



**Fun Cities Ltd v Mung’au & 2 others (Commercial Suit E451 of 2020)
[2024] KEHC 673 (KLR) (Commercial and Tax) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 673 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E451 OF 2020
MN MWANGI, J
JANUARY 19, 2024**

BETWEEN

FUN CITIES LTD APPLICANT

AND

**KATHERINE MUNG’AU ALIAS KATHERINE J.S.A MUNG’AU 1ST
RESPONDENT**

EVERLYNE OMBASA 2ND RESPONDENT

VITT CAPITAL KENYA LIMITED 3RD RESPONDENT

RULING

1. The plaintiff filed an Originating Summons dated 12th March, 2023 pursuant to the provisions of Section 17(6) of the *Arbitration Act*, 1995 and all enabling provisions of the law seeking the following orders –
 - i. That the Court be pleased to sit on appeal on the decision of the Tribunal Mr. D. N. Mbigi and be pleased to find and hold that;
 - a. The Tribunal (Mr. D. N. Mbigi) erred in law and fact by holding that it had jurisdiction to entertain the proceedings before it despite the insistence by the respondents that they never signed the Arbitration Agreement and which fact manifests the absence of an Arbitration Agreement and which fact therefore divests the Tribunal with (sic) the jurisdiction to entertain the proceedings before it;
 - b. The Tribunal (Mr. D. N. Mbigi) fell into error by holding that the exchange of the Credit Agreement was sufficient to establish the presence of an arbitration clause and therefore erroneously found that there was in existence a valid Agreement to Arbitrate;



- c. The Tribunal (Mr. D. N. Mbigi) erred in law by holding that by virtue of the Order issued by this Court on 27th February, 2021 referring the matter to arbitration the Tribunal lacked jurisdiction to determine its own jurisdiction; and
 - d. The Tribunal (Mr. D. N. Mbigi) erred in law by finding that the subject matter of the proceedings was arbitrable despite the application by the Claimant to amend its pleadings being allowed and which amendment wholly pleaded a claim for complex fraud and which claim ousted the jurisdiction of the Tribunal to deal with proceedings before it.
- ii. That the Court be pleased to allow this Originating Summons, set aside the ruling of the Tribunal (Mr. D. N. Mbigi) delivered on the 13th February, 2023 and find that the Tribunal lacks the requisite jurisdiction to continue determining the arbitration proceedings before it;
 - iii. That the Court be pleased to allow the Chamber Summons filed herewith dated 12th March, 2023 and allow the Notice of Motion dated 31st August, 2022 filed before the Tribunal in its entirety; and
 - iv. That costs of this Summons and the arbitration proceedings be awarded to the applicant.
2. The application is supported by grounds on the face of it and an affidavit sworn on 12th March, 2023 by Morrison Muchiri, the plaintiff's Director. In opposition thereto, the defendants filed grounds of opposition dated 31st March, 2023 raising the following grounds–
- i. The Arbitrator has jurisdiction to determine his own jurisdiction, including whether or not there exists an arbitration clause and/or the validity of an arbitration clause and/or whether a dispute has arisen;
 - ii. An arbitration clause is separate and distinct from the agreement in which it is contained, despite the fact that the said agreement can be null and void *ab initio* and a decision on its interpretation or existence can only be made by an Arbitral Tribunal. The arbitration clause survives the death of the agreement in which it is contained;
 - iii. The applicant has not appreciated the purport of “in writing” under Section 4 of the [Arbitration Act](#) and therefore has mistakenly concluded that there is no arbitration clause;
 - iv. The Arbitrator duly appreciated that Section 4(3)(b) provides for an Arbitration Agreement derived from exchanged correspondence between parties, such as in this case, as a valid Arbitration Agreement ‘in writing’;
 - v. The foundation of Arbitration proceedings is the consent of all participating parties in an Arbitration Agreement. Third parties cannot be enjoined (sic) in an arbitration dispute unless such power is donated by the Arbitration Agreement or by parties’ consent;
 - vi. The arbitration clause at issue does not grant jurisdiction to the Arbitral Tribunal to join third parties and the respondents did not and will not consent to such addition of third parties;
 - vii. The Arbitrator’s jurisdiction is only limited to what is contained in the contract, and can arbitrate only in so far as the claim relates to breach of contract and not allegations of fraud;
 - viii. The applicant’s applications are estopped by the doctrine of res judicata since the Court has already determined the question of the existence of an arbitration clause via the Court order dated 23 (sic). Further, the Court already determined that the Arbitrator has jurisdiction the Arbitrator’s jurisdiction (sic);



