



**Aywa v African Center for Technology Studies (Miscellaneous Application E534 of 2025)
[2025] KEHC 12944 (KLR) (Commercial and Tax) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12944 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E534 OF 2025
F GIKONYO, J
SEPTEMBER 18, 2025
IN THE MATTER OF THE ARBITRATION ACT
IN THE MATTER OF AN APPLICATION FOR THE APPOINTMENT OF AN ARBITRATOR**

BETWEEN

FRANCIS ANG'ILA AYWA APPLICANT

AND

AFRICAN CENTER FOR TECHNOLOGY STUDIES RESPONDENT

RULING

1. The notice of motion dated 26th May 2025 is seeking an order compelling the respondent to appoint their preferred arbitrator or leave to commence the arbitration proceedings by way of the sole arbitrator already nominated.
2. The application is made under Section 159(2) of *the Constitution* of Kenya, Section 12(2), (3), (4) and (5) of the *Arbitration Act*, Order 51, Rule 1 of the Civil Procedure Rules.
3. The application is premised on the grounds set forth on the face of it, the supporting affidavit sworn by the applicant on 26th May 2025.
4. The grounds are that:-
 1. The applicant, a consultant, entered into a consultancy agreement with the Respondent on or about 11th January, 2023 to assess Parliaments' preparedness to address climate change issues in Kenya, Ghana, Mozambique, Senegal and Zambia.
 2. The applicant duly performed his obligations and submitted the required deliverables that were acknowledged by the respondent.



3. Despite this, the respondent failed and/ or neglected to remit payment for the completed work thus breaching the terms of the contract.
 4. The contract expressly provides for arbitration as the mechanism for resolving any disputes, with each party appointing an arbitrator and a referee to be jointly appointed by the two arbitrators.
 5. The applicant appointed an arbitrator and notified the respondent who has since failed and/ or refused to appoint its arbitrator or otherwise participate in the arbitral proceedings.
 6. The continued non-cooperation by the respondent frustrates the arbitration process warranting the intervention of this court to safeguard the applicant's right to have this dispute resolved.
 7. It is in the interest of justice, equity and conscience that the application is allowed.
 8. The respondent will not suffer any prejudice were this court to grant the orders sought.
5. There was no response filed by the respondent despite service evidenced by an affidavit of service sworn by Jeirus Omondi Ooko on 30th May 2025.

Analysis and Determination

6. I have considered the application, the supporting affidavit and the evidence.
7. Section 12 (2) of the [Arbitration Act](#) provides that:-
 - “(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairman and failing such agreement—
 - a. in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the arbitrator;
 - b. in an arbitration with two arbitrators, each party shall appoint one arbitrator; and
 - c. in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.”
8. The applicant produced a copy of the contract for his engagement by the respondent and terms of reference under project reference Agnes/OSF/BMGF/WS3.
9. Clause 8 of the contract reads:-
 - “Arbitration- Any dispute arising in the interpretation or performance of this contract which cannot be settled by negotiation shall, at the request of either party, be submitted at ACTS to an Arbitration Board composed of:-
 - a) Two arbitrators, one being appointed by each of the parties.
 - b) A referee chosen by the two arbitrators.In the event of disagreement as to the nomination of the referee, he shall be appointed by the Chairman of the Court of Arbitration of the International Chamber of Commerce.”



10. The applicant also produced a notification of appointment of arbitrator dated 24th March 2025.
11. Thus, Section 12 (3) to (9) of the [Arbitration Act](#) are specifically relevant to this application and provide that: -
- “(3) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party (“the party in default”)—
- a. has indicated that he is unwilling to do so;
 - b. fails to do so within the time allowed under the arbitration agreement; or
 - c. fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party), the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.
- (4) If the party in default does not, within fourteen days after notice under subsection (3) has been given —
- a. make the required appointment; and
 - b. notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.
- (5) Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.
- (6) The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.
- (7) The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator.
- (8) A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.
- (9) The High Court in appointing an arbitrator shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.”
12. These are default provisions which apply where parties fail to appoint arbitrators in accordance with their arbitration agreement. It will profit this idea, the observation by the late Majanja J. in *Wanjala &*



- “ 15. ...section 12 of the Arbitration Act dealing with appointment of arbitrators, does not supplant the parties’ right to appoint or prescribe the mode of appointment of the arbitrator but only sets out a default procedure for the court to intervene should the either fail to comply with the contractual provisions for appointment of an arbitrator. The court can only intervene in matters appointment if the agreement provides for appointment and either party fails to comply with the agreement.”
13. The import of section 12(3) & (4) of the Arbitration Act is that, once a party notifies the other party of the appointment of an arbitrator and the defaulting party does not comply, “the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.”
14. There is no evidence that the respondent has complied with the procedure agreed in the arbitration agreement despite notice of appointment of arbitrator by the applicant.
15. Of greater values in this discourse is that, the role of the court in the appointment of arbitrators is severely limited under section 12 of the Arbitration Act, and the insistence of the law is on the right of parties to appoint their arbitrator(s). The party autonomy to choose has now been engendered and enlarged in the Constitution especially in article 159(2)(c) of the Constitution limiting the role of the court to promoting alternative justice systems. Which explains the constitutional underpinning of the principle of non-interference.
16. This constitutional framing posits that parties should adhere to their arbitration agreements, and should be guided by the provisions of the Arbitration Act.
17. Deriving from this functional foundation, the procedure provided for appointment of arbitrators under section 12(3) & (4) of the Arbitration Act applies to the facts of this case.
18. And, it bears repeating that, the import of the section 12(3) & (4) of the Arbitration Act is that, once a party- for purposes of this decision shall be referred to as the compliant party- notifies the party in default of the appointment of an arbitrator and the party in default does not comply, “the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.”
19. It is significant to note that the use of the word ‘may’, does not give the court a role in the appointment of arbitrator except in accordance with section 12(7) & (9) of the Arbitration Act. The compliant party should appoint his arbitrator as sole arbitrator without recourse to the court. Parties should not fear to or limit exercise of their autonomy provided under the arbitration agreement and the law. I buttress that, the power of appointment of arbitrators except where it is otherwise provided in the arbitration agreement or the arbitration Act, is reposed in the parties. Therefore, it is not in order for a compliant party to seek appointment by the court of the arbitrator it has already appointed and notified the party in default. Similarly, as I stated earlier, the role of the court under article 159(2)(c) of the Constitution is to promote alternative justice forum agreed between the parties. Section 12(3) & (4) of the Arbitration Act should be interpreted and understood within this framing and parties should take courage to exercise their autonomy under their arbitration agreement and the Arbitration Act. Making this application unnecessary call for help.



20. Recourse to the court in respect to appointment made under section 12(4) is circumscribed by section 12(5)(6)(7)(8) & (9) of the Arbitration Act, and its jurisdiction is invoked by the party in default who is dissatisfied by the appointment of the sole arbitrator under section 12(3) & (4) of the Arbitration Act. The procedure is not a cognitive confusion but specially intended to avoid giving the party in default a veto power over a consensual and mutual process; and making the success of an application under subsection (5) grantable 'only if it [the High court] is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.'
21. Nevertheless, just a reinstatement and for clarity, if not already appointed, the applicant shall appoint the sole arbitrator within 14 days and accordingly notify the party in default; and the arbitral proceedings to commence in accordance with the arbitration agreement and the Arbitration Act; 'and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.'
22. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2025
THROUGH TEAMS ONLINE APPLICATION.**

F. GIKONYO M

JUDGE

In the presence of: -

Ms. Musando for Kanyonge for Applicant

N/A for Respondent

CA- Kinyua

