



Rusnell & 2 others v Bushebi (Sued in his personal capacity and also t/a Bushnell Auto Scanners); Ncba Bank Kenya Limited (Interested Party) (Commercial Case 45 of 2017) [2023] KEHC 24549 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 24549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 45 OF 2017**

MN MWANGI, J

JULY 21, 2023

BETWEEN

CARL DOUGLAS RUSNELL 1ST PLAINTIFF

FERNWOOD DEVELOPMENT LIMITED 2ND PLAINTIFF

BUSHNELL DEVELOPERS LIMITED 3RD PLAINTIFF

AND

JOSEPH BUSHEBI DEFENDANT

SUED IN HIS PERSONAL CAPACITY AND ALSO T/A BUSHNELL AUTO SCANNERS

AND

NCBA BANK KENYA LIMITED INTERESTED PARTY

RULING

1. The application before me is a Notice of Motion dated 21st November, 2022 brought under the provisions of Section 6(1)(a) of the *Arbitration Act*, 1995, Article 159(2)(c) of *the Constitution* of Kenya, 2010, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 46 Rule 1 of the Civil Procedure Rules, and all enabling provisions of the law. The defendant seeks the following orders –
 - i. Spent;
 - ii. That these proceedings be stayed and the dispute herein be referred to arbitration in terms of Clause 31 of the Articles of Association and Memorandum of Understanding of the 3rd plaintiff;



- iii. That in the alternative to prayer (ii) above, the plaint dated 4th November, 2022 be struck out for being an abuse of the Court process; and
 - iv. That the costs of this application be awarded to the defendant/applicant.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Joseph Bushebi, the defendant herein. In opposition thereto, the plaintiffs filed a replying affidavit sworn on 23rd March, 2023 by Carl Douglas Rusnell, the 1st plaintiff herein and a director of the 2nd and 3rd plaintiff companies. The plaintiffs also filed grounds of opposition dated 24th February, 2023 raising the following grounds –
- i. That primarily, without prejudice to any of the below captured contestations, the application by the defendant/applicant comprises of an admission that this Honourable Court has jurisdiction to seize and determine this matter by reason that the Arbitration Agreement is null and void, inoperative or being incapable of being performed;
 - ii. That ideally, by the defendant/applicant relying on the provisions of Section 6(1)(a) of the *Arbitration Act*, 1995 he has ideally challenged and/or brought into question the validity of the alleged Arbitration Agreement and invites this Honourable Court to interrogate, inter alia, the nullity and inoperative nature of the alleged agreement;
 - iii. That in the alternative and without prejudice to the foregoing, the impugned application cannot stand and/or is incapable of success by reason that it places reliance on the incorrect provisions of the law;
 - iv. That noting that the quoted Section of the *Arbitration Act*, 1995, Section 6(1)(a), is the focal and/or pivotal enabling authority relied upon by the defendant/applicant, it cannot be gainsaid that the orders sought are incapable of being granted under the relied upon provision and the impugned application ought to fail, thus (sic);
 - v. That notwithstanding, the impugned application runs afoul of the provisions of Section 6(1) of the *Arbitration Act*, 1995 by reason that it was brought before this Honourable Court outside the mandatory period provided therein, to wit, much later (on or about six (6) years) from when the defendant/applicant entered appearance and/or acknowledged the claim;
 - vi. That further, the defendant/applicant has made other steps, other than those allowed by the said Section, including but not limited to; filing a statement of defence and amended defence, filing various applications and responses to applications filed on behalf of the plaintiffs and even filing an appeal against the decision of the learned Justice Nzioka;
 - vii. That further, too (sic), in the alternative and without prejudice to the foregoing, the present claim against the defendant for breach of fiduciary duty, perpetrated through fraud and/or material misrepresentation of facts, is not a difference as to the construction or otherwise of the Articles of Association; therefore, rendering this present suit divested of any matter agreed to be referred to Arbitration (sic);
 - viii. That in sum, this impugned application is frivolous, mischievous, vexatious and ill motivated; effect of which shall be to stunt expeditious conclusion of this suit to the prejudice of the plaintiffs; and
 - ix. Such other grounds and reasons to be adduced at the hearing hereof.



