



**Rao v Shreeji Chemicals Limited & 2 others (Miscellaneous Civil Application E734 of 2021) [2022] KEHC 10762 (KLR) (Commercial and Tax) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10762 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E734 OF 2021**

**WA OKWANY, J**

**JUNE 23, 2022**

**BETWEEN**

**MUKKASA GIRIDHAR RAO ..... APPLICANT**

**AND**

**SHREEJI CHEMICALS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**HARESH VRAJLAL DAMODARDAS SONI ..... 2<sup>ND</sup> RESPONDENT**

**DELTA INTERNATIONAL FZE ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling determines the application dated 30<sup>th</sup> September 2021 and the Notice of Preliminary Objection (PO) dated 21<sup>st</sup> October 2021. I will consider the PO first as its outcome will determine the fate of the application.

**Preliminary Objection**

2. The respondents filed the Preliminary Objection in opposition to the Originating Summons dated 30<sup>th</sup> September 2021 citing the following grounds:-
  1. This Honourable Court lacks Jurisdiction to hear the Originating Summons dated 30/9/2021 because the question of the applicability of arbitration to the alleged dispute touching on the parties herein is res subjudice pending delivery of a ruling on 4/1 1/2021 by this Honourable Court in HCOMM Petition No. 5 of 2021 Mukassa Giridhar Rao vs Shreeji Chemicals Limited, Hareesh Vrajlal Damordadas Soni, Delta International FZE and Shreeji Enterprises (K) Limited.



2. This Honourable Court lacks Jurisdiction to hear the Originating Summons dated 30/9/2021 and the Supporting Affidavit sworn by Mukassa Giridhar Rao (the Applicant) since there is no arbitration clause governing any of alleged differences amongst the Applicant and the 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents as shareholders of the 1<sup>st</sup> Respondent herein.

The arbitration clause under Clause 44 of the Articles of Association (the Arbitration Clause) of the 1<sup>st</sup> Respondent (the Company) is strictly limited to differences arising between the Company on the one hand, and, members, their executors, administrators, or assigns on the other hand.

Clause 44 of the Articles of Association of the 1<sup>st</sup> Respondent provides thus:

"Whenever any differences arises Isicl between the Company on the one hand and any of the Isicl members, their executors, administrators, or /assigns on the other hand touching [sic] the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes or touching on anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of statues or touching on any breach, or alleged breach, of these Articles, or any claim on account of any such breach or alleged breach of this, or otherwise relating to the premises, or to these Articles or to any statutes affecting the Company, or to any affairs of the Company, every such difference shall be referred to the decision of any arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference."

The Import is that the Arbitration Clause exclusively applies to differences between the Company and any of the members, their executors, administrators or assigns on the other hand.

Resultantly, the 2<sup>nd</sup> Respondent, Haresh Vrajlal Damodardas Soni, and the 3<sup>rd</sup> Respondent, Delta International FZE, on the one hand, and the Applicant on the other hand, do not have any arbitration agreement amongst them as members or shareholders of the 1<sup>st</sup> Respondent hence this Honourable Court does not have jurisdiction pursuant to Section 10 and 12 of the *Arbitration Act* 1995, (the Act), to appoint a sole arbitrator in relation to the alleged dispute and or issue any orders against them as sought in the Application.

3. The applicant filed grounds of opposition dated 29<sup>th</sup> October 2021 in response to the Preliminary Objection wherein it states that:-
  - a. The Applicant's Originating Summons dated 30<sup>th</sup> August 2021 (Originating Summons) does not violate the rules of subjudice as the issues raised in the Injunction Application dated 30<sup>th</sup> April 2021 filed in HCCOMM Petition No. E005 of 2021 are separate from the issues raised in the Originating Summons.



- b. Ground 2 of the Preliminary Objection does not raise a pure point of law and therefore is defective. The issue as to whether the dispute between the Applicant and the Respondents is subject to arbitration by virtue of clause 44 of the 1<sup>st</sup> Respondent's

Articles of Association or whether there is an arbitration agreement between the Applicant and the Respondents, are issues of fact, which are liable to be contested and proven by way of evidence.

- c. In accordance with Company Law jurisprudence, a company's Memorandum and Articles of Association (MemArts) gives rise to a contract not only between a member and the company but also amongst the members of the company. Therefore, an arbitral clause in a company's MemArts would govern disputes between a company and its members as well as disputes amongst its members. As such, Article 44 of the Articles has been properly invoked for purposes of resolving the dispute between the Applicant and the Respondents.
- d. This Honourable Court has the jurisdiction to appoint an arbitral tribunal pursuant to Order 46 Rules 5 and 20 of the *Civil Procedure Rules* 2010 and section 12 of the *Arbitration Act*, 1995, where parties have been unable to agree on the appointment of an arbitrator.
- e. The Preliminary Objection is brought in bad faith and is only intended to delay the hearing and determination of the Originating Summons.
- f. The Preliminary Objection is misconceived and an abuse of the court process.

