



**Cherangani Hills Limited v Jyoti Structures Limited (Civil Miscellaneous
E010 of 2024) [2025] KEHC 5610 (KLR) (6 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5610 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL MISCELLANEOUS E010 OF 2024**

RK LIMO, J

MAY 6, 2025

BETWEEN

CHERANGANI HILLS LIMITED PLAINTIFF

AND

JYOTI STRUCTURES LIMITED DEFENDANT

RULING

- 1 This ruling relates to an Amended Notice of Preliminary Objection dated 10/9/24 The defendant has raised the Preliminary objection listing the following grounds namely;-
 - a That the suit and the Notice of Motion dated 28/9/2024 is incompetent as the plaintiff has not complied with the doctrine of exhaustion stipulated in paragraph 23 of the letter of offer which provides;

“In case of any disputes the decision of Senior Vice President of Ms Jyoti Structures Ltd shall be final and binding JSL & MS Cherangani Hills Limited”
 - b That the plaintiff has not exhausted available dispute resolution mechanism and the court lacks jurisdiction
- 2 In its written and oral submissions through learned counsel Ms Wamayi & Co Advocate, the defendant maintains that its preliminary objection is hinged on a letter of instruction at paragraph 23 which stipulates that in case of any dispute, the decision of Senior Vice President of Ms Jyoti Structures Limited shall be final and binding JSL and M Cherangani Hills Limited
- 3 The defendant contends that it is trite that parties are bound by their own terms of contract and that the plaintiff voluntarily agreed to be bound by the decision of the Vice President of the defendant in the event of a dispute of whatever nature between themselves It relies further on the provision of Section 2 of the *Fair Administrative Action Act* No4 of 2013



- 4 The defendant faults the plaintiff for not exhausting the dispute resolution mechanism provided before seeking the intervention of this court
- 5 The defendant relies on the Court of Appeal decision in *Geoffrey Muthingi & another v Samuel Muguna & 1756 others* (2015) eKLR where the court inter alia observed that it is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked and that courts ought to be the fora for last resort rather than a first point of call The court in that case was faced with a dispute involving church members and leadership of East Africa Pentecostal Church
- 6 The defendant submits that the suit herein and the Notice of Motion dated 28/8/2024 were premature and incompetent for offending the doctrine of exhaustion
- 7 The plaintiff is opposed to the preliminary objection raised and relies on written submissions by learned counsel Ms Kidiavai & Co Advocates dated 29/9/24 and oral submissions by Songole Advocate
- 8 The plaintiff submits that the preliminary objection raised is not a point of law but requires factual verification
- 9 It submits that the letter of offer or the clause in the contract is not absolute and cannot oust the jurisdiction of this court It further submits that though such clauses in contracts are binding they are subject to principles of fairness and court's intervention where justice demands
- 10 According to the plaintiff the doctrine of exhaustion does not apply where the alternative dispute resolution is not established by legislation It is its case that a court of law retains the discretion where the alternative remedy is unavailable, impractical or inadequate It relies on *Kenya Ports Authority v Modern Holdings (EA) Limited* (2017) eKLR and the decision cited by the defendant It argues that courts must balance the application of exhaustion doctrine with access to justice
- 11 It also relies on the decision in *Nyeri County Government v Cecilia N Ndungu* (2015) eKLR in its contention that jurisdiction of this court is conferred by law and not by agreement by the parties, and that the jurisdiction of this court supercedes any other jurisdiction
- 12 This court has considered the preliminary objection raised and submissions by both parties The issues raised in this preliminary objection are;-
- i Whether the parties agreed on an alternative dispute resolution mechanism
 - ii Whether the doctrine of exhaustion applies

(i) Whether the parties agreed on alternative dispute resolution mechanism

- 13 It is not contested that the parties in this case agreed to engage each other on some business activity/venture The basis of their engagement is contained in a letter of offer dated 4/4/2018 authored by the defendant The letter of offer stipulates that the subject of the offer was;

