REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga (CJ& P), Mwilu (DCJ & VP), Ibrahim, Wanjala and Lenaola, SCJJ)

PETITION OF APPEAL NO. 7 OF 2016

–BETWEEN–

DHANJAL INVESTMENTS LIMITED.....APPELLANT

–AND–

KENINDIA ASSURANCE COMPANY LIMITED.....RESPONDENT

(*Being an Appeal from the Judgment and decision of the Court of Appeal sitting in Malindi* ***(Githinji, Makhandia & Ouko JJA)*** *delivered on the 6th day of December 2013 in Civil Appeal No. 117 of 2010****)***

JUDGMENT OF THE COURT

Lenaola, SCJ with whom *Maraga, CJ & P, Mwilu, DCJ & VP, Ibrahim and Wanjala SCJJ* agree:

A. INTRODUCTION

[1] This is an appeal brought under the provisions of Article 163(4)(b) of the Constitution. It was filed following a review of certification by this Court that the appeal involves matters of general public importance *vide* its ruling delivered on 10th May 2016. The Appellant's initial application for certification of the appeal as involving matters of general public importance was declined by the Court of Appeal in its ruling (Okwengu, Makhandia & Sichale, JJA) dated 22nd May 2014.

[2] The appeal is against the judgment by the Court of Appeal at Malindi, delivered on the 6th December 2013 by Githinji, Makhandia & Ouko JJA in Civil Appeal No. 117 of 2010 wherein the learned judges of appeal overturned the High Court decision that dismissed the Respondent's application to set aside an arbitral award made against the Respondent.

B. SUMMARY OF THE FACTS

[3] The Appellant was insured by the Respondent under a Public Liability Insurance Policy No. 107/052/11/00648/2000/06 dated 24th March 2000. The policy covered the period between 11th September 1999 and 30th June 2000. On 4th March 2000, whilst the policy was in force, one of the Appellant's properties, Travelers Mwaluganje Elephant Camp, fell victim to a robbery and tourists who were guests at the camp were attacked, assaulted and deprived of their property and money. The Appellant notified the Respondent of the said incident.

[4] As a consequence of the said attack, 9 of the tourists instituted proceedings on 25th April 2006 in the United Kingdom, through their tour operator, for recovery of damages against the Appellant. Upon service of the Statement of Claim filed in respect of the proceedings in the United Kingdom, the Appellant, through its advocates, notified the Respondent, through its letters dated 28th August 2006 and 30th August 2006, of the institution of suit and requesting the Respondent to take up defence of the suit and also to indemnify the Appellant under the policy for any amounts as may be found to be payable by it.

[5] The Respondent did not respond to the said letters prompting the Appellant to lodge a formal complaint by a letter dated 13th July 2007 to the Commissioner of Insurance. In its letter dated 31st July 2007, the Respondent indicated that the policy had a jurisdiction clause and under the terms of the policy, the Respondent was unable to participate in any legal proceedings instituted out of Kenya.

[6] The Appellant was subsequently found liable and required to satisfy an aggregate sum of £379,317.37 and Shs.450,000 in liability and costs, which amounts the Appellant sought to be indemnified by the Respondent but in vain.

[7] Under clause 10 of the policy, the Respondent's right to refer to arbitration any dispute arising as to the Respondent's liability for any insurance claim or the amount of its liability under the policy existed without a similar right extended to the Appellant. Clause 11 on the other hand provided a limitation period of 12 months from the disclaimer of liability if such disclaimer had not been referred to arbitration such that the claim would be deemed to have been abandoned and thereafter not recoverable.

[8] The Appellant construed the Respondent's letter of 31st July 2007 as a disclaimer of liability and according to it, it became apparent that the Respondent was not ready to initiate any arbitral proceedings under clause 10 of the policy. In order to avoid being caught up by the limitation period under clause 11 of the policy, therefore the Respondent resorted to Section 11(2) of the Arbitration Act 1995 and appointed an arbitrator on 29th July 2008, three days to the limitation period there being no procedure under clause 11 of the policy for the Appellant to otherwise appoint an arbitrator.

[9] The arbitrator, Mr. Mulwa Nduya accepted the appointment and convened a preliminary meeting through a letter addressed to both the Appellant and the Respondent to *inter alia* address his appointment as an arbitrator in the matter. The Respondent never took any steps in the arbitration proceedings and with the participation of the Appellant alone, the arbitral proceedings were carried out culminating in an arbitral award published on 8th December 2008.

[10] On 27th February 2009, the Appellant served upon the Respondent a notice under Rule 5 of the Arbitration Rules 1997 and this prompted the

Respondent to institute proceedings before the High Court to set aside the award, a process that ultimately led to the present appeal.

C. PROCEEDINGS BEFORE THE COURTS

(i) (a) at the High Court

[11] The Respondent filed an application before the High Court on 4th March 2009 under section 35(2)(a)(iii)(iv) of the Arbitration Act, 1995 and Rule 4(2) of the Arbitration Rules 1997 and Section 3A of the Civil Procedure Act seeking the following reliefs:

> **a) THAT Arbitral award of Mr. Mulwa Nduya dated 8th December 2008 in the above matter be set aside.**
>
> **b) THAT the arbitral proceedings and the award herein be declared null and void.**

The main ground in support of the application was that the appointment of the arbitrator did not follow the procedure outlined in the policy which condition was obligatory and necessary for any lawful arbitration proceedings. Further, that the appointment of the arbitrator was not in accordance with Section 12(3)(b) of the Arbitration Act 1995. That therefore, the proceedings conducted by the said arbitrator were null and void *ab initio* and the arbitral award legally defective and incapable of being enforced. The application was opposed by the Appellant and both parties appeared to argue their respective cases before the High Court.