3. On 27th April, 2023, the defendant filed a Notice of Preliminary Objection to the admission of the plaintiff's replying affidavit sworn on 23rd March, 2023, by Carl Douglas Rusnell, the 1st plaintiff herein and a director of the 2nd and 3rd plaintiff companies on the following grounds –
 - i. That the replying affidavit sworn on 23rd March, 2023 at Mesa, Arizona, United States of America, by Carl D. Rusnell before one Amanda Potinsky offends the document legalization requirement in International Law, a requirement by which an affidavit sworn and commissioned before a US Notary Public ought to be legalized by a Kenyan Consular Officer in the USA before the same can be used in a Kenyan Court. Whereas the USA and England are signatories to the Apostille Convention, Kenya is not; hence legalization of such foreign documents is necessary to avoid the Court entertaining quacks who are located outside its jurisdiction.
 - ii. That in the absence of legalization and commissioning duly executed as provided for under Section 2 of the *Oaths and Statutory Declarations Act* and Section 9, 24 and 30 of the *Advocates Act*, the authenticity, validity and evidentiary value of the affidavit sworn on 23rd March, 2023 by Carl D. Rusnell along with the annexures thereto cannot be confirmed by this Honourable Court and ought to be expunged from the records.
4. The application was canvassed by way of written submissions. The defendant's submissions were filed by Joseph Bushebi the defendant herein on 29th March, 2023, whereas the plaintiffs' submissions were filed on 11th May, 2023 by the law firm of Ogetto, Otachi & Co. Advocates.
5. Mr. Bushebi, the defendant herein submitted that the plaintiffs filed an amended plaint dated 4th November, 2022 to add the 3rd plaintiff as a party to the suit. That the aim of the amendment was to pursue a derivative action against him in regard to breaches of fiduciary duty as a director of the 3rd plaintiff. That thereafter, he filed an amended defence dated 21st November, 2022 alongside the instant application but the plaintiffs did not take any further steps to progress the main suit. He further submitted that the 3rd plaintiff was incorporated by the 1st plaintiff, Mr. Emmanuel Wafula and himself pursuant to the Articles of Association and Memorandum of Understanding dated 10th June, 2008. Mr. Bushebi stated that the 3rd plaintiff has a compulsory dispute resolution mechanism through Arbitration provided for under Clause 31 of the Memorandum of Understanding & Articles of Association.
6. It was stated by the defendant that Clause 31 provides inter alia that whenever any difference arises between the company on the one hand and its members on the other hand touching on any breach of the Articles or any affairs of the 3rd plaintiff, every such difference shall be referred to an Arbitrator. He stated that the claim herein is a derivative action between the 3rd plaintiff company and the defendant as its member/shareholder, and that the dispute touches on affairs and alleged breaches of the Articles relating to the premises affecting the 3rd plaintiff, thus it should be referred to an Arbitrator to be appointed by the parties in the manner specified in the Clause 31. Based on the foregoing, Mr. Bushebi submitted that there is a valid arbitration clause which justifies an order for stay of proceedings and referral of the dispute to arbitration as provided for under Section 6(1) of the *Arbitration Act*.
7. He further submitted that the dispute between the 1st & 2nd plaintiffs and himself is based on fraudulent misrepresentation but the prayers sought by the plaintiffs in the amended plaint do not reflect this fact as they are not seeking contract avoidance based on the alleged fraud. Mr. Bushebi asserted that parties are bound by their Articles of Association hence whether he breached his fiduciary duty in his capacity as a shareholder/director as alleged, is an issue contemplated under Clause 31 of the Articles of Association and Memorandum of Understanding. He cited Article 159(2)(c) of *the*



Constitution of Kenya, 2010 and Section 6(1) of the Arbitration Act and stated that he raised the issue of Arbitration promptly at the time of filing his amended defence.

