Columbia Developers (K) Limited v Rogham Investment Limited; Co-operative Bank of Kenya Limited (Interested Party) (Commercial Case E010 of 2024) [2025] KEHC 15534 (KLR) (29 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15534 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

COMMERCIAL CASE E010 OF 2024

NIO ADAGI, J

OCTOBER 29, 2025

BETWEEN

COLUMBIA DEVELOPERS (K) LIMITED ..... PLAINTIFF

AND

ROGHAM INVESTMENT LIMITED ..... DEFENDANT

AND

CO-OPERATIVE BANK OF KENYA LIMITED ..... INTERESTED PARTY

RULING

1. By a Notice of Motion application dated 7th May 2024 brought under Section 6 of the *Arbitration Act*, 1995, Section 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law Rogham Investment Limited, the Applicant seeks for orders that:-

    a. Spent

    b. That pending the hearing of any other application, more so the application dated 23rd April, 2024, the application herein be heard in priority to any other proceeding taken in this application.

    c. That the proceedings herein and the entire case be stayed in their entirety to await determination of any dispute between the Applicant and Respondent through arbitration.

    d. That the costs of this application be provided for.

2. The application is premised on grounds that:-

a. the Applicant and the Respondent entered into a contract for building works over the property known as L.R. No. 20777 located within Mlolongo, Mavoko Municipality.

b. one of the terms provided in the contract is that of dispute resolution as provided under Clause 45.0 thereof.

c. the dispute resolution mechanism as provided for under the aforesaid Clause 45.0 of the agreement entered between the Applicant and the Respondent is Arbitration.

d. Arbitration being the dispute resolution mechanism agreed by the parties, this court is bereft of jurisdiction to handle the issues presented by the case herein.

e. the entire suit as filed is therefore an abuse of the court process, vexatious, scandalous and frivolous.

f. it is just and fair that the application herein is heard and determined.

g. no prejudice shall be visited upon the applicant as they is already a defined dispute resolution mechanism.

3. The application is further supported by the Supporting Affidavit of Aaron Gitonga sworn on 7th May 2024.

4. The applIcation Is Opposed By Columbia Developers (k) Limited, the Respondent through its Grounds of Opposition dated 7th June 2024 as follows:-

a. The application is misconceived, incompetent, bad in law, and an abuse of the court process.

b. There is no dispute between the parties hereto, capable of being referred to arbitration.

c. The Applicant's suit which the Respondent seeks to stay is predicated upon a certificate of payment issued by the Respondent.

d. Precedents settle the law that a certificate of payment that is not disputed cannot constitute a dispute for reference to arbitration

5. Directions were given for the application to canvassed through written submissions. Both parties complied. The Respondent/Applicant's submissions are dated 3rd March 2025 filed by Teddy & Co. Advocates whilst the Applicant/Respondent's submissions are dated 18th March 2025 filed by Nduli & Co. Advocates'.

6. The Interested Party indicated that it supported the instant objection application but did not wish to file submissions.

Applicant's Submissions

7. The Applicant submitted that it entered into a contract with the Respondent for building works over the property known as L.R. No. 20777 located within Mlolongo, Mavoko Municipality.

8. One of the terms in the contract is dispute resolution, as provided under Clause 45.0, which is Arbitration. Through an application dated 23rd April 2024 filed in the High Court in Nairobi, the Respondent sought to dupe the court into granting interim orders against the Applicant herein. In seeking the orders, the Respondent disregarded the dispute resolution mechanism as agreed between the parties.

9. The Applicant framed the following issues for determination which it submitted on as follows: -

   a. Whether or not the court has jurisdiction to handle issues presented by the case herein?

   b. Whether or not there is a dispute between the parties capable of being referred to Arbitration?

   c. Whether or not the application dated the 7th of May 2024 is misconceived, incompetent, bad law and abuse of court process?

10. As regards the first issue on whether or not the court has jurisdiction to handle issues presented by the case herein, it was submitted that a suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. Reliance was placed on Article 159 (2) (c) of *the Constitution* of Kenya, 2010 as read together with Section 6(1) of the *Arbitration Act* state that where Parties to a Contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement.

11. That Section 10 of the *Arbitration Act* further states that no court shall intervene in a matter governed by the Act except as provided under the Act. Reliance was placed on the case of Owners of the Motor Vehicle M. V. Lillians versus Caltex Oil (Kenya) Limited (1989) KLR 1 at page 14 line 29-43 Nyarangi JA (as he then was) had this to say:

> "Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

12. These words were echoed by this Court in Joseph Muthee Kamau Another v. David Mwangi Gichure & Another (2013) eKLR as follows;

> "When a suit has been filed in a court without jurisdiction it is a nullity. Many cases have established that; the most famous being Kagenyi v. Musirambo (1968) E4 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court's pecuniary jurisdiction.
>
> We hold that jurisdiction cannot be conferred at the time of delivery of judgement. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit"

.

