**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISC. CIVIL APPLICATION NO. 111 OF 2015**

**ANTONY MUNENE MAINA.....APPLICANT**

**VERSUS**

**THE UNIVERSITY OF NAIROBI.....1ST RESPONDENT**

**STUDENTS ORGANISATION OF**

**THE UNIVERSITY OF NAIROBI (S.O.N.U).....2ND RESPONDENT**

**RULING**

1. By an application brought by way of Chamber Summons dated 8th April, 2015, the Applicant herein sought leave of this Court to apply for certiorari to quash the amendments made to the 2nd Respondent's Constitution by the 1st Respondent; leave to apply for an order prohibiting the Respondents from allowing the 2015 Elections of the Students' Organisation of the 1st Respondent from being conducted under the said amendments; and leave to apply for mandamus compelling the Respondents to submit the proposed amendments to the membership of the 2nd Respondent. The applicant also applied for directions that the grant of the said leave does operate as a stay of the proceedings in question.

2. It was the applicant's case that the said amendments had not been approved by at least two thirds of the *bona fide* members of the 2nd Respondent as required under Article 39 of the 2nd Respondent's Constitution (hereinafter referred to as "the said Constitution") hence were tainted with procedural impropriety.

3. When the application came before me for hearing on 8th April, 2015, pursuant to the proviso to Order 53 Rule 1(4) of the ***Civil Procedure Rules***, I directed the applicant to serve the application on the Respondents for *inter partes* hearing on the 9th April, 2015.

4. On the said 9th April, 2015 when the matter was called out for hearing **Mr Mereka**, learned counsel for the 1st Respondent informed the Court that he intended to raise a preliminary objection challenging the jurisdiction of his Court to entertain these proceedings.

**Mr Kiongera**, learned counsel for the Applicant similarly informed the Court that he was ready to oppose the objection.

5. Since the issue of jurisdiction is central to these proceedings and any legal proceedings, as was stated by **Nyarangi JA** in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**:

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

6. Similarly in **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the same Court expressed itself as follows:

> **"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."**

7. Lastly, on the same issue, the Supreme Court in the case of **Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed that:

> **"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot**

**entertain any proceedings… Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."**

8. It therefore behoves this Court to consider and determine whether or not it has jurisdiction to entertain the instant proceedings. The challenge to the jurisdiction of this Court was premised on Article 35 of the said Constitution of the 2nd Respondent. The said provision which is headed "Dispute Resolution" provides as follows:

> ***1. All disputes regarding the interpretation and implementation of this Constitution shall, as provided by Article 159 of the Constitution of the Republic of Kenya 2010, first be solved (sic) through the following:***
>
> ***a. Good offices.***
>
> ***b. Mediation.***
>
> ***c. Conciliation.***
>
> ***d. Negotiation.***
>
> ***2. Where such methods as described above fail, parties shall proceed to arbitration.***
>
> ***3. For purposes of Section 2 above, there shall be an Arbitrator who shall be appointed by the Parliament from among members of the University staff on the recommendation of Parliament, subject to the approval of the Vice Chancellor.***

**9. Mr Mereka** whose submissions were supported by **Mr Babu Owino**, the 2nd Respondent's Chair Person, asserted that in view of the foregoing Article this Court ought not to entertain these proceedings. In their views, the Applicant had not complied with the provisions of the said Article. The only attempt at complying therewith was a letter addressed by the applicant to the Vice Chancellor of the 1st Respondent which letter neither referred to the said Article 35 nor was an invitation to invoke the provisions of the same. To the contrary the same was just a general complaint. Accordingly, the applicant had not satisfied the requirements of Article 35 to warrant invoking the jurisdiction of this Court.

10. In **Mr Babu Owino's** view, the applicant having withdrawn his earlier application due to non-compliance with the same Article, this application was an afterthought as the issues raised herein ought to have been raised in the said earlier application.

11. The objection was opposed by **Mr Kiongera** who submitted that the applicant had attempted to comply with the provisions of Article 35 aforesaid but his attempts to do so were frustrated by the 1st Respondent. Therefore the applicant had no alternative but to invoke the supervisory jurisdiction of this Court pursuant to Article 165 of the Constitution as read with sections 8 and 9 of the ***Law Reform Act*** Cap 26 Laws of Kenya. Therefore having made attempts to comply with Article 159 of the Constitution, learned counsel urged this Court to entertain these proceedings since in his view these proceedings are properly before this Court.