[12] By a ruling delivered by the High Court *(Ojwang J, as he then was)* on 16th October 2009, the application was dismissed. The learned Judge found that the only substantive question that arose in the application was whether the Appellant had appointed the arbitrator unilaterally. Relying on Section 4 of the Arbitration

Act, the judge found that the insurance policy contained arbitration clauses which were binding on the parties. In his finding, clause 11 specifically carried a residual opening for reference to arbitration and since the Respondent has the right to refer any dispute to arbitration under clause 10, the residual opening would also be the natural one for the Appellant. The Judge therefore agreed with the Appellant that the notification of the appointment of the arbitrator to the Respondent sufficed and the Respondent's silence over the matter would only serve to create a dispute resolution vacuum in a dispute to the detriment of the Appellant.

(ii) (a) At the Court of Appeal

[13] Aggrieved by the ruling, the Respondent appealed to the court of Appeal and in its judgment dated 6th December 2013, the appellate court set aside the High Court's ruling and the arbitral award. In its finding, the appellate court faulted the High Court Judge in creating a residual opening to the Appellant to appoint an arbitrator contrary to established practice based on the principle of freedom of contract that courts should not re-write terms of a contract for contracting parties. The appellate Judges were therefore of the view that Section 11(2) and 12(2) of the Arbitration Act 1995 were inapplicable and there was no basis for the appointment of the sole arbitrator.

(b) Certification of the appeal to the Supreme Court as a matter of general public importance.

[14] As noted earlier, aggrieved by the Judgment of the Court of Appeal, the Appellant sought a certification of its intended appeal to this Court as one raising matters of general public importance. The application was declined by the Appellate Court vide its ruling delivered on 22nd May 2014. The Court of Appeal in doing so noted that there was nothing special in the Appeal as it would not have a significant or important bearing on the interests of the public generally.

[15] The Respondent thereafter moved to this Court seeking to review the Appellate Court's decision declining the certification. Upon review, the appeal was certified as involving matters of general public importance and of note is that in its application, the Appellant had set out the following questions of law for certification as matters of general public importance:

a) *Is it open to an Insurer, such as the Respondent, who in its public insurance policy, sets out a twelve-month bar to the making of all disputes arising out of the contract to Arbitration, to "ignore" arbitral proceedings that are initiated by its insured, and in the process treat all correspondence to it from the Arbitrator as of no consequence?*

b) *The learned judge in the High Court (Ojwang J, as he then was) held in the Ruling delivered on 16th October 2009, that the conduct of the Respondent insurer undermines and or erodes the purposes for which arbitrations are held, as alternative modes of dispute resolution, and hence, the policy behind the law on arbitration cannot condone such conduct: Do the aforesaid conclusions embody a correct juridical statement of the law, in relation to the attitude and conduct of parties to arbitrations generally?*

c) *Should an insured faced with a clause in an insurance policy such as that which the applicant had to deal with i.e. clause 11 (barring all claims of the Appellant and deeming them as abandoned and irrecoverable unless the respondent of its own free will refers them to arbitration within 12 months from the date of the dispute) be left without a legal remedy, for no fault at all on its part, other than the*

reason that the insurer has ignored all arbitral proceedings initiated by the insured?

d) The Appellant filed in the Court of Appeal the grounds for affirming the decision of the High Court. These grounds were never considered or dismissed. They are still alive. What is the impact of this state of affairs on the proper administration of justice?

e) The Court of Appeal, in its determination of the Appeal before it, was persuaded by the provisions of section 12 of the Arbitration Act, as amended in 2010, by Act No.11 of 2009 published in Legal Notice No.48 of the 8th April 2010, and not the initial section 12 as originally enacted in the 1995 Act.

f) In the proper administration of justice, was it open to the court to be persuaded by arguments based on an enactment that was not in force at the time when the cause of action arose?

g) Is this the proper case for this Court to invoke its powers conferred by Section 27 of the Supreme Court Act 2011 and direct the High Court to proceed to enforce the Appellant's award filed in the High Court on the 13th January 2009?

(iii) The case at the Supreme Court

a) The Appellant's

[16] The Appellant filed its petition of appeal and record on 6th June 2015. The petition sets out the above questions as falling for determination and the reliefs sought by the Appellant relate to the setting aside of the decision of the Court of

Appeal and their substituting thereof with orders with the effect of enforcing the arbitral award made in favour of the Appellant. The appeal is supported by an affidavit by Fredrick Wanyoike Kiuru, the Appellant's General Manager sworn on 2nd June 2016. The appeal further raises 10 grounds of appeal summarized as follows:

1. *The Court of Appeal erred in completely failing to consider and evaluate the specific grounds affirming the decision of the High Court filed by the Appellant under Rule 94(1) of the Court of Appeal Rules leading the said Court to reach an erroneous decision of setting aside the ruling delivered by the High Court;*

2. *It was wholly wrong, both as a matter of arbitration procedure and as a matter of law for the Respondent to have consciously chosen to ignore arbitration proceedings while the Respondent itself was unwilling to refer the emerging dispute to arbitration under clause 10 of the policy and that the conduct of the Respondent was unlawful and poignant in the wake of the limitation imposed by clause 11 of the policy.*

3. *Section 12(2) and (4) of the Arbitration Act apply only in circumstances where parties to an Arbitration Agreement have set out a procedure of appointing an arbitrator. It was therefore procedurally and legally wrong for the Court of Appeal to have resorted to the application of that section in the matter before it when the policy relied upon had spelt out no procedure to be used for a reference by the Appellant.*

4. *The Court of Appeal erred as a matter of law in holding that the arbitrator appointed by the Appellant was wrongly appointed,*

without properly evaluating the correct law applicable in the circumstances obtaining in this case as specifically spelt out in clause 11 of the policy, when read with Section 11(1) and (2) of the Arbitration Act 1995.

The Appellant has set out the arguments in the grounds of the Petition of Appeal. The Appellant further filed written submissions on 20th July 2016. In the submissions, the Appellant reiterates its arguments and facts as presented to the Court of Appeal which we have summarized herebelow.

