MMC Petroleum Limited v Fujita Corporation/Mitsubishi Corporation Limited (Civil Suit E016 of 2022) [2023] KEHC 611 (KLR) (10 February 2023) (Ruling)

Neutral citation: [2023] KEHC 611 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E016 OF 2022

OA SEWE, J

FEBRUARY 10, 2023

BETWEEN

MMC PETROLEUM LIMITED ..... APPLICANT

AND

FUJITA CORPORATION/MITSUBISHI CORPORATION LIMITED ..... RESPONDENT

RULING

1. The applicant, MMC Corporation, filed this suit against Fujita Corporation/Mitsubishi Corporation (hereinafter, "the respondent") on March 23, 2022 seeking the following reliefs:

   (a) Spent;

   (b) that pending the hearing and determination of this suit, the court be pleased to grant an injunction barring the respondent from accessing, controlling, operating and utilizing the completed fuel station at Mwache Precast Yard;

   (c) A declaration that article 17.4 of the service agreement between the applicant and the respondent, dated November 14, 2020, does not require the parties to strictly pursue their arbitration claims before the International Court of Arbitration (ICA) as the parties are only required to use the International Chamber of Commerce (ICC) Arbitration rules as rules of procedure in arbitrating their disputes;

   (d) That the court be pleased to direct that the dispute between the applicant and the respondent arising from the service agreement entered into by the parties on November 14, 2020 be heard and determined by a single arbitrator to be jointly appointed by the parties, and the appointment be made within 14 days of the order of the court;

(e) As an alternative to prayer [d] above, the court be pleased to direct that the dispute between the applicant and the respondent arising from the service agreement entered into by the parties on November 14, 2020 be heard and determined by three arbitrators, with each party appointing one arbitrator and the two arbitrators so appointed to appoint the third arbitrator within 21 days of the order of the court;

(f) That pending the arbitration of the dispute between the parties, the court be pleased to grant an injunction barring the respondent from accessing, controlling, operating and utilizing the completed fuel station at Mwache Precast Yard;

(g) The costs of these proceedings as well as the costs of the appointment of an arbitrator be borne by the respondent.

2. The application was premised on the grounds that the parties executed a service agreement on November 14, 2020 for the installation and maintenance of fuel tanks and dispensing pumps as well as supply of fuel at the respondent's sites in Mwache Precast Yard, Tsunza U-Turn Bay Area and Mteza Laydown Yard. It was the contention of the applicant that after it partially fulfilled its contractual obligations by carrying out the installation and maintenance of one complete fuel station at Mwache Precast Yard and the supply of fuel thereat, the respondent unreasonably terminated the service agreement with effect from October 8, 2021 vide a letter dated September 28, 2021.

3. It was the assertion of the applicant that, since the contract was frustrated by factors beyond its control, it declared a dispute after attempts at negotiation with the respondent failed; thus necessitating the appointment of an arbitrator pursuant to Article 17.4 of the service agreement. The applicant further stated that its efforts to get the parties to mutually appoint an arbitrator proved futile; and that the costs of arbitration at the International Court of Arbitration are prohibitive. It was therefore on the basis of the foregoing that the applicant prayed for the intervention of the court.

4. The grounds aforementioned were explicated in the Supporting Affidavit sworn on March 17, 2022 by one of the directors of the applicant, Mr George Nyasimi, to which were annexed copies of the pertinent documents, such as the service agreement, notice of termination as well as the applicant's letter by which he declared a dispute pursuant to article 17.4 of the service agreement, among other documents. In support of its assertion that the costs of having the dispute handled by the International Court of Arbitration would be prohibitive, the applicant provided a breakdown of the fees and costs that would ultimately be payable in such an eventuality.

5] Mr Nyasimi concluded his averments by asserting that article 17.4, which provides that disputes between the parties be resolved under the ICC Arbitration rules was not intended to compel the parties to take their disputes before the International Court of Arbitration (ICA); and that it only required the parties to use the ICC Arbitration Rules as rules of procedure in arbitrating their disputes.

6. The respondent opposed the application. It filed Grounds of Opposition on March 29, 2022 contending that:

(a) the injunctive relief sought by the applicant by way of an Originating Summons is incompetent, bad in law and unprocedural in so far as rule 2 of the Arbitration Rules provides that an application for interim relief under section 7 of the *Arbitration Act* be made by summons in the suit.

(b) Article 17 of the service agreement provides that disputes between the parties be settled under the rules of arbitration of the International Chamber of Commerce by one or more arbitrators

appointed in accordance with the said rules; and therefore that the Court does not have the jurisdiction over the proposed arbitral proceedings.

