Coffee Management Services Limited v New Murarandia Farmers Cooperative Society (Civil Case E001 of 2022) [2025] KEHC 11035 (KLR) (24 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11035 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CIVIL CASE E001 OF 2022

TW OUYA, J

JULY 24, 2025

BETWEEN

COFFEE MANAGEMENT SERVICES LIMITED ..... PLAINTIFF

AND

NEW MURARANDIA FARMERS COOPERATIVE SOCIETY ..... DEFENDANT

RULING

1. This is a Ruling into a Preliminary Objection lodged by the Defendant following a Plaint instituted by the Plaintiff for recovery of sums owed by the Defendant.

2. The Plaintiff, by an Amended Plaint dated 20th June 2023, moved this honourable Court seeking payment of USD 400,652.16, being the outstanding sum owed by the Defendant as at 30th June 2023 plus interest at 12 % per annum as at 30th June 2023.

3. The basis of the claim was that in the crop year 2019/2020 the Plaintiff successfully tendered and was awarded the business of milling services with the Defendant resulting in the signing of a Milling and Marketing agreement dated 26th July 2019. The Plaintiff entered into another Milling and Marketing agency agreement with the Defendant on 27th May 2020.

4. It was a term of the Milling and Marketing Agency agreement that the Plaintiff was to provide financial assistance to the Defendant from time to time. Also, the Plaintiff was to recover any sums advanced to the Defendant from the proceeds of sale of the coffee which the Defendant was to deposit with the Plaintiff. The Plaintiff was to deduct any and all sums advanced to the Defendant before transmitting any balance to the Defendant.

5. Pursuant to these agreements and the relationship created between the parties, the Defendant sought a coffee crop advancement from the Plaintiff on several occasions and the Plaintiff accepted.

6. Subsequently, the Plaintiff and Defendant also entered into a Security Agreement dated 18th July 2020 to secure a loan advancement of USD 317,820. The Defendant was therefore to deliver cleaned and dried coffee to the Plaintiff for purposes of securing prompt payments towards any and all amounts advanced to the Defendant.

7. Towards this end, the Plaintiff variously disbursed the aforesaid advance to the Defendant which accrued to USD 400,652.16 inclusive of interests as at 30th June 2023 which sum continues to attract interest. However, the defendant defaulted in the repayment of the sums advanced. Additionally, he neglected, refused and totally failed to deliver to the Plaintiff the clean and dried coffee for purposes of securing the outstanding amount as agreed in the agreements.

8. It is further averred that the Defendant, in flagrant breach of the agreement later diverted the coffee thereby curtailing the Plaintiff's effort to recover the balance of the loan proceeds thereof.

9. As a result, the Plaintiff has suffered and continues to suffer, heavy losses thereof as a result of the Defendant's actions.

10. The Defendant filed a Preliminary Objection dated 23rd April 2024 urging the following points:

    i. This court lacks the jurisdiction to entertain, hear and determine the Amended Plaint dated 20th June 2023 for reason that the same offends the doctrine of exhaustion and constitutional avoidance;

    ii. The Plaint offends the provisions of Section 58 [3] of the Cooperative *Societies Act*, Cap 490 Laws of Kenya, the Commissioner for Cooperative Societies having exercised his administrative powers to appoint the director of Cooperatives in Muranga County to oversee the dispute between the Plaintiff and the Defendant.

    iii. The Honourable Court lacks the requisite jurisdiction to hear and determine the suit herein as it offends clause 12.3 of the Agreement dated 18th June 2020, clause 16 of the Agreement dated 27th May 2020, clause 17 of the Agreement dated 26th July 2019 being arbitration clauses.

11. The Preliminary Objection was disposed through written submissions.

12. The Defendant's submissions were primarily on jurisdiction of the court based on the exhaustion doctrine and arbitration clause in the Agreement.