8. Mr. Bushebi relied on the case of the Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 and contended that the Arbitration Clause in the Articles of Association and Memorandum of Understanding ousts the jurisdiction of this Court to hear and determine the dispute herein thus the said dispute should be referred to Arbitration. He stated that in a situation where parties agreed to refer disputes to arbitration, the jurisdiction to deal with substantive disputes or differences is given to the Arbitrator so that the matter in dispute can be dealt with in a manner agreed between the parties.
9. The defendant relied on the decisions in Techno Service Limited v Nokia Corporation & 5 others (Civil Case E093 of 2020) [2022] KEHC 236 (KLR); Union Technology Kenya Ltd v County Government of Nakuru [2017] eKLR and Meshack Kibunja Kaburi & 3 others Versus Kirubi Kamau & 5 others Civil Case E547 of 2020 [KLR 2022] and submitted that pursuant to Section 6 of the Arbitration Act, Cap 4 of 1995 and Article 159(2)(c) of the Constitution of Kenya, 2010, this Court has the power to stay proceedings and refer matters to arbitration. He added that referring the dispute herein to Arbitration as agreed by the parties will save time and realize the intention of the oxygen principles.
10. Mr. Muyuri, learned Counsel for the plaintiffs submitted that this matter was instituted on 31st January, 2017 upon discovery of a well-orchestrated fraudulent scheme by the defendant that resulted in the fraudulent obtaining and misappropriation of about Kenya Shillings One Hundred Million. The plaintiffs’ Counsel relied on the Court of Appeal’s holding in the case of Eunice Soko Mlagui versus Suresh Parmar & 4 others [2017] eKLR and stated that in dealing with an application for stay and referral of a suit to arbitration, the Court ought to consider whether the party applying for the referral of a suit to arbitration has done so at the time of entering appearance or before acknowledging the claim in question, since filing of a defence constitutes acknowledgement of a claim within the provisions of Section 6 of the Arbitration Act.
11. Counsel cited Section 6(1) of the Arbitration Act, 1995 and the case of Niazsons (K) Ltd v China Road & Bridge [2001] eKLR and stated that the defendant has to demonstrate that he filed the instant application promptly, either before entering appearance or at the time of entering appearance and acknowledging the claim as brought against him, but the defendant is incapable of persuading this Honourable Court of the promptness of the impugned application since he entered appearance on or about 28th February, 2017 and later filed his defence on 23rd August, 2017. Counsel further stated that a period of about six (6) years has lapsed between the time the defendant entered appearance and filed a defence acknowledging the claim brought against him and the filing of the application herein. He contended that the defendant is precluded from relying on the provisions of Section 6(1) of the Arbitration Act, 1995.
12. Mr. Muyuri contended that the defendant has made numerous other steps other than those allowed by Section 6(1) of the Arbitration Act, as he has filed a statement of defence, an amended defence, various applications and responses to applications filed on behalf of the plaintiffs, preliminary objections, notices of cross-examination and an appeal against the decision of the learned Justice Nzioka. He submitted that as a result, the defendant has failed to comply with the first consideration which a Court is required to analyze, thus he is precluded from relying on Section 6(1) of the Arbitration Act, 1995. The plaintiffs’ Counsel referred to the case of Niazsons (K) Ltd v China Road & Bridge (supra) where the Court held that it is not open for a party to take out an application for stay of proceedings and at the same time file a written statement of defence. He asserted that the defendant’s admission that he filed an amended defence together with the instant application divests him of the benefit of Section 6(1) of the Arbitration Act.