13. Reference was also made to the decision in Wringles Company (East Africa) -v- Attorney General 3 Others (2013) eKLR where it was held:-

> "Parties had agreed that in the case of a dispute arising as to the validity of the agreement, then the same would be subject to arbitration and the court cannot rewrite the same. "

14. The Applicant relied on the above Constitutional, Statutory provisions and case law to show that this Court lacks jurisdiction to handle this matter since one of the terms in the contract is that of dispute resolution as provided under Clause 45.0 which is Arbitration.

15. On whether there is a dispute between the Parties capable of being referred to Arbitration, the Applicant submitted that it is not in dispute that the Applicant and the Respondent entered into an agreement. It is also not in dispute that the dispute resolution mechanism agreed upon by both parties as per their agreement in clause 45.0 is Arbitration.

16. The Applicant submitted that Section 6 (l) of the *Arbitration Act* is key. It reads:

> " (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 co 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 isa condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

17. Reliance was placed in Prof. Lawrence Gumbe & another v Honorable Mwai Kibaki & Others: High Court Miscellaneous No.1025 of 2004 where the court had the following to say about Section 10

> " Our Section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to recognize this autonomy, we would become a pariah State and could be isolated internationally".

18. Further, Justice Kimaru applied the same principle in Kenya Airports Parking Services Ltd & another v Municipal Council of Mombasa [2010] eKLR where he stated that-

> " It is in this courts view that where there exists an agreement with an arbitration clause, under the principle of separability of the arbitration clause, if a party to the agreement is of the opinion that the agreement is unlawfully and therefore invalid, such view does not invalidate the arbitration clause in the agreement. "

19. The Applicant submitted that the Respondent did not present any substantial evidence that is in line with the *Arbitration Act* that would necessitate this court to interfere with the arbitration Process therefore this matter ought to be referred to arbitration.

20. Lastly, on whether or not the application dated 7th May 2024 is misconceived, incompetent and bad in law and an abuse of the court process, the Applicant submitted that; The black law dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure

from reasonable use "An abuse is clone when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use"

21. That in Public Drug Co V Breyerke Cream Co it was stated that the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.

22. Further in Republic v Paul Kihara, Attorney General &amp: 2 others Ex parte Law Society. of Kenya 12020] eKLR, the Court stated that the situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of the court has not been or resorted to fairly, properly, and honestly to the detriment of the other party.

23. In the words of Oputa J.SC (as he then was) in Amaefule other Vs the State abuse of judicial process is: -

> " A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process. "

24. The Applicant submitted that the application dated the 7th of May, 2024 is legitimate since it is only praying that the terms of the agreement between it and the Respondent be honoured and upheld.

25. That it would not be unfair but also prejudicial to the Applicant if this honourable court refused to recognize this autonomy as this matter doesn't fall under the purview of being an abuse of court process.

26. It is the Applicant's submission that this Court lacks jurisdiction since the dispute resolution mechanism agreed upon by the parties is arbitration and this honourable court has no jurisdiction to re-write terms of a contract that has already been agreed upon.

27. Moreover, 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 opinion that it is without jurisdiction evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

28. The Applicant urged this Court to down its tools and refer this matter to arbitration.

Respondent's Submissions

29. The Respondent submitted that the application dated 7th May 2024 seeks for its suit for summary judgement for payment of approved interim payment certificate issued by the Applicant's consultants be stayed and the matter be referred to arbitration. That the application is opposed by the Respondent/ Plaintiff through grounds of opposition dated 7th June 2024.

30. The Respondent submitted that the only issue for determination before the court is whether to stay the proceedings and refer the same to arbitration. It is the Respondent's submission that once the interim certificate of payment is issued, and the same is not disputed, it in fact becomes a debt and it would attract interest as provided in the contract. What is before this court is an unpaid and undisputed interim payment certificate.

31. The Respondent submitted that courts have always respected the Parties' contracts, which set out dispute resolution clauses requiring all disputes to be referred to arbitration. That the court's respect for the arbitration process was immortalized in the dissenting decision of the Court of Appeal in

Safaricom Limited vs Ocean View Beach Hotel Limited and Others; which upheld the sacrosanct right of the parties to refer their disputes to arbitration.

32. However, there are instances where the contract has an arbitration clause but in reality, there is no dispute to go to arbitration. To this extent the court will not grant stay the proceedings. That this is the import of section 6 (1) of the *Arbitration Act*,1995.

33. It was submitted that where there is an arbitral agreement as is the case herein, Section 6(1) of the *Arbitration Act*, recognizes that:

> "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.