(c) The applicant has failed to meet the threshold for the grant of interim relief in an arbitration.

(d) The parties are bound by the terms of the service agreement and a court of law cannot amend or rewrite the terms of the contract between the parties.

(e) The applicant is guilty of non-disclosure of material facts and is therefore unworthy of the interim relief sought.

(f) The application datedMarch 17, 2022 is frivolous, vexatious and an abuse of the court process and therefore ought to be dismissed with costs to the respondent.

7. In addition to the Grounds of Opposition, the respondent filed a Replying Affidavit sworn on April 5, 2022 by its project manager, Lau Jeck Deng. While conceding that a dispute had arisen between the parties, the respondent asserted that the proposal by the applicant to have Mr Paul Lilan appointed as their arbitrator was in breach of article 17.4 of their service agreement. The respondent further averred that the applicant fully participated in negotiating the terms of the service agreement and was well aware from the very onset that in the event of a dispute an arbitrator would be appointed in accordance with the ICC Rules. Thus, at paragraph 12 of the Replying Affidavit, the respondent added that, the applicant is estopped from complaining that it is unable to bear the costs of complying with the procedure provided for in article 17 of the agreement.

8. The application was canvassed by way of written submissions, pursuant to the directions given herein on March 29, 2022. Accordingly, Mr Omoke, learned counsel for the applicant, relied on his written submissions filed on May 5, 2022. He proposed the following issues for determination:

(a) Whether the injunctive relief sought by the applicant should be granted;

(b) The interpretation of article 17.3 of the service agreement; and,

(c) Who should bear the costs of these proceedings.

9. Mr Omoke submitted that there is nothing wrong with the applicant seeking injunctive relief within the Originating Summons as rule 3(2) of the Arbitration Rules only refers to summons without specifying what type of summons is contemplated. He relied on article 159(2) of the *Constitution* to support his submission that it would be unreasonable to impose minute aspects of the rule on the applicant at the expense of substantive justice and fairness. Counsel further submitted that what is important is that the prayer for injunction has been brought before a court of competent jurisdiction; and therefore the focus should be on whether the applicant meets the threshold for grant of the order.

10. At paragraphs 5 and 6 of his written submissions, Mr Omoke urged the court to find that the applicant has established a *prima facie* case; and that an award of damages cannot cure the harm being caused by the applicant by unlawfully withholding the applicant's infrastructure despite having terminated the contract between the parties. In his view, an injunction restraining the respondent from utilizing the applicant's assets is the best interlocutory relief pending the arbitration proceedings. He relied on *Giella v Cassman Brown* [1973] EA 358 to buttress his submissions.

11. On interpretation of Article 17.3 of the service agreement, Mr Omoke urged the Court to find that it does not expressly require the parties to resolve their disputes at the ICA; and that it only identifies the mode of dispute resolution and the rules of procedure. According to him, if the intention of the parties was to use the ICA, nothing would have been easier than to specifically ordain the ICA as the dispute resolution institution. He added that, in view of the respondent's refusal to cooperate in the

nomination of an arbitrator, the arbitrary acquisition of the applicant's assets at Mwache Precast Yard and the rest of the acts of bad faith listed in paragraph 6 of the applicant's Supplementary Affidavit, it would only be fair and just that the respondent be condemned to pay the costs of these proceedings.

12. On behalf of the respondent, Ms Aluvale relied on her written submissions dated May 9, 2022. She proposed the same issues as Mr Omoke for determination, namely, interpretation of article 17.4 of the service agreement, whether the applicant has met the mandatory conditions for the grant of injunction in an arbitration, and who should pay the costs of the application. In respect of the first issue, Ms Aluvale submitted that the parties explicitly agreed to adopt the procedure set out in article 17 of the service agreement; and in particular that any dispute arising out of the contract would be settled in accordance with the rules of arbitration of the International Chamber of Commerce. She therefore submitted that the applicant ought to have followed that procedure strictly. She relied on *International Hotels Corporation v Mukawa (Hotels) Holdings Limited* [1977] eKLR, *National Bank of Kenya Limited v Pipeplastic Samkolit & Another* [2001] KLR 112 and *Nyoro Construction v Attorney General* [2018] eKLR to support his argument.

13. Ms Aluvale added that the court lacks the jurisdiction to intervene and grant the orders sought, granted the clear provisions of sections 10and 17 of the *Arbitration Act*; which give the arbitral tribunal the power to make determination as to its jurisdiction. She accordingly postulated that the instant application ought to have been filed before the ICA in the first instance. Counsel further took issue with the fact that the prayer for interim relief pending arbitration has been sought through an Originating Summons instead of a Chamber Summons as provided for in rule 2 of the Arbitration Rules, 1997.