“Letter of intent for remaining civil works and building services of New 22033 K V Ortum Substation”



14 Among the terms and conditions in the said letter of offer is a clause in paragraph 23 thereof that stipulates as follows;

“In case of any disputes, the decision of Senior Vice President of Ms Jyoti Structures Ltd shall be final and binding JSL and Ms Cherangani Hills Ltd”

15 It is quite apparent from the above that there was a contractual engagement between the plaintiff and the defendant where both parties agreed that in the event of a dispute arising then a Senior Officer of the defendant would render a decision and that decision would not only be binding to the parties but would be final

16 It is therefore clear from the factsevidence before me that the parties agreed on some sort of dispute resolution mechanism The quest ion of the objectivityreasonableness andor whether the term is binding to parties herein is the next issue for determination

(ii) Whether the doctrine of exhaustion applies

17 The doctrine of exhaustion is a legal principle anchored under Article 159(2) of the *Constitution* Article 159(2) provides;

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles;

- a justice shall be done to all, irrespective of status;
- b justice shall not be delayed
- c alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
- d justice shall be administered without undue regard to procedural technicalities; and
- e the purpose and principles of this Constitution shall be protected and promoted” (emphasis added)

The doctrine of exhaustion binds parties particularly where a contract or term of engagement provides so to first explore and exhaust the available alternative dispute resolution mechanism before resorting to courts Before one can say the doctrine applies, heshe alleging must demonstrate the following;

- i That a mechanism exists to resolve the dispute
- ii That the alternative mechanism is lawful, fair and contains sufficient safeguards for valid, objective and fair determination of a dispute
- iii That the alternative mechanism is expeditious, efficient, lawful, reasonable and procedurally fair (Article 47(1) of the *Constitution*)

The above guidelines determine whether the doctrine of exhaustion applies in a particular set of circumstances

18 In this instance, the defendant has alleged that the doctrine applies against the plaintiff and that the plaintiff's suit is incompetent and premature by the operation of the doctrine



- 19 The mechanism provided under paragraph 29 of the *Constitution* as highlighted above appears to be skewed and biased because it states that in the event of a dispute, the defendant will render a decision which decision is final In other words a dispute arising between the two parties, will be decided by one side of parties in dispute and that decision would be final and any party aggrieved has no window or chance for redress That presents a problem because for one an alternative dispute resolution mechanism presumes existence of an independent and objective body that is not party to the dispute How can one be a judge of his own cause and be expected to render a fair and unbiased verdict?
- 20 So while the doctrine of exhaustion applies where an alternative mechanism for dispute resolution exists, there are exceptions to the rule/principle Where the remedy provided is inadequate, ineffective, unfair or unreasonable as in this instance, the doctrine certainly cannot apply
- 21 It is even blatant and illegal for a term in contract to provide that the alternative mechanism is final without necessary or requisite fairness, impartiality and effectiveness A contract that contains a term that flies in the face of the *Constitution* or any other law cannot be sustained Article 48 of the *Constitution* provides for a fundamental right of access to justice Besides that Article 47(1) provides for right to fair administrative action that is fair, lawful and reasonable An alternative dispute resolution mechanism should conform with the law
- 22 This court finds that paragraph 29 of the letter of offer to the extent that it provides that a decision of a party in dispute will be binding both the parties and would be final is unconstitutional, null and void It is unsustainable

If the term had provided that a dispute would be determined by an independent arbitrator, then this court would have found that the doctrine of exhaustion would have applied In this instance the decision by a party in dispute would certainly be skewed in his favour against the plaintiff In any event if the decision would be in plaintiff's favour, then this dispute would not have arisen in the first place

In the premises this court finds no merit in the preliminary objection dated 10/9/24 The same is dismissed with costs to the plaintiff

DELIVERED, DATED AND SIGNED AT KITALE THIS 6TH DAY OF MAY, 2025

HON JUSTICE RK LIMO

