

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM MISC. APP. NO. E773 OF 2024 (OS)

IN THE MATTER OF INTENDED ARBITRATION OVER THE JOINT VENTURE AGREEMENT DATED 20TH AUGUST 2023 OVER MONACS HEALTH KENYA LIMITED BETWEEN AGAEZI FLORENCE SONYA (MONACS LLC) AND PIUS OCHOLA OPENDI-

-AND-

IN THE MATTER OF THE ARBITRATION ACT, NO. 4 OF 1995 LAWS OF KENYA

-BETWEEN-

AGAEZI FLORENCE SONYA (MONACS LLC).....APPLICANT

-VERSUS-

PIUS OCHOLA OPENDI.....RESPONDENT

RULING

1. The applicant filed an *ex-parte* Originating Summons dated 19th December 2024 pursuant to the provisions of Order 37 Rules 10 & 11 of the Civil Procedure Rules, 2010, Sections 1A & 3A of the Civil Procedure Act, 2010 and all other enabling provisions of the law. The applicant prays for orders that disputes under the Joint Venture Agreement dated 20th August 2023 be referred to Arbitration before a sole arbitrator being an Advocate appointed by the Chairman of the Chartered Institute of Arbitrators-Kenya, that the seat of Arbitration shall be Nairobi, that the proceedings shall be conducted virtually and in English. The applicant also prays for an order to the effect that the Arbitral Award shall be final and binding subject to enforcement by a competent Court and that the parties to the Arbitration be at liberty to seek interim relief from Courts pending the Arbitral Award.

2. The application is premised on the grounds on the face of the Summons, and it is supported by an affidavit sworn on the same day by Ms Agaezi Florence Sonya, the plaintiff herein. She averred that she is the sole Manager of MONACS LLC, a US-registered company, which entered into a Joint Venture Agreement dated 20th August 2023 with the respondent to expand Monacs Health Kenya Limited. She contended that disputes subsequently arose concerning finances, transparency, leadership, and management of equipment, leading her to write to the respondent vide letters dated 16th July 2024 & 16th September 2024, inviting him for negotiations with a view of reaching an amicable resolution of the dispute, but the respondent ignored the invite.
3. She deposed to having requested the Chartered Institute of Arbitrators on 14th November 2024 to appoint an Arbitrator, but the Institute advised the parties to agree in writing on the appointing authority or seek Court intervention. Ms Sonya stated that she proposed a resolution on appointment of an Arbitrator on 21st November 2024, but the respondent failed to respond, warranting the instant application. She asserted that save for pending interim proceedings before **Ngong Magistrate's Court MCCCmisc No. E028 of 2024**, no other suits exist on the matter in issue.
4. In opposition to the Summons, the respondent filed a replying affidavit sworn on 20th January 2025 by Dr. Pius Ochola Opendi, the respondent herein. Dr. Opendi averred that the instant application is *res judicata* noting that the applicant had earlier filed a Notice of Motion application dated 26th July 2024 before Ngong Magistrate's Court on the same subject matter, wherein interim orders were granted but the application was later dismissed on 17th January 2025. He contended that the applicant failed to exhaust the Joint Venture Agreement's dispute resolution mechanism, particularly amicable negotiations, before seeking Arbitration. He stated that the

invitation to negotiate was only made belatedly and in bad faith after interim orders had already been obtained.

5. Dr. Opendi stated that under Section 6(1) of the Arbitration Act, Arbitration should have been sought at the earliest opportunity through a stay application, which was not done. He asserted that the instant application is misleading, violates Section 7 of the Civil Procedure Act and offends equitable principles since the applicant has not come to Court with clean hands. He also stated that allowing the application herein would cause him to suffer irreparable harm. He urged this Court to strike out the application with no orders as to costs.
6. The instant application was canvassed by way of written submissions. The applicant's submissions were filed on 10th February 2025 by the law firm of Kiluva A. K. & Company Advocates, whereas the respondent's submissions were filed by the law firm of Eric Ntabo & Company Advocates on 25th February 2025.
7. Mr. Kiluva, learned Counsel for the applicant submitted that the applicant entered into a Joint Venture Agreement with the respondent on 20th August 2023, but a dispute arose over finances, transparency, leadership, and management of equipment. He stated that written invitation to negotiate and subsequent correspondence, including an application to the Chartered Institute of Arbitrators, went unanswered by the respondent, necessitating the instant application. Counsel further submitted that the Ngong Magistrate's Court case was only in respect to interim reliefs and did not address Arbitration, hence this application is not *res judicata*. He stated that the respondent has not denied receipt of correspondence, the existence of the Clause 8 of the Joint Venture Agreement providing for Arbitration, or the existence of disputes and he has not shown the prejudice he would suffer in the event that the instant application is allowed.