13. Citing the case of Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR where the Court of Appeal discussed the purpose of the doctrine of exhaustion. The defendant submitted that the doctrine requires that where a specific legal framework provides a dispute resolution mechanism, parties must first exhaust that mechanism before seeking recourse in court. The court held that:

> " The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is no bypassing of the designated institutions and that unnecessary litigation is avoided. It is a doctrine that promotes alternative dispute resolution mechanisms and ensures that the courts are not overburdened with cases that can be resolved elsewhere."

14. It was further submitted that the Commissioner for Cooperative development conducted an inquiry into the financial affairs of the Defendant in pursuant to Section 58 [3] of the Cooperative *Societies Act*, Cap 490. The inquiry report compiled by the Commissioner for Cooperative Development disclosed that the loan alleged by the Plaintiff was merely a ploy intended to defraud the Defendant. In view of the findings contained in the inquiry report, the Commissioner for Cooperatives Development

appointed the Director of Cooperatives Murang'a County to engage the parties concerned and give appropriate directions. The Director of Cooperatives Murang'a County has not yet completed the process as it is therefore premature for the Plaintiff to litigate the same matter pending before the Director of Cooperatives Murang'a County for an administrative action. Therefore, the Plaintiff's failure to disclose the process that commenced at the instant of the Director of Cooperatives is an attempt to deceive the court.

15. It was the Defendant's submission that the doctrine of constitutional avoidance dictates that courts should avoid deciding constitutional issues where a matter can be resolved on other forums. Reliance was placed on the case of Speaker of the National Assembly v James Njenga Karume [1992]eKLR where the court stated that:

> " ...where there is a clear procedure for redress of any particular grievance prescribed by *the constitution* or an act of Parliament, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

16. The Defendant submitted that the Plaintiff had failed to follow the prescribed procedure under Clause 12.3 of the Agreement dated 18th June 2020, Clause 16 of the Agreement dated 27th May 2020, Clause 17 of the Agreement dated 26th July 2019 being Arbitration Clauses and Section 58 of the Cooperative *Societies Act* which gives the Commissioner for Cooperatives the power to intervene on any matter that touches on financial mismanagement of Cooperative Societies. Therefore, the Plaint should be struck out.

17. Reference was made to Section 6 [1] of the *Arbitration Act* which enjoins a court to stay proceedings and refer the matter to arbitration where parties have agreed to refer their disputes to arbitration. Citing the case of Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR where the Court of Appeal held that:

> " ...where parties have entered into an arbitration agreement, the court must give effect to the agreement and refer the dispute to arbitration unless there are compelling reasons to the contrary."

18. It was therefore submitted that the Plaintiff, having not demonstrated that the arbitration clauses are null and void or incapable of being performed and that the Defendant having brought up the issue of the arbitration clauses promptly, this honourable court should dismiss the suit and refer the matter to arbitration pursuant to Section 6 [1] of the *Arbitration Act* and for an administrative action by the office of the Director of Cooperatives Murang'a County as recommended by the Commissioner for Cooperative Development.

19. Relying on Nyutu Agrovet Limited v Airtel Networks Kenya Limited [2015] eKLR, the Defendant submitted that it is an established principle that courts must uphold arbitration agreements unless exceptional grounds for setting them aside exist.

20. The Plaintiff opposed the Preliminary objection on the basis that it lacks merit and fails to meet the legal threshold for a valid Preliminary Objection. The Plaintiff's submissions were premised on the question of the Jurisdiction of this honourable court to hear and determine the suit herein.

21. It was submitted that the Preliminary Objection is not a pure point of law as enunciated in the case of Mukhisa Biscuit Manufacturing Company Limited v West end Distributors Ltd [1969] EA 696 as the Defendant has raised factual disputes that require the court to examine evidence. The submission by the Defendant that the Plaint offends the decision of the Commissioner for Cooperative Development

as contained in the inquiry report conducted under Section 58 [3] of the Cooperative *Societies Act* is a question of fact which requires adducing of evidence. See also the case of Kenya Breweries Limited & another v Keroche Breweries Limited [2020]eKLR where the court held that in a preliminary objection the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed as they are prima facie presented in the pleadings on record. This was also the position advanced by the court in Dismas Wambola v Cabinet Secretary, Treasury & 5 others [2017]eKLR

22. Citing the case of Pyramid Hauliers Ltd v Nehemiah Kinyanjui [2021]eKLR, the Plaintiff submits that documentary evidence cannot be submitted through submissions as evidence attached to submissions cannot be considered to have been properly produced for purposes of supporting a party's case.

