



Upperhill Chambers Limited v Amiran Communications Limited; Amiran Communications Limited (Plaintiff to the Counterclaim); Upperhill Chambers Limited & another (Defendant to the Counterclaim) (Commercial Case E283 of 2022) [2025] KEHC 386 (KLR) (Commercial and Tax) (23 January 2025) (Ruling)

Neutral citation: [2025] KEHC 386 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E283 OF 2022
PM MULWA, J
JANUARY 23, 2025**

BETWEEN

UPPERHILL CHAMBERS LIMITED PLAINTIFF

AND

AMIRAN COMMUNICATIONS LIMITED DEFENDANT

AND

AMIRAN COMMUNICATIONS LIMITED PLAINTIFF TO THE COUNTERCLAIM

AND

UPPERHILL CHAMBERS LIMITED DEFENDANT TO THE COUNTERCLAIM

CHINA WU YI COMPANY LIMITED DEFENDANT TO THE COUNTERCLAIM

RULING

1. Vide a plaint dated 20th June 2022, the plaintiff (hereinafter plaintiff/Upperhill Limited) seeks reliefs against the defendant (hereinafter defendant/Amiran) arising out of a breach of contract for the installation of an integrated security solution. The defendant denied the plaintiff's claim and by way of a counterclaim (defence and counterclaim dated 14th September 2022) sued Upperhill Limited for unpaid fees and the 2nd defendant (hereinafter 2nd defendant/China Wu Yi) for breach of a contract for the construction of an office block and associated works. The 2nd defendant filed a reply to defence and defence to counterclaim dated 19th September 2023.



2. By a Chamber Summons application dated 14th June 2024, brought pursuant to Article 159 (2)(c) of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act, Sections 6 and 10 of the Arbitration Act No. 4 of 1995 and Rule 2 of the Arbitration Rules 1997, the plaintiff/Upperhill Limited seeks for orders that the suit be stayed and the dispute herein be referred to arbitration and costs be provided.
3. The application is premised on the grounds on the face thereof and the supporting affidavit of one Michael Nduli, that the proceedings arise out of contractual disputes between the parties over works partially carried out, that two (2) agreements made applied in the execution of the works and the services rendered, that the Main Contract and Sub-Contract Agreements contain arbitration clauses and that Article 159 (2)(c) of the Constitution requires the Court to promote alternative forms of dispute resolution.
4. In a replying affidavit sworn on 25th June 2024 by Rhodes Ndambuki, a Quantity Surveyor, the 2nd defendant/China Wu Yi supported the plaintiff's application as it sought to advance the unequivocal intention of the parties that any dispute be settled through arbitration. It was argued that Clause 31.1 of the agreement between the defendant/Amiran and the 2nd defendant/China Wu Yi clearly ousted the jurisdiction of the court.
5. The defendant/Amiran opposed the application through a replying affidavit sworn on 4th July 2024 by Gordon Yeo its then Country Manager, who averred that the defendant is not a party to the Main Contract between the plaintiff/Upperhill Limited and the 2nd defendant/China Wu Yi and again that the plaintiff/Upperhill Limited is not a party to the Sub-Contract agreement between the defendant/Amiran and the 2nd defendant/China Wu Yi.
6. The application was canvassed by way of written submissions. The plaintiff's/Upperhill Limited submissions are dated 5th September 2024, those by the defendant/Amiran are dated 14th October 2024 and the ones by the 2nd defendant/China Wu Yi are dated 29th August 2024.
7. All the parties submit that there exists two agreements which provide that any dispute arising between the respective parties to the agreement would be referred to arbitration. Evidently, there is the Main Contract Agreement where Clause 45.1 binds the plaintiff/Upperhill Limited on the one hand and the 2nd defendant/China Wu Yi on the other. The other is the Sub-Contract Agreement where Clause 3.1 binds the 2nd defendant/China Wu Yi as the Contractor and the defendant/Amiran as the Sub-Contractor.
8. It is the plaintiff's assertion that given the issues raised in the dispute, the need arises for the assessment and testing of the quality of works, review and verification of cost, remeasurement and all other related issues to be referred to arbitration as stipulated in the respective arbitration clauses.
9. The 2nd defendant submits that the dispute between itself, the plaintiff and the defendant are interconnected and arise from the same construction project. That the claims and counterclaims involve complex commercial issues relating to performance, payment and contractual obligations under both the Main Contract and Sub-Contract. And further that the same would be addressed comprehensively by referring the entire dispute to arbitration.
10. It is submitted for the defendant/Amiran that there exists no arbitration agreement between itself and the plaintiff/Upperhill Limited and further that the statutory conditions under Section 6 of the Arbitration Act have not been met to warrant the granting of the orders sought.



Analysis and determination

11. I have considered the application, grounds, affidavits and the rival submissions. The issue for determination is whether the court should refer this matter to arbitration pursuant to the arbitration agreements between respective parties herein.
12. 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 (see Samuel Kamau Macharia & another versus Kenya Commercial Bank & 2 others [2012] eKLR).
13. Section 6(1) of the *Arbitration Act*, provides that a court may stay proceedings and refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
14. In the case of Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2000] eKLR, it was held by majority that an applicant for a stay of proceedings under section 6(1) of the *Arbitration Act* was obliged to bring his application promptly, and that is not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought.
15. From the record, it is clear that the plaintiff's application herein was lodged way long after the pleadings were closed and matter certified ready for hearing. It cannot therefore be said that the application was brought promptly as the defendant/Amiran entered appearance and filed a defence and counterclaim. Thereafter the 2nd defendant filed a reply to defence and defence to counterclaim. Equally, the plaintiff/Upperhill Limited filed a rejoinder.
16. In determining whether to grant a stay of proceedings, the Court is called upon to consider validity and enforceability of the arbitration agreements. It means that the court cannot enforce unconscionable arbitration agreements. The defendant/Amiran is opposed to and has indeed demonstrated that there exists no arbitration agreement between itself and the defendant in the main suit.
17. Indeed, there are two arbitration agreements, that is:
 - i. between the plaintiff/Upperhill Limited, and the 2nd defendant/China Wu Yi, and
 - ii. between the defendant/Amiran and the 2nd defendant/ China Wu Yi.It therefore follows that there exists no valid and enforceable arbitration clause ousting this court's jurisdiction from hearing and determining the dispute between the plaintiff/Upperhill Limited and the defendant/Amiran.
18. Parties in an agreement/contract are bound by the mutually agreed and express terms of their agreement. If there is no agreement between parties, it is not the duty of a court to impose one. The agreements between the plaintiff and the 2nd defendant (Main Contract) and between the defendant/Amiran and the 2nd defendant (Sub-Contract) are not connected and are incapable of being performed for purposes of arbitration.
19. I reach the conclusion that the instant application is not brought in good faith and is merely a means to delay the expeditious determination of the dispute herein.
20. In the upshot, the plaintiff's Chamber Summons application dated 14th June 2024 is found to lack merit and is dismissed with costs to the defendant/Amiran.



RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2025.

P.M MULWA

JUDGE

In the presence of:

Mr. Ngatia, S.C. for Plaintiff/Upperhill Limited

Mr. Kanja & Ms. Moka for Defendant/Amiran

Ms. Ng'ang'a h/b for Ms. Njoki for 2nd Defendant/China Wu Yi

Court Assistant: Carlos