14. On whether the applicant has met the mandatory conditions for the grant of injunction in an arbitration, Ms. Aluvale made reference to the criteria set in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR, and urged the Court to find that none has been proved by the applicant, namely:

    (a) The existence of an arbitration agreement;

    (b) Whether the subject matter of arbitration is under threat;

    (c) whether injunction is the most appropriate measure of protection;

    (d) the period the injunction must last and its effect on the subject matter of the agreement.

15. Ms Aluvale also relied on *Compassy Trading Company Limited v Kenyatta International Convention Centre* [2019] eKLR and Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] eKLR to support the submission that the applicant stands to suffer no irreparable harm if the orders sought are declined. She took exception to the assertion by the applicant in its Supporting Affidavit that the respondent is an unscrupulous foreign corporation, building their enterprise on the backs of hard-working Kenyans; and urged for the dismissal of the application with costs.

16. I have given careful consideration to the application and its Supporting Affidavits, the response thereto by way of Grounds of Opposition and Replying Affidavit, as well as the written submissions filed by learned counsel. The background facts are largely undisputed, namely that the applicant entered into a service agreement dated November 14, 2020 with the respondents (a consortium of two companies) for the installation and maintenance of fuel tanks and dispensing pumps as well as supply of fuel at the respondent's sites in Mwache Precast Yard, Tsunza U-Turn Bay Area and Mteza Laydown Yard.

17. It is common ground that, by September 28, 2021 the applicant had only partially fulfilled its contractual obligations by carrying out the installation and maintenance of one complete fuel station

at Mwache Precast Yard. Accordingly, the respondent proceeded to terminate the service agreement with effect from October 8, 2021, vide a letter dated September 28, 2021. It is manifest from that letter that the respondent terminated the contract on the grounds of fundamental and persistent breach on the part of the part of the applicant. In particular, the respondent is said to have acted pursuant to article 16 of the service agreement which provided for termination if the service provider committed a fundamental breach of the agreement.

18. On its part, the applicant contended that the contract was frustrated by factors beyond its control, including the outbreak of the global Covid-19 pandemic. Accordingly, the applicant declared a dispute after attempts at negotiation with the respondent failed, and proceeded to propose the appointment of Mr Paul Lilan, advocate, as an arbitrator pursuant to article 17 of the service agreement. As the respondent was opposed to the proposal, contending that it was in disregard of article 17.4 of the service agreement, the applicant was constrained to seek the intervention of the court by filing the instant suit by way of Originating Summons.

19. In his submissions, counsel for the respondent raised preliminary points touching on the competence of the application as well as the jurisdiction of the court. In the premises, it is imperative that the court addresses itself to those two issues before engaging in a merit consideration of the application. The first limb of Ms Aluvale's objection was to the effect that an application for interim relief ought to have been the subject of a separate application by way of Chamber Summons. She also submitted that the Court lacks the jurisdiction to entertain the suit from the standpoint of section 10 of the *Arbitration Act*.

20. It is indeed the case that, among the prayers sought by the applicant in its Originating Summons is a prayer for a temporary injunction barring the respondent from accessing, controlling, operating and utilizing the completed fuel station at Mwache Precast Yard pending the hearing and determination of this suit as well as the intended arbitration. In essence, those aspects of the applicant's Originating Summons seek interim measures of protection for purposes of Section 7(1) of the *Arbitration Act*. That provision states:

> "It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure."

21. Hence, the court has the discretion under section 7 of the *Arbitration Act* to grant restraining orders or such other interim measures of protection as would meet the ends of justice. I find succour in this posturing in the decision of Onguto, J in *Futureway Limited vs. National Oil Corporation of Kenya* [2017] eKLR. Here is what the Learned Judge had to say, which I entirely agree with:

> "While I agree with the respondent that the correct legal principle is that parties must be held to their bargain and the court ought not to relieve or burden either party to a bargain, I do not agree that in seeking an interim or provisional relief the applicant is seeking to have the court redraw the contract for the parties. It is true the transport contract provided for a termination clause. The intended arbitration will, *inter alia*, be focused on this clause with a rider question as to whether the termination was valid also set to occupy the arbitral tribunal. The applicant contends and the respondent denies that the termination was valid. The arbitral tribunal may be called to answer this question but in the meantime the applicant would want to see to it that its slot in the transport services of the respondent is not occupied by another party. I do not see how it may be said that a consideration as to whether or not the status quo is to be maintained equates re- drawing the contract for the parties...For purposes of section 7 of the *Arbitration Act* the court must be bold and open enough to preserve

where need be any chose-in-action or contractual right. Such choses-in-action or contractual rights may, in my view, be appropriately deemed as assets..."

