



**Ventra Locomotives v Kenya Railways Corporation (Civil Suit  
E009 of 2022) [2025] KEHC 10836 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10836 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL SUIT E009 OF 2022**

**JM OMIDO, J  
JULY 3, 2025**

**BETWEEN**

**VENTRA LOCOMOTIVES ..... PLAINTIFF**

**AND**

**KENYA RAILWAYS CORPORATION ..... DEFENDANT**

**RULING**

**A. Background.**

1. The instant suit, based on contract, was commenced by way of a plaint dated 6<sup>th</sup> June, 2022 and filed in court on 8<sup>th</sup> June, 2022. The Plaintiff in precis pleaded that it entered into an Agreement dated 19<sup>th</sup> January, 2025 (“the Agreement”) vide which the Plaintiff agreed to sell and supply Rift Valley Railways (“RVR”) three motor trolleys at an agreed price of USD 228,000 each, totaling to USD 684,000.
2. The Plaintiff pleaded that pursuant to the Agreement, the Plaintiff raised its invoice for USD 684,000 dated 17<sup>th</sup> February, 2015 against which RVR settled the sum of USD 478,800 being in respect of 60% (USD 410,400) of the advance against purchase order no. 5500001292 and 30% (USD 68,400) in respect of motor trolley serial number 268. The Plaintiff stated that it complied with the terms of the Agreement by having the motor trolleys inspected and shipped in good condition between October, 2015 and April, 2016. The three motor trolleys were received by at the RVR/KR Mombasa yard by April, 2016.
3. The Plaintiff pleaded further that subsequent to the termination of the concession agreement between RVR and Kenya Railways, the Plaintiff sought payment of the balance due in the amount of USD 205200 from the Defendant and in accordance with clause 11.1 of the Agreement, held a meeting with the Defendant on 21<sup>st</sup> September, 2018 in which the Defendant agreed and committed in writing to pay the balance of USD 205,200 by way of six equal monthly instalments of USD 34,200, commencing



November, 2018 and with the last instalment being paid in April, 2019. The Defendant failed to make the payments, necessitating this suit.

4. The reliefs that the Plaintiff seeks against the Defendant, are as follows:
  - a. The principal sum of USD 205,200 together with interest thereon at court rates.
  - b. Costs of the suit together with interest thereon at such rate and for such period as this Honourable Court may deem fit.
  - c. Any such and further relief as this Honourable Court may deem fit to grant.
5. The Defendant was served with summons to enter appearance, the plaint and other court process on 24<sup>th</sup> June, 2022 and filed a memorandum of appearance dated 8<sup>th</sup> July, 2022 on even date. The Defendant did not file a statement of defence.
6. Vide a request for judgement dated 29<sup>th</sup> July 2022 and filed on the same day, the Plaintiff herein formally applied for judgement to be entered against the Defendant in default of a defence. The default judgement was entered and endorsed on 17<sup>th</sup> August, 2022 for the sum of USD 205,200 together with costs and interest. The judgement remains undisturbed.

#### **B. The Notice Of Motion Dated 1<sup>st</sup> September, 2022.**

7. The Defendant's Notice of Motion dated 1<sup>st</sup> September, 2022 is expressed to be brought under Article 159(2)(c) of *the Constitution* of Kenya, Section 6(1) and (2) of the *Arbitration Act*, Cap 49 Laws of Kenya, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 51 rule 1 of the Civil Procedure Rules and all other enabling provisions of the law and seeks the following orders:
  1. THAT this Honourable Court be pleased to stay the suit filed herein by the Plaintiff and the dispute be referred to Arbitration in accordance with Clause 11.2 of the Agreement dated 19<sup>th</sup> January, 2015 entered into between the Plaintiff and Rift Valley Railways (Kenya) Limited.
  2. THAT the costs of this suit and the application be borne by the Plaintiff.
8. The grounds upon which the application is premised are set out on its face as follows:
  - a. The Plaintiffs cause of action herein arises from alleged breach of the terms of the Agreement dated 19<sup>th</sup> January, 2015 between the Plaintiff herein and Rift Valley Railways (Kenya) Limited.
  - b. Under the terms of the Agreement, specifically Clause 11.2 of the Agreement, it was mutually agreed by the parties to the Agreement that any dispute, controversy or claim arising out of or relating to the Agreement shall be referred to and finally resolved through Arbitration under the *Arbitration Act* of Kenya Cap 49 of the Laws of Kenya and the Rules made thereunder.
  - c. In filing this suit against the Defendant, the Plaintiff has failed to follow the mutually agreed procedure for settlement of disputes as per the Agreement.
  - d. It is only just and fair that the dispute be resolved in accordance with the terms agreed upon by the parties to the Agreement.

