

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**COMM. CASE NO. E308 OF 2023**

**BETWEEN**

**DUBAI GEMS LIMITED..**

.....**PLAINTIFF**

**AND**

**TATU CITY LIMITED.....1<sup>ST</sup>**

**DEFENDANT**

**CEDAR IV LIMITED.....2<sup>ND</sup>**

**DEFENDANT**

**RULING**

**Introduction and Background**

1. The Plaintiff has approached the Court by way of the Notice of Motion dated 30<sup>th</sup> October 2024 made, *inter alia*, under **sections 1A, 1B, 3, 3A & 63 (e)** of the ***Civil Procedure Act(Chapter 21 of the Laws of Kenya)***, **sections 6 & 7** of the ***Arbitration Act(Chapter 49 of the Laws of Kenya)*** and **Order 40 rules 1, 2, 3 (1) & (3), and 4 (1) and Order 51 rule 1** of the ***Civil Procedure Rules*** seeking to stay this proceedings pending the

hearing and determination of a separate arbitration process in London, UK.

2. The application is supported by the affidavit of Hon. ELIJAH NJORE NJOROGÉ, a director of the Plaintiff, sworn on 30<sup>th</sup> October 2024. It is opposed by the Defendants through the Grounds of Opposition dated 6<sup>th</sup> January 2025. The parties have also supplemented their arguments by filing written submissions which together with the pleadings I have considered and I will be making relevant references to in my analysis and determination below.

### **Analysis and Determination**

3. After careful consideration of the pleadings and rival submissions filed by the parties herein, I note that the main issue for the court's determination is whether this proceeding to stayed pending the hearing and determination of arbitral proceedings in the London Court of International Arbitration. The Plaintiff states that the core of the dispute originates from a Subscription and Shareholders' Agreement dated 16<sup>th</sup> June 2008, relating to the 2<sup>nd</sup> Defendant where apparently, the Plaintiff's predecessor was allocated a 4% shareholding in the 2<sup>nd</sup> Defendant under this agreement.
4. It avers that Clause 26 of this Shareholders' Agreement explicitly states that any disputes arising from the agreement must be resolved through arbitration under the rules of the London Court of

International Arbitration (LCIA) in London, England. The Plaintiff states it has decided to refer the substantive issues of this dispute to the LCIA for determination and that given the binding arbitration clause, this court's involvement is currently unnecessary and should be reserved for later stages, such as the adoption and enforcement of the eventual arbitral award.

5. In response, the Defendants urge that that they are strangers to the Plaintiff. They claim to have no dealings with it and are not party to any agreement that provides for arbitration with them. They label the Plaintiff as "a vehicle for extortion" asserting that the 1<sup>st</sup> Defendant is not a signatory to the Subscription and Shareholders' Agreement and therefore, the Plaintiff cannot invoke the arbitration clause within that agreement, as it confers no legal rights upon them. They contend that a Plaintiff who originates a suit cannot later seek to stay those same proceedings under **section 6** of the **Arbitration Act**. The Defendants contend that this right is only available to a Defendant who has not yet filed pleadings and that since the Plaintiff chose to file the suit, its remedy is to withdraw it, not to seek a stay.
6. The Defendants state that pleadings have closed, meaning the court process is already advanced and they note that the arbitration clause was not pleaded and was not invoked by the

Plaintiff earlier and that by proceeding this far in court, the parties have elected to use the court process and ousted the arbitration clause.

7. The Defendants characterize the entire application as "**vexatious, frivolous and a clear case of abuse of court process**" and they urge the court to dismiss it.
8. **Section 6** of the **Arbitration Act** provides in part as follows:

*6(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.*

9. From the above provision, I am inclined to agree with the Defendants that the same is typically invoked by a Defendant at the earliest opportunity, after entering appearance and before filing

a defence. A Plaintiff who has already filed the suit is not the intended beneficiary of this provision and it would actually be an abuse of the court process for a party to expend the court's time and resources to file a suit, knowing very well that there is an arbitration process to be followed. The Plaintiff, having actively participated in this suit by filing its pleadings has acquiesced and submitted to the court's jurisdiction (see **Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] KECA 376 (KLR)** and **Charles Njogu Lofty v Bedouin Enterprises Ltd [2005] KECA 336 (KLR)**)

10. Other than acquiescing to the court's jurisdiction, a question also arises as to whether there is a clear and valid arbitration agreement between the parties that covers a dispute between them. From the Agreement, the Plaintiff and the 1<sup>st</sup> Defendant are not named and signing parties. The 1<sup>st</sup> Defendant, as a non-signatory, cannot be forced into arbitration under this agreement.

11. The Plaintiff, also not a direct signatory, claims to have acquired rights by succession from a Mr. ETIENNE DEBLAR and it argues that as the successor to a party who was allocated shares, it can "step into the shoes" of that party and invoke the arbitration clause. The Agreement itself anticipates that new shareholders will join after its execution and Clause 9.9(b) explicitly states: "*No transfer of the*

*whole or part of the beneficial interest in, or legal ownership of, any share... shall be made unless... (b) the transferee shall have first executed a Deed of Adherence."*

12. The documents provided do not contain an executed Deed of Adherence for the Plaintiff or for ETIENNE DEBLAR and thus a missing link in the Plaintiff's chain of title. In summary, the Plaintiff is not a direct party to the Agreement and its right to arbitrate is derivative and conditional, and the absence of a Deed of Adherence makes it difficult for the court to conclude that it is a successor of title to the direct parties of the Agreement.

### **Conclusion & Disposition**

13. In conclusion, the Plaintiff has failed to satisfy the fundamental prerequisites for a stay of proceedings under **section 6** of the **Arbitration Act**. It is neither a party to the arbitration agreement it seeks to rely upon, nor is it the category of litigant for whom the remedy of a stay is intended. Its application is procedurally improper and substantively unmerited and it is thus dismissed with costs.

**DATED SIGNED AND DELIVERED virtually at NAIROBI this  
7<sup>TH</sup> DAY of NOVEMBER 2025**

.....  
**J.W.W. MONGARE**  
**JUDGE**

**IN THE PRESENCE OF**

1. N/A for the Plaintiff/Applicant.
2. Ms. Khadija holding brief for Mr. Ahmed Abdulahi SC for the Respondent.
3. Amos - Court Assistant

ORIGINAL