4. The respondent's case was that the PO raises pure points of law as it deals with the question of jurisdiction which should be resolved at the inception of the suit.

5. The applicant, on the other hand, submitted that the purpose of the application is to obtain orders to restrain the respondents from removing the applicant as a director of the company and that the applicability of the arbitral clause is a contested issue that can only be determined after receiving evidence from the parties.

6. The case of *Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd* [1969] EA 696 explained what constitutes a preliminary objection as follows: -

“so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit per Sir Law J.A.”

Sir Charles Newbold P. in the same case stated that:

“A preliminary objection is in the nature of what used to be a demurer. 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 an exercise of judicial discretion.”

7. The respondent raised the issue of subjudice and whether the arbitral clause is applicable in this case. I find that these are not pure points of law as they will require proof of facts to be produced in evidence. I find that the preliminary objection does not raise pure points of law and I therefore dismiss it with no orders as to costs.



## Application dated 30<sup>th</sup> September 2021

8. The application seeks the following orders:-
  - a. Spent
  - b. This Honourable Court be pleased to appoint Ms. Njeri Kariuki as the sole arbitrator pursuant to Article 44 of the 1<sup>st</sup> Respondent's Articles of Association, in order to resolve the dispute between the Applicant and the Respondents
  - c. In the alternative to prayer (a), this Honourable Court be pleased to appoint a sole arbitrator from the following list of two (2) arbitrators, in accordance with Article 44 of the 1st Respondent's Articles of Association, to determine the dispute between the Applicant and the Respondents:
    - i. Ms. Esther Kinyenje ; and
    - ii. Mr. Kamau Karori.
9. The application is supported by the affidavit sworn by the applicant's Director and Shareholder Mr. Mukkasa Giridhar Rao and is based on the following grounds:-
  - a. The Applicant is a shareholder and director of the 1<sup>st</sup> Respondent (the Company). The 3<sup>rd</sup> Respondent is the majority shareholder of the Company, with a shareholding of 900,000 ordinary shares, followed by the 2<sup>nd</sup> Respondent with a shareholding of 787,500 shares and lastly the Applicant, with a shareholding of five hundred and sixty-two thousand, five hundred (562, 500) ordinary shares (the Shares). The Applicant was also the Operations Director of the Company until 15<sup>th</sup> April 2021, when the 2nd Respondent, on behalf of the Company, unlawfully terminated his employment.
  - b. The Applicant and the 2<sup>nd</sup> Respondent, being a majority shareholder of 1<sup>st</sup> Respondent together with 3<sup>rd</sup> Respondent which is wholly owned by the 2nd Respondent, entered into a memorandum of understanding on 4<sup>th</sup> April 2019 (2019 MOU) where it was agreed that if the Applicant was to sell or transfer his shareholding in the Company, it would be on the basis of an estimated book/market value. This position was reiterated in a subsequent MOU that was entered into between the Applicant and the 2<sup>nd</sup> Respondent on 18<sup>th</sup> September 2020 (2020 MOU).
  - c. A dispute on the proposed basis of valuing the Shares arose between the 2nd Respondent and the Applicant which was referred to Mr. Sanjeev Khagram (Mr. Khagram) of A.B. Patel & Patel Advocates (A.B. Patel Advocates). On 22<sup>nd</sup> February 2021, a meeting was held at A.B. Patel Advocates, where the 2<sup>nd</sup> Respondent offered to buy the Applicant's Shares in the Company. The Applicant agreed to sell his Shares in the Company subject to the valuation of the Shares at fair value by an independent person or persons either jointly appointed by the Applicant and the 2<sup>nd</sup> Respondent or individually. On 16<sup>th</sup> March 2021, a further meeting was held where the 2<sup>nd</sup> Respondent, contrary to what was agreed in 22<sup>nd</sup> Feb 2021 meeting and MOUs signed previously signed,



reiterated his offer to buy the Subject Shares at face value and a share in the dividends of the Company as per the audited accounts of 2019. As the offer was only for the face value of the shares and not the market value. However, that offer was not acceptable to the Applicant.