#### **C. The Affidavit In Support Of The Application.**

9. The application is supported by the affidavit of Christine Macharia, who describes herself as "the Ag. GM – Legal Services and CS of Kenya Railways Corporation".



10. In precis, the said deponent states in her affidavit that the Plaintiff's cause of action arises from alleged breach of the terms of the Agreement entered into between the Plaintiff and RVR. That under clause 11.2 of the the Agreement, any dispute, controversy or claim arising out of or relating to the Agreement ought to be referred to and finally resolved through Arbitration under the *Arbitration Act*, Cap 49 Laws of Kenya, with the seat of the arbitration being in Nairobi.
11. The deponent proffers the position that the Plaintiff should not have filed this suit as the dispute between the parties herein should now be referred to arbitration.

#### **D. The Affidavit In Opposition To The Application.**

12. The Defendant's Motion is resisted by the Plaintiff, who to that end filed sworn on 27<sup>th</sup> September, 2022 by Henry Samuel, who states that he is the Defendant's Chief Executive Officer.
13. In his affidavit, the said deponent states that the dispute in this matter stands resolved as there is a judgement in place, entered on 17<sup>th</sup> August, 2022.
14. The deponent further proceeds to state that in line with the arbitration clause in the agreement, the parties herein held a meeting on 21<sup>st</sup> September, 2018 with a view to resolving the dispute herein and an agreement was reached that the Defendant liquidates the undisputed amount of USD 205,200 by six monthly instalments of USD 34,200 commencing November, 2018 and ending in April, 2019. That the Defendant however failed to pay a single instalment.
15. The position that the said deponent presents is that clause 11.2 of the Agreement provides for an amicable settlement and that reference to arbitration is only available if the parties failed to reach an amicable settlement. That as such, reference to arbitration is or was not available as the parties reached an amicable settlement vide the meeting held on 21<sup>st</sup> September, 2018 whereby the arrangement to pay by instalments was reached.
16. The deponent annexed to his affidavit as HS-1 and HS-2 the minutes of the meetings held between the parties on 21<sup>st</sup> September, 2018 and 16<sup>th</sup> February, 2017, respectively.
17. The position of the Defendant is thus that as the amount owing is not disputed, having been agreed upon in the meeting between the parties, there is no outstanding dispute that is capable of being resolved through arbitration.
18. On 21<sup>st</sup> February, 2024, this court (Shariff J) issued directions that the application be canvassed by way of written submissions. The parties filed their respective submissions.

#### **E. The Defendant's Submissions.**

19. The Defendant urges in its submissions that the entry of the default judgement was irregular and of no legal effect in light of the arbitration clause in the Agreement. The Defendant's Advocates explain that upon filing a memorandum of appearance on 8<sup>th</sup> July, 2022, they sought further instructions to enable them file a defence but there was (what is in the submissions described as) a "slowdown in communication" caused by the "political atmosphere" given that the general elections were to take place/took place on 27<sup>th</sup> August, 2022. The Defendant therefore states that the delay in filing the application was excusable and not inordinate.



20. The Defendant seeks to rely on clause 11.1 and 11.2 of the Agreement, whose contents are not disputed by the parties, which provides thus:

- “ 11. 1 Dispute or disagreement arising during the interpretation or execution of the contract shall be settled through amicable negotiation firstly.
11. 2 If the amicable negotiation fails, any dispute, controversy or claim arising out of or relating to this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved through Arbitration under the *Arbitration Act* of Kenya (Cap. 49 of the Laws of Kenya) and the Rules made thereunder. The seat of the Arbitration shall be Nairobi, Kenya.”

21. The Defendant further submits that filing a defence would have meant that its right to invoke the arbitration clause would stand waived. To that end, the Defendant relied on the following authorities:

- a. Neelcon Construction Co. Limited v Kakamega County Assembly [2018] eKLR in which the court held a party who has been sued and who desires to invoke an arbitration clause should not file a defence but should without delay file an application for stay of proceedings and for the dispute to be referred to arbitration.
- b. Mt. Kenya University v Ste Up Holdings (K) Limited [2018] eKLR in which the court held that after the party who wishes to invoke an arbitration clause has entered an appearance and an application seeking reference to arbitration, the party should take no further procedural steps in the matter.
- c. Board of Trustees, *National Social Security Fund v Sokomania Limited (Civil Suit E149 of 2022)* [2023] KEHC 21827 (KLR) (Civ) (15 August 2023) (Ruling) in which the court held that where a party files an application seeking reference to arbitration and a judgement in default of a defence is subsequently entered against such party, such a judgement is irregular and ought to be set aside.