- ix. The present applications consist an unlawful invitation to the Court to sit in its own appeal; and
 - x. The applicant's applications are brought in bad faith, misconceived and should be dismissed with costs.
3. The plaintiff also filed a Chamber Summons application dated 12th March, 2023 under the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Order 40 Rules 1 & 2 and Order 45 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions. It seeks the following orders –
- i. Spent;
 - ii. Spent;
 - iii. Spent;
 - iv. That the Court be pleased to review and set aside the orders of this Court issued on 27th September, 2021 and the Court be pleased to terminate the arbitration proceedings initiated vide the said orders of the Court and direct that this matter does proceed;
 - v. That the Court be pleased to allow the plaintiff to amend its claim as per the annexed draft amended plaint and the Court be pleased to allow the plaintiff 14 days from the date of the orders of this Court to file the amended plaint; and
 - vi. That costs of this Chamber Summons be awarded to the applicant.
4. The Chamber Summons has been brought on the grounds on the face of it and is supported by an affidavit sworn on 12th March, 2023, by Morrison Muchiri, the plaintiff's Director. In opposition thereto, the defendants filed a replying affidavit sworn on 31st March, 2023 by Katherine Mung'au, the 3rd defendant's Director. The defendants also filed grounds of opposition dated 31st March, 2023 raising the following grounds–
- i. The applicant's applications are estopped by the doctrine of res judicata since the Court has already determined the question of existence of an arbitration clause via the Court order dated 23 (sic). Further, the Court already determined that the arbitrator has jurisdiction the Arbitrator's jurisdiction (sic);
 - ii. The Chamber Summons does not meet the grounds for review under Order 45 because:
 - a. it does not invite this Court to deal with an error or mistake apparent on the face of the record;
 - b. it does disclose any new evidence that could not have been within the applicant's knowledge after exercise of due diligence; and
 - c. the applicant has not demonstrated any other sufficient reason for review.

The Claimant ought to have appealed at the Court of Appeal.
 - iii. The present applications consist an unlawful invitation to the Court to sit in its own appeal;
 - iv. No ground exists for termination of the arbitration proceedings;
 - v. The draft amended plaint does not seek any new prayer save for joining third parties who are strangers to the Arbitration Agreement.