8. Mr. Ntabo, learned Counsel for the respondent relied on the provisions of Section 7 of the Civil Procedure Act, the cases of **Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)** [2022] KEHC 2227 (KLR) & **E.T. v Attorney General & another** [2012] KEHC 5506 (KLR) and submitted that the instant application is *res judicata*. He argued that the conditions for application of the *res judicata* doctrine are satisfied since there exists a former suit between the parties herein being **Ngong Magistrate's Court MCCCmisc No. E028 of 2024**, the dispute in both matters arises from the same Joint Venture Agreement, involving the same core issues of ownership, equipment, finances, and management and the former case was heard and determined on its merits, with a Ruling delivered on 17th January 2025.

9. Counsel contended that the parties herein, though presented differently, are essentially the same actors litigating under the same title. He argued that Arbitration is not a new subject matter but merely a different method of resolving the same dispute. Mr. Ntabo relied on the Court of Appeal case of **Adrec Limited v Nation Media Group Limited** [2017] KECA 106 (KLR), and submitted that the applicant waived its right to Arbitration by fully participating in **Ngong MCCCmisc No. E028 of 2024**, without seeking a stay under Section 6(1) of the Arbitration Act. He further submitted that the instant application is also barred by the doctrine of *res judicata* since the issues raised herein have already been litigated between the same parties in the earlier case.

ANALYSIS AND DETERMINATION.

10. I have considered the instant application, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit by the respondent and the written submissions by Counsel for the parties. The issues that arise for determination are –

- i) **Whether the instant application is *res judicata*; and**
- ii) **If the dispute between the parties herein should be referred to Arbitration.**

Whether the instant application is *res judicata*.

11. The respondent contends that this application is *res judicata* **Ngong MCCCmisc No. E028 of 2024** as the issues raised herein have already been heard and determined in the aforesaid case vide a Ruling delivered on 17th January 2025.
12. The doctrine of *res judicata* is provided for under Section 7 of the Civil Procedure Act which states 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.
13. The Civil Procedure Act has also provided explanations in respect to the application of the *res judicata* doctrine. Explanation 1-6 states that -

Explanation (1) -The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation (2) -For the purposes of this section, the competence of a Court shall be determined irrespective of any provision as to right of appeal from the decision of that Court.

Explanation (3) -The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation (4) - Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation (5) - Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation (6) - Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

14. The Supreme Court in the case of **John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others** [2021] KESC 39 (KLR) addressed itself on the doctrine of *res judicata* as follows –

Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, [2010]

eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

15. It is not in contest that **Ngong MCCCmisc No. E028 of 2024** was between the same parties as those in this suit. Upon perusal of the pleadings filed therein which have been attached to the respondent's replying affidavit, it is evident that in the aforesaid suit, the applicant was seeking interim reliefs of injunction against the respondent restraining him from *inter alia* destroying and/or disposing of the equipment in dispute.
16. In this suit however, the applicant is praying for orders that disputes under the Joint Venture Agreement dated 20th August 2023 be referred to Arbitration before a sole Arbitrator, being an Advocate appointed by the Chairman of the Chartered Institute of Arbitrators-Kenya. He also prays for the seat of Arbitration to be in Nairobi, and for the proceedings to be conducted virtually and in English. He also prays for an order for the Arbitral Award to be final and binding subject to enforcement by a competent Court and that the parties to the Arbitration be at liberty to seek interim reliefs from Courts pending the Arbitral Award.
17. It is further noteworthy that in the affidavit in support of the reliefs sought in **Ngong MCCCmisc No. E028 of 2024**, the applicant indicated that the application in the said suit was made pending the invocation of Section 8 of the Joint Venture Agreement which requires any dispute arising from the said Agreement to be referred to Arbitration in accordance with the Arbitration Act (No. 4 of 1995) Laws of Kenya. In the premise, the fact that the application in **Ngong MCCCmisc No. E028 of 2024** was not filed under the provisions of Section 6 of the Arbitration Act, does not mean that it was not contemplated under the said provisions in view of the applicant's

averment in paragraph 15 of the affidavit in support of the application therein.

