REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI LAW COURTS

CASE NUMBER: HCCOMMMISC/E120/2021

CITATION: NORTHWOOD DEVELOPMENT COMPANY LIMITED VS SHUAIB WALI MOHAMMED

RULING

Introduction

1. By an Originating Summons dated 18th February 2021 expressed under the provisions of section 17 (6) of the Arbitration Act, (herein after referred to as the Act), Rule 3 (1) of the Arbitration Rules 1997, sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law, Northwood Development Company Limited (herein after referred to as the applicant), seeks an order that this court sets aside the Arbitrator's Ruling dated 2nd February 2021 issued in Arbitration proceedings between Shuaib Wali Mohammed and Northwood Development Company Limited dismissing the applicant's Preliminary Objection dated 14th January 2021 and substitute it with an order of this court upholding the said Preliminary Objection. The applicant also prays for any other order this court may grant in the interests of justice. Lastly, it prays for costs of the Originating Summons.

2. Prayers (1) & (2) of the Originating summons are spent. However, I must mention that even if prayer (2) was still being sought, it is doubtful whether it would be available from this court considering the provisions of section 17 (8) of the Act which provides that: -
(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.

The grounds relied upon

3. The Originating Summons is anchored on the grounds listed on the face of the application and explicated in the Affidavit of Anthony Mbau sworn on 18th February 2021. The applicant is aggrieved by the Arbitrator's ruling rendered on 2nd February 2021 dismissing its Preliminary Objection dated 14th January 2021. In the said objection, the applicant cited 4 grounds, namely, lack of jurisdiction, that the claim is statute barred, that the claim offended section 4 (1) (a) of the Limitation of Actions Act and that the claim is incompetent.

4. The applicant in the instant Originating Summons has framed 7 questions for determination by this court. One, whether an Arbitrator's finding that he has jurisdiction to hear a dispute is final. Two, whether parties can confer jurisdiction to an arbitrator where none exists. Three, whether the arbitral tribunal is bound by the general pleading that "Jurisdiction of this tribunal is admitted" even where none exists. Four, whether the Limitation of Actions Act limits jurisdiction of any court or tribunal. Five, whether failure to plead limitation of actions in the main pleadings renders a preliminary objection thereon unsustainable. Six, whether the plea of limitation arises from the pleadings filed in the arbitral proceedings between the parties herein; and, seven, whether the applicant's Preliminary Objection dated 14th January 2021 is merited.

5. The applicant states that the Respondent's cause of action arose in January 2012, and, that, the arbitral proceedings were commenced on 31st May 2018, over seven years after the cause of action arose, hence the arbitration was time barred and nullity ab initio. The applicant also states that in its defence it reserved the right to apply for the Respondent's claim to be struck off at any time during the arbitral proceedings. It contends that the tribunal has no jurisdiction to hear and determine the dispute.

6. Also, the applicant states that the Arbitrator scheduled a hearing date for 17th February 2021, purporting the same to be have been agreed upon by consent of the parties, and, by letters dated 12thFebruary 2021 and 16thFebruary 2021, its Advocates protested about the said hearing date on grounds that it had been imposed upon them without affording them time to consult on the availability or otherwise of their witnesses, particularly a Mr. Anthony Mbau who was out of town on the said date and incapable of attending the hearing.

7. The applicant states that the hearing date was premature because the issues had not been framed or filed as directed by the Arbitrator, and, that the Arbitrator stated that hearing had to proceed because of the claimant's poor health" raising questions as to when and who brought the claimant's health to his attention. The applicant states that it was unable to attend the hearing, and, that the Arbitrator appeared to be sympathetic to one party to the detriment of the other. Also, it states that on 17th February 2021 the Arbitrator, using an unidentified number telephoned Mr. Wafula, the Respondent's Advocate and gave him 15 minutes to attend the hearing in default, he would to proceed with the hearing. It states that the telephone communication was contrary to the Arbitrator's directions that all communication would be in writing and copied to all the parties.