13. It was submitted by Counsel that by undertaking all these other steps from the institution of this suit to the present, the defendant demonstrated that he has submitted to the jurisdiction of this Honourable Court to hear and determine the dispute between the parties herein hence he cannot turn around and deny this Court's jurisdiction. To this end, Counsel relied on the Court of Appeal decision in the case of the Speaker of the National Assembly v Njenga Karume [1992] eKLR, where it was held that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed and it is not open to anyone to bypass it.
14. The plaintiffs' case is that in a majority of instances where directions that would see this matter inch closer to its substantive progression and/or hearing were given, applications which would eventually have the effect of delaying and scuttling progression of the main suit would be made on behalf of the defendants. Mr. Muyuri stated that justice delayed is justice denied, and it has been a period of about six (6) years since this matter was filed, yet it has never proceeded to hearing. He also stated that it is improbable that each and every Judge that issues a directive and/or order that the defendant deems unsuitable either has a vested interest in the matter, is impartial, lacks professional competence, has a predetermined mind, lacks professional integrity, prejudices him by there being two matters running concurrently and/or that they will not accord him a fair hearing.
15. Mr. Muyuri cited the case of Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR, where the Court of Appeal defined the term abuse of the Court process as when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. He submitted that the instant application is an abuse of Court process as it has been filed with complete knowledge that it does not meet the requisite rudimentary thresholds as required by the law. He asserted that every litigant has the right to prosecute their suit accordingly, but both parties to a suit and the Courts balance and/or find equilibrium between the competing interests of that right and the enshrined principles and rights to expeditious dispensation of justice as well as effective and efficient application of the judicial process.
16. In challenging the admissibility of the plaintiffs' replying affidavit, the defendant relied on extracts from Wikipedia as probative material. To counteract the said action, Counsel for the plaintiffs cited the United States Court of Appeal case of Campbell ex rel. Campbell v Secretary H.H.S 665 F.2d 48 (2d Cir. 1981) and submitted that Wikipedia is not an authoritative and/or reliable source of probative material that may sufficiently be relied upon to deduce the correctness and/or veracity of the content therein. He contended that void of any statute or writ to disclose the veracity and scope of the alleged International Law that has been breached, the Wikipedia extracts are of no probative value and this Honourable Court is not bound by the contents therein. He also contended that Section 83(1) of the Law of *Evidence Act* provides that the Court shall presume to be genuine every document purporting to be a certificate, a certified copy or other document which is declared by law to be admissible as evidence of any particular fact and which is substantially in the form and purporting to be executed in the manner directed by law in that behalf.
17. He submitted that the first port of call in determining the admissibility of the said replying affidavit is to interrogate its compliance with the criteria hereinabove. He explained that Order 19 Rule 3 of the Civil Procedure Rules, 2010, provides that affidavits are acceptable and admissible at law as proof of such facts as the deponent is able of his own knowledge to prove as well as on statements of information and belief showing the sources and grounds thereof. He stated that Section 5 of the *Oaths and Statutory Declarations Act*, Cap 15 of the Laws of Kenya makes provision that every Commissioner for Oaths before whom any oath or affidavit is taken or made, shall state truly in the jurat or attestation at what place and on what date the oath or affidavit was taken or made.



18. Mr. Muyuri indicated that the equivalent of such an officer, in a foreign jurisdiction, is a Notary Public. He contended that the plaintiffs' replying affidavit complies with all the requirements of the pertinent provisions thereby falling within the ambit of the presumption of genuineness as enshrined under the dictates of Section 83(1) of the Law of *Evidence Act*. To this end, he relied on the case of *West African Foodstuffs Co. Ltd & 2 others v Kayser Investment Ltd* [2021] eKLR. He submitted that the authenticity, validity and evidentiary value of the contents of the plaintiffs' replying affidavit can be ascertained by this Court by assessment of the Court record with the points of law being verified by the Court's own cognizance and in any event, there is no prejudice that shall be occasioned to the defendant as there is no new material that has been adduced through the said replying affidavit that would raise issues of authenticity and validity.

Analysis and Determination.