- vi. The Arbitrator has jurisdiction to determine his own jurisdiction, including whether or not there exists an arbitration clause and/or the validity of an arbitration clause and/or whether a dispute has arisen;
 - vii. An arbitration clause is separate and distinct from the agreement in which it is contained, despite the fact that the said agreement can be null and void ab initio and a decision on its interpretation or existence can only be made by an Arbitral Tribunal. The arbitration clause survives the death of the agreement in which it is contained;
 - viii. The applicant has not appreciated the purport of “in writing” under Section 4 of the [Arbitration Act](#) and therefore has mistakenly concluded that there is no arbitration clause;
 - ix. The Arbitrator duly appreciated that Section 4(3)(b) provides for an arbitration agreement derived from exchanged correspondence between parties, such as in this case, as a valid arbitration agreement ‘in writing’; and
 - x. The foundation of arbitration proceedings is the consent of all participating parties in an arbitration agreement. Third parties cannot be enjoined (sic) in an arbitration dispute unless such power is donated by the arbitration agreement or by parties’ consent.
5. On 20th March, 2023, this Court gave directions consolidating the Originating Summons and Chamber Summons. This Court also directed that both applications would be canvassed by way of written submissions. The plaintiff’s submissions were filed on 5th June, 2023 by the law firm of MK Mwangi Advocates LLP, whereas the defendants’ submissions were filed by the law firm of Onchari Otiso & Company Advocates on 24th June, 2023.
 6. Mr. M. Mwangi, learned Counsel for the plaintiff cited the case of [KTDA Ltd & others v Savings Tea Brokers Ltd](#) [2015] eKLR and Section 4 of the [Arbitration Act](#) and contended that there is no arbitration agreement between the plaintiff and the defendants. He submitted that the defendants’ averment in their affidavit in support of their Chamber Summons application that they had executed the Credit Agreement and delivered it to the plaintiff for its execution but they were yet to receive their signed copy of the same, informed this Court’s decision to refer the suit between the parties to an Arbitral Tribunal on the ground that pursuant to Article 9 of the Credit Agreement, there seemed to be a consensus that both parties had executed the Credit Agreement albeit separately.
 7. It was stated by Counsel that when the defendants filed their statement of response before the Arbitrator, at paragraphs 10, 11, 12 and 13 of the said statement they denied ever executing the Credit Agreement. Further, they filed witness statements where they expressly denied ever executing the Credit Agreement and challenged the jurisdiction of the Arbitral Tribunal to hear and determine the dispute because of the fact that they did not execute the said Agreement and were therefore not bound by the arbitration clause.

To this end, Counsel relied on the Court of Appeal case of [Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others](#) [2014] eKLR, where the court quoted with approval the holding of the Malawi Supreme Court of Appeal in [Malawi Railways Ltd v Nyasulu](#) [1998] MWSC 3.
 8. Mr. M. Mwangi relied on the Supreme Court’s holding in the case of [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others](#) [2012] eKLR and further stated that the defendants are bound by their pleadings, which are demonstrative of the fact that they did not execute the Credit Agreement thus there exists no basis for the dispute to be referred to arbitration. He referred to the decisions in [Charles Migichi Mungai practicing as Clarion Architects v Multimedia University](#)



of Kenya [2021] eKLR and *Goodison Sixty-One School Limited v Symbion Kenya Limited* [2017] eKLR and asserted that Section 4(3) of the *Arbitration Act* stipulates three (3) conditions to be satisfied before an Arbitration Agreement can be regarded as being in writing but none of these conditions were satisfied by the defendants.

9. The plaintiff's Counsel submitted that when matters involve serious allegations of fraud, then arbitration will not be an appropriate forum. He cited the case of *Gerick Kenya Limited v Honda Motorcycle Kenya Limited* [2019] eKLR and *Kenneth Maweu Kasinga v Cytonn High Yield Solution LLP & another* [2020] eKLR, where the Court laid down three (3) principles that govern when fraud becomes un-arbitrable. He further submitted that after the defendants filed their statement of response, the plaintiff discovered that the matters raised in the said responses disclosed that the transaction was a complex fraud that required it to amend its claim by abandoning its initial claim for breach of contract and plead a wholly new claim founded on fraud.

Counsel contended that the principles laid out in *Kenneth Maweu Kasinga v Cytonn High Yield Solution LLP & another* (supra) would operate to oust the jurisdiction of the Arbitral Tribunal in this instance.

