



**Fracht AG v Lochab Transport Limited; Southern Shipping Services Limited & 6 others (Interested Parties) (Commercial Case E272 of 2024) [2025] KEHC 11298 (KLR) (Commercial and Tax) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11298 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E272 OF 2024**

**AA VISRAM, J  
JULY 24, 2025**

**BETWEEN**

**FRACHT AG ..... PLAINTIFF**

**AND**

**LOCHAB TRANSPORT LIMITED ..... DEFENDANT**

**AND**

**SOUTHERN SHIPPING SERVICES LIMITED ..... INTERESTED PARTY**

**REAL MANAGEMENT SERVICES (2002) LIMITED ..... INTERESTED PARTY**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY . INTERESTED PARTY**

**BUSINESS REGISTRATION SERVICE ..... INTERESTED PARTY**

**KENFREIGHT EAST AFRICA LIMITED ..... INTERESTED PARTY**

**HORN OF AFRICA TRANSPORTERS LIMITED ..... INTERESTED PARTY**

**SIMON NYAMALI GWARO ..... INTERESTED PARTY**

**RULING**

**Introduction and Background**

1. The Plaintiff and the Defendant entered into a Joint Working Agreement dated 29<sup>th</sup> June, 2021, under which the Plaintiff provided asset financing for heavy-lift transport operations in East and Central Africa, while the Defendant undertook the role of business development.



2. In a plaint dated 20<sup>th</sup> May, 2024, the Plaintiff contends that it financed the acquisition of trailers and trucks and disbursed loans amounting to USD 3,876,889.93 to the Defendant as working capital for the venture. The Plaintiff alleges that the Defendant breached the Agreement by attempting to sell the company to a third party through share transfers and changes in directorship without prior notice or consent. The Plaintiff maintains that this action fundamentally alters the nature of the joint venture and exposes it to significant risk of loss.
3. The Plaintiff further claims that certain financed assets have been put up for auction due to the Defendant's debts to its landlords, who are the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties. It asserts that the Defendant failed to apply 50% of free cash flow to the repayment of the loan as agreed, unilaterally transferred shares without consultation, disposed of financed assets to settle personal debts, breached duties of loyalty and good faith, and accrued debts that resulted in the auctioning of Plaintiff-financed assets.
4. The Plaintiff seeks, among other reliefs, a permanent injunction restraining interference with financed assets, an order directing registration of the Plaintiff as the lawful owner, an order compelling the release of all financed assets, police-supervised enforcement of the orders, a declaration of profits made from the joint venture, a prohibition on share transfers pending asset recovery and loan repayment, special damages of USD 3,876,889.93, general damages, and costs of the suit.
5. The Defendant raised a Preliminary Objection dated 21<sup>st</sup> June, 2024, arguing that this Court lacks jurisdiction since Clause 60 of the Agreement provides for mediation and, failing that, final and binding arbitration under Kenyan law.

## **Submissions**

### **Defendant's Submissions**

6. The Defendant submits that Clause 60 mandates that unresolved disputes first be submitted to mediation and, if unsuccessful, to final and binding arbitration in accordance with the Kenyan law. The Defendant argues that this clause ousts the jurisdiction of the Court to determine disputes arising from the Agreement. It also contends that the Plaintiff has failed to produce evidence of a registered debenture or other document establishing a registrable interest in the Defendant's movable property despite alleging to have disbursed substantial loan amounts.

### **Plaintiff's Submissions**

7. The Plaintiff submits that under Section 6 of the *Arbitration Act*, a party seeking referral of a dispute to arbitration must file a formal application for stay of proceedings, and that a Preliminary Objection is not the prescribed method. It argues that Preliminary Objections must be confined to pure points of law and cannot involve contested facts requiring evidence, citing *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696.
8. The Plaintiff further argues that Clause 60 is ambiguous and incapable of being performed because it fails to specify an arbitration institution, does not designate an appointing authority, lacks a procedure for appointment of the arbitrator, does not specify the number of arbitrators, omits the seat or location of arbitration, does not state the language of arbitration, and fails to define the timeframe for resolving disputes. It maintains that courts cannot rewrite an arbitration clause to insert missing terms and therefore the clause is inoperative.