[17] In that regard, the Appellant takes issue with the Respondent's position that the latter's decision to ignore the arbitral proceedings bears little significance. In the circumstances, the Appellant argues that the Respondent should not be availed the option to challenge the arbitral proceedings contrary to the mandatory provisions of Section 14(2) of the Arbitration Act. The Appellant further asserts that if the Respondent expected to question the jurisdiction of the arbitral process, it should have invoked the provisions of Section 17 of the Arbitration Act rather than ignore the process. The Appellant in that context referred to the Court of Appeal decision in ***East African Power Management Limited v Westmont Power Kenya Limited*** (Civil Appeal No.55 of 2006) on the same point. That in failing to take such measures, the Respondent waived its right to challenge the arbitration and set aside the award. The Appellant further relies on the Court of Appeal decision in ***Hinga v Gathara*** (2010) 1 EA 63 to argue that a challenge under Sections 14 and 17 of the Arbitration Act could only be made prior to the publication of the award as was also the finding in ***Tradax International S.A. v TAS The Enegli (1981) 3* All ER 344.**

[18] The Appellant in addition agrees with the trial Judge's finding that the Respondent's conduct undermined the purposes for which arbitrations are held

as an alternative mode of dispute resolution and that the policy behind the law on arbitration cannot condone such conduct. The Appellant furthermore argues that clause 11 of the policy imposed a time limitation without the attendant mechanism for the Appellant to follow in making a reference to arbitration to avoid the limitation bar and setting aside the arbitration proceedings will amount to rewarding the Respondent at the expense of the Appellant.

[19] On clauses 10 and 11 of the policy and Sections 11 and 12 of the Arbitration Act, the Appellant admits that clause 10 makes provision for reference to arbitration only if such recourse is to be taken by the Respondent and that the clause is not designed to be used by the Appellant if read strictly. However, the Appellant argues that clauses 10 and 11 read together placed a dilemma to the Appellant and to avoid the dilemma, the Appellant resorted to Section 11 of the Arbitration Act 1995 to appoint an arbitrator as the limitation period set out in clause 11 of the policy document is recognized by section 34(2) of the Limitation of Actions Act. Similarly, that Section 22 of the Arbitration Act 1995 provides for commencement of arbitration proceedings on the date on which a request for the dispute to be referred to arbitration is received by the Respondent, in this case 29th July 2008.

[20] On Section 12 of the Arbitration Act, 1995 the Appellant argues that the same was inapplicable, the Appellant having resorted to Section 11(2) of the Arbitration Act 1995, as any references to the procedure for appointment or procedure agreed upon only applied to the Respondent who had a right to initiate arbitration under the policy. The Appellant further pointed out that Section 12(2) & (4) of the Arbitration Act was amended by Act No.11 of 2009 the hallmark of which was the removal of the procedural requirements under sub-sections (3) to (5) and putting in place a totally new method of appointing an arbitrator in case of a disagreement between the parties. The Appellant thus faults the appellate court for embracing the reasoning advanced by the Respondent based on the new

amendment to the law, two years after the arbitration in question thus and inevitably reaching an erroneous conclusion.

[21] As for the grounds of affirming the decision, the Appellant submits that it filed a notice under Rule 94(1) of the Court of Appeal Rules and that the same were overlooked by the appellate court in making its determination. Drawing an analogy from explanation 5 of Section 7 of the Civil Procedure Act which deems any relief prayed for and not granted to have been refused, the Appellant submits that the said provision does not regulate procedures of the Court of Appeal. That therefore the Court of Appeal having not determined the grounds, the same are available for determination by this Court.

[22] The Appellant in conclusion invites this Court to consider the grounds in line with the established legal maxim of *audi alterem partem* under the right to be heard as a basic principle of the rules of natural justice. The appellant in that regard refers to the Supreme Court of Uganda decision in ***Habre International Company Ltd v Kassam & Others (1999)* 1EA 125** where the Court made a specific determination on the subject grounds affirming the decision of the Court of Appeal. That by determining the grounds, the Appellant submits, this Court will have remedied the error of law committed by the Court below.

b) The Respondent's

[23] On the factual background, the Respondent argues that the public liability policy in question excluded liability arising under any contract of indemnity and it had a jurisdiction clause for any disputes to be resolved by arbitration or by court having jurisdiction over the place where the policy had been issued. That the claim, being based on indemnity emanating from proceedings against the Appellant in the United Kingdom, was excluded under the policy. The Respondent further argues that its letter of 31st July 2007 cannot be regarded as a

disclaimer of liability or acceptance of liability to indemnify the Respondent as the letter simply did not speak to the issue.

[24] The Respondent furthermore faults the appointment of Mr. Nduya as the sole arbitrator and that there were glaring oddities including the manner of appointment as per the letter of 29th July 2008 from the Appellant's advocates to Mr. Nduya. Among the oddities highlighted by the Respondent is the unilateral appointment of the arbitrator, lack of a statement as to when and how the Appellant had disclaimed liability, failure to identify the applicable clause conferring the right to appoint an arbitrator on the Appellant and non-reliance on Section 11 of the Arbitration Act.

[25] The Respondent also admits that it did not participate in the arbitration process and regarding the award, it is the Respondent's position that rather tellingly, the arbitrator felt compelled to consider the respondent's letter of 31st July 2007 as a letter disclaiming liability and it takes issue with the arbitrator's failure to isolate as an issue his appointment as the sole arbitrator by the Appellant. That these circumstances compelled the Respondent to make the application to the High Court to set aside the arbitral award, the genesis of the proceedings before us.

[26] The Respondent reiterates in the above context the sanctity of contract and argues that it is not for the courts to rewrite the same. It relies on ***National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001]*** **KLR 112 at 118** for that proposition. It further contends that in addressing the legal effect of its inactivity in the arbitration proceedings, which should be of no legal consequence, this Court must first address the correctness of the arbitrator's appointment as the same was unlawful and the attendant proceedings are necessarily rendered a nullity.

