



REPUBLIC OF KENYA



**Saad v Ahmed (Commercial Miscellaneous Application E929 of 2024)
[2025] KEHC 13235 (KLR) (Commercial and Tax) (19 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13235 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E929 OF 2024
JWW MONG'ARE, J
SEPTEMBER 19, 2025**

BETWEEN

SAAD MIGDAD SAAD APPLICANT

AND

ISSA AHMED RESPONDENT

RULING

1. The Applicant by Originating Summons application dated 7th November 2024 filed under Order 37 Rule 10 of the Civil Procedure Rules, Section 63 of the [Civil Procedure Act](#) and Section 35(1) (c) of the Partnership Act, seeking the following reliefs:-
 1. That an order be issued against the Respondent removing the Respondent as a Partner from the Partnership between the Applicant and the Respondent as detailed in the partnership deed dated 1st May 2024.
 2. That the partnership between the Applicant and the Respondent as detailed in the partnership deed dated 1st May 2024 be broken up seven (7) days, after taking accounts of what is payable to each partner.
 3. That an order of permanent injunction be issued barring the and prohibiting the Respondents from interfering with in anyway whatsoever with the business known as Velocity Gymn and SPA.
 4. That such other order as this Honourable Court shall in the circumstances deem fit to grant in the interest of Justice.
 5. That each party bear its own costs.



2. Alongside the Originating summons, the Applicant also filed a Notice of Motion application on 7th November 2024 and brought under a certificate of urgency and filed under sections 3, 3A and 3B of the Civil Procedure Act, Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, Section 46 and 50 of the Partnerships Act seeking the following orders: -
 1. Spent
 2. Spent
 3. That pending the hearing and determination of the suit herein an order of Injunction be issued against the Respondent herein, his agents, personal representatives or any other person acting under his authority including NCBA Bank and DTB Bank barring and prohibiting him(them) from further interfering in any way whatsoever with the operations of the business known as Velocity Gymn and SPA, including its bank accounts held as NCBA Bank, Eastleigh Branch AC No. 9138870016 and DTB Bank, Mwanzi Road Branch AC no. 0037797001.
 4. That costs of this application be borne by the Applicant.
3. The Application is supported by the grounds set out on its face and the supporting affidavit of SAAD MIGDAD SAAD sworn 7th November 2024. The application is opposed and the Respondent filed an application to discharge the exparte orders granted pursuant to the Applicants application of 7th November 2024 and dated 23rd January 2025 and sought the following prayers;-
 1. Spent
 2. That the Honourable Court be pleased to discharge and/or set aside the exparte injunctive orders issued on 14th November 2024.
 3. That pending reference to arbitration, an interim an order of preservation be and is hereby issued restraining the Applicant/Respondent from accessing, operating, drawing funds, paying out and in any manner whatsoever interfering with Bank Accounts Number 9138870016 domiciled at NCBA Bank, and Account Number 0037797001 domiciled at DTB Bank, Mwanzi Road Branch.
 4. That this Honourable Court be pleased to order stay of the proceedings herein and refer the matter to arbitration in accordance with clause 18 of the Partnership and Equity Deed dated 1st May 2024.
 5. That costs of this application be provided for.
4. The Respondent's application is equally supported by the grounds set out on its face and the supporting and further affidavits Issa Ahmed sworn on 23rd January 2025 and 26th February 2025 respectively. In response thereto, the Applicant filed a replying affidavit sworn by Saad Migdad Saad sworn on 7th April 2025.
5. In addition to the pleadings herein the Defendant filed a notice of Preliminary Objection dated 11th March 2025, challenging the jurisdiction of this Court to hear and determine the present suit and application as filed. Both parties filed written submissions and appeared before the Court to highlight the submissions orally, which I have carefully considered.
6. It is the norm that where a party raises a Preliminary Objection the same should be dealt with in the first instance as it has the power to cause the entire suit to be determined. This is the position laid down in locus Classica case on Preliminary objections 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 paragraphs D-F Law JA as he then was had this to say:

“....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.”