10. He also contended that by the Arbitral Tribunal allowing the amendment of the plaintiff's claim, it allowed the plaintiff to pursue a claim for a complex fraud to be pleaded and which in effect ousted its jurisdiction to deal with the same. Counsel asserted that the Tribunal erred in disallowing the inclusion of additional parties, as the law only requires the consent of those parties, but the Tribunal failed to allow the said parties to signify their acceptance to the proceedings or not.
11. He stated that the provisions of Section 6 of the *Arbitration Act* do not usurp the role of the Arbitrator to determine his jurisdiction under Section 17 of the Act. Further, that a referral of a matter to Arbitration by a Court does not lock out a Tribunal from determining whether or not it has jurisdiction to entertain a matter since the High Court's referral is a preliminary determination that preserves the Arbitrator's jurisdiction to determine the matter wholly.
12. On his part, Mr. Otiso, learned Counsel for the defendants submitted that in its earlier ruling, the Court correctly quoted the decision in *Niazsons (K) Limited v China Road & Bridge Corporation Kenya* cited by the Court in *Africa Spirits Limited v Prevab Enterprises Limited* [2014] eKLR. He stated that it mattered not that the plaintiff had expressed doubt as regards its validity in correspondences exchanged between the parties. He further submitted that in holding that the exchange of the Credit Agreement was sufficient to establish the presence of an arbitration clause, the Arbitrator duly appreciated the provisions of Section 4(3)(b) of the Arbitration Agreement. Counsel relied on the case of *Universal Education Trust Fund v Monica Chopeta* [2012] eKLR and argued that there did exist an exchange of documents in which the parties expressed their intention to enter into an Arbitration Agreement.
13. He stated that an arbitration clause is separate and distinct from the agreement in which it is contained, and despite the fact that the said agreement can be null and void ab initio, the arbitration clause survives the death of the agreement in which it is contained pursuant to the provisions of Section 17 of the *Arbitration Act*.
14. Mr. Otiso further stated that the Chamber Summons application does not meet the grounds for review set out under Order 45 of the *Civil Procedure Rules*, 2010 since it does not invite this Court to deal with an error or mistake apparent on the face of the record, it does not disclose any new evidence that could not have been within the plaintiff's knowledge after exercise of due diligence and that the plaintiff has not demonstrated any other sufficient reason to warrant a review. Counsel asserted that the plaintiff's



applications consist of an unlawful invitation to this Court to sit in its own appeal as the issues raised do not merit a review.

Analysis and Determination

15. I have duly considered the applications herein, the grounds upon which they are anchored, and the affidavits filed in support thereof. I have also taken into consideration the grounds of opposition and the replying affidavit by the defendants and the written submissions by Counsel for the parties. The issues that arise for determination are –
 - i. Whether these applications are res judicata;
 - ii. Whether this Court should review its orders issued on 27th September, 2021;
 - iii. Whether this Court should sit on appeal of the Arbitrator’s ruling dated 13th February, 2023 and set it aside; and
 - iv. Whether the plaintiff should be allowed to amend its claim.
16. The plaintiff’s Director, Morrison Muchiri in his affidavit in support of the Chamber Summons application dated 12th March, 2023, deposed that the plaintiff initially filed the suit between the parties herein on 5th November, 2020. That thereafter, the defendants filed an application seeking to move the Court to stay the matter and refer it to Arbitration.
17. He averred that vide a ruling dated 16th September, 2021, Justice Okwany held that it was not disputed that the parties entered into a Credit Agreement and as a result, she referred the dispute between the parties herein to Arbitration. He further averred that the plaintiff then filed a Notice of Motion application dated 31st August, 2021 before the Tribunal on the ground that the Tribunal lacked jurisdiction to handle this matter. He deposed that subsequently, the Tribunal delivered a ruling on 13th February, 2023 dismissing the said application.
18. It was stated by the plaintiff that it was never aware of the defendants’ position in this matter until after they filed their response to the claim, witness statements, and bundle of documents. He further stated that the plaintiff was able to discern from the defendants’ responses that the negotiations for the Credit Agreement and the exchange of documents was all an exercise in frivolity as the defendants knew that they were not in a position to advance the plaintiff the sum of USD. 2,000,000.00 or any other amounts.
19. In addition, that the plaintiff discovered that the Credit Agreement was not executed by the defendants by design as it was always their intention not to enter into a proper and valid agreement. He asserted that the 3rd defendant was a facade designed to conceal and obfuscate the boundaries between it and Vitt Capital (Mauritius) Limited.
20. Mr. Muchiri deposed that it is clear that the plaintiff can no longer sustain a claim for breach of contract against the defendants for there was never a valid contract to begin with, and it was therefore necessary for the plaintiff to amend its plaint and proceed against the defendants for a claim for fraud. He further deposed that the plaintiff has now discovered the participation of other persons in the fraud perpetrated against it, and now wishes to include them in the proceedings.
21. He further deposed that the proposed 4th & 5th defendants were significant participants in the fraudulent scheme as is evident from the witness statement of Zubian Sharif Khawaja filed by the defendants. He stated that the 1st defendant owns the 3rd defendant and was a Director of the 4th defendant at the time of the transaction.