- d. On 7<sup>th</sup> April 2021, the Applicant received a notice from Sage Registrars (the EGM Notice), informing him that an Extra-Ordinary General meeting (the EGM) was scheduled to take place on 6<sup>th</sup> May 2021, for purposes of effecting his removal as a director of the Company and increasing the share capital of the Company for purposes of converting debts allegedly owed to the 3<sup>rd</sup> Respondent and Shreeji Enterprises Limited (Shreeji Enterprises) to equity. Furthermore, the allotment of 2,575,705 ordinary shares to the 3<sup>rd</sup> Respondent and 1,200,000 ordinary shares to Shreeji Enterprises was to be approved at the said meeting.
- e. The Applicant issued an objection to the EGM vide his letter dated 23<sup>rd</sup> April 2021 and requested that the meeting be postponed, to allow his rights as a shareholder in relation to any new shares in the Company to be respected and to allow for the ongoing discussion concerning the sale of the Shares.
- f. On 28<sup>th</sup> April 2021, the Applicant issued a Notice of Transfer to the Company and its shareholders, offering to sell the Shares at the indicative amount of USD 3.46 million (the Sale Amount), based on an independent valuation that was conducted by Grant Thornton, Kenya (Grant Thornton).
- g. With the threat of a looming unprocedural agenda to remove him as a director of the 1<sup>st</sup> Respondent and the proposed unlawful dilution of the Shares by an increase of share capital and share allotment to the 3<sup>rd</sup> Respondent and Shreeji Enterprises hanging in the balance, the Applicant filed a Chamber Summons Application (the Injunction Application) dated 30<sup>th</sup> April 2021 before this Honourable Court in Nairobi HCCOMM Petition No. E005 of 2021, seeking temporary orders restraining the Respondents and the Company's Board of Directors from effecting his removal as a director of the Company and increasing the share capital of the Company for purposes of converting the debt owed to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to equity and the allotment of 2,575,705 ordinary shares to the 3<sup>rd</sup> Respondent and 1,200,000 ordinary shares to Shreeji Enterprises.
- h. While the Injunction Application was pending determination, the Applicant received communication from the 2<sup>nd</sup> Respondent on behalf of the Company, that the 3<sup>rd</sup> Respondent had deposited KES 68,827,500 (the Proposed Amount) with the Company as consideration for the transfer of the Shares. According to the 2<sup>nd</sup> Respondent, the Proposed Amount was based on a disputed valuation report dated 30<sup>th</sup> April 2021 (the Auditor's Valuation) prepared by the Company's auditor, Jessie & Associates (the Company Auditor) which certified the value of an ordinary share in the Company as Kenya Shillings one hundred and twenty-two and thirty-six cents (KES 122.36) as at 30<sup>th</sup> April 2021 and that the total number of issued ordinary shares was 2,250,000.



- i. This Honourable Court recognized the urgency of the Applicant's Injunction Application and granted the Applicant the interim orders sought, on 5<sup>th</sup> May 2021.
- j. The Applicant was dissatisfied with the method of valuation of shares done by the Company's Auditor which valued Applicant Shares at KES 68,827,500 as opposed to the indicative amount of USD 3.46 million valued by the Independent Auditor Grant Thornton. The Proposed Amount was significantly lower than the offer proposed in the Notice of Transfer being a gap of over KES 300,000,000. The Disputed Auditor's Valuation was done on Net Assets Value method, a method applied for a Company in distress or under a forced merger or amalgamation, whereas the 1<sup>st</sup> Respondent is a profit-making company and has net profitable reserves as per the audited accounts of 1<sup>st</sup> Respondent as of 31<sup>st</sup> December 2020. Grant Thornton valued the Shares at the Sale Amount, having found that the Shares were equivalent to 25% of the Company's shares. Therefore, it was quite evident that the 2<sup>nd</sup> Respondent had used his position as the majority shareholder of the Company and the fact that he is the sole owner and shareholder of the 3<sup>rd</sup> Respondent, to frustrate the Applicant by intentionally undervaluing the Shares through the issuance of the disputed Auditor's Valuation based on an irrelevant method of valuation.
- k. Consequently, through a letter dated 28<sup>th</sup> May 2021, the Applicant rejected the Auditor's Valuation and proposed that the parties appoint an independent valuer, failure to which the Applicant stated that he would refer the valuation and transfer dispute (the Dispute) to arbitration pursuant to the Arbitral Clause.
- l. On 31<sup>st</sup> May 2021, the Applicant received two letters from the Respondents, rejecting the Applicant's proposal for an independent valuation as well as the referral of the Dispute to arbitration (the Rejection Letters). Consequently, and in accordance with the Arbitral Clause, the Applicant issued a Notification of Dispute dated 4<sup>th</sup> June 2021 (Notification of Dispute) to the Respondents, so as to agree on the appointment of a sole arbitrator in relation to the Dispute.
- m. In the Notification of Dispute, the Applicant proposed the nomination of Ms. Njeri Kariuki (Ms. Kariuki), Mr. Kamau Karori (Mr. Karori) and Mr. Kiragu Kimani (Mr. Kimani) as the sole arbitrator and requested the Respondents to nominate their preference within 7 days from the date of the Notification of Dispute. However, the Respondents indicated that they had invoked section 12 (3) (c) of the *Arbitration Act* (the Act) so as to extend their response time to 14 days instead of 7 days. In invoking section 12 of the Act, it was evident that the Respondents were not agreeable to the appointment of a sole arbitrator.
- n. In compliance with section 12 (3) of the Act, the Applicant nominated Ms. Kariuki as his preferred arbitrator and gave the Respondents several opportunities to nominate their preferred arbitrator. The Respondents failed to nominate an arbitrator despite the many opportunities and extensions issued to them. On 9<sup>th</sup> July 2021, the Applicant issued a notice to the