22. The Defendant submits that its application is anchored on Article 159(2)(c) of *the Constitution* which provides that in exercising judicial authority, the courts and tribunals shall promote alternative forms of dispute resolution including arbitration provided that the same do not contravene the Bill of Rights, are not repugnant to justice and morality or do not result in outcomes that are repugnant to justice or morality and/or are not inconsistent with *the Constitution* or any written laws.

23. The Defendant further hinges its application on Section 6(1) of the *Arbitration Act*.

24. In its further submissions, the Defendant proffered the position that the courts cannot rewrite a contract for the parties and that the parties are bound by the terms of the Agreement dated 19<sup>th</sup> January, 2015. The Defendant placed reliance on the authority of South Nyanza Sugar Co. Ltd v Leonard O. Arera [2020] eKLR in which the court made the following observations:

- “ 15. It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. In National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -



A court of law cannot rewrite 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.

16. In *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -

We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

25. The Defendant urges that as there is an arbitration clause in the Agreement, the parties are bound by the same and this court should therefore refer the dispute to arbitration.
26. The Defendant further submits that the discussions and minutes of 21<sup>st</sup> September, 2018 fell within the amicable resolution clause (clause 11.1) and as the matter remained unresolved, the arbitration clause (clause 11.2) ought to automatically apply.
27. The Defendant invited the court to consider the decision of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) in which the Defendant pointed out holding numbers 5, 8 and 13, which read as follows:

Holding No. 5:

5. Section 10 of the Act enunciated the necessity to curb the court’s role in arbitration so as to give effect to that policy. The principle of party autonomy was recognized as a critical precept for guaranteeing that parties were satisfied with the results of arbitration. It also helped to achieve the key objectives of arbitration, which was, to deliver fair resolution of disputes between parties without unnecessary delay and expense. The Act was enacted with the key purpose of increasing party autonomy and minimizing court intervention.

Holding No. 8:

8. The objective of arbitration was to obtain the fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense. The second objective ought to have been the promotion of party autonomy (arbitration being a consensual process in that the primary source of the arbitrator’s jurisdiction was the arbitration agreement between the parties). The third objective was balanced powers for the courts: court support for the arbitral process was essential, the price being supervisory powers for the court to ensure due process. True to the principle of party autonomy, the tribunal’s statutory powers could only be excluded or modified by the parties in their arbitration agreement. They were also subject to the tribunal’s statutory duty to conduct the proceedings in a fair and impartial manner.

Holding No. 13:

13. When a person signed a document, that signature should denote an intention to be bound by the terms and conditions embodied in the signed document.



28. In the text of the said decision, Mativo J (as he then was) observed as follows in the respective paragraphs:

“36. In Kenya, court intrusion in arbitration proceedings is limited only to circumstances expressly permitted by the *Arbitration Act*. In this respect, section 10 of the Act provides that except as provided in the Act, no court shall intervene in matters governed by the Act. In dictatorial terms, the section limits the jurisdiction of the court to only such matters as are provided for by the Act. The section exemplifies the recognition of the policy of party’s “autonomy” which underlie the arbitration generally and in particular the Act.”

29. The court went on to state as follows in paragraph 41:

“41. The principal purpose of an arbitration clause is to provide a specialized tribunal to hear the dispute falling within the ambit of the matters governed by the agreement. Parties are at liberty to contract to allow to vest arbitrability determinations in the arbitrator, but only if the agreement contains clear language to that effect.”

30. The court proceeded as follows in paragraph 51:

“

“51. The other reason to bear in mind is that the Arbitrator, and not the court has authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of the agreement including, but not limited to any claim that all or any part of the agreement is void or voidable. In *Rent-A-Center West Inc. v Jackson* 130 S. Ct. 2772 (2010), a 5-4 decision held that unconscionability challenge should go to the arbitrator. A reading of the agreement shows that the parties consented to the seat and place of arbitration and the applicable law. In absence of fraud or misrepresentation, they are bound by their choice. This court cannot re-write their preferred choice. In *Roger Shashoua & 2 others v Sharma* [2009] EWHC 957, the court held that: An agreement as to the seat of arbitration bring in the law of that country as to the curial law and is analogous to an exclusive jurisdiction clause. Not only is there an agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that by agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place of designated as the seat of arbitration.”