22. It is plain therefore that, notwithstanding the provisions of section 10 of the *Arbitration Act*, the court has the jurisdiction to entertain the prayer for temporary injunction. Indeed, section 10 recognizes that such interventions as are specifically provided for in the Act are tenable. Thus, the submissions by Ms Aluvale that the court lacks the requisite jurisdiction to entertain the application are clearly misplaced. Nevertheless, rule 2 of the Arbitration Rules is equally explicit that applications under the Act be brought by way of Chamber Summons. It provides that:

> " Applications under sections 6 and 7 of the Act shall be made by summons in the suit."

23. Thus, there ought to have been a delineation between the suit as initiated by the Originating Summons and the application for interim measures of protection so as to not obfuscate the issues; especially in an application such as this where the opposing side ends up seeking the dismissal of an entire application at the interlocutory stage. In find succor in this posturing in the decision of Ransley, J in *Re Full Gospel Churches of Kenya//* [2004] eKLR that:

> " Even if the applicant has a right to injunctive relief in an Originating Summons, which I am of the view they do not, injunctive relief in respect of a matter which is the subject matter of arbitration is dealt with in section 7(1) of the *Arbitration Act*...It appears to me that this Application by way of an Originating Summons is totally misconceived."

24. Thus, for Mr Omoke to submit, as he did, that the failure to comply with rule 2 of the *Arbitration Act* is a minute infraction which ought to be cured by article 159(2) of the Constitution, is to miss the whole purpose of rules of procedure; which purpose was aptly captured by Hon Kiage, JA in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others* [2013] eKLR thus:

> " I am not in the least persuaded that article 159 of the *Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost effective manner...were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice...it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity."

25. Even assuming that the application was competently before the court, the issue at hand, to my mind, is not so much about whether the correct procedure in appointing an arbitrator was followed. While it is true that the parties covenanted, by dint of article 17.4 of the Service Agreement to settle any disputes arising under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules, it ought to be left to the arbitral tribunal to make a determination on its jurisdiction. Section 17 of the *Arbitration Act* provides that:

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in subsection (2) or (3) admit a later plea if it considers the delay justified.

(5) The arbitral tribunal may rule on a plea referred to in subsections (2) and (3) either as a preliminary question or in an arbitration award on the merits.

(6) 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.

(7) The decision of the High Court shall be final and shall not be subject to appeal.

(8) While an application under subsection (6) is pending before the High Court the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided and such award shall be void if the application is successful.

26. Accordingly, in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR, Hon Nyamu, JA expressed the view, in connection with section 17 aforestated that:

> " ...The section gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under section 17(6) of the Arbitration Act as the commercial court in this matter purported to do. In this regard, I find that the superior court did act contrary to the provisions of section 17 and in particular violated the principle known as "Competence/Competence" which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this means is "Competence to decide upon its competence" and as expressed elsewhere in this ruling in German it is "Kompetenz/Kompetenz" and in French it is "Competence de la Competence". To my mind, the entire ruling is therefore a nullity and it cannot be given any other baptism such as "acting wrongly but within jurisdiction."

27. It is in the light of the foregoing that I find the submissions of Ms Aluvale untenable with regard to the jurisdiction of the court in connection with the applicant's prayer for interim measures of protection. As pointed out herein above, the prayer for injunction pending arbitration is within the ambit of section 7 of the *Arbitration Act*. That being my view, the next issue to consider is whether, in the circumstances hereof, sufficient cause has been shown for the issuance of the orders sought.

28. In *CMC Holdings Limited & Another vs Jaguar Land Rover Exports Limited* [2013] eKLR it was held that:

> " ...The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that the subject matter of the arbitral proceedings will not be in

the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection..."

29. Accordingly, the conditions that an applicant must satisfy are well-settled. For instance, in Safaricom Limited Case (*supra*) it was held that:

> " Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-
>
> 1. The existence of an arbitration agreement;
> 2. Whether the subject matter of arbitration is under threat;
> 3. In the special circumstances, what is the appropriate measure of protection after an assessment of the merits of the application?
> 4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties?

30. The Court of Appeal further observed that in determining such an application, the court must ensure that it does not delve into the merits of the disputation between the parties. It accordingly held:

> " ... the High Court should have confined itself to the issue of either granting the interim measure or refusing to grant it without delving into the merits. The usurpation of the arbitrator's jurisdiction by the superior court also contravened section 17 of the *Arbitration Act*."