23. Therefore, the Plaintiff submits that the ground of the Preliminary Objection on non-compliance with Section 58 of the Cooperative *Societies Act* must fall as it seek adducing of evidence and which evidence cannot be adduced through submissions.

24. Regarding the objection on grounds of an arbitration clause, the Plaintiff relies on Mt. Kenya University v Step Up Holdings [k] Ltd [2018] eKLR to advance the position that the Defendant is barred from relying on Section 6 [1] of the *Arbitration Act* on the basis that the Defendant filed a Memorandum of Appearance on 19th December 2023, attended court on several occasions for pretrial only to file a Preliminary Objection on 24th April 2024 alleging non-compliance with the arbitration clause. This was contrary to the Court of Appeal's observation in the Mt. Kenya University case [Supra] where the court held thus:

> " .... We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter. The appellant herein entered appearance, and then responded to the respondent's application for injunction before filing the application seeking an order for reference to arbitration. Critically, the appellant's response to the respondent's application for injunction amounted to taking of a procedural step in the matter before the initiation of the reference process."

25. Reliance was further placed on the case of Yooshin Engineering Corporation v AIA Architects Ltd [2020] eKLR where the Court of Appeal held that a Preliminary Objection on the ground of an existing arbitration clause filed four days after filing a memorandum of appearance is one to be dismissed, the Court of Appeal stated thus:

> " The Preliminary Objection was raised four days after entry of appearance. This Court has severally held that the provisions of Section 6[1] of the Act must be construed strictly...in our view, the preliminary objection was not only improperly worded but was also raised after entry of appearance and the appellant having acquiesced the jurisdiction of the court."

26. The Plaintiff further submitted that allowing the Preliminary Objection would amount to countenancing forum shopping as the Defendant had already taken procedural steps in the matter and was thus barred from relying on Section 6 [1] of the *Arbitration Act*. See the case of Stratogen Limited *v County Government of Kisii [Civil Case 1[E002 of 2021*][2023] KEHC and ET Timbers Limited v Fang [Admiralty Cause E003 of 2021] [2024]

27. It was further submitted by the Plaintiff that Section 6 of the *Arbitration Act* requires the filing of an application for one to divest the court of jurisdiction. By filing a preliminary Objection, the Defendant filed a Pleading, a procedural step, therefore, he cannot rely on Section 6 of the Act.

28. Also, the Plaintiff submits that the dispute herein is not covered in the arbitration clause. Therefore, there would be no dispute to refer to arbitration if the court were to take that approach.

29. Lastly, it is submitted that the case herein is a pure civil case for breach of contract arising from the Defendant's refusal to pay a loan advanced by the Plaintiff. The same does not raise any constitutional issues to warrant the application of the doctrine of exhaustion. Therefore, the application of the doctrine of exhaustion is misguided and untenable. Moreover, the doctrine of exhaustion is an administrative law principle that requires parties to utilize the statutory remedies provided before seeking judicial intervention. Reliance was placed on the case of R v Independent Electoral and Boundaries Commission [IEBC] & others ex parte the National Super Alliance Kenya [NASA] & 6 others [2017] eKLR.

30. Ultimately, the Plaintiff submits that the dispute herein falls squarely within the jurisdiction of this honourable court. Therefore, the Plaintiff prays that the Preliminary Objection be dismissed with costs.