34. The Respondent submitted that, when the court was faced with a similar application in the case of Nanchang Foreign Engineering Company (K) Ltd vs Easy Properties Kenya Limited [2014] eKLR, Kamau, J expressed herself as follows:

> "It is a condition precedent that there be a dispute capable of being referred to arbitration before a court can stay proceedings filed in court. Bearing in mind that it is trite law that he who alleges must prove, the burden of proving that a dispute indeed exists for it to be referred to arbitration lies with the party alleging the fact ... This court's conclusion is similar to that in the case of Ellis Mechanical Services Limited vs. Wates Construction Limited ... cited in the case of Civil Appeal No. 26 of 2007 UAP Insurance Company Limited vs. Michael John Beckett (Supra) where Lord Denning had the following to say:- The defendants cannot insist on the whole going to arbitration by simply saying that there is a dispute or difference about it. If the court sees that there is a sum which is indisputably due then the court can give judgment for that sum and let the rest go to arbitration."

35. It was submitted that the onus of proving that the matters in dispute falls within a valid and subsisting arbitration clause is on the party applying to the court for a stay of proceedings. Non payment of approved and undisputed interim payment certificate is not a dispute capable of being referred to arbitration. Reliance was placed in the case of Naizons (K) Ltd (vs China Road & Bridge Corporation Kenya Ltd (2001) KECA 376, eKLR, where the Court of Appeal analysed what happens when there is no dispute between A and B, but B just declines to pay.

> "This pertinent issue was adequately dealt with by the Earl of Halsbury LC in the House of Lords London and North Western and Great Western Jointly Rly Cos vs J H Billington Ltd (1899) AC79 at 81 when he said:-"That a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion before the action is launched either by formal plaint in the County Court or by writ in the superior courts. Any contention that the parties could, when they are sued for the price of the services, raise then for the first time the question whether or not the charges were reasonable and that therefore they have a

right to go to an arbitrator, seems to be absolutely untenable." If a debtor agrees that money is due, but simply fails to pay it, there is obviously no dispute, the creditor can and must proceed by action, rather than by arbitration. Equally, silence in the face of a screaming claim does not constitute nor raise a dispute..... It is settled law that mere refusal to pay upon a claim, which is not really a dispute, does not necessarily give rise to a dispute calling an arbitration clause into operation. It must follow, therefore, that courts can be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which an employer merely persists in not paying. As there was in my view no or any genuine dispute between the parties, a stay on the respondent's application ought to have been rejected by the learned judge"

36. The Respondent submitted that the Applicant has not stated the nature of the dispute which has arisen between the Parties. The grounds in support of the application do not disclose the dispute if any. It only refers to the contract and the arbitration clause. The Applicant must specify the dispute and the nature of the dispute. A mere denial to pay the approved interim certificate of payment is not a dispute for arbitration, but an action for summary judgment that lies within the jurisdiction of this court.

37. Reliance was made in the case of Adcock Ingram East Africa Limited vs Surgilinks Limited [2012] eKLR, in which Musinga, J. (as he then was) expressed himself thus:

> " The defendant has not shown why it has refused to make payment of the undisputed amount, which is not less than Kshs.65 million as expressly admitted. It would therefore be unreasonable to refer the entire claim to arbitration."

38. It was further submitted that the application is seeking to stay an interim payment certificate duly issued and approved by the Applicant through their consultants, which the Applicant did not deny or dispute, just like other previous interim payment certificates that they duly honoured.

39. That the dispute must be a "matter in dispute" that the Parties have agreed to arbitrate, not just mere denial to pay a routine payment certificate. Reference was made to the case of China Sichuan Corporation for International Techno-Economic Cooperative (Sietco) vs Kigwe Complex Limited, (2013) eKLR; where Justice Havelock while dismissing an application for stay, held as follows;

> " Most developers are lay people. That is why they employ consultants experienced in the building industry to assist them in construction projects. It is those consultants who are their agents and are employed to ensure that their interests are looked after and that they are not exploited by unscrupulous contractors.
>
> The Agreement and Conditions of Contract for Building Works utilised for the Defendant's Project (more commonly known as the JBC Conditions of Contract) forming the Agreement between the parties is in common use in Kenya. Such envisages payments being made to the contractor (the Plaintiff) under clause 34 thereof, for work carried out on the project which have been certified as satisfactory and performed by the Architect.
>
> Such payments are normally made as against interim payment certificates but once the Works being carried out have been completed, clause 34.17 provides for the measurement and evaluation thereof and a final account is computed before the issuance of the final payment certificate. As I understand it from the Replying Affidavit of the Plaintiff (paragraph 8), the final certificate has been issued in the amount of Shs.17,339,150.70 and prior Valuation Statements have been issued by the Project Manager (also the agent of the Defendant) totalling Shs.8,560,150.90. The above comes to a total of Shs.25,899,301.60

whereas the sum prayed for by way of the Plaintiff's Summary Judgement Application is Shs.25,560,150.90..... I detail all this because the Defendant's Application for stay pending arbitration comes as somewhat of a surprise in the face of certification from its professional consultants. To my mind, I agree with the second point as raised by learned counsel for the Plaintiff when he says that there is no dispute between the parties which can be referred to arbitration. Such comes within the parameters of section 6 (1) (b) of the *Arbitration Act* and consequently, on that ground alone, I am not inclined to stay these proceedings and refer the parties to arbitration."