8. Further, the applicant states that despite the arbitrator acknowledging that the Respondent's advocates letters raised substantial legal and factual issues and acknowledging that an application had been filed for leave to amend the applicant's Statement of Defence, the hearing proceeded on 17th February 2021 in the absence of the Respondent and its advocate.

Respondent's Replying Affidavit

9. The Respondent, Mr. Shuaib Wali Mohamed swore the Replying Affidavit dated 24th February 2021 in opposition to the Originating Summons. He deposed that the applicant's Preliminary Objection was premised on Section 4 (1) (a) of the Limitation of Actions Act and an assertion that the Arbitrator lacked jurisdiction to entertain the dispute. He deposed that there are exceptions to the above section such as where the claim is acknowledged or payments are made in respect of the claim. Further, that the right accrues on and not before the date of the acknowledgement or the last payment. He deposed that the applicant had acknowledged the debt, hence the limitation period began to run after the acknowledgement.

10. Mr. Mohamed averred that in view of the exceptions to Section 4 of the Limitation of Actions Act, it is not possible to determine when the Respondent's right of action accrued without hearing evidence. He averred that the Tribunal was right in its determination, and, that what constitutes the claimant's cause of action and when it accrued are matters which can only be determined by way of evidence at the hearing. He deposed that to the extent that the Preliminary Objection requires evidence to be resolved, the objection based on limitation is unsustainable. Further, he averred that an objection based on Limitation of Actions Act is only possible where the facts as pleaded or admitted establish a clear basis for determining when the cause of action accrued.

11. He deposed that the applicant's 'reservation' pleaded at paragraph 3 of its defence is inconsequential in so far as the applicant did not plead the basis upon which the reservation was made. Further, that the applicant cannot convert its plea of reservation to be a plea of limitation of actions which was never pleaded at all.

12. He deposed that that section 17 (2) of the Act expressly requires that a plea that a tribunal has no jurisdiction to be raised not later than at the time of submitting the Statement of defence, and, that the applicant never raised any objection on jurisdiction either before filing its defence or in its defence. Also, he deposed that the applicant voluntarily and expressly admitted the tribunal's jurisdiction at paragraph 17 of the its defence, only to change its position 5 months later.

13. He deposed that based on the material before him, the arbitrator correctly held: -

"The Respondent is bound by its own averment that "the jurisdiction of this Tribunal is admitted. That pleading is binding upon me and the Claimant as well. No evidence in contradiction of that averment is admissible and would be ignored. The Claimant did not address me on the challenge of my jurisdiction by the Respondent although he noted correctly that it was one of the grounds of the Preliminary Objection. The Respondent in its submissions in paragraphs 13 states that the Respondent had raised an objection to the jurisdiction of this tribunal. With due respect to the Respondent, I was not able to find such a pleading in its Statement of Defence. The issue of my jurisdiction or lack thereof cannot be validly raised for the first time through the Respondent's submissions. In the case of Clips Ltd vs Brands Imports (Africa) Ltd formerly named Brand Imports Ltd (2015) eKLR the court held that;- it is trite law that new issues cannot be raised in submissions. Korir, J in the case of Republic v Chairman Public Procurement Administrative Review Board & Another Ex-Parte Zapkass Consulting and Training Limited & Another (2014) eKLR also held that: "The Applicant, the Respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored"

14. Mr. Mohamed deposed that the hearing date of 17th February 2021 was taken by consent in the presence of the parties' lawyers, but despite having taken the hearing date on 2nd February 2021, the applicant's advocates purported to unilaterally adjourn the hearing vide their letters of Friday 12th February 2021 and 16th February 2021 respectively alleging that the date was imposed vide a letter dated 16th February 2021 written 14 days after the date was taken and on the eve of the scheduled hearing date of 17th February 2021. Additionally, he deposed that he instructed his advocates to write to the Arbitrator copying to the applicant informing the tribunal that he intended to proceed with the hearing as scheduled and also raising concerns over his ill health. Further, that the hearing of the arbitration had been adjourned twice at the applicant's instance.

15. Mr. Mohamed deposed that he and his advocate were present on 17th February 2021 when the

Arbitrator telephoned the applicant's advocate Mr. Paul Wafula and asked him to attend the hearing, but Mr Wafula asked for time to take instructions promising to call the Arbitrator back, and the Arbitrator allowed him 15 minutes but he never called back. That the Arbitrator called him again at about 9:40 a.m. and Mr. Wafula categorically stated that neither him nor his client would attend the hearing.

16. He also averred that the applicant filed an Amended Defence on 16th February 2021 without leave of the Tribunal which was served upon his lawyers on 17th February 2021 at 11.30a.m while the hearing was proceeding at Blue Violets Plaza Building.

17. Further, he deposed that Mr. Gregory Karungo Advocate from the firm of Walker Kontos Advocates later telephoned the Arbitrator who put him on speaker phone seeking an adjournment on grounds that the hearing date had been imposed on them, but the Arbitrator observed that his directions on hearing had not been varied and he directed the claimant to proceed with the hearing which he did and thereafter closed his case.
18. Mr. Mohamed deposed that a formal application for leave to file an Amended Defence was filed on 18th February 2021 and served upon his lawyers the same day after the conclusion of the hearing on 17th February 2021. Lastly, he deposed that having made the ruling, the arbitrator proceeded with the hearing as contemplated under Section 17 (6), (8) of the Act.

The applicant's advocates submissions

19. Mr. Wafula, the applicant's counsel submitted that the Arbitrator held that the parties in their pleadings confirmed his jurisdiction, and, that he ruled he had jurisdiction to hear and determine the dispute and his decision is final. He cited section 17 (6) of the Act which provides that where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by the ruling may apply to the High Court within 30 days after having received notice of the ruling, which means a decision of an arbitral tribunal that it has jurisdiction to hear a matter is appealable to this court within 30 days. He cited Kamconsult Limited v Telcom Kenya Limited & another which held that section 17 (1) of the Act gives the arbitral tribunal powers to rule whether or not it is vested with jurisdiction to hear a matter before it, and where the tribunal rules that it has jurisdiction, such a decision is appealable to the High Court.

20. Also, he cited George C. Gichuru v Senior Private Kioko & another for the holding that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exists, and, that a court would act in vain, if it were to exercise a jurisdiction it does not have. Additionally, he cited Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel in which the Court of Appeal stated that it would be illegal for the High Court in exercise of its powers under section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court having jurisdiction and therefore sanctify an incompetent suit because no competent suit exists that is capable of being transferred.

21. He submitted that in holding that parties in their pleadings have confirmed the arbitrator's jurisdiction to hear the matter and by assuming jurisdiction where none exists, the arbitral tribunal fell into error requiring the intervention of this court. He referred to the arbitrators finding that the applicant is bound by its own averment admitting the jurisdiction of the Tribunal. He cited Orange Democratic Movement v Yusuf Ali Mohamed & 5 others in which the court held that a party cannot through its pleadings confer jurisdiction to a court when none exists, and that jurisdiction is conferred by law not through pleading and legal draftsman ship. Buttressed by the said decision,

counsel argued that parties cannot even through their own pleadings confer jurisdiction on a court or a tribunal where none exists.

22. Mr. Wafula took issue with the arbitrators finding that the Limitation of Actions Act does not limit the jurisdiction of any court or tribunal, but only limits the period within which parties may legally access courts or arbitral tribunals on certain causes of action and enforce the same. He cited Abdulhamid Ebrahim Ahmed v Municipal Council of Mombasa in which the court held that failure to plead limitation in the defence or raise it in the course of trial does not confer the court with jurisdiction to entertain the claim and that jurisdiction can be raised at any stage of the pleadings and even on appeal. He also cited Director Ltd v Samani which cited Maina Nderitu v Kenya Power and Lighting Co. Ltd & another holding that an action cannot be brought after the expiry of the limitation period nor does a court have the power to entertain an action which is barred by limitation.

23. Regarding the arbitrators holding that there is no pleading or averment in the defence citing the limitation, and the holding that the applicant is bound by his pleadings, counsel argued that the limitation of actions is a plea that impacts on the jurisdiction of the court or any tribunal. He relied on Abdulhamid Ebrahim Ahmed v Municipal Council of Mombasa for the holding that section 4(1) of the Limitation of Actions Act takes away the court's jurisdiction. He submitted that even though jurisdiction was not expressly pleaded, the plea of limitation is a jurisdictional question which could be raised at any point even on appeal. He argued that in failing to appreciate that the issue of limitation was a jurisdictional issue that could be raised at any point in the proceedings, the arbitral tribunal grossly erred.

24. Counsel also argued that the plea of limitation arises from the pleadings filed in the arbitral tribunal. He pointed out that the Respondent pleaded that he learned that the unit had been re-sold long after the contractual completion date and noting that the applicant had not rescinded the sale, the Respondent asked the applicant's advocates in January 2012 if he could compete the sale by paying the balance of the purchase price. (Citing South Nyanza Sugar Company Limited v Diskson Aoro Owuor).

25. Additionally, counsel submitted that the admission in the defence was made on a without prejudice basis and cited Randu Nzau v Mbuni Transport Company Ltd which held that without prejudice admissions are inadmissible. Counsel cited Symon Mubika Maciura v Attorney General & 8 others which held that where the cause of action is based on fraud, the period of limitation does not begin to run until the plaintiff has discovered the fraud. He argued that time began to run after the Respondent learnt that the unit had been sold.

26. The applicant's counsel submitted that actions founded on contracts cannot be the subject of any arbitration if brought after 6 years from the date when the cause of action arose, hence, by dint of section 4 (1) of the Limitation of Actions Act, the arbitral Tribunal lacks jurisdiction to deal with any action founded on a contract if the same is brought after 6 years from the date when the said cause of action arose.

The Respondent's advocates submissions

27. Miss Ouma, the Respondent's counsel submitted Section 17 (1) of the Act in conformity with the doctrine of Kompetenz Kompetenz expressly provides that an Arbitrator can rule on his own jurisdiction. She submitted that the arbitrator herein did in fact rule on his own jurisdiction and

determined that he had jurisdiction to hear the claim. Further, she argued that the applicant admitted the Tribunal's jurisdiction at paragraph 17 of its defence.

28. Miss Ouma urged the court to adopt the Tribunal's holding that the Limitation of Actions Act does not limit the jurisdiction of any court or Tribunal, but only limits the period within which a party may legally access courts or tribunals. Additionally, she submitted that the applicant has failed to demonstrate how exceptions under section 23(3) of the Limitation of Actions Act should be prosecuted once the same is raised in opposition to an objection premised on section 4 (1) (a) of the Limitation of Actions Act. She argued that once the exception under Section 23(3) has been raised, evidence must be tendered to support the argument. She submitted that the applicant's contention that the Arbitrator erred in law and in fact cannot stand. She submitted that the Arbitrators ruling on the twin issues cited in the Preliminary Objection, namely, jurisdiction and the statute of limitation is final.

29. Further, she cited section 23 (3) and 26 of the Limitation of Actions Act which provides for exceptions to an objection under Section 4 (1) (a). She submitted that Section 23 provides an exception where the debt is acknowledged after the limitation period has expired and the effect of the acknowledgment. Further, she argued that Section 24 clarifies what amounts to an acknowledgement of a debt and how it is determined, i.e., it must be in writing and signed by the person making it. She also submitted that the provision explains who can make the acknowledgement of the debt.

30. Miss Ouma submitted that the Respondent in his Replying Affidavit before the Arbitral Tribunal cited the said exceptions in opposition to the Preliminary Objection. She submitted that the objections brought under Section 23 (3) can only be canvassed by adducing evidence to establish the facts. She argued that the arbitral Tribunal correctly held that limitation does not limit the jurisdiction of any court or Tribunal, but only limits the period within which a party may legally access courts or tribunals.

31. Counsel cited section 26 of the Limitation of Actions Act which provides that where the action is premised on fraud, the limitation period does not begin to run until the Plaintiff discovers the fraud or the mistake. She submitted that the time began to run in this case after the Respondent discovered the fraud. She argued that the Respondent is guilty of deliberate concealment of a fact relevant to the Respondent's right of action which automatically postpones the start of the limitation period. To buttress her argument, she placed reliance on RG Securities (No. 2) Limited v Allianz Global Corporate and Speciality CE and 2 Others which held that time does not start to run if there has been concealment, until the concealment is discovered.

32. Miss Ouma submitted that the failure by the applicant to plead limitation in its defence rendered the Preliminary Objection unsustainable. She cited Order 2 Rule 4 of the Civil Procedure Rules, 2010 and National Bank of Kenya v Data Solve Limited & 2 Others in which the court declined a Preliminary Objection premised on section 4(1) (a) of the Limitation of Actions Act on grounds inter alia that it was not pleaded in the defence. Further, she relied on Re Rules of The Supreme Court 1971 [WA] Ex Parte Gates where the Supreme Court of Western Australia following Common Wealth of Australia v Mewett held that a party is only called to answer the defence of limitation when it is made and that the limitation period is irrelevant until the defendant raises the plea, and until that time the question of limitation does not arise for consideration by the Court.

33. Miss Ouma submitted that the applicant did not plead the defence of Limitation in its Statement

of Defence. She urged the court to uphold the arbitrators finding citing Independent Electoral and Boundaries Commission & Ano v Stephen Mutinda Mule & 3 others for the proposition that Parties are bound by their Pleadings and cannot found a case beyond the one pleaded. She submitted that the Respondent cannot validly raise the issue of limitation in its Preliminary Objection because it was not pleaded. She also cited Mukisa Biscuit Manufacture Ltd v West end Distributors Ltd which defined a Preliminary Objection as one consisting of a pure point of Law which has been pleaded or which arises by implication of the Pleadings, and which if argued as a Preliminary Objection may dispose of the suit.

34. M/s Ouma further argued that after the impugned Ruling, the applicant filed an application dated 18th February 2021 seeking leave to amend its defence to introduce an averment denying the jurisdiction of tribunal. She submitted that the Arbitrator rightly held that the applicant is bound by its pleadings and added that only pleaded issues can be canvassed. She urged the court to dismiss the Originating Summons.

Determination

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

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

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

38. The Supreme Court in the above case at paragraph 57 of the judgment 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. Therefore, parties who resort to arbitration, must know with certainty instances when the jurisdiction of the courts may be invoked. Under the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator, recognition and enforcement of arbitral awards, and other specified grounds such as where the arbitral tribunal rules as a preliminary question that it has jurisdiction.

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

40. 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. An arbitrator's jurisdiction derives from the parties' agreement. For an arbitrator to have jurisdiction, all the following must apply: - (i) There must be a binding agreement to arbitrate. (ii) The arbitrator must have been validly appointed. (iii) There must be a dispute that the parties had agreed to arbitrate.

42. Jurisdiction can be challenged by attacking the agreement's validity or on the tribunal's jurisdiction over the subject matters, among other challenges. Section 17 of the Act provides for the doctrine of kompetenz-kompetenz, a jurisprudential doctrine whereby a legal body, such as a court or arbitral tribunal, may have competence, or jurisdiction, to rule as to the extent of its own competence on an issue before it. The doctrine of kompetenz-kompetenz is enshrined in the UNCITRAL Model Law on International Commercial Arbitration and Arbitration Rules. Article 16(1) of the Model Law and article 23(1) of the Arbitration Rules both dictate that "the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."
43. The plea for lack of jurisdiction should be raised before submitting the statement of defence. Where the issue is that the tribunal has exceeded the scope of its authority, the plea must be raised as soon as the matter alleged to be beyond scope is raised during the proceedings. The tribunal decides the matter either as a preliminary question or in an arbitration award on the merits. Any party aggrieved by the ruling can apply to the High Court within 30 days to decide the matter. The High Court's decision is final and not capable of appeal.

44. Section 17 is a wide provision conferring on the Arbitral Tribunal the power to rule on all jurisdictional issues pertaining to its own competence to adjudicate on the matter. However, for a better understanding of this provision, it is important to know what falls within the ambit of the Arbitral Tribunal’s jurisdiction. It is important to note that there is no jurisdiction given to the Arbitral tribunal as a matter of right or inherence or by the statute. Rather, the jurisdiction of the Arbitral Tribunal is derived through the Arbitration Clause or Arbitration Agreement between the parties. The jurisdiction of an Arbitral Tribunal is, thus, determined in accordance with the Arbitration Agreement between the parties and subject to the supplementary provisions of the Arbitration Act.

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

46. The word "including" in the above provision is indicative of the fact that the provision is inclusive in nature. Some of the factors considered to be within the jurisdiction of an Arbitral Tribunal are the existence or the validity of an Arbitration Agreement can be determined by the Arbitral Tribunal as per Section 17. The existence and validity of the Arbitration Agreement is left to be determined by the Arbitral Tribunal, amongst other jurisdictional issues. If the subject matter of the dispute falls within the category of a non-arbitrable dispute, the Arbitral Tribunal has no jurisdiction to adjudicate the dispute and an objection can be raised under Section 17 stating that the subject matter of the dispute is beyond the jurisdiction of the Arbitral tribunal.

47. The Arbitral Tribunal is a creature of the Arbitration Agreement between the parties. Therefore, the scope of the Arbitral Tribunal is determined in accordance with what is stated in the Arbitration Agreement. If the reference to Arbitration is on an issue that is not mentioned in the Arbitration agreement or falls beyond the bracket of disputes the parties have agreed to refer to Arbitration, an objection can be raised stating that the Arbitral Tribunal does not have jurisdiction to decide on the issue since it is beyond the scope of its authority.

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

49. Back at home, it has been held that the Limitation of Actions Act applies to arbitrations with the same force it applies to litigation and that the issue of limitation of actions of the arbitration and the contractual limitation period usually arises as a preliminary point. In Barlany Car Hire Services Limited v Corporate Insurance Limited the court agreed with the defendant that the clause imposing the contractual deadline was a condition precedent to a valid claim as was held in H. Ford & Co. Limited v Compagnie Furness (France) where a clause to similar effect was upheld. The court quoted with approval the following:

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

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

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

51. It is important to mention that the limitation upheld by the court in the above decision was provided in the arbitration agreement, hence, the holding that parties may in an arbitration clause provide a shorter period than provided under the Limitation of Actions Act. This distinction is useful because in the instant case, the arbitration clause did not provide for a limitation period.

52. This leads me to the key question of how and when to object. The answer is that an objection to the jurisdiction of the Arbitral Tribunal is to be raised in the form of a plea to be presented before the Arbitral Tribunal. The plea must substantiate the brief facts and the grounds on which such an objection is being raised in a clear and precise manner. The time frame within which it should be raised before the Arbitral Tribunal is expressly provided under section 17 (2) of the Act which provides that a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.

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

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

55. In S.N. Malhotra & Sons vs. Airport Authority of India & Ors., the Delhi High Court dissected the anatomy of Section 4 (the equivalent of our section 5) and stated that the said provision prescribes 4 pre-conditions to constitute a deemed waiver of the right to object. Applying those postulates to section 16 of the Indian legislation governing Arbitration, (the equivalent of our section 17), the Delhi High Court held that there is deemed waiver of the right to object to the jurisdiction of the Arbitral Tribunal, if:- the Arbitral Tribunal is lacking or exceeding jurisdiction; either of the parties to the Arbitration Agreement has knowledge of such want or excess of jurisdiction; the party continues with the Arbitration proceedings without raising an objection to jurisdiction; the party

raises an objection, with delay that is not justified; or after the submission of Statement of Defence, and non-participation in the proceedings.

56. Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Courts take cognizance of the fact that persons do not as a rule lightly abandon their rights. Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the waiver be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive. The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it.

57. None of the parties addressed the question of waiver. No argument was presented before me on the question whether the applicant is simply caught up by the provisions of sections 5. However, section 17(3) of the Act was cited by the Respondent in its opposition to the application. In any event, in its statement of defence dated 21st August 2020, the applicant admitted the jurisdiction of the tribunal at paragraph 17. At paragraph (3) it pleaded that it reserved the right to apply for the striking out the claim at any time of the proceedings. The applicant's objection was not raised as required by section 17 (2) which provides: -

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

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

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

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

61. The above provision must be construed inconformity that the Act which permits court intervention only in circumstances permitted by the Act. I have herein above alluded to circumstances under which a plea on jurisdiction may be admitted late. I have also addressed the question of waiver as provided in section 5 of the Act. It is my view that the applicant did not raise its plea on jurisdiction not later that at the time of filing its defense as provided by the above section.

62. Despite my above finding, I will address the objection raised by the applicant in support of its Preliminary Objection. The applicant's argument as I understood it is that the Respondent's claim was time barred. I must hasten to point out that this argument is not anchored on the Arbitration Agreement. The Sale agreement provided for rescission of the contract. There is nothing on record to show that the contract was ever rescinded to trigger running of limitation period to bar an arbitration claim under the agreement.

63. The applicant's objection was premised on section 4(1) (a) of the Limitation of Actions Act which provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. Whereas this is a valid ground of law to defeat the claim, the argument as correctly pointed out by Miss Ouma ignores the clear provisions of section 23 (3) of the Limitation of Actions Act which provides: -

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

64. The import of the above provision is that time begins to run from the date a debt is acknowledged or payment is made. The question whether or not the applicant acknowledged the debt as alleged by the Respondent is a question of fact which can only be resolved by way of evidence before the arbitrator. It cannot be determined summarily by way of a Preliminary Objection.

65. The Respondent alleged fraud claiming that he only learnt that the unit had been re-sold before the agreement was rescinded as provided under the agreement. The Respondent argues that he learnt about the re-sale when he went to inquire whether he could be allowed to proceed with the transaction. He provided the date he learnt the unit had been re-sold which was not contested. Section 26 of the Limitation of Actions Act provides for extension of limitation period in case of fraud or mistake. It reads: -
Where, in the case of an action for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
(b) the right of action is concealed by the fraud of any such person as aforesaid; or (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

66. Whether or not there was fraud is weighty issue of fact which can only be resolved by way of evidence. In fact, the law is that allegations of fraud must be strictly proved. Such an issue cannot be determined as a ground for Preliminary Objection.

67. Considering the nature of the Preliminary Objection and the factual issues discussed above, serious doubts do arise as to whether the Preliminary Objection was premised on pure points of law. A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. If the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law. As Law JA in Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd stated: -
"…so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."

68. In the words of Sir Charles Newbold P in the above decision at page 701, B: -

"*…A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop."(Emphasis added)*

69. Useful guidance can be obtained from Omondi v National Bank of Kenya Ltd & Others which held that: -

"The objection as to the legal competence of the Plaintiffs to sue…and the plea of res judicata are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections…In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts…" *(Emphasis added)*

70. Thus, a preliminary objection may only be raised on a "pure question of law." To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record. In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.

71. In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations. The issues raised above are issues of fact which require evidence to be proved. They are not pure points of law. They do not qualify to fall within the definition of a Preliminary Objection. As Law JA said in Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd (supra), a preliminary objection consists of a pure point of law which has been pleaded, or which arises by

clear implication out of pleadings.

72. The issue of limitation was not pleaded in the defense nor does arises by clear implication out of the pleadings. I may profitably recall the words of an Australian Court on the principles of good pleadings thus: -

"*In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything. … Elegance is the simplicity found on the far side of complexity.*
While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.
… Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.

Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination." (Emphasis supplied)

73. The Court of Appeal in Dakianga Distributors (K) Ltd v Kenya Seed Company Limited rendered itself as follows: -

"A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-
"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."

74. The general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination. It is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case. I note that subsequent to the impugned ruling the applicant filed an application seeking to

amend its defense which adds credence to the fact that the issue of jurisdiction was not pleaded in its initial defense.

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

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

77. Limitation of actions refers to the period of time in which a person has to file a case in court or a tribunal. The limitation defines time periods following the accrual of the right of action in which a litigant must assert his claim. The terms jurisdiction and limitation are totally different. Limitation only limits a party's right to institute a claim which is statute barred. Absence of jurisdiction connotes that the court or tribunal has no power to entertain the case. Flowing from the above discussion and the distinctions highlighted above between jurisdiction and limitation of actions, the conclusion becomes inevitable that the applicant's plea on jurisdiction and limitation was unsustainable. The effect is that the assault on the Arbitrator's decision on the Preliminary Objection cannot be sustained on the grounds presented in this case.

78. The applicant paused the question whether an Arbitrator's finding that he has jurisdiction to hear a dispute is final. The answer is in section 17 (6) of the Act which provides that 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.

79. The other question posed by the applicant is whether parties can confer jurisdiction to an arbitrator where none exists. The answer(s) is simple. One, it has not been demonstrated that the Arbitrator had no jurisdiction or exceeded his jurisdiction. Two, true to the principle of party autonomy, the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. Three, the parties submitted to the arbitral process voluntarily. Four, no objection was raised at the earliest opportunity including at the time of filing the defense. Five, the attempt to raise jurisdictional hurdle belatedly offends section 17 (3) of the Act and the waiver hurdle created by section 5.

80. Lastly, earlier in this determination, I addressed with sufficient clarity the other questions posed by the applicant, namely, whether the arbitral tribunal is bound by the general pleading that "Jurisdiction of this tribunal is admitted" even where none exists; whether the Limitation of Actions Act limits jurisdiction of any court or tribunal; whether failure to plead limitation of actions in the main pleadings renders a preliminary objection thereon unsustainable; whether the plea of limitation

arises from the pleadings filed in the arbitral proceedings between the parties herein; and lastly, whether the applicant's Preliminary Objection dated 14th January 2021 is well merited. It will add no value to rehash the same here.

81. In view of my analysis of the law, authorities, discussion and conclusions arrived at herein above, it is my finding that the applicant has not established any grounds for the court to interfere with the Arbitrators ruling dated 2nd February 2021 rendered in Arbitration proceedings between Shuaib Wali Mohammed and Northwood Development Company Limited dismissing the applicant's Preliminary Objection dated 14th January 2021.

82. The upshot is that the applicant's Originating Summons dated 18th February 2021 is unmerited. Accordingly, I dismiss the said application with no orders as to costs.

Orders accordingly

Signed and Dated at Nairobi this 10th day of March 2021

John M. Mativo
Judge

SIGNED BY: HON. JUSTICE J. M. MATIVO

THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT
HIGH COURT COMMERCIAL AND TAX
DATE: 2021-03-10 04:03:35+03