22. It was stated by the plaintiff that at the time it filed its Statement of Claim, it was not aware of the scope of the 4th, 5th & 6th proposed defendants involvement in the fraud.
23. In the affidavit filed by the plaintiff sworn by Morrison Muchiri, the plaintiff's Director in support of the Originating Summons dated 12th March, 2023, he deposed that the plaintiff's position has always been that the draft Credit Agreement submitted to the defendants was never executed by both parties thus there is no proper Arbitration Agreement between the parties herein.
24. He also deposed that the defendants in their statement of response filed before the Arbitral Tribunal pleaded in paragraph 13 therein, that they did not execute the Credit Agreement hence the Tribunal lacks jurisdiction to entertain any proceedings on that basis. The plaintiff averred that it was aggrieved by the Tribunal's ruling delivered on 13th February, 2023 and wishes to appeal against its entirety by way of this application.
25. The defendants in their replying affidavit sworn by Katherine Mung'au, the 3rd defendant's Director, deposed that the plaintiff misunderstood her challenge to the Credit Agreement which is the subject matter of the arbitration proceedings because she admitted to having signed a Credit Agreement between the plaintiff and the 3rd defendant and sent it to the plaintiff who never executed nor sent it back.
26. She averred that the Credit Agreement annexed to the plaintiff's pleadings is not signed by any party hence it may have terms which are different from the Credit Agreement which she signed and sent to the plaintiff. She further averred that in her replying affidavit sworn on 10th October, 2022 she averred that if there exists a Credit Agreement then it is the one she signed and sent to the plaintiff.
27. Ms Mung'au asserted that the Arbitral Tribunal's decision dated 13th February, 2023 is merited since the Arbitrator appreciated that the arbitration clause is separable from the main contract and that the validity of the mother agreement does not affect the validity of the arbitration clause. She deposed that the Arbitrator appreciated that the plaintiff's allegations of breach of contract and fraud, both of which are arbitrable issues within the jurisdiction of the Arbitrator pursuant to the arbitration clause contained in the Arbitration Agreement.
28. She contended that the Arbitrator appreciated that arbitration proceedings are exclusive to the parties to an arbitration clause and in this case, there is no formal agreement or consent of the parties to join Third Parties to the proceedings.
29. The defendant stated that the plaintiff's application is an attempt to invoke unnecessary Court intervention in the ongoing arbitration proceedings, contrary to Section 10 of the *Arbitration Act*. She further stated that the plaintiff's application offends the doctrine of res judicata since the Court has already determined the question of existence of an arbitration clause via its orders issued on 27th September, 2021.
30. The defendant averred that the plaintiff's application is an attempt to appeal against this Court's orders issued on 27th September, 2021 and an unlawful invitation to this Court to sit on appeal of its own decision.

Whether these applications are res judicata.

31. Section 7 of the *Civil Procedure Act* provides that –

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between



parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

32. In order for the doctrine of *res judicata* to be effectively invoked, the party raising it must satisfy the doctrine’s five essential elements, which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that –
- i. The suit or issue raised was directly and substantially in issue in the former suit;
 - ii. That the former suit was between the same party or parties under whom they or any of them claim;
 - iii. That those parties were litigating under the same title;
 - iv. That the issue in question was heard and finally determined in the former suit; and
 - v. That the Court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
33. From the above, it is evident that the said doctrine ousts the jurisdiction of a Court to try any suit or issue which had been determined in finality by a Court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. It is not in dispute that the defendants filed an application to this Court seeking orders for stay of proceedings in the High Court and for the High Court to refer the dispute between the parties herein to arbitration pursuant to an arbitration clause contained in the Credit Agreement between the parties herein. That vide a ruling delivered on 16th September, 2021, Hon. Judge Okwany found that there existed an Arbitration Agreement between the parties herein. The Hon. Judge allowed the said application and referred the dispute to an Arbitral Tribunal.
34. At the said Tribunal, the plaintiff filed an application seeking the Arbitral Tribunal to make a determination that it did not have jurisdiction to determine the dispute between the parties herein on grounds that the defendants in their statement of response denied ever executing the Credit Agreement which forms the subject of the plaintiff’s claim, and which led the High Court to make a decision referring the dispute between the parties herein to arbitration. Vide a ruling dated 13th February, 2023, the Tribunal dismissed the said application and held that there existed an Arbitration Agreement between the parties herein, thus it had the requisite jurisdiction to entertain the proceedings before it. The Arbitral Tribunal also held that by virtue of the High Court ruling dated 16th September, 2021, it lacked jurisdiction to determine its own jurisdiction as it could not come to a contrary opinion to that of the High Court. It also held that it is bound by the decision of the High Court on jurisdiction.
35. In light of the Tribunal’s finding, the plaintiff filed the Originating Summons herein seeking to appeal against the said decision, and for this Court to find that the Arbitral Tribunal lacks the requisite jurisdiction to determine the proceedings currently before it. The plaintiff also filed a Chamber Summons application seeking an order for review of this Court’s ruling dated 16th September, 2021, and an order allowing the plaintiff to amend its claim as per the annexed draft amended plaint. Notably, in as much as the applications herein are between the same parties, who were also the parties in the application dated 14th December, 2020 and amended on 22nd January, 2021, and the said parties were litigating under the same title; the issues and/or circumstances giving rise to the present applications were not directly and substantially in issue in the application dated 14th December, 2020 and amended on 22nd January, 2021.



36. From the pleadings filed by the parties herein, I am of the considered view that the applications herein which seek an order for review of this Court's ruling dated 16th September, 2021 and to appeal against the Arbitrator's ruling, are as a result of the pleadings filed before the Arbitral Tribunal, and the Arbitrator's ruling delivered on 13th February, 2023, both of which were not directly and substantially in issue in the application dated 14th December, 2020 and amended on 22nd January, 2021 which as explained herein above, was seeking orders for stay of proceedings in the High Court and for the said Court to refer the dispute between the parties herein to arbitration pursuant to an arbitration clause contained in the Credit Agreement between the parties herein. As a result of the above finding, this Court holds that the issues in question in the instant applications were not heard and finally determined by the Court in the ruling dated 16th September, 2021 with respect to the application dated 14th December, 2020 and amended on 22nd January, 2021.
37. That being the case, the applications herein do not offend the doctrine of res judicata as provided for under Section 7 of the [Civil Procedure Act](#), as the issues herein have never been determined by a Court of competent and concurrent jurisdiction to this Court.

Whether this Court should review its orders issued on 27th September, 2021.

38. In the Chamber Summons application dated 12th March, 2023, this Court has been asked to review and set aside its orders issued on 27th September, 2021 staying the proceedings in the High Court and referring the said dispute to arbitration. In determining this issue, it is important to first determine whether this Court has the jurisdiction to do so. In the [Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd.](#) [1989] eKLR, the Court 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. Further, in [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others](#) [2012] eKLR, the Supreme Court held that -

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

40. It is now settled law that the High Court's jurisdiction in arbitration matters is provided for by the [Arbitration Act](#). Section 10 of the [Arbitration Act](#) provides that -

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

41. From the foregoing provisions, it is evident that the the Civil Procedure Rules, 2010 and the [Civil Procedure Act](#), Cap 21 Laws of Kenya do not apply to issues and/or matters related to Arbitration. For this reason, the plaintiff cannot rely on the provisions of the [Civil Procedure Rules](#), 2010, and more specifically, to Order 45 of the [Civil Procedure Rules](#), 2010, to seek an order for review of this Court's orders issued on 27th September, 2021. It is noteworthy that the [Arbitration Act](#) does not provide for review of the High Court's decision by the said Court with respect to arbitration. This was the holding



by the Court of Appeal in the decision in *Kamconsult Ltd v Telkom Kenya Ltd & another* [2016] eKLR, where it was held as hereunder –

“...However, the *Arbitration Act* does not provide for review of High Court decisions made pursuant to Section 17 (6) of the Act, and therefore under Section 10 of the Act the High Court has no jurisdiction to intervene and confer upon itself the powers to review its decision. As was held in the above two cases, a rule cannot override a substantive law. Sections 3A, 63e and 80 of the *Civil Procedure Act* are also not applicable pursuant to Section 10 of the *Arbitration Act*.

We take note of the fact that arbitration proceedings are intended to provide a faster and less technical process for resolution of disputes. Thus the omission to provide powers of review is not an inadvertent omission but a deliberate attempt to provide finality to litigation...”

42. Bound by the above mentioned holding by the Court of Appeal and the provisions of Section 10 of the *Arbitration Act*, this Court finds that it does not have the requisite jurisdiction to review its orders issued on 27th September, 2021 staying the proceedings in the High Court and referring the dispute between the parties herein to arbitration.

Whether this Court should sit on appeal of the Arbitrator’s ruling dated 13th February, 2023 and set it aside.

43. Section 17(6) of the *Arbitration Act* provides that –

“Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.

44. It is evident from the pleadings herein that vide a ruling delivered by the Arbitral Tribunal on 13th February, 2023, the Arbitrator found that there existed an Arbitration Agreement between the parties herein, thus it had the requisite jurisdiction to entertain the proceedings before it, and by virtue of the High Court ruling dated 16th September, 2021, it lacked jurisdiction to determine its own jurisdiction as it could not come to a contrary opinion to that of the High Court. Furthermore, it is bound by the decision of the High Court on jurisdiction.
45. This Court holds that having already found that there exists an Arbitration Agreement between the parties herein and having referred the dispute between the parties herein to arbitration, this Court cannot sit on appeal of the Tribunal’s decision dated 13th February, 2023, as the same will be tantamount to sitting on appeal of its own decision. I therefore agree with Counsel for the defendants that the plaintiff’s Originating Summons amounts to an attempt by the plaintiff to invite this Court to sit on appeal of its own decision.
46. The plaintiff averred that in the ruling dated 13th February, 2023, the Arbitrator allowed it to amend its claim but declined to allow it to add parties who were not in the Credit Agreement as it lacked jurisdiction to do so. It is now settled law that the findings by an Arbitral Tribunal are final and binding to the parties to the arbitration. In addition, the Originating Summons herein was filed pursuant to the provisions of Section 17(6) of the *Arbitration Act* which contemplates appeals in instances where the Arbitral Tribunal has found that it has jurisdiction. Therefore, this Court cannot sit on appeal of the said finding.



Whether the plaintiff should be allowed to amend its claim.

47. In view of the foregoing finding, this Court cannot issue an order allowing the plaintiff to amend its plaint as per the draft amended plaint let alone determine this issue as it will amount to an exercise in futility. The dispute between the parties herein is before the Arbitral Tribunal hence amending the plaint filed by the plaintiff in this suit will have little to no effect to the proceedings before the Arbitral Tribunal.
48. For the above reasons, I find that the Originating Summons and Chamber Summons dated 12th March, 2023 filed by the plaintiff are not merited. I therefore dismiss them with costs to the defendants.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JANUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Wambui h/b for Mr. M. Mwangi for the plaintiff/applicant

Mr. Bunyasi h/b for Mr. Otiso for the defendant/respondent

Ms B. Wokabi – Court Assistant.