31. Mativo J proceeded to render himself as follows in paragraph 54:

54. Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes by an arbitral tribunal, as an alternative to adjudication by the courts or a public forum established by law. Parties by mutual agreement forgo their right in law to have their disputes adjudicated in the courts/public forum. Arbitration agreement gives contractual authority to the arbitral tribunal to adjudicate the disputes and bind the parties. The arbitration agreement being the product of a consensual



contract, I refuse the invitation to “rectify the arbitration clause.” The applicant is inviting the court to venture into the forbidden sphere of re-writing contracts willfully signed by consenting parties.

32. In conclusion, the court held that where an arbitration clause is operative, it is binding between the parties. The court then went ahead to stay the proceedings in the particular case pending arbitration of the dispute between the parties.
33. With the foregoing submissions, the Defendant urged that the application seeking stay of proceedings in the instant case pending arbitration be allowed with costs.

#### **F. The Plaintiff’s Submissions.**

34. In its submissions in opposition to the Defendant’s Motion, the Plaintiff stated that it had, in accordance with clause 11.1 of the Agreement held a meeting with the Defendant and the dispute was resolved, with an agreement that the agreed sum of USD 205,200 be settled by the Defendant in four monthly instalments, but the Defendant did not pay any of the instalments and that it was the failure by the Defendant to make good the claim that necessitated the filing of this suit.
35. The Plaintiff placed reliance on the authority of Nanchang Foreign Engineering Company (K) Limited v Easy Properties Kenya Limited (2014) eKLR where it was stated:-

“It is very clear parties from the aforesaid clause cannot proceed for determination in an arbitral proceeding before an amicable settlement had been attempted. Attempt of an amicable settlement was a condition precedent before the dispute was referred to arbitration. Neither the plaintiff nor the Defendant provided the court with any evidence to show that they had indeed attempted such amicable settlement. On this ground alone, the Defendant’s application would automatically fail as referral to arbitration would be premature.”

36. In the Plaintiff’s view, as the parties had reached an agreement under clause 11.1 as to what was due to the Plaintiff and the manner of liquidation thereof, clause 11.2 (the arbitration clause) was not applicable as the same could only be invoked if the amicable negotiation failed.
37. The Plaintiff further submitted that the Defendant had failed to prove the nature of the dispute that should be referred to arbitration or that it has a dispute which this court should refer to arbitration, the same having been resolved under clause 11.1 of the Agreement and that if there was any outstanding dispute after the application of clause 11.1, the Defendant should have invoked the provisions of clause 11.2 at the meeting held on 21<sup>st</sup> September, 2018.
38. To that end, the Plaintiff referred the court to the authority of Esmailiji v Mistry Shamji Lalji & Co. [1980] eKLR in which the Court of Appeal held as follows:

“Mr Jiwaji who argued the appeal on behalf of the employers before us conceded that his clients did not ask for the matter to be referred to arbitration. Also, his submission that because the parties knew they were bound by the arbitration clause the employers were not required to say that they wanted to go to arbitration is I think incorrect. Even so the employers had to satisfy the court, the onus as to which was upon them, that they were then and also at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration. This they failed to do. Though aware of the arbitration clause there was no onus upon the contractors to suggest arbitration for no dispute existed so far as they were concerned.”



39. The Plaintiff further relied on the decision of *Niazsons (K) Limited v China Road & Bridge Corporation Kenya* [2001] in which the court (Tunoi JA) held:

“Moreover, there is no evidence on the material before this court that the respondent had invoked or relied on the arbitration clause before the suit was instituted. It is plain that if anything, the respondent in his affidavit sworn in support of its application for stay, deponed that it was only after the respondent was served with summons on 9<sup>th</sup> February, 1999, that it instructed its lawyers to set the arbitration process in motion. Most arbitration clauses usually start:

“If any dispute or difference shall arise between the parties ... then the matter goes to arbitration.”

The issue is what happens when there is no dispute between A and B, but B just declines to pay? This pertinent issue was adequately dealt with by the Earl of Halsbury LC in the House of Lords in the case of *London and North Western and Great Western Jointly Rly Cos vs J H Billington Ltd* (1899) AC 79 at 81 when he said:

“That a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion before the action is launched either by formal plaint in the County Court or by writ in the superior courts. Any contention that the parties could, when they are sued for the price of the services, raise then for the first time the question whether or not the charges were reasonable and that therefore they have a right to go to an arbitrator, seems to be absolutely untenable.”