[27] The Respondent also argues that neither the High Court nor the Court of Appeal found either clause 10 or 11 of the policy to be ambiguous and that it was not in dispute that the arbitrator's appointment was not made under clause 10 of the policy document. The Respondent further faults the Appellant for raising fresh arguments at this stage and also faults the trial judge for falling into error by accepting the Appellant's unilateral appointment of an arbitrator without reference to statutory provisions or the policy document.

[28] The Respondent [in stating so however admits] that Section 12 of the Arbitration Act is applicable to the present dispute and concedes that it mistakenly referred to the current Act as amended but this anomaly was corrected in argument before the appellate court whose decision was made on the basis of the correct provision prior to the amendment.

[29] The Respondent further contends that even if clause 11 of the policy creates a residual opening for the Appellant to refer the matter to arbitration, the appointment of Mr. Nduya is still unlawful as in that case, there would be no procedure as to the number of arbitrators and that under Section 11(2), the number of arbitrators would be one and by Section 12(a), the parties can agree on the arbitrator to be appointed, which did not happen in this case. That the Respondent did not agree to the appointment of Mr. Nduya as was in fact presented to the Respondent as a *fait accompli* and that such a situation would render the arbitral proceedings and the award as void *ab initio* as was determined by the Supreme Court of India in ***Dharma Prathishthanam v M/s Madhok Construction Pvt. Ltd Civil Appeal 7140 of 2004***.

[30] In the Respondent's view and based on the above decision, there was good reason for it to decline participation in the illegal proceedings before Mr. Nduya lest it was precluded from challenging his appointment. That in case the Respondent was recalcitrant and impended the appointment of the arbitrator, the

Respondent in the alternative argues that flowing from the above Indian decision the Appellant had recourse to the High Court to appoint an arbitrator.

[31] The Respondent furthermore and in responding to the authorities cited and relied upon by the Appellant and specifically on ***Hinga v Gatharai,* (supra)** argues that the case did not address the impropriety in the unilateral appointment of an arbitrator but rather the challenge based on failure to adhere to several statutory processes. That the appellate court in the present instance rightly held that the matters in issue did not come within the purview of Section 35 of the Arbitration Act on setting aside an award but should have been ventilated under Sections 14 and 17 of the said Act on challenge procedure and competence of arbitral tribunal to rule on its jurisdiction respectively.

[32] In response to the reliance on ***Tradax International S.A. case* (supra)**, by the Appellant, the Respondent submit that the said case had nothing to do with the propriety or otherwise of the unilateral appointment of an arbitrator or whether failure to participate in arbitral proceedings somewhat validates an appointment. Moreover, that the 1950 English Arbitration Act is not in *pari materia* with the Arbitration Act 1995 and most countries had moved away from the Model law that inspired the previous Arbitration Act Cap.49 Laws of Kenya.

[33] The respondent also takes issue with a procedural objection raised by the Appellant to the effect that the setting aside application is precluded by Sections 14 and 17 of the Arbitration Act and further argues that the objection presently raised was forfeited and cannot be raised at present as it was neither raised in the courts below nor does it form part of the application for certification of the appeal to this court.

[34] As for the notice of grounds for affirming the decision, the Respondent submits that the Appellant accepts that those grounds were all dependent upon

the validity of Mr. Nduya's appointment and even if the court were to consider the grounds, the same should be dismissed for reasons already outlined. In conclusion, the Respondent argues that upholding the Appellant's position and restoration of the High Court's decision upholding the impugned arbitral award would be dystopian and an action wholly undermining the arbitral process. That an arbitration process is party led with state institutions playing a supporting role, with emphasis on consent at the heart of the arbitral process.

D. ANALYSIS AND DETERMINATION

[35] The appeal having been certified as one involving matters of general public importance, the questions for this Courts' determination have been set out as earlier mentioned. Before proceeding further, we wish to point out that at the time the matter was certified as one involving general public importance, the Court did not have the advantage of the arguments to be made in the substantive appeal. The Appellant is at all times however expected to keep sight of the public importance aspect. From the perusal of the filed appeal and the submissions made in support of it, the Appellant did not, in our view, properly articulate its substantive case relating to the policy document and arbitration process in a manner that transcends their specific circumstances to create a public aspect to the dispute.

[36] For instance, whereas the general public issue for determination relates to the right of the insurance companies in public insurance policies to set a 12-month limitation period for any claims arising and not made and the remedy available to the insured as a result of that limitation bar if the insurance companies chose to ignore arbitration proceedings (clause 11 of the policy), the Appellant restricted itself to the specific policy it has with the Respondent on that issue. We expected the Appellant to not only demonstrate its case but also demonstrate the allegedly unlawful market practice thus transcending its

individual predicament. The Appellant, we however note, alluded to its previous policy with Fidelity Insurance and we were keen to know whether that policy contained similar provisions but nothing was said of it. In the same breadth, we at the very least expected to be informed how rampantly the allegedly unlawful policy has been issued to members of the public to demand or require this court's intervention.

[37] In stating the above, it is not lost to us that the Appellant pleaded that the policy did not commence through the completion of a proposal form as is the ordinary course in insurance contracts but rather by an assessment of the Appellant's risk from which a policy was devised. It is therefore reasonable to infer that the policy, subject of the present litigation, is an exception and only applicable to the Appellant and not necessarily the standard policy available to the public. We are however persuaded that the above limitations notwithstanding, the question of the place of arbitration in our legal system and whether it was properly invoked in the present dispute is a matter of public importance. The grounds of affirmation are also of a public nature thus requiring our attention and warrants consideration as being a matter of general public importance.

[38] In the words of Lord Tucker of the House of Lords in **Attorney-General for Northern Ireland v. Gallagher [1963]AC 349** "*once the Court from which the appeal is brought has certified that a point of law of general importance is involved in the decision and leave to appeal has been given, either by this Court, or this House, the jurisdiction of this House to hear the appeal is established, and there is nothing in the Administration of Justice Act, 1960, in any way limiting its jurisdiction. It will always be a matter for the exercise of its discretion whether to allow a point in no way connected with the certified point of law to be argued on the appeal, and it is not to be assumed from the decision in this case that the appellant can as a matter of right raise any such point.*"

Having said so, it is our view, the matters raised in the appeal can be determined under the following broad categories:

i) The place of the Public Liability Insurance policy document and its dispute resolution mechanism.
ii) The place of the Arbitration proceedings.
iii) The place of the grounds of affirmation.
iv) Reliefs, if any.

