that-"… claim of actual bias requires proof that the decision maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case a hand."

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[68] Cr App No. 180 of 1980

[69] As was held in the American case of Perry vs Schwarzenegger, 671 F. 3d 1052 (9th Circ. Feb. 7th 2012

[70] *Imperial Oil Ltd v Quebec (Minister for Environment)* (2003) 231 DLR (4th) 477.

[71] *Minister for Immigration and Multicultural Affairs Ex p Jia* (2001) 205 CLR 507 at 539, 551, 584 (distinguishing the standards expected of government ministers compared to other decision-makers); *Bell v CETA* (2003) 227 DLR (4th) 193 at 204-207 (distinguishing between the standards expected of courts and tribunals); PCCW-HKT Telephone Ltd v Telecommunications Authority [2007] HKCFI 129; [2007] 2 HKLRD 536 at 549 (distinguishing between an administrative authority and a tribunal); *Allidem Mae G v Kwong Si Lin* [2003] (HCLA 35/2002) at [39] (noting that the bias rule "must bear in mind the specific characteristics and actual circumstances of the Labour Tribunal").

[72] Supreme Court No. 11 of 2016.

[73] {2009} U Monash LRS 10.

97. As the House of Lords stated, in formulating the appropriate test, the court should look at the matter through the eyes of the reasonable man, because the court personifies the reasonable man."[74]The Lords also made clear that the standard was one of a "real danger" as opposed to a "real likelihood" or "real suspicion." In a subsequent decision, the House of Lords also affirmed that the fair-minded observer would take account of the circumstances of the case at hand.[75] Whether the allegation relates to actual or apprehended bias, it is a serious matter, which strikes to the validity and acceptability of a decision. Actual bias has been applied in the following two fact-situations: (a) where a decision maker has been influenced by partiality or prejudice in reaching a decision; and (b) where it has been demonstrated that a decision maker is actually prejudiced in favour or against a party.[76]

98. What is important in apparent bias is that the circumstances surrounding the adjudication are such that an inference can be drawn that the decision maker might be disposed towards one side or another in the matter in court. Case law shows that it is difficult to prove actual bias,[77] apparently because of the subjectivity attendant upon it. It is enough that apparent bias be shown, that is, if viewed by the objective standard, which is that a reasonably informed person with knowledge of the facts would reasonably apprehend the possibility of bias in the circumstances.[78] In order to satisfy the requirement that an apprehension of bias must be reasonable in the circumstances, the reasonable, objective, informed and fair-minded person enters the fray.[79] As formulated, the test is: "whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the decision maker has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and submissions of counsel. Applying

[74] {1993} UKHL 1; {1993} AC 646 at 670.
[75] Porter v Magil {2001} UKHL 67; {2002} 2 AC 357.
[76] See *McGuirk v University of New South Wales* 2010 NSWADTAP 66 paras 9 and 11; *PCL Constructors Canada Inc v IABSORIW Local No 97* 2008 CanLII 39763 (BCLRB) para 1.
[77] On the contrary, Burns and Beukes Administrative Law 303-304 think it is the other way round. For them, it is generally "a simple matter to identify actual bias since the administrator will reflect a closed mind to the issues raised." In their view, "a reasonable suspicion of bias or perceived bias is rather more complex"
[78] Per Lord Brown, *R (Al-Hasan) v Secretary of State for the Home Department* 2005 19 BHRC 282 (HL) 287 para 37; Granpré J, *Committee for Justice and Liberty v National Energy Board* 1978 1 SCR 369 (SCC) 393. *Vakuata v Kelly* 1989 167 CLR 568 (HCA) is another example. The trial judge had made statements critical of the evidence given by defendant's medical experts in previous cases. The Australian High Court held that although no case of actual bias was made out against the judge, the remarks made by him would have excited in the minds of the parties and in members of the public a reasonable apprehension that the judge might not bring an unprejudiced mind to the resolution of the matter before him
[79] *Sager v Smith* 2001 3 SA 1004 (SCA); *S v Roberts* 1999 4 SA 915 (SCA). See also the judgment of Leon JP in the Swazi Court of Appeal in *Minister of Justice and Constitutional Affairs v Stanley Wilfred Sapire*; In *Re Stanley Wilfred Sapire* 2002 (Unreported) Civ Appeal No. 49/2001 (Re Sapire).

the above tests to the facts and circumstances of this case, it is my finding that the **1st** applicant has failed the test to demonstrate either bias or undue influence or both. I find no merit in the allegations of undue influence or bias.