Respondents informing them that in default of their nomination of an arbitrator, he would appoint Ms. Kariuki as the sole arbitrator in the matter.

- o. In what can only be considered as bad faith, the Respondents revoked their reliance on section 12 (3) of the Act through their letter dated 21<sup>st</sup> July 2021 and nominated Mr. Khagram as the sole arbitrator. The Respondents also rejected the nomination of Ms. Kariuki without providing any cogent reasons for doing so. This was done even though Ms. Kariuki is regarded as one of Kenya's best commercial arbitrators, having been ranked in Band 1 by the Chambers and Partners 2021 legal rankings and the fact that she confirmed that she is not conflicted in this matter.
- p. Through a letter dated 2<sup>nd</sup> August 2021, the Applicant rejected the nomination of Mr. Khagram as the sole arbitrator since he was conflicted. Mr. Khagram had already conducted a failed mediation involving the Applicant and the 2<sup>nd</sup> Respondent, in relation to the Shares and he had a historic advocate-client relationship with 2<sup>nd</sup> Respondent who is the majority shareholder of the 3<sup>rd</sup> Respondent and director and shareholder in the Company. The Applicant requested the Respondents to nominate another arbitrator who was not conflicted and reconfirmed the nomination of Ms. Kariuki as his arbitrator.
- q. However, through a letter dated 16<sup>th</sup> August 2021, the Respondents proceeded to renominate Mr. Khagram as their preferred arbitrator without providing his credentials or resolving the questions of conflict that the Applicant had raised.
- r. The Respondents are well aware that Mr. Khagram is conflicted. Therefore, their insistence on his nomination as well as their rejection of Ms. Kariuki without any cogent reasons clearly points to the fact that they intend to frustrate the process of constituting the arbitral tribunal.
- s. This Honourable Court has the jurisdiction to appoint an arbitral tribunal pursuant to Order 46 Rules 5 and 20 of the Civil Procedure Rules 2010 and section 12 of the *Arbitration Act*, 1995, where parties have been unable to agree on the appointment of an arbitrator, following the provisions of the arbitral clause that binds them. The Respondents have participated in the process of appointing an arbitrator in relation to the dispute between the Applicant and the Respondents and it is in the interest of justice for this Honourable Court to appoint the arbitrator to enable the parties to proceed with the determination of their dispute.
- t. The Applicant has also proposed the nomination of either Mr. Karori or Ms. Esther Kinyenje as sole arbitrators to determine the Dispute, considering their experience in commercial disputes and the fact that they have confirmed that they are not conflicted in the matter.
- u. Without this Honourable Court's intervention, the Applicant will be unable to commence the arbitral proceedings pursuant to the Arbitral Clause, which bind the Respondents and the Applicant's right to property enshrined by Article 40 of *the Constitution* will be violated by the Respondents who have already devalued the Shares through the Auditor's Valuation.