19. I have considered the application filed herein, the grounds on the face of it and the affidavits filed in support thereof, the grounds of opposition and the replying affidavit by the plaintiffs. I have also considered the Preliminary Objection raised by the defendant and the written submissions by Counsel for the parties. The issues that arise for determination are –
- i. Whether the Preliminary Objection dated 27th April, 2023 is merited and if it should be sustained;
 - ii. Whether the instant application is an abuse of the Court process;
 - iii. Whether the dispute herein should be referred to Arbitration and these proceedings stayed; and
 - iv. Whether the amended plaint dated 4th November, 2022 should be struck out for being an abuse of the Court process.
20. In the affidavit filed by the defendant he deposed that the plaintiffs filed an amended plaint dated 4th November, 2022 to pursue a derivative action against him for breaches of fiduciary duty as a director of the 3rd plaintiff. He averred that the 1st plaintiff, himself and one Mr. Emmanuel Wafula incorporated the 3rd plaintiff pursuant to Articles of Association and a Memorandum of Understanding dated 10th June, 2008.
21. He further averred the dispute herein touches on matters allegedly done, executed, omitted or suffered in pursuance of the said Articles of Association and on alleged breaches of the said Articles relating to the premises affecting the 3rd plaintiff. In addition, that at Clause 31 of the Articles of Association and Memorandum of Understanding, the 3rd plaintiff has a compulsory dispute resolution mechanism through Arbitration, which states that every such differences shall be referred to an Arbitrator to be appointed by the parties in the manner specified in Clause 31.
22. It was stated by the defendant that the plaintiffs are attempting to circumvent the Arbitration agreement by prematurely filing the derivative suit which is a clear abuse of the Court process. He further stated that the plaintiffs instituted this suit in violation of Section 6 of the *Arbitration Act* and the 3rd plaintiff's Articles of Association hence they are improperly before the Court.
23. The plaintiffs in their replying affidavit deposed that the period within which the defendant has brought the instant application is immensely protracted and it is legitimately expected that the underlying motive thereof is to derail the expeditious progression and conclusion of this matter, by delaying conclusion of pre-trials and subsequent scheduling for hearing.
24. They averred that there is not a fact in dispute that the parties herein agreed to refer to Arbitration by reason that the substratum and core of this suit is predicated upon a claim of orchestration of



systematic fraud by the defendant and not on the construction, incidents or consequences of the purported Articles. Further, that by relying on the provisions of Section 6(1)(a) of the *Arbitration Act*, 1995, the defendant has challenged and/or brought into question the validity of the alleged Arbitration Agreement.

25. They stated that the protracted period within which the instant application has been brought demonstrates that it is an afterthought and craft engineered to delay this matter, especially in the backdrop of the other numerous applications filed on behalf of the defendant.

Whether the Preliminary Objection dated 27th April, 2023 is merited and if it should be sustained.

26. It is trite that in order for a Preliminary Objection to succeed, it should raise a pure point of law, it should be argued 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. See *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, where the Court considered what constitutes a Preliminary Objection.
27. The defendant contended that the plaintiffs' replying affidavit having been Notarized by a Notary Public at Arizona, in the United States of America offends the document legalization requirement in International Law, a requirement by which an affidavit sworn and commissioned before a US Notary Public ought to be legalized by a Kenyan Consular Officer in the USA before the same can be used in a Kenyan Court. He averred that legalization of such foreign documents is necessary to avoid the Court entertaining quacks who are located outside its jurisdiction. The plaintiffs on the other hand submitted that their replying affidavit complies with all the requirements of the pertinent provisions, thereby falling within the ambit of the presumption of genuineness as enshrined under the dictates of Section 83(1) of the Law of *Evidence Act*.
28. On perusal of the plaintiffs' replying affidavit, I note that it was signed before a Notary Public at Arizona, in the United States of America. Therefore, the question this Court has to answer is whether the said affidavit was properly notarized for use in Kenyan Courts. Section 83 of the *Evidence Act* which the plaintiffs have relied on provides for certified documents, for this reason, it is my finding that the plaintiffs' replying affidavit in opposition to the instant application does not fit within the confines of the said provisions since it is not a certified document.
29. The affidavit in question was taken and notarized at Arizona in the United States of America. It is noteworthy that the United States of America is not a commonwealth country, therefore, the affidavit in issue ought to have been authenticated by affidavit or otherwise to ascertain if the signature and seal of attestation affixed thereto was that of such Notary Public. The Court in the case of *Techno Service Limited v Nokia International Oy-Kenya & 3 others* [2020] eKLR also made a similar finding by stating that -

“The learned judge made the above statement after finding that Section 88 of the *Evidence Act* permitted, as admissible in the Kenyan Court, documents which were admissible in the English court. The learned judge proceeded to find, as stated above, that for any documents from a non-commonwealth country, such as the subject affidavit in this matter, needed to have the Notary's signature and seal attesting proved or authenticated by affidavit or otherwise. Techno was right to argue that the affidavit of Cynthia Randall was sworn before a Notary public, Amber L. Brazier, in the state of Washington but there was no authentication of that Notary. That objection by Techno is accordingly upheld...”