Upon our determination of the above issues, we shall then have answered the questions as framed in the certification proceedings and properly within our jurisdiction so to do.

a) The Public Liability Insurance

[39] It is common ground that the disputed policy was in place as at the time the robbery event occurred on the night of 3rd and 4th May 2000. It is also not in dispute that the policy was issued on 24th May 2000, about 20 days after the occurrence of the incident subject of the claim, The Appellant did not therefore have time to consider the conditions before the incident and was thus inclined to work within it as received.

[40] Paragraph 23 of the affidavit by the Appellant's representative filed in reply to the Respondent's application to set aside the arbitral award before the High Court is categorical that the Appellant invoked the provisions of clause 11 of the policy to initiate arbitration. It is this provision that the High Court found to contain a residual right granted to the Appellant to refer any dispute between the parties to arbitration as a logical consequence of the Respondent's rights to arbitration under clause 10 of the policy. To put the matter in perspective, clause 10 provides:

> ***" If any dispute shall arise as to whether [the respondent] is liable under this policy or as to amount of its liability, the matter shall "if required by the company" be referred to the decision of two neutral persons as Arbitrators one of whom shall be named by each party or an umpire who shall be appointed by the said Arbitrators before entering on the reference and in case (the appellant) or his legal personal representatives shall neglect or refuse for the space of two calendar months after request in writing from (the respondent) to name an Arbitrator the Arbitrator of the (Respondent) may proceed alone and no action or proceedings shall be brought or prosecuted on this policy until the award of the arbitrators or umpire has been first obtained"***

Clause 11 then provides:

> ***"If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve (12) calendar months from the date such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purpose be deemed to have been abandoned and shall not thereafter be recoverable hereunder."***

A concise reading of the two clauses would lead to the inevitable conclusions that clause 10 only availed the Respondent the sole right to initiate the arbitration proceedings and this position was buttressed by both the High Court and the Court of Appeal. We would thus without hesitation agree with that finding by the two Courts.

[41] On clause 11, the High Court found that the said clause had a residual opening available to the Appellant while the Court of Appeal found that a plain reading of the clause was to the effect that the claim would lapse if the dispute was not referred to arbitration within 12 months after disclaimer by the Respondent. In considering the two competing positions, we are mindful of the applicability of the 12-month limitation period and that the Respondent had to refer the matter to arbitration within that period only.

[42] In order to rely on clause 11, there are two necessary considerations for the limitation period to apply. First, there has to be a disclaimer of liability by the Respondent and secondly, such disclaimer shall not have been referred to arbitration under the provisions therein contained. Applying that fact to the Appellant's circumstances, there is disagreement as to whether the letter dated 31st July 2007 by the Respondent amounted to a disclaimer. Both the Arbitrator and the High Court in agreeing with the Appellant construed the letter to amount to a disclaimer. The Court of Appeal, rightly noted that the disclaimer was subject to how the letter of 31st July 2007 was construed. In the end, the Court of Appeal inferred the disclaimer from the Respondent's conduct and not any unequivocal disclaimer in clear terms.

[43] The question then becomes whether it is open for this Court to make any further inquiry as to whether there was any other construction of that letter of 31st July 2007. In answering that question, we note that the Respondent has argued that the issue of disclaimer had never arisen in correspondence between the parties as the Respondent was merely asked to take up defence of a claim against the Appellant in the United Kingdom and the Respondent, invoking the jurisdiction clause, declined to participate in legal proceedings out of Kenya. That may have well settled the matter as neither party took any further steps for almost one year until the 29th July 2008, three days to the expiry of the limitation

period under the policy and when the Appellant appointed an arbitrator, without notice to the Respondent.

[44] The Respondent has stated that it did not see the need to escalate the matter further and that it was incumbent upon the Appellant, as the aggrieved party, to progress the matter further in the intervening period to crystallize the dispute and set in motion any dispute resolution mechanism in good time. Be that as it may, Counsel for the Respondent reluctantly conceded that the Respondent had in fact no plans to indemnify the Appellant in the claim arising from the proceedings instituted in the United Kingdom.

[45] With the above facts in mind and turning to the second and more important issue, that the disclaimer ought to have been referred to arbitration under the provisions therein contained, we at the outset note that from a plain reading of clause 11, any reference to arbitration must arise from the Respondent's disclaimer. There is no other condition in the policy document that makes reference to arbitration apart from clause 10, which as noted above, only grants the Respondent the right to refer any dispute to arbitration. Further, refusal to take up the defence of proceedings instituted in the United Kingdom does not by itself amount to a disclaimer under the policy as the Appellant had not in that letter made any specific claim under the policy. It therefore follows that had the Respondent disclaimed liability, then there would necessarily have arisen a dispute as to whether the respondent was liable or not within the meaning of clause 10 of the policy which did not avail the Appellant the right to arbitration.

[46] From the foregoing, did the Appellant find itself in a dilemma and did it have no other lawful and contractual avenue to address its difficulty? The Appellant submits that it did, while the Respondent submits that there was no lacuna in the policy. The Appellant inferred arbitration under the policy

document but was that correct? There is no doubt that the parties' relations are governed by the policy document. Without rewriting the policy, we have considered all the conditions in it and in particular clause 12 which in our views is indicative. Clause 12 relates to limitation of jurisdiction and it provides:

> "***Any dispute of claim arising out of or under or in connection with this policy, <u>if referable</u> to Arbitration will be referred to Arbitration only at the place of issue of the policy and <u>if triable by a court of law</u> shall be tried and determined by the court having jurisdiction over the place where the policy has been issued and according to the laws (including procedural and limitation) laws of the country in which the policy is issued . . .***" (Emphasis ours)

Again, a plain reading of clause 12 reveals that there were two mechanisms available – arbitration and litigation before a Court with competent jurisdiction. Having noted that the only reference to arbitration in the document is found in clause 10 and is available only to the Respondent, it is evident that all other disputes including a dispute as to the liability of the Respondent under the policy would end in litigation before a competent Court. The Respondent advanced this position while the Appellant insists that arbitration should be available to it in the same manner as it would be to the Respondent and on this basis proceeded with the unilateral appointment of the arbitrator, despite the policy document being very clear and express as to the issue.