- v. Despite the issuance of the interim orders by this Honourable Court in relation to the Injunction Application, the Respondents have threatened to transfer the Proposed Amount to the Applicant to complete the transfer and sale of the Shares, even though the Applicant has raised objections to the disputed Auditor's Valuation. In issuing the interim orders in relation to the Injunction Application, this Honourable Court has recognized the fact that the Shares are in danger of being wasted away by the actions of the Respondent. Therefore, it is in the interest of justice that this application be certified urgent, it be heard on a priority basis and that this Honourable Court grants prayers (b) or (c) of the application.
10. The 1<sup>st</sup> respondent opposed the application through the replying affidavit of its Director Mr. Haresh Vrajlal Damodarsdas who states that the applicant voluntarily sold his shares to the 3<sup>rd</sup> respondent in 2015. He concedes that there exists a dispute resolution clause 44 of the 1<sup>st</sup> respondent's Articles of Association which governs disputes between the company on one hand and the members on the other hand. He further states that the applicant wrongly invoked the arbitration clause 44 of the Articles of Association to settle the differences between the applicant and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. He states that there must be an arbitration agreement between the parties to warrant the submission of a dispute to arbitration according to the *arbitration Act*. He further states that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are not parties to the arbitration agreement and that the Chartered Institute of Arbitration and the Nairobi Center for International Arbitration could appoint arbitrators.
11. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent opposed the application through the replying affidavits of its shareholder Mr. Haresh VrajlaL Damodardas Soni who adopted and reinstated the contents of the 1<sup>st</sup> respondents replying affidavit.
12. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the court should appoint an arbitrator to determine the dispute between the parties herein.
13. The applicant moved this court to refer the matter to arbitration pursuant to Order 46 Rule 1 and 2 of the Civil Procedure Rules which provides as follows:-
- (1) Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.
  - (2) The arbitrator shall be appointed in such manner as may be agreed upon between the parties.
14. The process of appointment of an arbitrator is provided for under Section 12 of the *Arbitration Act* as follows:-
- 12(1) No person shall be precluded by reason of that person's nationality from acting as an arbitrator, unless otherwise agreed by the parties.
  - (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairman and failing such agreement—



- (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the arbitrator;
  - (b) in an arbitration with two arbitrators, each party shall appoint one arbitrator; and
  - (c) in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.
- (3) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party (“the party in default”)—
- (a) has indicated that he is unwilling to do so;
  - (b) fails to do so within the time allowed under the arbitration agreement; or
  - (c) fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party), the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.
- (4) If the party in default does not, within fourteen days after notice under subsection (3) has been given —
- (a) make the required appointment; and
  - (b) notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.
- (5) Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.
- (6) The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.
- (7) The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator.
- (8) A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.



- (9) The High Court in appointing an arbitrator shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.
15. The applicants case is that he is a shareholder and director of the 1<sup>st</sup> respondent and a dispute ensued where the applicant agreed to sell his shares in the company to the 2<sup>nd</sup> respondent. The applicant contends that by virtue of the arbitration clause it issued a notification of dispute to the respondents to commence a process of appointment of a sole arbitrator in the dispute by requesting them to nominate their preferred arbitrator. The applicant further contends that the parties were unable to agree on the appointment of the arbitral tribunal thus necessitating the filing of this application.
16. The respondents, on the other hand, argued that the arbitral clause is strictly limited to differences between the company on one hand as a party and any member, their executors, administrators or assigns on the other hand as another party. The respondent further contended that there is no arbitration agreement between the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
17. The Arbitration clause provides inter alia that:-
- “Whenever any differences arises between the Company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes or touching on anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of statues or touching on any breach, or alleged breach, of these Articles, or any claim on account of any such breach or alleged breach of this, or otherwise relating to the premises, or to these Articles or to any statutes affecting the Company, or to any affairs of the Company, every such difference shall be referred to the decision of any arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference.”
18. The applicant has invoked the provisions of Order 46 of the Civil Procedure Rules and section 12 of the *Arbitration Act*. The court has the inherent power to appoint an arbitrator under the above provisions based on the contract between the parties or the arbitral clause. I note that in the circumstances of this case the arbitral clause gives the parties the autonomy of choosing their own arbitrator and further provides for what should happen in the event that they fail to agree on a single arbitrator.
19. In view of the foregoing, the applicant suggested that one Ms. Njeri Kariuki be appointed as the sole arbitrator. Under Section 12(4) of the *Arbitration Act*, the court does not have the original jurisdiction in the appointment of the arbitrator and can only intervene where a party has made an appointment and the other party moves to court to set aside the appointment. The arbitral clause gives the power to each party to appoint their own arbitrator in the event they are unable to agree on a single arbitrator. I therefore find that it will be premature for this court to make the appointment at this stage as the parties have not exhausted their rights under the Act.
20. In the premises I find that the application dated 30<sup>th</sup> September 2012 is not merited and is therefore strike it out with no orders as to costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF JUNE 2022.

W. A. OKWANY

JUDGE

**In the presence of: -**

No appearance of the parties

Court Assistant- Sylvia