30. In the case *Pasatificio Lucio Garofalo SPA v Security & Fire Equipment Co & Another* [2001] eKLR Justice A. G. Ringera (as he then was) considered affidavits sworn outside the Commonwealth and stated thus:

“...it follows that the affidavit in the instant case which was taken in Napoli, Italy, has to be proved by affidavit or otherwise to have been taken by a Notary Public in Italy and that the signature and seal of attestation affixed thereto was that of such Notary Public. There is no such proof here. It may very well be that the certificates in Italian and the other writing in Italian was meant to do that. However, as there was no translation of the same into English-which is the official language of the High Court-this Court cannot and will not know the position.”

31. Similarly, in the case of *Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited* [2016] eKLR, the Court when faced with an objection similar to the one that has been raised in this case of the replying affidavit that was notarized outside a commonwealth country held as follows-

“ 11. I am in total agreement with the reasoning of Ringera J. (as he then was) and I do adopt the same herein. Indeed, Section 88 of the *Evidence Act*, Cap 80 of the Laws of Kenya provides that documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by virtue of Order 41 rule 12 of the Rules of the Supreme Court, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp, seal or the official position of the person taking the affidavit. The same position obtains in Kenya. As there is no such presumption in favour of documents made outside the commonwealth, it follows that the affidavit in the instant case which was taken in Dubai, in the United Arab Emirates, would have to be proved by affidavit or otherwise to have been taken by a Notary Public in UAE and that the signature and seal of attestation affixed thereto was that of such Notary Public.

32. The plaintiffs argued that the authenticity, validity and evidentiary value of the contents of their replying affidavit can be ascertained through assessment of the Court record with the points of law being verified by the Court’s own cognizance. Further, that there is no prejudice that shall be occasioned to the defendant as there is no new material that has been adduced through the said replying affidavit that would raise issues of authenticity and validity.
33. It can be argued that failure to prove by affidavit or otherwise that the plaintiffs’ replying affidavit was taken by a Notary Public in the USA and that the signature and seal of attestation affixed thereto was that of such Notary Public is a procedural technicality that affects the form rather than the substance of the said affidavit, hence curable under the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010. My finding however is that failure to prove by affidavit or otherwise that the plaintiffs’ replying affidavit was taken by a Notary Public in Arizona, USA and that the signature and seal of attestation affixed thereto was that of such Notary Public is fatal since the Court has no way of ascertaining whether the Notary Public’s signature and seal of attestation affixed thereto was that of such Notary Public and/or if the said Notary Public is authorized to practice as such in the USA. Consequently, the plaintiff’s replying affidavit is reduced to mere averments that are only fit to be addressed in a witness statement and for the witness to be subjected to cross-examination.



34. In light of the analysis made here before, I uphold the defendant's Notice Preliminary Objection dated 27th April, 2023. I hereby strike out the plaintiffs' replying affidavit sworn on 23rd March, 2023.

Whether the instant application is an abuse of the Court process.

35. The plaintiffs' contended that the defendant has in the past filed various applications which would have the effect of delaying and scuttling progression of the main suit. They contended that the instant application is an abuse of Court process as it has been filed with complete knowledge that it does not meet the requisite rudimentary thresholds as required by law. The term abuse of the Court process was defined by the Court of Appeal in the case of Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR, as follows -

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive.”

36. The Court of Appeal in the case of Meme v Republic & another [2004] eKLR also discussed the issue of abuse of the Court process as hereunder-

“An abuse of the court's process would, in general, arise where the court is being used for improper purpose, as a means of vexation and oppression, or for ulterior purposes, that is to say, court process is being misused.”