31. Having considered the Preliminary Objection, the parties' respective submissions and the pleadings filed herein, the issues arising for the determination are follows: -

    a. Whether the Preliminary Objection is a proper preliminary objection that raises pure points of law.

    b. Whether the Plaintiff's suit offends the doctrine of exhaustion

32. The principles established by the time-honoured, Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors [1969] EA 696, cited with approval by the Supreme Court in Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, [2014] eKLR,are settled that:

> " 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. [emphasis added]"

33. Sir Charles Newbold in the same case went on to state: -

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."

34. Therefore, when preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.

35. In the case of Oraro... v ...Mbaja [2005] 1KLR 141, the Court held that:

> " Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence."

36. The court in Omondi v National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177, addressed the matters to be considered in determining the validity of preliminary objection and held that: -

> " ... In determining [Preliminary Objections] the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion...."

37. From the foregoing, it is trite that a preliminary objection is only limited to points of law where facts are not contested. I will therefore limit myself to the law and uncontested facts in determining the instant Preliminary Objection. The gist of the Preliminary Objection is the challenge on the jurisdiction of this court to entertain this suit on the basis of the doctrine of exhaustion and the fact that there is an arbitration clause.

38. The centrality of jurisdiction was discussed in the oft cited case of Owners of Motor Vessel 'Lillian S' v Caltex Oil [Kenya] Limited [1989] KLR 1 wherein it was held thus: -

> " Jurisdiction is everything. Without it a court has no power to make one more step. Where a court 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 before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

39. From the undisputed facts of this case, it is clear that this case arises from a breach of contract dated 18th July 2020 between the Plaintiff and the Defendant. Where the Plaintiff had advanced a sum of USD 317,820 to the Defendant. However, the defendant defaulted in the repayment of the sums advanced despite demand and notice of intention to sue being made.

40. The parties herein entered into three different agreements. Remarkably, all the agreements provide an arbitration clause in the event of a dispute.

> Clause 17 of the Marketing Agency agreement provides that disputes arising out of the agreement that cannot be resolved amicably be referred to arbitration under the *Arbitration Act* 1995 Kenya. The tribunal is to consist of one arbitrator to be appointed by agreement between the parties. The arbitration is to be in Nairobi and undertaken in English.
>
> Clause 16 of the Marketing agency dated 27th May 2020 also makes a similar provision that disputes arising out of the agreement be referred to arbitration.

41. I have reproduced the arbitration clause in the Security Agreement, under which the sums in dispute were advanced provides in clause 12.3 that:

> Any dispute, controversy or claim arising out of or relating to this agreement or the breach, termination or invalidity thereof, if not settled mutually between the parties shall be referred to arbitration under the Rules of the Chartered Institute of Arbitrators of the United Kingdom, Kenya Branch. The number of arbitrators being one [1]. In the event if failure to agree between the Parties on the choice of arbitrator, the Chair of the arbitrators Kenya branch shall appoint the arbitrator under its rules. The language to be used in the arbitral proceedings shall be English. The proceedings shall take place in Nairobi. [Emphasis added]

42. Although the Plaintiff alleges that the dispute herein is not covered in the Arbitration clauses in the agreement. Clause 12.3 of the Security Agreement reproduced hereinabove provides that any dispute that the parties are unable to settle amicably should be referred to arbitration.

43. From the undisputed facts of this case, it is clear that the instant suit arises from a breach of contract, therefore, the claim by the Plaintiff that the dispute herein is not envisioned by the agreement is misleading.

44. In the instant case, the preliminary objection is a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. This was one of the examples given in the Mukisa Biscuits case [supra] as to what a preliminary objection should be.

