



**Wuk & 2 others v Roberts & another (Commercial Arbitration Appeal  
E002 of 2024) [2025] KEHC 12102 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12102 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL ARBITRATION APPEAL E002 OF 2024**

**F WANGARI, J**

**MAY 15, 2025**

**BETWEEN**

**ALEC ROGER AGNES VAN WUK ..... 1<sup>ST</sup> APPELLANT**

**GUIDO JOHANNES FRANCISCUSMARIA PALLADA ..... 2<sup>ND</sup> APPELLANT**

**BELRO INVESTMENTS LIMITED ..... 3<sup>RD</sup> APPELLANT**

**AND**

**EDWARD DAVID ROBERTS ..... 1<sup>ST</sup> RESPONDENT**

**LUCY VIRGINIA WANJIRU PETTIT ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application subject of this ruling is the Chamber Summons dated 04/12/2024. It is brought under the provisions of section 7 and 17 (6) of the *Arbitration Act*, Rules 2 and 3 of the Arbitration Rules and all other enabling provisions of the law. The Applicants/ Appellants seek the following orders:
  - a. Spent
  - b. That pending the hearing and determination of this appeal, the court do grant stay of arbitral proceedings before the Arbitrator Mr. Peter Njeru.
  - c. That cost of this application be provided for.
2. The grounds in support of the application in summary is that the parties herein had entered into a Share Purchase Agreement but the said agreement was terminated due to the failure on the Respondents by failing to complete the transaction for lack of funds.
3. The Respondent filed a claim dated 25/04/2024 before an arbitrator as per the arbitration clause in the agreement. The Applicants raised a preliminary objection claiming that the arbitrator had no jurisdiction to hear the matter as the claim by the Respondents had been filed out of time.



4. Vide the ruling dated 20/11/2024, the arbitrator dismissed the Preliminary Objection and directed that the arbitration do proceed before the arbitrator, Mr. Peter Njeru. Aggrieved by the said ruling, the Applicants filed this appeal by way of Memorandum of Appeal. It is pending this appeal that the Applicants seeks to have the proceedings before the arbitrator stayed, as no prejudice shall be suffered by the Respondents.
5. The Respondents herein opposed the application by filing Grounds of Opposition dated 10/01/2024 and a Notice of Preliminary Objection dated 20/01/2024. The Respondents stated that the application by the Applicants was fatally and incurably defective. The Applicants ought to have moved the court by way of Originating Summons, hence the application and the Memorandum of Appeal are misplaced.
6. It was directed that the application be canvassed by way of written submissions. Both parties complied by filing their rival submissions with their supporting authorities.

### **Analysis and Determination**

7. I have considered the application, supporting affidavit and the submissions filed, the authorities cited as well as the law and I discern the following issues for determination: -
  - a. Whether the Preliminary Objection has merits.
  - b. Whether the application has merits.
  - c. What is the order as to costs?
8. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700, Law, JA stated: -

“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. 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.”
9. For a Preliminary Objection to succeed the following tests ought to be satisfied;
  - a. it should raise a pure point of law;
  - b. it is argued on the assumption that all the facts pleaded by the other side are correct; and
  - c. it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
10. A valid Preliminary Objection should, if successful, dispose of the suit or application.
11. The application was hinged on the provisions of the [Arbitration Act](#), 1995. Section 7 of the [Arbitration Act](#), provides as follows;  
Interim measures by court



1. It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.
  2. Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.
12. The above provision has been interpreted to empower court to grant interim orders for purposes of preserving the subject matter and or maintaining the status quo so as to ensure tranquility before the hearing and determination of the dispute. The primary objective of the court when intervening under Section 7 of the Act is to ensure that the subject matter of the arbitration proceedings is not jeopardized before an award is issued, thereby rendering the entire proceedings nugatory.
13. In *Infocard Holdings Limited vs AG & 2 Others* [2014] eKLR, the court held that Section 7 does not give courts the power to look into the merits of the agreement and the dispute generally lest it interferes with the jurisdiction of the arbitral tribunal.
14. Similarly, in *CMC Holdings Limited v Jaguar Land Rover Exports Limited* [2013] eKLR the court held that: -
- “...In practice, parties to international arbitrations normally seek interim measures of protection. They provide a party to the arbitration an immediate and temporary injunction if an award subsequently is to be effective. The measures are intended to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection...”
15. The Applicants also brought the application under section 17 (6) of the application which provides as follows;
- Competence of arbitral tribunal to rule on jurisdiction
- (6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.
16. From the Preliminary Objection, the Respondents stated that the court ought to have been moved by way of Originating Summons and not by filing of Memorandum of Appeal. Rule 3 of the Arbitration Rules provides as follows;
- 3 Applications under sections 12, 15, 17, 18, 28 and 39 of the Act shall be made
- (1) by originating summons made returnable for a fixed date before a Judge in chambers and shall be served on all parties at least fourteen days before the return date.



(2) Any other application arising from an application made under subrule (1) shall be made by summons in the same cause and shall be served on all parties at least seven days before the hearing date.

17. The Applicants having been aggrieved by the ruling regarding the preliminary question of jurisdiction by the arbitral tribunal, are subject to the provisions of section 17 (6) of the Act. Under Rule 3 (1) of the Rules, it is in mandatory terms that any application under section 17 should be by way of Originating Summons. Subsequent applications arising from the Originating Summons should be made by way of summons.
18. The Applicants do not contest the provisions of Rule 3(1) of the Rules. They submit the rule is only applicable to applications but not appeals. The Arbitration Act does not provide for direct appeals to the High Court but by filing of an application to set aside the arbitral award under section 35 of the Act. S. 35(2) provides the conditions upon which the arbitral award may be set aside.
19. The ruling subject to these proceedings was not an arbitral award but a ruling on preliminary proceedings. I do agree with the Respondents that the Applicants ought to have strictly followed the procedure as per the provisions of section 17 (6) as read with Rule 3(1), and therefore erred in law in commencing these proceedings by way of a Memorandum of Appeal. (See Chania Gardens Limited v Gilbi Construction Company Limited & ano [2015] eKLR). I find that the Preliminary Objection has merits and the Memorandum of Appeal filed is hereby struck out.
20. As for the Chamber summons dated 04/12/2024, the institution of these proceedings having been fatally defective, the Chamber Summons is also struck out. Even though the Preliminary Objection would have been dismissed, the orders being sought for in the application would not have been granted by virtue of section 17 (8) of the Arbitration Act.
21. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. Considering that there are arbitration proceedings pending, each party to bear its own costs.
22. Having found as above, the following orders flow therefrom: -
  - a. The Preliminary Objection dated 20/01/2024 is hereby upheld.
  - b. The Memorandum of Appeal and the Chamber Summons dated 04/12/2024 are hereby struck out.
  - c. Each party to bear its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 15<sup>TH</sup> DAY OF MAY, 2025.**

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**F. WANGARI**

**JUDGE**

In the presence of:

M/S Amina Advocate for the Applicant

Mr. Mugo Advocate for the Respondent



M/S Norah, Court Assistant