[47] The Appellant did not address us on why it never considered the Court litigation option while it was an open and available option to it. Reference to arbitration appears to have been as an exception and only applicable in a very specific instance of disclaimer. We therefore find that the Appellant is at fault for its conduct in the circumstances.

[48] In any event, if the Appellant sought to enjoy similar rights as those of the Respondent as it pertains to reference of any dispute to arbitration, then it would have proceeded under the provisions of clause 10 which also set out the process to be adopted in naming its arbitrator whilst inviting the Respondent to do the same. The Appellant's belated attempt to argue before us that it invoked clause 10 to proceed with arbitration is unacceptable in three respects. First, it seeks to have us consider the issue at the first instance the same not having followed the requisite court hierarchy. Secondly, it contravenes the Appellant's own pleadings on record being paragraph 23 of the Replying Affidavit already alluded to. In that paragraph, the Appellant stated that it had invoked Clause 10 aforesaid to commence the arbitration. Lastly, should the Court adopt that position on the issue, it will inevitably amount to re-writing a parties' contract, contrary to established legal principles.

[49] Consequently, we find that the policy document was not ambiguous as to the dispute resolution mechanism and particularly the place of arbitration proceedings in favour of the Respondent. This position was affirmed by both the High Court and the Court of Appeal. We need not re-emphasize that arbitration proceedings rely on the goodwill and consent of both parties and are not to be imposed especially when the rights are not expressly contained in the contract. We are thus not persuaded that the *contra proferentum* rule applies in the circumstances and the invocation of the right to arbitration under the policy by the Appellant was in error.

b) The place of the Arbitration process

[50] The parties extensively submitted on the arbitration process with the Appellant justifying the arbitration process as conducted while underscoring the non-participation by the Respondent in the arbitration process as a sign of bad faith by the latter. The Respondent on the other hand is categorical that the

arbitration process was unlawful and therefore a nullity and to that extent its non-participation is inconsequential. The High Court also framed the following question for determination: *Did the (appellant) name the arbitrator unilaterally?* It is this determination by the High Court that formed the basis of the appeal to the Court of Appeal, and our certification as to the matters involving general public importance and ultimately the appeal before us.

[51] Following from the above, we find it necessary to also consider whether the appointment of Mr. Mulwa Nduya as arbitrator was in accordance with the policy and the law. In line with our above findings on the policy document, we reiterate that neither clause 10 nor 11 of the policy document allowed the Appellant to invoke the procedure for commencement of the arbitration proceedings and to go further and appoint the sole arbitrator. In the event, the Appellant's view that it had a concomitant right to resort to arbitration under the policy is erroneous as its rights should be those set out in clause 10 including the procedure for commencement of arbitration and no other. Even if it had that right – and we have said that it does not, the Appellant should have commenced the process by proposing and naming its arbitrator whilst calling upon the Respondent to do the same and proceed as contemplated under clause 10 of the policy. It is thus anarchical for the Appellant to resort to specific aspects of the policy at the expense of others by claiming the right to invoke arbitration under the policy but not the procedure set out thereunder while relying on the same clause.

[52] The Appellant further argues that it appointed an arbitrator under the provisions of Section 11(2) of the Arbitration Act 1995. That Section deals with the determination of the number of arbitrators and provides that the number of arbitrators shall be one where parties, being free to determine the number of arbitrators, fail to do so in such determination. As was rightly pointed out by the Court of Appeal, we fail to find the applicability of this Section. For the Appellant to rely on this Section, it ought to have first invited the Respondent to participate

in the arbitration process and propose an arbitrator failure of which the Appellant would have been at liberty to proceed to appoint as it did. This is in view of our finding that the Appellant did not have any express recourse to arbitration under the policy unlike the Respondent.

[53] Further to the above, we agree with the Appellant that Section 12(2) and (4) of the Arbitration Act is inapplicable to the present dispute as these provisions would only have applied if the parties had agreed upon a procedure of appointing the arbitrator. As the policy gave no such right to the Appellant, the Appellant could only have proposed a procedure to the Respondent for the latter's agreement. As this did not happen and the agreement was never proposed or reached, we disagree with the Court of Appeal's finding that the Appellant had recourse under Section 12(4) of the Arbitration Act 1995.

[54] Accordingly, we do not find it necessary to discuss further the provisions of Section 12 of the Act as such discussion is superfluous. Section 12 having been found to be inapplicable, the interrogation as to whether the Court of Appeal referred to it as amended or not is also moot and would amount to an unnecessary academic discourse by this Court.

[55] We now turn to the Respondent's conduct prior to the commencement of the arbitration proceedings. The Appellant has argued in that regard that the Respondent was at liberty to challenge the arbitral proceedings under Sections 14 and 17 of the Arbitration Act 1995. The Respondent disagrees on the grounds that this issue is being raised for the first time and was never considered by the Courts below. Our reading of the record confirms that indeed, this is so. The Appellant's submissions filed at the Court of Appeal makes no reference to these Sections of the said Act. Nonetheless, looking at the appeal in totality, a determination of the appeal would require that we allude to those Sections for completeness.

[56] On Section 14, since parties had not agreed on the appointment of the arbitrator, they cannot have agreed on the challenge procedure. For avoidance of doubt Section 14(2) of the Arbitration Act provides:

> "***Failing an agreement under sub section (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.***"

The above provision only relates to the procedure for challenging arbitration proceedings and should be read alongside Section 13 which contains the grounds for any such challenge. These grounds relate to impartiality and independence of the arbitrator as well as the qualifications of an arbitrator as set by parties. There is no indication whatsoever that the Respondent had grievances in these respects towards the arbitrator and with respect, we do not think that Section 14(2) applies to the present dispute.