45. It is noteworthy that the instant case is distinguishable from the decision of the Court of Appeal in Yooshin Engineering Corporation v AIA Architects Ltd [2020] eKLR where a Preliminary objection that was raised four days after entering appearance was dismissed. It is noteworthy that in the Yooshin case, the Appellant not only filed the Preliminary Objection four days after entering appearance but also proceeded to file Replying affidavits on the other applications that were before court. It is the act of filing the Replying affidavits that was considered as acknowledging the claim under Section 6 [1] of the *Arbitration Act* and not merely the fact that the same was filed four days after entering appearance. Similarly, in the Mount Kenya University Case [Supra] that the Plaintiff has relied on, the distinction with the instant case is that, the Appellant first filed a Defence and Defendant's witness statements after filing the Preliminary Objection. Therefore, the court was right in holding that the parties had taken procedural steps in the suit and could therefore not raise the issue of existence of an arbitration clause.

46. In the instant case, however, the Preliminary Objection herein was the only significant procedural step that the Defendant took in responding to the Plaint. Although, the Plaintiff has joined issue with the fact that the Preliminary Objection is a pleading and therefore removes one under the protection of Section 6 [1] of the *Arbitration Act*, the principles of a preliminary objection as envisioned in the Mukisa Biscuits case [Supra] take note of the fact that the existence of an arbitration clause is a good ground for raising a preliminary objection:

> " 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. [emphasis added]

47. The Court finds and holds that the Notice of Preliminary Objection as raised by the Defendants/ Objectors meets the test of what amounts to a Preliminary Objection. It raises pure points of law and can be determined without ascertainment of facts from elsewhere other than the material placed before the court. The agreements that the objection is based on are documents that the Plaintiff has attached to the Plaint.

Whether the Plaintiff's suit offends the doctrine of exhaustion

48. The Objection hinges on the fact that the Agreements giving rise to the suit have an arbitration clause. The Court has gone through the said agreements and is satisfied that they al make provision for reference of disputes between the parties to arbitration. Specifically, clause 12.3 of the Security Agreement, upon which the dispute herein is hinged, contains an Arbitration clause that provides:

> Any dispute, controversy or claim arising out of or relating to this agreement or the breach, termination or invalidity thereof, if not settled mutually between the parties shall be referred to arbitration under the Rules of the Chartered Institute of Arbitrators of the United Kingdom, Kenya Branch. The number of arbitrators being one [1]. In the event if failure to agree between the Parties on the choice of arbitrator, the Chair of the arbitrators Kenya branch shall appoint the arbitrator under its rules. The language to be used in the arbitral proceedings shall be English. The proceedings shall take place in Nairobi. [Emphasis added]

49. Section 6[1] of *Arbitration Act* states as follows:

> "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....."

50. In the instant suit, clause 12.3 of the Security Agreement, Clause 16 of the Marketing Agreement and Section 17 of the Marketing Agreement make provision for dispute resolution through arbitration. According to the said clause, parties clearly agreed that all claims and disputes that were to arise under the agreement were to be referred to be a single arbitrator to be appointed by the parties. It is trite that parties are bound by their terms of Contract and the Court cannot rewrite the said Contract.

51. Section 6 of the *Arbitration Act* requires the Court, where an application is made by a party, to stay the proceedings and refer the matter for Arbitration. In this case, no such application has been made. Instead, the Defendant has raised an objection premised on the doctrine of exhaustion. The court then has to decide whether the objection is merited.

52. The Plaintiff has contended that the instant suit is purely a civil claim on breach of contract and therefore the doctrine of exhaustion, which is an administrative and constitutional law principle, should not be used as a legal bar against the instant suit.

53. As eloquently explained in the case of Speaker of the National Assembly v Njenga Karume [1992] eKLR, where there is a clear procedure for redress of any particular grievance, prescribed under *the Constitution* or Statute, that procedure must be strictly followed.

54. The Court of Appeal in the case of Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR, reiterated on the doctrine of exhaustion and held as follows:

> "We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside

of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

"We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs' disputes had they filed them within the church set up. And there was always the right, acknowledged by the learned Judge, of approaching the courts after exhaustion of the church mechanisms. By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely."