12. I have considered the foregoing. That the dispute the subject of these proceedings is in respect of the interpretation and implementation of the 2nd Respondent's Constitution is not in dispute. Accordingly it cannot and it was not been disputed by the Applicant that the dispute herein falls squarely within the provisions of Article 35 of the same Constitution. That Article provides for the dispute resolution mechanisms in such matters and particularises 4 such alternative dispute mechanisms as good offices, mediation, conciliation and negotiation. Whereas this Court is not aware of an ADR mechanism known as "good offices" this Court is certainly aware of the other three ADR mechanisms. According to the said Article 35 in event of failure to resolve dispute's covered by Article 35 of the said Constitution, the parties were enjoined to resort to Arbitration. The legislation under which arbitration proceedings are carried out in this country is the ***Arbitration Act***, ***1995*** and pursuant to section 2 thereof the Act applies to domestic and international arbitrations

13. The Court of Appeal in **East African Power Management Limited vs. Westmont Power (Kenya) Limited Civil Appeal No. 55 of 2006** expressed itself as hereunder:

> **"The arbitration clause in question is not in our view ambiguous. The intention of the parties to refer any dispute to arbitration is clearly expressed in the clause and as held by the superior court it was not only necessary to give effect to the intention of the parties but it was a mandatory duty on the part of the court. Again it has not been demonstrated that there is no agreement at all to refer to arbitration or that it is not valid. Thus, the court's limited role in intervening where parties have agreed to refer a matter to arbitration is set out in section 10 of the Arbitration Act as follows: "Except as provided in this Act no court shall intervene in matters governed by this Act." The equivalent to Article 6 of the Model Law upon which the Kenyan provision is based reads: "In matters governed by this Law, no court shall intervene except where so provided by this Law."… In short, the role of the court as captured in the 1995 Act is a facilitative role. Thus, in the (ICC Publication, 1993) an English Judge, Lord Mustill in "*Comments and Conclusions" in Conservatory & Provisional Measures in International Arbitration 9th Joint Colloquium*" has described the relationship between the courts as follows: "Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organization which could take steps to prevent the arbitration agreement from being ineffective. When the arbitrators take charge, they take over the baton and retain it until they have made an award. At this point, having nolonger a function to fulfil, the arbitrators hand over the 'baton so that the court can in case of need lend its coercive powers to the enforcement of the award."… The words "shall be referred to arbitration" mean that when parties agree that a dispute shall be determined by arbitration, they voluntarily cut themselves off the recourse to the courts of law and they must be held to their agreement by courts of law in accordance with the Arbitration Act, 1995…Moreover, we find that where a dispute between**

**the parties exists, the parties must be taken to have agreed that all disputes relating to a particular transaction are to be resolved by the same tribunal. They could not reasonably be said to have chosen an arbitral tribunal and a court of law at the same time to deal with different issues in the same transaction."**

14. It is therefore clear that in matters governed by an arbitration clause the Court only plays a facilitative role rather than on obstructionist one. The Court therefore cannot bypass an arbitration clause under the guise of exercising its supervisory jurisdiction under Article 165 of the Constitution.

15. The applicant however contends that his attempts to have the matter resolved in the manner contemplated under the second respondent's constitution were frustrated by the 1st Respondent. In my view where a party to an arbitration clause by action or omission frustrates the putting in motion of an arbitral process where the same is applicable, an aggrieved party is properly entitled to invoke the Court's jurisdiction to facilitate the said process. In that event the Court would in appropriate cases be entitled to compel the party in default to co-operate in the commencement of the arbitral process. In my view a party who has entered into an agreement to refer their disputes to arbitration cannot resile from the same and therefore an aggrieved party is entitled to apply for orders compelling the intransigent party to subject himself or herself to the arbitral proceedings. However this jurisdiction does not entitle the Court to bypass the arbitral process and step in the shoes of an arbitrator. The applicant if his contention was correct ought therefore to have moved the High Court in civil proceedings for an order in the nature of mandatory injunction compelling the Respondents to submit to an arbitration process.

16. What the applicant seeks by these proceedings is that this Court ought to take over the role of the arbitrator in the proceedings covered by an arbitration clause. With respect this Court cannot do that. To do so would amount to usurping the powers conferred on the arbitrator.

17. I have said enough to show that this Court has no jurisdiction to entertain these proceedings in the manner presented.

18. In the result these proceedings are struck out but with no order as to costs as leave was yet to be granted.

**Dated at Nairobi this 10th day of April, 2015**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Mr Kiongera for the Applicant***

***Miss Jemator for Mr Mereka for the 1st Respondent***

***Cc Richard***