[57] On the other hand, Section 17 deals with the competence of the arbitral tribunal and empowers the arbitrator to rule on his own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement. We expected the arbitrator to satisfy himself of his jurisdiction in dealing with the matter particularly in the wake of non-participation by the respondent. Unfortunately, the final award published gleams over the issue. Whereas an arbitrator under Section 17 of the Arbitration Act has competence to rule on his jurisdiction, the same does not have to be prompted by any party.

Moreover, the arbitrator in the present matter having noted that he had been appointed under clause 11 of the policy proceeded to arbitrate on the basis that the letter by the respondent dated 31st July 2007 was a disclaimer and then proceeded to interrogate the jurisdiction clause relating to the Respondent's refusal to participate in litigation outside of Kenya on that basis.

[58] As we have already made our finding on the right to refer any dispute to arbitration and determined that under clause 11 or any other clause in the policy are not available to the Appellant to institute arbitration, it is inevitable that the arbitration proceedings so instituted were irregular under the policy as well as the Arbitration Act 1995.

[59] Our position on the matter notwithstanding, we take great exception to the conduct of the Respondent generally. Arbitration proceedings, like judicial proceedings are sacrosanct and must be treated with decorum. The act of ignoring the arbitration process or even responding to correspondence not only by the Respondent but also by a respectable firm of advocates on record for the Respondent was totally unwarranted. As slothful and irregular one may perceive a process to be, respect to legal processes should remain sacrosanct. We were indeed not persuaded by the reasons given as to why the Respondent did not participate in the arbitration process even if for the limited purpose of objecting to the jurisdiction of the arbitrator. This could have saved precious judicial time and facilitated expeditious resolution of the dispute one way or the other. We digress. We have determined that the arbitration process was a nullity and we so hold.

c) Notice of Grounds of Affirmation

[60] In its notice of grounds for affirming the decision of the High Court lodged at the Court of Appeal, the Appellant sought to affirm the High Court decision on the following grounds:

i) The [respondent] as the author of the standard form insurance policy in issue was at all times aware that the (Appellant's) claim stood to be time barred at the expiry of 12 months from the date of its letter to the [appellant] dated 31st July 2007, in terms of clause 11 of that policy. It was therefore unfair and unconscionable for the Appellant to have treated correspondence to it on this arbitration as being of "little significance."

ii) By treating correspondence copied to it in relation to the arbitration as of "little significance" and consequently "ignoring" the entire "arbitral process," then later seeking to set aside the award pronounced, the (Respondent) exuded and acted contrary to law and particularly the spirit and intention of the said Act, and the provisions of Section 12 of the said Act could not and cannot in the circumstances come into play in aid of the (Respondent).

iii) The arbitral process having been commenced by the [Appellant] as by law required, the intentional abstention by the [Respondent] from participating in that process deprived it of the right to have the resultant award set aside.

The Appellant thus argues that the above grounds were totally ignored by the Court of Appeal and are therefore still alive for our consideration. The Respondent's position on the other hand is that the grounds were only dependent on the appointment of the arbitrator which the Respondent submits was unlawful.

[61] In our assessment of the Court of Appeal's decision, we have not come across any reference to the notice of the grounds of affirmation or the contents therein. This may be so because the High Court decision related to the legality

and procedure of the appointment of the arbitrator whereas the Court of Appeal decision faulted that appointment. It was therefore unnecessary in the Court of Appeal's view for it to engage in analyzing a consequence founded on an unlawful action.

[62] While the above position was convenient to the Court of Appeal, it was prudent for it to specifically address the grounds and make a finding on each of them even if to dismiss them later or find that there was no need to consider them in light of its findings. In failing to do so, the Court rendered the issue undetermined putting the Appellant in a state of uncertainty even though the Appellant could have made an inference of the Appellate Court's decision from the Judgment. Rule 94(1) of the Court of Appeal Rules is not academic and in vain and once it is invoked, the Court is moved appropriately and like every other manner that a Court is moved, a decision has to be taken one way or the other.

[63] Even if the Court of Appeal did not therefore render itself on the merits of the grounds of affirmation, we are inclined to consider them as they were properly placed before it for determination. This is because, just like the memorandum of appeal which was lodged at the appellate Court, the notice of grounds of affirmation is among the materials that were available before that Court for consideration in arriving at its decision subject of the appeal before us. In this context, we shall proceed to consider the said grounds as contained in the notice of grounds of affirmation alongside the appeal. In addition, the grounds are part of what has been framed and certified as involving general public importance.

[64] Looking at the grounds, therefore, it is evident that they largely relate to the conduct of the Respondent in the arbitral process, the applicability of Section 12 of the Arbitration Act and the right of the Respondent to have the resultant arbitral award set aside. In that regard, we are aware that every person is entitled

to approach Courts for recourse and it is not for the Appellant to determine when and how that approach should be other than to challenge the proceedings as provided under the law. This is the import of the constitutional right to access justice under Article 48 of the Constitution. Further, Section 35 (2), (iii), (iv) and (v) of the Arbitration Act 1995 which the Respondent founded its application for setting aside at the High Court does not impose any preconditions as to the conduct of the person seeking to rely on the provisions. We cannot therefore agree with the Appellant in this regard.

[65] We also note that the Appellant has already submitted at large on the other issues set out in the notice of grounds of affirmation and we have in the course of determining other issues raised in the appeal made our findings on the issues raised. It is therefore unnecessary to belabor the issues further as it is apparent that the Appellant's grounds of affirmation are without merit upon substantive consideration of them for the plain reason that the arbitration proceedings have been found to be a nullity, the conduct of the Respondent is of no consequence.