18. In the premise, I am not persuaded that the issues raised in this case are similar to those raised in **Ngong MCCCmisc No. E028 of 2024** in order for the respondent to successfully raise a plea of *res judicata*.

If the dispute between the parties herein should be referred to Arbitration.

19. The applicant relied on Clause 8 of the Joint Venture Agreement dated 20th August 2023 and sought for orders for this Court to direct that disputes arising from the Joint Venture Agreement dated 20th August 2023 to be referred to arbitration before a sole Arbitrator, being an Advocate appointed by the Chairman of the Chartered Institute of Arbitrators-Kenya, with Nairobi as the seat of Arbitration. The applicant also prays for orders that the Arbitration proceedings be conducted in English and to be held virtually, with the Arbitral Award being final and binding, subject to enforcement by a competent Court and that the parties herein be at liberty to seek interim reliefs from Courts pending the Arbitral Award.
20. The Joint Venture Agreement dated 20th August 2023 provides for an Arbitration agreement under Clause 8 thereof which states that -

The Parties shall first attempt to amicably resolve the matter through amicable negotiations between the Parties, who have authority to settle the same. If the matter is not resolved by such negotiation within thirty (30) days of receipt of a written 'invitation to negotiate', the Parties will resolve the matter in good faith through Arbitration in accordance with the Arbitration Act (No. 4 of 1995) Laws of Kenya.

21. From the averments made by the parties herein, it is apparent that a conflict falling within the scope of the aforesaid Clause exists between the parties, justifying invocation of the said Clause. The respondent however contends that the applicant failed to exhaust the dispute resolution mechanism under the Joint Venture Agreement, specifically, the requirement for amicable negotiations, before resorting to Arbitration. The respondent averred that the invitation to negotiate was issued belatedly and in bad faith, only after interim orders had already been secured.
22. From the foregoing, notwithstanding the respondent's belief that the invitation was not made in good faith, the applicant complied with the provisions of Clause 8 of the Joint Venture Agreement dated 20th August 2023. The applicant sent a letter dated 16th September 2024 inviting the respondent to negotiate the outstanding issues under the Agreement and subsequently, by a letter dated 14th November 2024, requested the Institute of Chartered Arbitrators of Kenya to appoint an Arbitrator pursuant to the said Clause, approximately 59 days after the invitation to negotiate.
23. I am therefore satisfied that before commencing Arbitration, the applicant duly complied with Clause 8 of the Joint Venture Agreement dated 20th August 2023 by first inviting the respondent vide a letter dated 16th September 2024, to negotiate the unresolved issues, and thereafter upon the lapse of thirty days, instituting Arbitration proceedings vide its letter dated 14th November 2024.
24. As to whether the applicant waived its right to Arbitration by fully participating in **Ngong MCCCmisc No. E028 of 2024**, without seeking a stay under Section 6(1) of the Arbitration Act, this Court has already held that the mere fact that the application in **Ngong MCCCmisc No. E028 of 2024** was not brought under Section 6 of the Arbitration Act does not exclude it from the contemplation of that provision. This is evident from

paragraph 15 of the affidavit in support of the application in the said case, where the applicant expressly stated that the application was made pending the invocation of Clause 8 of the Joint Venture Agreement, which requires that any dispute arising therefrom be referred to Arbitration in accordance with the Arbitration Act (No. 4 of 1995).

25. The prayer for an order to the effect that the Arbitral Award shall be final and binding not granted because under Section 35(2) of the Arbitration Act, the right to set aside an Arbitral Award is provided for. Asking this Court to grant an order to that effect is tantamount to putting the cart before the horse. Such a prayer cannot be granted at this point in time.
26. In the circumstances, the instant application is partly merited. It is allowed in the following terms-
- i) **This Court hereby directs that disputes arising from the Joint Venture Agreement dated 20th August 2023 be referred to Arbitration before a sole Arbitrator;**
 - ii) **That the Chairman of the Chartered Institute of Arbitrators-Kenya is hereby directed to appoint an Arbitrator, being an Advocate of the High Court of Kenya;**
 - iii) **That the seat of Arbitration shall be Nairobi and the Arbitral proceedings shall be conducted virtually and in English;**
 - iv) **That parties herein are at liberty to seek interim reliefs from Courts pending the Arbitral Award; and**
 - v) **That the respondent shall bear the costs of this application.**

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 26th day of September 2025. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Kiluva for the applicant

Ms Omolo holding brief for Mr. Ntabo for the respondent

Ms B Wokabi – Court Assistant.

ORIGINAL