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”

7. It is therefore an imperative of this Court to determine the Preliminary Objection at the earliest opportunity. The Respondent has argued that the partnership deed executed between the parties herein contains an arbitration clause and therefore this matter should be referred for arbitration in line with the same.
8. In the partnership deed of 1st May 2024 clause 18 thereto reads as follows:-

“all disputes and questions whatsoever which shall either during the Partnership or afterwards arise between the Partners or their respective representatives or between any Partners or their respective representatives or between any Partners or Partner and the representatives of any other Partner touching on this Deed or the construction or application thereof or any clause or thing therein contained or any account valuation or division of assets debts, liabilities to be made hereunder or any act or deed of omission of any Partner or as to any other matter in any relating to the Partnership business or the affairs thereof or the rights duties or liabilities of any person under this Deed shall be referred to a single arbitrator in case the parties agree upon one otherwise to two arbitrators one to be appointed by each party to the difference in accordance with and subject to the provisions of the Arbitration Act, (Chapter 22 of the Laws of Kenya) or any statutory modification thereof for the time being in force.”
9. Section 6 of the Arbitration Act states as follows;” A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall..... stay the proceedings and refer the matter to arbitration unless it finds; -
 - a. That the arbitration agreement is null and void, inoperative or incapable of being performed;
 - b. That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
10. What this Court is being called to determine is if indeed the matter before this Court is a dispute as envisioned by section 6 of the Arbitration Act. I note that the above section was interpreted by the Court in Mbulia Community v Bilauri Limited(ELCC No. 003 of 2024) KEELC 4499 where the Court stated thus;- “ the tenor and import of Article 159(c) of the Constitution as read together with Section 6(1) of the Arbitration Act Cap 49 is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the Courts are obliged to give effect to that agreement. Secondly, whereat party elects to come to Court and the other party to the Arbitration



agreement seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance.”

11. I have looked at the Partnership agreement and specifically to clause 18 therein, I note that in designing the Partnership deed parties committed themselves to resolve all disputes arising from within and without the partnership through arbitration. In fact the wording at clause 18 reads as follows:-

all disputes and questions whatsoever which shall either during the Partnership or afterwards arise between the Partners or their respective representatives or between any Partners or their respective representatives or between any Partners or Partner and the representatives of any other Partner touching on this Deed or the construction or application thereof or any clause or thing therein contained or any account valuation or division of assets debts, liabilities to be made hereunder or any act or deed of omission of any Partner or as to any other matter in any relating to the Partnership business or the affairs thereof or the rights duties or liabilities of any person under this Deed shall be referred to a single arbitrator in case the parties agree upon one otherwise to two arbitrators one to be appointed by each party to the difference in accordance with and subject to the provisions of the Arbitration Act, (Chapter 22 of the Laws of Kenya) or any statutory modification thereof for the time being in force.”
12. My understanding of the above provision in the partnership agreement is that parties envisioned that all disputes including a dispute that may lead to a dissolution of the partnership shall be resolved through arbitration in the manner set out under the said clause 18 hence the use of the word “all disputes and questions whatsoever” in defining the dispute. The said clause 18 also includes the following wordings “during the Partnership or afterwards arise between the Partners” and “touching on this Deed or the construction or application thereof or any clause or thing”. This, in my view makes it clear that the parties to the Partnership agreement had clarity in their minds that all disputes of whatever nature related to the Partnership agreement without exception would be resolved through arbitration. I note from the said clause 18, parties did not make exclusions to the nature of the disputes but included all disputes arising from within and without, meaning, even after the partnership was dissolved.
13. The Court of Appeal in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] KECA 362 (KLR) stated as follows; - “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.” Flowing from the above holding, it is, therefore, not the business of this Court to determine how the dispute between should be resolved as parties clearly elected to submit all disputes whatsoever related to the Partnership Deed to arbitration. I decline therefore the invitation by the Applicant to find that the present dispute can only be resolved by the Courts.
14. In sum I am satisfied that the Preliminary Objection dated 11th March 2025 by the Respondent has merit and I allow the same. I find that indeed the dispute between the parties is one that was envisioned and falls under all disputes as envisioned under clause 18 of the Partnership Deed. Let the parties proceed with the arbitral process in the manner as set out therein.
15. The effect of my finding is that the application by the Applicant fails. All interim orders issued pursuant thereto are vacated and discharged forthwith. On costs, I note that the parties are still partners, I hold that each party shall meet their own costs of the application herein. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2025

.....
J.W.W. MONGARE
JUDGE



In The Presence Of

Ms. Nyambura holding brief for Mr. Ochieng for the Applicant.

Mr. Moshe holding brief for Mr. Kiprop for the Respondent.

Amos- Court Assistant