31. With the foregoing in mind, I have perused and considered the applicant's Originating Summons and the pertinent affidavits. It is instructive that the applicant conceded, at paragraphs 4, 9, 11 and 12 that it failed to adhere to the terms of the service agreement for various reasons that were beyond its control; and that it then proceeded to declare a dispute after attempts at negotiations with the respondent failed. Indeed, by January 11, 2022 when the applicant proposed the appointment of Mr Paul Lilan as an arbitrator, the service agreement had long been terminated and the site taken over by the respondent.

32. Further to the foregoing, the documents annexed to the respondent's Replying Affidavit seem to suggest that the parties held a meeting on October 22, 2021 at which the termination was confirmed and a resolution made to pay the applicant a reasonable sum based on the assessment of work done and expenses incurred in provision of one mini station as well as the fuel supplied. Whereas these assertions are subject to proof before the arbitrator, it appears plain that the site was taken over on October 8, 2021 and that an injunction at this point in time would hardly serve the interest of justice. In the premises, prayers 2 and 6 are untenable.

33. In the light of the foregoing conclusion, the next question to pose is whether the applicant is entitled to prayers 3, 4 or 5 of the Originating Summons dated March 17, 2022. The applicant thereby seeks orders that:

    (a) A declaration be made that article 17.4 of the service agreement between Fujita Corporation/ Mitsubishi Corporation and MMC Petroleum Limited entered into on November 14, 2020 dos not require the parties to strictly pursue their arbitration claims before the International Court of Arbitration (ICA) as the parties are only required to use the International Chamber of Commerce (ICC) Arbitration Rules as rules of procedure in arbitrating their disputes.

(b) The court be pleased to direct that the dispute between the applicant and the respondent arising from the service agreement entered into by the parties on November 14, 2020 be heard and determined by a single arbitrator to be jointly approved by the parties, and the appointment be made within 14 days of the order of the court.

(c) In the alternative to [b] above, the court be pleased to direct that the dispute between the applicant and the respondent arising from the service agreement entered into by the parties on November 14, 2020 be heard and determined by three arbitrators, with each party appointing one arbitrator and the two arbitrators so appointed to appoint the third arbitrator within 21 days of the order of the court.

34. The prayers aforestated in essences seek the intervention of the Court in the appointment of an arbitrator. In this regard, section 12 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.

35. In the event of a stalemate, as appears to have been the case in this instance, section 12(3) and (4) stipulate 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.

36. It is plain then that the plaintiff approached the Court prematurely and in disregard of the aforestated provisions of the *Arbitration Act*. Indeed, subsections (5), (6) and (7) of section 12 are explicit that:

(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.

37. Clearly therefore, the court can only intervene after compliance with subsections (3) and (4) of section 12 of the *Arbitration Act*. I find succor in *Pitstop Technologies Limited v Dynamic Branding Ventures Limited* [2020] eKLR in which Hon Majanja, J held that:

> 4. Section 12 of the Act recognises party autonomy by giving each party an opportunity to participate in the appointment of the arbitrator. This arbitration clause in the Agreement contemplates the appointment of a sole arbitrator hence under section 12(2) of the Act, the parties are required to agree on the arbitrator. Section 12(3) of the Act goes on to provide what happens when a party defaults or does not participate in the appointment. Section 12(4) then stipulates that once notice has been given to the other party, the party not in default may appoint the sole arbitrator and the arbitrator so appointed shall determine the matter and make a binding award.
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> 5. At this stage, it is important to point out that the High Court is not involved in the process of appointment of an arbitrator where one party has defaulted. In line with the principle of party autonomy, the process remains in the parties' hands. It is only after the party has made an appointment under section 12(4) of the Act, that the party in default is entitled to move the High Court to set aside that appointment. This section buttresses the fact that the party who is not in default is entitled to make an appointment. It is only after the High Court has dealt with the application to set aside the appointment and allowed the application, that it may, by consent of the parties or on the application of either party appoint a sole arbitrator.
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> 6. The process as outlined in section 12 of the Act does not give the High Court original jurisdiction to appoint an arbitrator when the other party is in default...The Summons is therefore premature as the process appointment is still in the applicant's hands (see also *Wachiuri Wahome t/a Adili Communications v Kenya Automotive Repairers Association* ML HC No. 1057 of 2010 [2011] eKLR and Trustees, Tourism Promotion Services Staff Pension Scheme v Genafrica Asset Managers ML HC no 161 of 2018 (OS) [2019] eKLR).

38. It is in the light of the foregoing reasons that I find no merit in the Originating Summons dated March 17, 2022. The same is hereby dismissed with an order that each party shall bear own costs of the application.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10TH DAY OF FEBRUARY 2023

OLGA SEWE

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JUDGE