40. In conclusion, the Respondent submitted that the Applicant has failed to prove that there is a dispute or the nature of the dispute to which this court ought to refer to arbitration.

41. That the Respondent has demonstrated that it has raised matters in the Plaint which calls for determination by this court as provided under Section 6(1)(b) of the *Arbitration Act*.

42. In view of the foregoing, the Respondent prayed that the application for stay be dismissed and the Applicant/Defendant be allowed to file their defence (if any) or the court proceeds to enter summary judgment thereof.

Analysis and Determination

43. I have carefully perused and considered the Plaint filed herein, the prayers sought by the Plaintiff in the application dated 23rd April 2024, the Defendant/Applicant's application under consideration dated 7th May 2024, the Grounds of Opposition thereto by the Plaintiff/Respondent and the rival submissions by the Parties' advocates.

44. The issue I form for determination is whether this court should stay the proceedings herein and refer the matter to arbitration.

45. The bone of contention here is on the terms of Clause 45.0 of the contract between the Parties herein. The Clause provides for "settlement Of Disputes" and states as follows:

    45.1 In case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of the The Architectural Association of Kenya on the request of the applying party.

    45.2 The arbitration may be on the construction of this contract or on any matter or thing of whatsoever nature arising thereunder or in connection therewith. including any matter or thing left by this contract to the discretion of the Architect, or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation referred to in clause 34.0 of these conditions. or the rights and liabilities of the parties subsequent to the termination of contract.

    45.3 Provided that no arbitration proceedings shall he commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute.

45.4 Notwithstanding the issue of a notice as stated above. the arbitration of such a dispute or difference shall not commence unless an attempt has in the first instance been made by the parties to settle such dispute or difference amicably with or without the assistance of third parties.

46. Relying on the above Clause the Defendant/Applicant challenged this court's jurisdiction in hearing and determining the Plaintiff/Respondent's Claim and contends that the matter has to be referred to arbitration.

47. The Plaintiff/Respondent on the other hand maintains that application is seeking to stay an interim payment certificate duly issued and approved by the Applicant through their consultants, which the Applicant did not deny or dispute, just like other previous interim payment certificates that they duly honoured.

48. It is the Respondent's position that once the interim certificate of payment is issued, and the same is not disputed, it in fact becomes a debt and it would attract interest as provided in the contract. What is before this court is an unpaid and undisputed interim payment certificate.

49. Non payment of approved and undisputed interim payment certificate is not a dispute capable of being referred to arbitration. See Naizons (K) Ltd (vs China Road & Bridge Corporation Kenya Ltd (2001) KECA 376, eKLR.

50. It is trite that the dispute must be a "matter in dispute" that the Parties have agreed to arbitrate, not just mere denial to pay a routine payment certificate. Reference was made to the case of China Sichuan Corporation for International Techno-Economic Cooperative (Sietco) vs Kigwe Complex Limited, (2013) eKLR;

51. It is my observation that the Applicant has not stated the nature of the dispute which has arisen between the Parties. The grounds in support of the application do not disclose the dispute if any. It only refers to the contract and the arbitration clause. The Applicant must specify the dispute and the nature of the dispute. A mere denial to pay the approved interim certificate of payment is not a dispute for arbitration, but an action for summary judgment that lies within the jurisdiction of this court. See Adcock Ingram East Africa Limited vs Surgilinks Limited [2012] eKLR.

52. I am persuaded that the Plaintiff/Respondent has demonstrated that it has raised matters in the Plaint which calls for determination by this court as provided under Section 6(1)(b) of the *Arbitration Act*.

53. In the end, I make the following orders:-

a. The Notice of Motion application dated 7 th May 2024 is found to be without merit and the same is dismissed.

b. The Defendant/Applicant and the Interested Party are allowed to file and serve responses to the suit herein within 14 days of this ruling.

c. A mention date to be fixed for pre-trial.

d. Costs shall be in the cause.

It is hereby so ordered.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 29TH OCTOBER 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 29TH OCTOBER 2025

In the presence of :-

Ms. Nyambura for Mr. Ochieng for the Defendant/Applicant

Mr. Michael Nduli for the Plaintiff/Respondent