



**Finasi-ishu Construction SPV v Benchmark Solutions Limited (Commercial Case E580 of 2023) [2025] KEHC 224 (KLR) (Commercial and Tax) (20 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 224 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E580 OF 2023**

**AA VISRAM, J  
JANUARY 20, 2025**

**BETWEEN**

**FINASI-ISHU CONSTRUCTION SPV ..... PLAINTIFF**

**AND**

**BENCHMARK SOLUTIONS LIMITED ..... DEFENDANT**

**RULING**

1. I have considered the Notice of Preliminary Objection dated 13<sup>th</sup> December, 2023, the submissions in support and in opposition to the same, and the applicable law.
2. The basis of the objection is that this court has no jurisdiction to deal with the present matter for the reason that the agreement between the parties in relation to the subject matter in dispute contains an arbitration clause.
3. Upon reading the Engagement Agreement dated 9<sup>th</sup> September, 2022, the subject agreement, I further note that the same also contains an exclusive jurisdiction clause at clause 11.0 of the Agreement.
4. The Arbitration Clause is found at Clause 13 of the Agreement and reads as follows:-

Clause 13:

Arbitration

Any dispute arising out of or in connection with this Agreement shall be referred to arbitration by a single arbitrator to be appointed by agreement between the parties, or in default of such agreement, within 14 days of notification of a dispute, upon the application of either party the arbitrator shall be appointed by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators of the United Kingdom (emphasis mine)



Such arbitration shall be conducted in Nairobi in accordance with the rules of the arbitration of the said Institute and subject to and in accordance with the provisions of the London Court of International Arbitration (LCIA).

To the extent permissible by law, the determination of the arbitrator shall be final conclusive and binding upon the parties.

5. Clause 11.0 of the Agreement reads as follows:

11.0 Governing law and Jurisdiction:-

This mandate/ Engagement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including noncontractual disputes or claims) shall be governed by and construed in accordance with English law.

6. Based on my reading of the above clauses, it is evident that both parties intended to have their disputes arising under the said agreement to be resolved by way of Arbitration and in accordance with English Law, and the rules of the London Court of International Arbitration.

7. As regards the argument by the Plaintiff, that part of the dispute would not fall within the scope of the arbitration agreement; I am of the view that it is for the arbitral tribunal to determine the extent and scope of its jurisdiction, once formed, and in accordance with the terms of the agreement. This is in line with section 17 of the *Arbitration Act*, 1995 (“the Act”) and in consonance with the LCIA rules.

8. Further, the Plaintiff has not disputed the validity of the Arbitration Agreement, and in the absence of compelling reasons, this court ought not re-write the contract between the parties, and in doing so, confer upon itself jurisdiction.

9. For the sake of clarity, compelling reasons, to my mind, include evidence of coercion, fraud, or undue influence. None of the above have been alleged, and this court need not consider the same. Therefore, at this point, I do not think there is a basis for this court to interfere with the contractual agreement between the parties, to which, I might add, they are bound.

10. As regards the question as to whether the Plaintiff has moved the court properly? Namely, by way of Preliminary Objection, rather than pursuant to section 6 of the Act, and whether the same is fatal? I do not think there is a conflict in the present matter. I say so because the Defendant raised its Preliminary Objection from the outset; and has not yet taken any substantive steps to admit to the jurisdiction of this court, or waive its right to arbitration. Such a step, to my mind, would include the filing of its pleadings, such as its statement of defence in court. No such pleadings have been filed. In any event, I do not think that process, even if irregular, may defeat or confer jurisdiction, where there is none.

11. Further, by entering its appearance, and thereafter filing, as the sole step, its Preliminary Objection, the Defendant has emphatically denied the jurisdiction of this court and stated that there is an arbitration agreement in force. Nothing precludes the Defendant from still commencing the arbitral proceedings in accordance with the terms of the Agreement and the applicable Rules.

12. For the sake of clarity, I do not intend to import the ordinary rules of civil procedure into the *Arbitration Act*. However, our jurisprudence reflects that one of the purposes of a valid Preliminary Objection, is to bring to the court’s attention the presence of an arbitration agreement that may oust



the jurisdiction of the court. The test set out in the case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, states 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 the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”(Emphasis mine)

13. Further, the court stated that a valid Preliminary Objection must first, raise a point of law based on ascertained facts and not on evidence:-

“In the words of Sir Charles Newbold P, at page 701,

...A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” (emphasis mine)

14. Therefore, I am of the view that our jurisprudence has long accepted the filing of a Preliminary Objection as an alternative or addition to the procedure set out under Section 6 of the Act. I am therefore not creating an exception to section 10 of the *Arbitration Act*, but rather, recognizing that one that already exists. Further, my view is that the Preliminary Objection is acceptable in circumstances such as the present one so long as the same is raised as a first step in the proceedings, either at the same time as entering appearance, or immediately thereafter; and so long as the party does not waive its rights to arbitration, or admit to the jurisdiction of the court by acknowledging the claim, and filing its substantive pleadings.

15. Based on my understanding of the Agreement between the parties, and noting the presence of an undisputed and valid arbitration clause, I am of the view that the test set out above has been met. Accordingly, this court ought to down its tools until such time as the arbitral tribunal may determine the scope and extent of its jurisdiction in relation to the dispute between the parties.

16. I reiterate the pronouncement of the court in Owners of Motor Vessel “Lilian S” Vs Caltex Oil (K) Ltd [1989] KLR,

“Jurisdiction is everything without which a court of law has no power to make one more step where a court of law 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 the moment it holds the opinion that it is without jurisdiction.”

17. Finally, returning to the allegation that one of the claims may fall beyond the scope of the tribunal’s jurisdiction; I would add that if indeed that is the case, nothing prevents the parties from either extending the jurisdiction of the tribunal to determine that particular issue, or from approaching the court, in the future, in relation to any remaining issues. Therefore, in my view, no prejudice will be occasioned on the part of the Plaintiff as alleged.

18. Based on the reasons set out above, the Preliminary Objection is upheld. The Plaintiff is accordingly struck out with costs.

Dated and delivered virtually via Microsoft Teams this 20<sup>th</sup> day of January, 2025

**ALEEM VISRAM, FCI Arb**



**JUDGE**

**In the presence of;**

.....Court Assistant

..... For the Plaintiff

.....For the Defendant