If a debtor agrees that money is due, but simply fails to pay it, there is obviously no dispute, the creditor can and must proceed by action, rather than by arbitration. Equally, silence in the face of a screaming claim does not constitute nor raise a dispute (see *The Law and Practice of Commercial Arbitration in England*, by Sir Mustill and Prof Boyd p 96).

It is settled law that mere refusal to pay upon a claim, which is not really a dispute, does not necessarily give rise to a disputed calling an arbitration clause into operation. It must follow, therefore, that courts can be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which an employer merely persists in not paying. As there was in my view no or any genuine dispute between the parties, a stay on the respondent’s application ought to have been rejected by the learned judge.”

40. The Plaintiff concluded in his submissions that the Defendant’s application lacks merit and should be dismissed with costs.

### **G. Analysis And Findings.**

41. I have considered the Defendant’s Motion, the affidavit in support thereof, the replying affidavit, the submissions by the parties and the record in its entirety. The issues that are not disputed by the parties are as follows:

1. That the Agreement dated 19<sup>th</sup> January, 2015 was entered into by the parties and the same contained the two clauses (11.1 and 11.2) whose terms are reproduced above.
2. That vide the meeting held between the parties herein on 21<sup>st</sup> September, 2018, the parties invoked clause 11.1 of the Agreement and agreed that the amount due from the Defendant to the Plaintiff was USD 205,200 and that the same would be paid by the Defendant to the



Plaintiff in six equal monthly instalments of USD 34,200 commencing November, 2018, with the last instalment being paid in April, 2019.

3. That the Defendant did not pay any of the instalments.
42. The issues for determination, as discernible from the record, are as follows:
1. Whether the court has been properly moved to issue an order of stay of proceedings pending arbitration.
  2. Whether there is a dispute capable of being referred to arbitration.
  3. Who should bear the costs of the application?
43. I will proceed to address the above issues seriatim.
44. The first issue for me to determine is whether this court has been properly moved to issue an order of stay of proceedings pending arbitration.
45. Section 6(1) of the *Arbitration Act* provides that:
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.  
  
(Underlined emphasis).
46. My understanding of the provision above is that where a suit has been filed and a party wishes to invoke an arbitration clause, the application for stay of proceedings must be filed not later than the time of filing the memorandum of appearance. That then means that an application that seeks stay of proceedings and reference to arbitration that is filed after the entry of appearance is incompetent.
47. The Court of Appeal considered the above position in Section 6(1) of the *Arbitration Act* in the case of *Eunice Soko Mlagui v Suresh Parmar & 4 others* [2017] eKLR and stated that:
- “After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our mind, filing a defence constitutes acknowledgement of a claim within the meaning of the provision. Be that as it may, to the extent that after amendment, Section 6(1) still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance, the pre-2009 decisions of our courts on the application of Section 6(1) are still good law to that extent.



In *Charles Njogu Lofty v Bedouin Enterprises Ltd*, CA No 253 of 2003, this court considered Section 6(1) and held that even if the conditions set out in paragraphs (a) and (b) are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering appearance or is made after filing of the defence.”

(Underlined emphasis).

48. The question that then abounds is whether the defect in the application is one that can be cured under Article 159(2) of *the Constitution*. The answer to this question, which is also my persuasion is, happily, to be found in the authority of *Kemboy Law Advocates v Narok County Government (Miscellaneous Application E120 of 2023)* [2024] KEELRC 2365 (KLR) (30 September 2024) (Ruling) in which the court observed and held as follows:

“

“16. It has however been established that Article 159(2)(d) of *the Constitution* cannot be used to cure every legal misstep by parties (see *Nicholas Kiptoo Arap Salat v Independent Electoral & Boundaries Commission & 6 others* [2013] eKLR).

17. I do not think that the procedure set out in Section 6(1) of the *Arbitration Act* is a matter of mere technicality. To this extent, I agree with the following holding in *Diocese of Marsabit Registered Trustees v Technotrade Pavillion Ltd* [2014] eKLR:

“...the requirement in Section 6(1) of the *Arbitration Act* is not a mere technicality which can be diminished by Article 159(2)(d) of *the Constitution*...It is a substantial legal matter which aims at promoting and attaining efficacious resolution of disputes through arbitration by providing stay of proceedings but only where a party desirous of taking advantage of an arbitration clause in a contract has applied promptly to the Court for stay of proceedings and made a request to have the matter referred to arbitration...”