37. It is not disputed that the instant application was filed after the plaintiffs filed their amended plaint dated 4th November, 2022, where they introduced the 3rd plaintiff and brought a derivative action against the defendant. In the application herein, the defendant is seeking an order for the dispute herein to be referred to arbitration for hearing and determination, and for the proceedings to be stayed. The application is grounded on the fact that pursuant to Clause 31 of the Articles of Association and Memorandum of Understanding of the 3rd plaintiff, in the event of a dispute between the 3rd plaintiff company and any of its members touching on any breach of the Articles or any affairs of the 3rd plaintiff, the said dispute is to be referred to Arbitration. The defendant averred that in the amended plaint dated 4th November, 2022, the plaintiffs' case is that he breached his fiduciary duties to the 3rd plaintiff, which dispute falls within the dispute contemplated by Clause 31 of the 3rd plaintiff's Articles of Association and Memorandum of understanding.
38. Based on the foregoing, and the fact that the application herein is a direct consequence of the amended plaint dated 4th November, 2022, I find that the application herein has not been brought to delay/ scuttle the hearing and determination of the main suit and/or to irritate or annoy the plaintiff. Instead, its aim is to give the Court an opportunity to determine whether there is a valid arbitration agreement between the parties herein and whether the dispute between the parties herein falls within the scope of the dispute contemplated by Clause 31 of the 3rd plaintiff's Articles and Memorandum of Understanding. In doing so, the Court will have determined whether it has jurisdiction to hear and determine the main suit.
39. This Court therefore finds that the instant application is not an abuse of the Court process.



Whether the dispute herein should be referred to Arbitration and the proceedings stayed.

40. Section 6 of the Arbitration Act No. 4 of 1995 states as follows –

- “(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds–
- a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
 - b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
- (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
- (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.”

41. The Court’s obligation upon being moved under the above provisions, has been the subject of numerous Court decisions. A case in point is *Niazsons (K) Ltd v China Road Bridge* [2001] KLR, where it was held as follows-

- “All that an applicant for a stay of proceedings under section 6 (1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:
- a. Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;
 - b. Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and
 - c. Whether the suit intended concerned a matter agreed to be referred to arbitration”

42. On whether the instant application has been brought promptly the defendant submitted that after the plaintiffs filed their amended plaint dated 4th November, 2022, he filed the instant application together with an amended statement of defence thus the application herein was filed timeously. The plaintiffs on the other hand submitted that the instant application was not filed promptly since the defendant entered appearance on or about 28th February, 2017 and later filed his defence on 23rd August, 2017. In addition, the defendant has taken other numerous steps other than those allowed by Section 6(1) of the Arbitration Act, thus he is precluded from relying on the said Section. The plaintiff’s contended that the defendant’s admission that he filed an amended defence together with the instant application divests him of the benefit of Section 6(1) of the Arbitration Act.

43. As explained hereinabove, the application herein is a direct consequence of the amended plaint dated 4th November, 2022 which joined the 3rd plaintiff to this suit. The instant application was filed



alongside an amended statement of defence immediately after the amended plaintiff was filed and served on the defendant. For this reason, I find that the instant application was filed promptly.

44. It was submitted by the plaintiff that the defendant has made other numerous steps other than those allowed under Section 6 of the *Arbitration Act* thus he is precluded from relying on the provisions of the said Section. I find that this is not the correct position since the only other application filed by the defendant after he filed the instant application, was an application for Justice Majanja to recuse himself. It is noteworthy that the said application is not geared towards progression of the matter but towards the defendant's reaction to this case being heard by the said Hon. Judge.
45. In the case of UAP Provincial Insurance Company Ltd v Michael John Beckett [2013] eKLR, the Court of Appeal made the following observation in regard to applications for stay of proceedings filed pursuant to the provisions of Section 6 of the *Arbitration Act* -

“In our view, the issue with which Mutungi, J was concerned when dealing with the application under section 6 of the *Arbitration Act* was whether or not the arbitration clause would be enforced and whether the matter was one for reference to arbitration. Section 6 of the Arbitration provides an enforcement mechanism to a party who wishes to compel an initiator of legal proceedings with respect to a matter that is the subject of an arbitration agreement to refer the dispute to arbitration. Section 6 of the *Arbitration Act* under which UAP's application for stay of proceedings was presented provides in the relevant part:

.....