[66] Having held as above, and turning to the specific points framed and certified as matters of general public importance and set out in paragraph 15 of this judgment, we think that we have answered issues (a) to (d) and as regards other issues (e) and (f), the Court is reluctant to consider hypothetical questions not backed by actual facts and materials before it. The seventh issue (g) relating to the powers of the Court under Section 27 of the Supreme Court Act (to have its decisions enforced by the High Court) will be addressed as part of the reliefs.

E. CONCLUSION

[67] Having so stated, we must at this point remind parties that it is only the issues that are certified as being of great public importance that must form the basis for submissions and ultimately the decision of this Court. To frame certain

issues as being of great public importance at the point of certification under Article 163(4)(b) of the Constitution and then submit on issues that are specific to the parties at hand with no public element exhibited is an abuse of Court process and may lead to the dismissal of an appeal.

[68] Further, whereas this Court may allow parties to submit on an issue not previously framed as one for determination but which, while unconnected to any such framed issue, is nonetheless important in resolving a dispute before it, the 'public importance' criteria should never be lost. We thus agree with the House of Lords of the United Kingdom which as far back as 1961 in **Attorney General for *Northern Ireland v Gallagher*** [1963] AC 349 had this to say on the subject (per Lord Tucker);

> ***"I agree that once the Court from which the appeal is brought has certified that a point of law of general public importance is involved in the decision and leave to appeal has been given, either by that Court, or this House, the jurisdiction of this House to hear the appeal is established, and there is nothing in the Administration of Justice Act, 1960, in any way limiting its jurisdiction. It will always be a matter for the exercise of its discretion whether to allow a point in no way connected with the certified point of law to be argued on the appeal, and it is not to be assumed from the decision in this case that an appellant can as a matter of right raise any such point. In the present case I consider the point certified of necessity requires an examination of the decision of the Court of Criminal Appeal, and when this decision is looked at it becomes clear that in order to dispose of the appeal the direction of the Lord Chief Justice to the jury on the law***

with regard to the defence of insanity, as applied to the evidence given at the trial, must be considered." (Emphasis added)

Having stated as above, we now turn to the reliefs available to the parties.

d) Reliefs

[69] The reliefs sought by the petitioner herein are as follows:

i) That this appeal be allowed, and all the orders of the Court of Appeal given on the 6th December 2013 be set aside and in particular in the following manner:

a) The order of the Court of Appeal given on the 6th December 2013 allowing the Respondent's appeal to that Court in Civil Appeal No.117 of 2010 be set aside.

b) The order of the Court of Appeal given on the 6th December 2013 directing that:

> ***"The Ruling and Order of the trial Judge dated 16th October 2009 dismissing the application dated 4th March 2009 be and is hereby set aside and be substituted thereof with orders allowing the Appellant's application dated 4th March 2009 with costs and setting aside the arbitral award dated 8th December 2008 be set aside in its entirety."***

be set aside seriatim.

ii) In place of the said Orders there be substituted thereto the following orders, namely:

a) The Respondent's appeal to the Court of Appeal being Civil Appeal No.117 of 2010 lodged in that court on the 25th May 2010, be and is hereby dismissed with costs.

b) The Ruling of the High Court dated 16th October 2009, dismissing the Respondent's Chamber Summons application to that court dated 4th March 2009 be reinstated, and the Respondent's application of 4th March 2009 in the High Court be dismissed, with costs.

c) The arbitral award dated 8th December 2009 and filed in Court in Misc. Civil Application No.4 of 2009 on 13th January 2009 be reinstated in its entirety as a registered award of the High Court.

d) An order directing the High Court to proceed to enforce the arbitral award of 8th December 2008.

e) The costs of this Appeal be awarded to the appellant.

[70] Before issuing the final orders, we wish to address certain other issues arising from the reliefs sought. The first is the prayer relating to proceedings filed before the High Court in Misc. Civil Application No. 4 of 2009 which is in our view misplaced. No direct evidence was adduced or submissions made in respect of that case or its status. The issue is also not part of what was framed for determination and certified as of general public importance. Even if it was to be considered under Section 27 of the Supreme Court Act, the Appellant has not brought that aspect of the case for our consideration.

[71] In stating so, we note that Section 27 of the Supreme Court Act deals with enforcement of decision of the Court and it provides:

> ***"A judgment, decree or order of the Supreme Court may be enforced by the High Court as if it had been given or made by the High Court."***

This provision does not in any way connote what the Appellant is suggesting. Once the Court makes its orders, it is upon the litigants to seek to enforce the same before the High Court in the same manner that the High Court's orders would be enforced. Moreover, what is before us does not relate to the enforcement of the arbitral award but rather proceedings arising out of the setting aside of the award as a result of the Respondent's application at the High Court. The Appellant's application for enforcement of the arbitral award emanates from a different cause of action not before us. In any event, the arbitration process as instituted by the Appellant has been faulted and no consequential reliefs can accrue therefrom in favour of the Appellant.

[72] Secondly and in conclusion, whatever our findings on the notice of grounds of affirmation and the erroneous inference of the applicability of Section 12(4) of the Arbitration Act, (which was in any event conceded), on the substance of the Appeal before us, we are unable to accede to the Appellant's prayers and the Appeal is therefore one for dismissal.

[73] On costs, while they generally follow the event, the Court has the ultimate discretion, on a case to case basis, to determine which party should bear the responsibility of paying them. In the present case, we have partly faulted the Respondent for acting in a manner that triggered the dispute. Although it succeeded at the High Court, the Court of Appeal and this Court, we are of the view that this is one case where each party must bear its own costs at this Court

and the orders on costs in the Courts below is sustained and remains undisturbed.

F. FINAL ORDERS

[75] For the above reasons, the Appeal herein is hereby dismissed with each party bearing its costs in this Court only. Costs in the Courts below shall remain as ordered by those Courts.

[76] Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **20th day** of November, **2018**

.....	.....
D. K. MARAGA	**P. M. MWILU**
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT	**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**
.....	.....
M. K. IBRAHIM	**S. C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is

a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA