



**Rosslyn Suites Limited v Bowman Associates (Commercial Case E445 of 2025)
[2025] KEHC 13436 (KLR) (Commercial and Tax) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13436 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E445 OF 2025**

PM MULWA, J

SEPTEMBER 25, 2025

BETWEEN

ROSSLYN SUITES LIMITED PLAINTIFF

AND

BOWMAN ASSOCIATES DEFENDANT

RULING

1. Before me is a Notice of Preliminary Objection dated 15th July 2025 filed by the Defendant/ Respondent. The objection challenges the jurisdiction of this Court to hear and determine the Notice of Motion dated 26th June 2025 and the substantive suit. The ground advanced is that the dispute herein is subject to arbitration pursuant to the *Arbitration Act*, 1995, and by virtue of Sub-Clause 20.4 of the Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (FIDIC), which mandates reference of disputes to arbitration.
2. By consent of the parties, the Preliminary Objection was canvassed orally. Learned Counsel, Mr. Ndalila, appeared for the Respondent while Learned Counsel, Mr. Wachira, appeared for the Applicant.

Submissions

3. For the Respondent, it was urged that the substratum of the Applicant's grievance relates to variations, certificates, and valuations under the construction project, matters expressly provided for under the FIDIC contract. Clause 20.4 thereof obligates parties to refer disputes to arbitration. Counsel relied on Article 159(2)(c) of *the Constitution* which enjoins courts to promote alternative dispute resolution including arbitration.



4. Conversely, Counsel for the Applicant argued that the objection is misplaced. First, the relationship between the Applicant and the Respondent is one of a developer and consulting architect. The FIDIC contract, it was urged, governs the employer-contractor relationship, not that between the employer and the architect. The Architect is not a party to the FIDIC contract, and cannot rely on its dispute resolution mechanism.
5. Secondly, Counsel contended that the objection is fatally defective as Section 6 of the *Arbitration Act* prescribes the procedure for invoking an arbitration clause, through an application by way of chamber summons which ought to be filed at the time of entering appearance, and it should not be filed at a later date. It was urged that a preliminary objection cannot substitute that statutory procedure.

Issues for Determination

8. The issue arising for determination is whether the Preliminary Objection is merited.
9. In resolving this, the Court must address two questions: first, whether the FIDIC arbitration clause is binding as between the Applicant and the Respondent, and secondly, whether the objection meets the threshold contemplated under Section 6 of the *Arbitration Act*.
10. The law on preliminary objections is well settled. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, Law JA stated:

“A preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”
8. Similarly, Sir Charles Newbold, P. observed in the same case:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is 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.”
11. The first issue therefore is whether the objection raises a pure point of law. Jurisdiction is indeed a threshold issue. As was stated in *Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
12. However, in determining jurisdiction, the Court must examine whether the arbitration agreement exists between the disputing parties. Section 4(1) of the *Arbitration Act* requires an arbitration agreement to be in writing. Section 6(1) further provides that a party seeking to stay court proceedings on account of an arbitration agreement must apply by way of a formal application before filing any pleadings.
13. From the pleadings and submissions, it is common ground that the Applicant (developer) contracted with the Respondent (architect) separately from the construction contracts governed by FIDIC. The Respondent has not demonstrated that it was a signatory to the FIDIC agreement or that the Applicant and the Respondent contract incorporated FIDIC’s arbitration provisions by reference.



14. It is trite law that Parties are bound by their contracts and cannot be enforced by or against a third party (see *Agricultural Finance Corporation v Lengetia Ltd & Jack Mwangi* [1985] eKLR). This principle resonates here. The Respondent cannot import an arbitration clause from a contract to which it was not privy to and purport to bind all the parties.
15. Even assuming that the arbitration clause was binding, the proper procedure is set out under Section 6(1) of the *Arbitration Act*, 1995, which provides:

“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... that the arbitration agreement is null and void, inoperative or incapable of being performed.”
16. The record reflects that the Respondent entered appearance on 4th July 2025 and filed this objection on 15th July 2025. The objection therefore came after the statutory window contemplated by Section 6.
17. Article 159(2)(c) of *the Constitution*, which promotes alternative dispute resolution, cannot be invoked to circumvent mandatory statutory provisions or contractual realities. The Court of Appeal in *Kenya Pipeline Co. Ltd v Hyosung Ebara Co. Ltd & 2 Others* [2012] eKLR held that while *the Constitution* recognizes ADR, it does not oust the Court’s jurisdiction where the arbitration agreement is disputed or inapplicable.
18. This Court agrees with the submission by the Applicant that these are not pure points of law but contested facts requiring interrogation. A preliminary objection cannot invite the Court to investigate factual issues. As was emphasized in *Oraro v Mbaja* [2005] 1 KLR 141, Ojwang, J. (as he then was) stated:

“A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
19. From the foregoing, I find that the Preliminary Objection is misconceived. The arbitration clause in the FIDIC contract does not bind the Applicant and Respondent as between themselves, and even if it did, the Respondent has not invoked it in compliance with Section 6 of the *Arbitration Act*.
20. Accordingly, the Preliminary Objection dated 15th July 2025 is hereby dismissed with costs to the Plaintiff/Applicant.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF SEPTEMBER 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Wachira for Plaintiff

Ms. Jematia h/b for Mr. Ndalila for Defendant

Court Assistant: Carlos