99. The **1st** applicant argues that it was refused the opportunity to call an expert witness. Interestingly, the **1st** applicant filed *Easy Properties Limited v Express Connections Limited*[80] seeking the following orders: -

    a. ***That*** *this Honourable Court do issue an order adopting the Applicant's expert evidence Maga Structural Engineers Report already on the record of the tribunal.*

    b. ***That*** *the High Court do issue a warrant compelling Engineer Anthony Macharia Gatune to appear before the tribunal and testify.*

    c. ***That*** *in the alternative this Honourable Court do issue an order allowing the Applicant to provide an alternative expert witness to produce the report by Maga Structural Engineers.*

    d. ***That*** *the costs of this application be in the cause.*

100. In dismissing the said application, the court stated: -

> *"Based on the foregoing I find that this application does not raise a matter which requires the courts intervention in the ongoing arbitral process. The Arbitration Act is a complete code and party autonomy ought to be respected. Outside of Section 10 of the Arbitration Act, this Court has no jurisdiction to interfere with the arbitration process. Accordingly, I do dismiss in its entirety the application dated 27th September 2018 and award costs to the Respondent."*

101. The **1st** applicant is now citing issues which were adjudicated and dismissed in the above case. The said issues are *res judicata.* The doctrine of *res judicata* defined in the *Black's law Dictionary* as: -

> *"An issue that has been definitely settled by judicial decision; An affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transaction and that could have been but was not raised in the first suit. The three essentials are (1) an earlier decision on the issue, (2) a final Judgment*

[80] {2019} e KLR

on the merits and (3) the involvement of same parties, or parties in privity with the original parties."

102. In *Qayrat Foods Limited v Safiya Ahmed Mohamed & 6 others*[81] the court cited *James Karanja alias James Kioi (Deceased)*[82] which outlined the ingredients of *res judicata* as: -

> *"For the doctrine of Res Judicata to apply, three basic conditions must be satisfied. The party relying on it must show: - (a)That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated;(b) the matter in issue in the latter suit must have been directly and substantially in issue in the former suit; (c)that a court competent to try it had heard and finally decided the matters in controversy between the parties."*

103. The Supreme Court in *Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another* stated the following regarding *res judicata*: -

> *"[52] Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.*

104. From the above excerpts it's clear that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*. If in any subsequent proceedings (unless they be of an appellate nature or review) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment or ruling is called in question, the defense of *res judicata* can be raised. This means in effect that the judgment or ruling can be pleaded by way of estoppel in the subsequent case.

105. *Res judicata* is provided for in Section **7** of the Civil Procedure Act.[83] Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of Section **7** contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are:- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must

[81] {2020} e KLR.
[82] {2014} e KLR.
[83] Cap 21, Laws of Kenya.

have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.[84]

106. The **1st** applicant argued that the **2nd** applicant did not serve certified copies of the award and the agreement. However, the said documents are annexed to the **2nd** applicant's affidavit and they were uploaded into the e-filing system. The said argument fails.

Conclusion

107. Arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the parties. The arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are to be determined. The Arbitration Act confers the Arbitrator exclusive jurisdiction over questions of fact and law which excludes appeals and limits reviews. The court may only be approached as provided by the Act. The circumstances under which the court can intervene are enumerated in section **35** and as the Supreme Court stated in the *Nyutu Case* stated in exceptional circumstances otherwise the arbitral award is final. Unless the arbitration agreement provides otherwise, an award is only subject to the provisions of the Act, final and not subject to appeal or review and that each party to the reference must abide by and comply with the award in accordance with its terms. Clearly, the Legislature intended the arbitral tribunal to have exclusive authority to decide whatever questions submitted to it, including any question of law. That is what the parties agreed.

108. In view of my analysis of the facts, the law and authorities herein above detailed, it is my finding that the **1st** applicant has failed to establish any grounds for this court to set aside the arbitral award. Put simply, the **1st**applicant has not demonstrated any of the grounds provided in section **35** for setting the award aside.

109. I now turn to the **2nd** application. I have weighed the material presented before me and the law. I find no impediment to the said application. The effect is that the application dated

[84] See **Lotta v Tanaki {2003} 2 EA 556.**

4th November 2020 is merited. I allow the said application. The final orders of this court are as follows: -

a. ***That*** *the application dated* ***28th*** *December 2020, filed by Easy Properties Limited, i.e ARB No.* ***E007*** *of 2020 is hereby dismissed.*

b. ***That*** *the application dated* ***4th*** *November 2020, filed by Express Connections Limited, i.e ARB No.* ***E003*** *of 2020 is hereby allowed.*

c. ***That*** *Final Award delivered by Hon. Arbitrator, Advocate, Allen Waiyaki Cichui on* ***22nd*** *day of October, 2019 be and is hereby recognized and adopted as a judgment of this court.*

d. ***That*** *the award on costs award made by Hon. Arbitrator, Advocate, Allen Waiyaki Gichui on* ***5th*** *day of October, 2020 be and is hereby recognized and adopted as an order of this court.*

e. ***That*** *Express Connections Limited, be and is hereby granted leave to enforce the Final Award as a decree of this court.*

f. ***That*** *Easy Properties Limited shall pay Express Connections Limited the costs of these consolidated applications.*

Orders accordingly

Signed, dated and delivered vis e-mail at **Nairobi** this **7th** day of **September** 2021

John M. Mativo

Judge