



**Light Art Productions Ltd v Okoth (Civil Case E215 of 2024)
[2025] KEHC 2580 (KLR) (Civ) (12 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2580 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E215 OF 2024

AC MRIMA, J

MARCH 12, 2025

BETWEEN

LIGHT ART PRODUCTIONS LTD APPELLANT

AND

EDWARD OKOTH ALIAS KETHAN DEFENDANT

RULING

1. This ruling is in respect of a Notice of Preliminary Objection dated November 23, 2024 which was taken out by the Defendant. The objection was tailored as follows: -
 1. That this Honourable Court lacks the jurisdiction to hear and determine the dispute at hand as the same is a preserve of Arbitration or Mediation as provided for in Clause 4(V) of the contract between the parties dated 29/9/2024.
 2. That it is therefore just and meet in the circumstance for this Honourable Court to grant the following orders: -
 - a. Declare that it lacks jurisdiction to determine the suit,
 - b. Costs to the Defendant,
 - c. Any other order the Court may deem fit and just to award.
2. Pursuant to the directions of this Court, the objection was heard by way of written submissions. Both parties duly complied. In urging this Court to allow the objection, the Defendant submitted that Clause 4V of the contract entered into by the parties provided for resolution of disputes through good faith negotiations failure to which parties resort to mediation or arbitration. While relying on some



decisions, the Defendant submitted that the case be stayed as the dispute is referred to mediation or arbitration.

3. The Plaintiff opposed the objection and prayed for its dismissal on the basis of procedure. It submitted that the objection was improperly raised since an application ought to have been filed instead. Citing several decisions, the Plaintiff prayed that the objection be dismissed with costs.
4. Going forward, this Court will now resolve the contention on the procedure used by the Defendant in raising the objection. Speaking to the manner in which a plea of *res judicata* ought to be raised in a matter, the Supreme Court in [*John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others*](#) [2021] eKLR alluded to the position that the plea is anchored on evidential facts and that such facts ought to be properly raised in a matter. In that case, the plea of *res judicata* had been raised by way of Grounds of opposition and in the Replying Affidavit.
5. The Court, in dismissing the argument that the issue was improperly raised before Court, stated as follows: -

(53) Instead, and contrary to the Appellants submissions, the plea of *res judicata* was raised through both grounds of opposition and replying affidavits in response to the Appellants application. It is also evident that through the Replying Affidavits of the 3rd and 4th Respondents, evidence by way of the Judgment of JR No. 130 of 2011 was introduced through an affidavit to bolster the plea of *res judicata*.

6. The essence of the above decision is that whereas the Apex Court emphasized that evidential matters must be properly raised in suits, the Court, however, was satisfied that as long as the evidence required to dispose of the issue at hand was already part of the record then the necessity of re-introducing the same was not mandatory.
7. Returning to the case at hand, the Plaintiff's contention that a formal application ought to have been filed was based on Section 6 of the [*Arbitration Act*](#) which provides as follows: -

6. Stay of legal proceedings:

1. A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—
 - a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
 - b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
2. Proceedings before the Court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.



3. If the Court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.
8. A careful consideration of the Plaintiff's contention against the above provision and the record brings several issues to the fore. First, the objection was solely raised on the basis of the parties' contract dated 29th September 2024. The contract is part of the documents filed together with the Plaint. Therefore, in line with the decision in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Other case* [supra], and in the unique circumstances of this matter, the requirement to file a formal application becomes unnecessary. Second, Clause 4V of the contract provides for three ways of resolving any dispute under the contract. They are through good faith negotiations, mediation or arbitration. Therefore, resisting the objection based on only one of the modes provided for in the contract to the exclusion of the other two ways is erroneous. Since the *Arbitration Act* is limited to matters which are only subject of arbitration agreements, Section 6 of the *Arbitration Act* cannot be used as a complete bar to the objection at hand. Third, even if it were that the only mode of resolution of a dispute provided for in the contract was arbitration, still Section 6 of the *Arbitration Act* does not bar the filing of notices of preliminary objections. I say so because a notice of preliminary objection is an application in itself. The difference between such an application and the ordinary ones [by way of Notice of Motion or Chamber Summons] is that an application by way of notice of preliminary objection is limited to matters of law and not of evidence. However, as discussed above, the Supreme Court has delimited the parameters thereto more so in light of Article 159(2)(d) of the *Constitution*. The Plaintiff, therefore, seems to have misconstrued Section 6 of the *Arbitration Act* as to refer to applications only by way of Notices of Motion or Chamber Summons.
9. Deriving from the foregoing, there seems to be no meaningful resistance to the objection. Since the contract gave parties the liberty to choose a mode of alternative dispute resolution, it will be remiss of this Court to limit the parties to a specific mode. The parties ought to be given the agreed liberty to deal with the dispute as contemplated. To that end, it will be befitting of this Court to postpone any further judicial consideration of the dispute until after the available avenues are fully adhered to or unless it is adequately demonstrated that the matter under consideration falls within the exception to the doctrine of exhaustion.
10. Consequently, the following final orders do hereby issue: -
 - a. The Notice of Preliminary Objection dated November 23, 2024 is allowed to the extent that there shall be no further proceedings in this matter pending the determination of the dispute by way of negotiation, mediation or arbitration.
 - b. The parties shall settle for one of the said alternative ways of resolution of this dispute within 14 days of this ruling. In the event the parties are unable to agree on the mode of resolution, the Hon. Deputy Registrar of the Division shall refer the matter to mediation.
 - c. This matter shall be fixed for mention to ascertain the position and for further orders before either the Hon. Deputy Registrar or the Presiding Judge of the Civil Division, as the case may be, on a date to be given by the Hon. Deputy Registrar.
 - d. Costs of the objection shall be in cause.

Orders accordingly.



DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF MARCH, 2025.

A. C. MRIMA

JUDGE

Ruling No.1 virtually delivered in the presence of:

Mr. Raingo, Learned Counsel for the Plaintiff.

Mr. Wandera, Learned Counsel for the Defendant.

Michael – Court Assistant.