55. In the case of Yes Housing Co-operative Society Limited v Kenneth Onsare Maina [2020] eKLR, the Court held that:

> " Before concluding this issue Article 159[2][c] of *the Constitution* provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.
>
> 37. It follows that this Court is not just under a duty to enforce a contractual clause binding the parties to refer their disputes to arbitration but is under a Constitutional obligation to promote that mode of dispute resolution. In my view it would amount to an abdication of its judicial duty if the court were to shirk that duty and decline to refer a matter to arbitration simply because a party believes that the applicant's case is unmerited and is bound to fail. Whether or not the case is unmerited is for the arbitrator to determine."

56. Further in the case of County Government of Kirinyaga v African Banking Corporation Ltd [2020] eKLR, the Court held that:

> " The clear intentions of the parties was that if any dispute arises they oust the jurisdiction of the court and have preference to have the dispute settled through arbitration. This in line with Judicial Authority, under Article 159[2][c] of *the Constitution* which states. In exercising Judicial authority courts and Tribunals shall be guided by the following principles –
>
> "alternative forms of dispute resolution including reconciliation, mediation, arbitration ---------- shall be promoted"

57. In light of the foregoing, seeking internal remedies before moving to the courts is not limited to administrative law or constitutional remedies, the very essence of the exercise of judicial authority requires that alternative forms of dispute resolution mechanisms be embraced. Therefore, the requirement to pursue arbitration as envisioned by the parties in their agreement ought to be promoted in the spirit of *the Constitution* and not merely curtailed.

58. The Parties in this case by their agreement chose to have all their disputes and differences resolved through arbitration. I must remind the parties that they are bound by the terms of their contract. The Court of Appeal in the case of He*samuddin Gulamhussein Pothiwalla Admin, Trustee and Executor*

of the Estate of Gulamhussein & Ebrahim Pothiwalla v Kidogo Basi Housing Co-operative Society Ltd & 31 others [Civil Appeal No. 330 of 2003] held that:

> " A Court of Law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

59. The Parties choice of forum in their contract denies the court the jurisdiction to entertain this matter. The Court has no other option, but to comply with the law. This Court is not just under a duty to enforce the contractual clause binding the parties to refer their disputes to arbitration but is under a Constitutional obligation to promote that mode of dispute resolution. The Plaintiff came to this court before exhausting the dispute resolution mechanism agreed in the clause 12.3 of the Agreement dated 18th June 2020, clause 16 of the Agreement dated 27th May 2020 and clause 17 of the Agreement dated 26th July 2019. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked.

60. The Supreme Court in Bia Tosha Breweries Limited versus Kenya Breweries Limited & Others [KESC] Petition 15 of 2020 stated that:

> " The mandate of an arbitrator largely proceeds on the basis of the agreement by parties, and is mainly tasked with the resolution of a dispute as set out in the governing agreement.
>
> ...
>
> we are alive to the fact that arbitration must remain an option open to any party within their understanding of their contract and we have seen no bar to any of them invoking any arbitral clause to assert their rights under the said contract. The filing of proceedings under *the Constitution* cannot per se be a bar."

61. In Republic v Independent Electoral and Boundaries Commission [I.E.B.C.] Ex parte National Super Alliance [NASA] Kenya & 6 others [2017] eKLR, the Court while asserting that exceptions to the doctrine of exhaustion requirement will be decided on a case-by-case basis, held that:

> " As the Court of Appeal acknowledged in the Shikara Limited Case [supra], the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it."

62. The Plaintiff has not advanced any reason why the court should depart from the established principle. I am therefore persuaded that resorting to arbitration first, as espoused in the parties' agreements, would serve the values and interests of the parties as espoused in *the Constitution* and the law.

63. In view of the above the Notice of Preliminary Objection dated 24th April 2024 by the Defendants/ Objectors is merited. The said Preliminary Objection is upheld. The Plaintiff's suit is hereby struck out with costs to the Defendants/Objectors.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH JULY 2025.

HON. T. W. OUYA

JUDGE

For Plaintiff .....Ms Masara HB Wakwaya

For Defendant.....Mitiambo HB Orina

Court Assistant.....Brian