## Analysis and Determination

9. The principal issue is whether this suit should be referred to arbitration pursuant to Clause 60 of the Agreement.
10. The doctrine of exhaustion requires that where a contractually agreed dispute resolution mechanism exists, parties must exhaust that mechanism before resorting to court proceedings. The Court of Appeal in *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] KECA 304 (KLR) affirmed this principle, which also aligns with Article 159(2)(c) of the *Constitution* mandating promotion of alternative dispute resolution mechanisms.
11. Section 6(1) of the *Arbitration Act* provides that where proceedings concern a matter subject to an arbitration agreement, the Court shall stay the proceedings and refer the matter to arbitration upon application by a party made no later than the time of entering appearance, unless the arbitration agreement is found to be null, void, inoperative, or incapable of being performed, or where no actual dispute exists between the parties.
12. Although the Plaintiff argues that a formal application is the only proper method under Section 6, the wording of the provision does not expressly preclude a Preliminary Objection. This Court has previously entertained similar jurisdictional challenges raised by Preliminary Objection in circumstances where the objection is made either as the 'first step' or where the objector has not formally acknowledged either the claim, or jurisdiction of the court, and in doing so, waived its right to proceed by way of arbitration.
13. It is trite that a Preliminary Objection must be founded on uncontested facts and must raise a pure point of law capable of disposing of the suit without evidentiary inquiry. In the present case, it is undisputed that the Agreement contains an arbitration clause. Accordingly, the Preliminary Objection properly raises a jurisdictional point of law.
14. As to whether the clause is inoperative or incapable of being performed, Clause 60 provides: -

If the dispute is not resolved within a reasonable period, any or all outstanding issues may be submitted to mediation in accordance with any statutory rules of mediation. If mediation is not successful or unavailable, any outstanding issues will be submitted to final and binding arbitration in accordance with the laws of the Republic of Kenya. The arbitrator's award will be final, and judgment may be entered upon it by any court having jurisdiction within the Republic of Kenya.
15. While the clause lacks certain procedural details, the *Arbitration Act* provides mechanisms to address such gaps. Section 12 empowers the Court to appoint an arbitrator where parties cannot agree. Section 20 allows the arbitral tribunal to determine procedural rules in the absence of party agreement. Section 3(4) provides guidance for determining the seat of arbitration where it is unspecified. The arbitral tribunal may also determine the language of proceedings if the parties do not agree.
16. These statutory provisions ensure that the arbitration process can proceed effectively despite omissions in the clause. Further, courts are enjoined to uphold arbitration agreements in accordance with Article 159(2)(c) of the *Constitution* and ought to avoid invalidating them in circumstances where it is clear that the parties agreed to resolve their dispute by way of arbitration. This is especially so where the procedural deficiencies may be cured by reference to the *Arbitration Act*.
17. I therefore find that Clause 60 is valid, enforceable, and capable of being performed, and that the dispute falls within its scope.



**Disposition**

- 18. For the foregoing reasons, I make the following orders: -
  - a. The Defendant’s Preliminary Objection dated 21<sup>st</sup> June, 2024, is allowed.
  - b. These proceedings are stayed and the dispute is referred to arbitration in accordance with Clause 60 of the Joint Working Agreement.
  - c. The parties shall agree on an arbitrator within 30 days; failing agreement, the Chairperson of the Chartered Institute of Arbitrators (Kenya Branch) shall appoint an arbitrator within a further 30 days.
  - d. The Defendant is awarded costs of the Preliminary Objection.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF JULY, 2025.**

**ALEEM VISRAM, FCIArb**

**JUDGE**

In the presence of;

Court Assistant: Sakina

.....for Plaintiff

.....for Defendant

.....for 1<sup>st</sup> Interested Party

.....for 2<sup>nd</sup> Interested Party

.....for 3<sup>rd</sup> Interested Party

.....for 4<sup>th</sup> Interested Party

.....for 5<sup>th</sup> Interested Party

.....for 6<sup>th</sup> Interested Party

.....for 7<sup>th</sup> Interested Party