It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6(1) (b) of the *Arbitration Act* is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration.” (emphasis added)

46. It is not disputed that there is a claim that has been brought against the defendant herein. In the amended plaintiff dated 4th November, 2022 the plaintiffs contend that the defendant inter alia sent the 1st and 2nd defendants false and/or fabricated bank statements, records of accounts and related documentation on behalf of the 3rd plaintiff knowing them to be false, converted funds held by the 3rd plaintiff to his own use without authority, and improperly used his position as a director to enrich himself from funds held in trust by the 3rd plaintiff, hence breaching his fiduciary duty as a director of the 3rd plaintiff company as well as his mandate as an agent of the company.
47. In his amended statement of defence, the defendant denies the averments contained in the amended plaintiff and states that the 3rd plaintiff has a compulsory dispute resolution mechanism through Arbitration provided for under Clause 31 of the Memorandum of Understanding & Articles of Association. The said clause states as hereunder –

“Whenever any difference arises between the Company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching on the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes, or touching on anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of the statutes or touching on any breach, or alleged breach, of these Article or otherwise relating to the premises, or to these Articles or to any statutes affecting the company, or to any affairs of the company, every such difference shall be referred to an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single



arbitrator then to two arbitrators, of whom one shall be appointed by each of the parties in difference.” (emphasis added)

48. The plaintiffs contend that the dispute between the parties herein does not fall within the scope of the disputes contemplated by Clause 31 of the 3rd plaintiff’s Articles of Association and Memorandum of understanding. This is because the substratum and core of this suit is predicated on a claim of orchestration of systematic fraud by the defendant and not on the construction, incidents or consequences of the purported Articles. The defendant on the other hand asserts that the dispute herein is within the scope of Clause 31 of the 3rd plaintiff’s Articles of Association and Memorandum of understanding since there are allegations that he is in breach of his fiduciary duties to the 3rd plaintiff.
49. Clause 31 of the 3rd plaintiff’s Articles of Association and Memorandum of Understanding provides that any dispute between the 3rd plaintiff and any of its members, executors, administrators, or assigns touching on any breach or alleged breach of the said Articles or to any affairs of the company, shall be referred to an Arbitrator. It is evident that the said Clause 31 is couched in mandatory terms hence there is no room for parties to choose not to refer such a dispute to arbitration. In the premise, I find that the dispute herein falls within the scope of Clause 31 of the 3rd plaintiff’s Articles of Association and Memorandum of Understanding as it is between a member/director/shareholder and the 3rd plaintiff company touching on the defendant’s alleged breach of fiduciary duty to the 3rd plaintiff.
50. It is trite that parties are bound by the terms of their agreement and Courts cannot rewrite contracts and/or agreements between parties. The parties herein having voluntarily agreed to refer disputes such as the one herein to arbitration waived their right to a trial in the High Court and they cannot be seen to run away from the terms of their agreement. As a result, it is my finding that Clause 31 of the 3rd plaintiff’s Articles of Association and Memorandum of Understanding is binding to the parties herein and the dispute between them is in regard to matters agreed to be referred to arbitration. For the said reason and in light of the provisions of Article 159(2)(c) of *the Constitution* of Kenya, 2010, I hold that the dispute between the parties herein shall be referred to arbitration for hearing and determination.
51. In view of the above finding, this Court shall not determine whether the amended plaint dated 4th November, 2022 should be struck out for being an abuse of the Court process since it is an alternative prayer.
52. The upshot is that the application dated 21st November, 2022 is merited and it is allowed in the following terms –
- i. This Court hereby stays the proceedings in this suit and refers the dispute herein to arbitration in terms of Clause 31 of the 3rd plaintiff’s Articles of Association and Memorandum of Understanding; and
 - ii. The costs of the application dated 21st November, 2022 are awarded to the defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF JULY, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Muyuri for the plaintiffs/respondents



Mr. Bushebi – defendant appearing in person

Mr. Kipngétich h/b for Mr. Ayisi for the Interested Party

Ms B. Wokabi- Court Assistant.