(Underlined emphasis).

49. To that then, as the Defendant’s application defies Section 6(1) of the *Arbitration Act* following the fact that it was filed long after the Defendant had entered appearance, this court has not properly been moved and the Motion is incompetent, fatally.
50. Notwithstanding my finding that the Defendant’s Motion is incompetent, I will proceed to determine the second issue, which is whether there is a dispute capable of being referred to arbitration.
51. Judgement in default of defence was entered in this matter on 17<sup>th</sup> August, 2022. The judgement remains unchallenged as no application has been filed to upset it.
52. A judgment in a civil case refers to the formal decision or finding of a court resolving the issues in dispute between the parties, based on the evidence presented and the applicable law and it includes the orders or reliefs that the court grants.
53. In Black’s Law Dictionary (11th Edition), the definition of is as follows:

“Judgement” – A court’s final determination of the rights and obligations of the parties in a case.



It can also refer to:

A decision by a court or other tribunal that resolves a controversy and determines the rights and obligations of the parties in a case.

54. As I have stated, the judgement that was entered against the Defendant remains in force and undisturbed and/or unchallenged, as there has not been filed any application to that effect. That then means that whatever dispute that the Plaintiff presented vide the plaint dated 6<sup>th</sup> June, 2022 stood determined the moment the default judgement of 17<sup>th</sup> August, 2022 was entered and/or endorsed. There is therefore no outstanding dispute that is capable of being referred to arbitration.
55. That is not all. We have seen above that the Defendant does not dispute the Plaintiff's contention that in the meeting held between the parties herein on 21<sup>st</sup> September, 2018, the parties invoked clause 11.1 of the Agreement and agreed that the amount due from the Defendant to the Plaintiff was USD 205,200 and that the same would be paid by the Defendant to the Plaintiff in six equal monthly instalments of USD 34,200 commencing November, 2018, with the last instalment being paid in April, 2019.
56. It is instructive from the minutes of that meeting (annexed to the replying affidavit as HS-1) which are also not contested by the Defendant, the dispute between the parties was resolved under clause 11.1 whereby the amount due and a mode of payment of the same agreed upon.
57. The Defendant has not pointed out any other outstanding dispute that ought to have been resolved under clause 11.2. What then was left for the matter to be closed was the payment of the agreed amount of USD 205,200 by six instalments of USD 34,200, which the Defendant failed to pay.
58. Is the failure to pay that agreed sum a dispute to be resolved under clause 11.2? I do not think so. The authorities of Niazsons (K) Limited (supra) London and North Western (supra) in my view provide the proper position in law that if a party does not dispute the amount due, but simply fails to pay it, there is obviously no dispute that can be referred to arbitration. In such an event, the party claiming the amount can and must proceed by action, rather than by arbitration. The Plaintiff cannot in the premises be faulted for the action that it took in this suit.
59. The result I then reach on the second issue is that the Defendant has not satisfied the court that there is a dispute between the parties that is capable of being referred to arbitration under clause 11.2 of the Agreement.

#### **H. Disposition.**

60. Having reached the foregoing findings on the Defendant's application by Motion on Notice dated 1<sup>st</sup> September, 2022, I am of the conviction that the same is unmeritorious and is for dismissal. I proceed to dismiss it.
61. With regard to costs, Section 27 of the *Civil Procedure Act* provides that costs shall follow the event unless the court or judge shall for good reason otherwise order. In Reid, Hewitt & Co v Joseph, AIR 1918 Cal 717 & Myres v Defries (1880) 5 Ex D 180, the House of Lords noted that:

“The expression ‘costs shall follow the event’ means that the party, who, on the whole, succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.”



62. The Plaintiff is in the premises entitled to recover the costs of the Motion from the Defendant, which I proceed to assess at Ksh.10,000/-.
63. Orders accordingly.
64. This file is hereby closed.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 3<sup>RD</sup> DAY OF JULY, 2025.**

**JOE M. OMIDO.**

**JUDGE**

FOR PLAINTIFF:

FOR DEFENDANT:

COURT ASSISTANTS: Mr. Ngoge & Mr. Juma.

Ms. Kavagi: I seek leave to appeal.

Court: The Defendant to file a formal application for the court's consideration.

JOE M. OMIDO

JUDGE

