REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

HCCOMM. MISC APP. NO. E137 OF 2025

IN THE MATTER OF THE ARBITRATION ACT AND THE

ARBITRATION RULES, 1997

BETWEEN

ARCOVEDRDE (K) LIMITED……

……APPLICANT

AND

NJERI MINJU……

…1ST RESPONDENT

WILLIAM GATHECA……2ND RESPONDENT

CHARTERED INSTITUTE OF ARBITRATORS

(KENYA BRANCH) ……3RD RESPONDENT

RULING

1. There are two applications before this Honourable Court, the first one filed by the Applicant is dated 3rd February 2025 and its seeks to have the Honourable Court quash and set aside the appointment of **QS. Kithinji Nyagah B, FCIArb**, as the Sole Arbitrator over this dispute vide the letters dated 21st and 31st

January, 2025 by the Chairperson of Chartered Institute of Arbitrators.

2. In addition to filing a response to this motion, the Respondents also filed their

   own motion dated 24th February, 2025 seeking to set aside the interim orders of the Court issued in the Application of 3rd February 2025. Both parties on the directions of the Court have filed their written submissions which I have carefully considered.

3. A careful consideration of the record reveals that this Honourable Court on 3rd October, 2024, in a bid to enforce the lease agreement between the parties, directed that the dispute herein be determined through arbitration in accordance with clause 25 of the said lease agreement therein. On 11th November 2024, the Plaintiff accepted the Defendant's nomination of a single Arbitrator, Dr. Wilfred Mutubwa, FCIArb, who unfortunately passed on soon thereafter.

4. On 21st January 2025 and pursuant to the said clause 25 of the Lease Agreement, the Chairperson Chartered Institute of Arbitrators, appointed **QS. Kithinji Nyaga B, FCIArb,** as the sole Arbitrator. This act triggered the filing of the present application and the Applicant argues that the said appointment violates the said clause 25 of the lease agreement dated 21st

June 2021 which provides as follows; *" if the parties fail to agree on the Arbitrator within fourteen (14) days, they shall refer the matter to the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch,* ***who shall nominate the arbitrator who shall be an Advocate of not less than fifteen (15) years standing with significant experience in an knowledge of the real estate and construction practice."***

5. The Applicant argues that the appointment of **QS Kithinji Nyaga B, FCIArb**, as a sole Arbitrator by the Chairperson of CIArb is a nullity and that it contravenes the said clause 25 of the lease agreement, which required the Arbitrator so appointed, to be an advocate of 15 years post admission. They further argue that **QS Kithinji Nyaga FCIArb**, having been admitted as an advocate in 2015 as evidenced by his admission number P105/11755/15, does not qualify to be so appointed. The Applicant urges the Court to find that the said appointment is void *ab initio* and allow the application as prayed.
6. In responding to the application, the Respondents filed a replying affidavit sworn on 24th February 2025. In addition, the Respondents also filed their own application dated 24th February 2025 in which they seek to have this Court vacate the

conservatory orders issued in the interim, in the present application and also urge the Court to strike out the suit was filed for being premature and that it offends the legal doctrine of exhaustion.

7. The Respondents argue that this Court lacks the requisite jurisdiction to hear the application as filed as the Applicant has not exhausted the available dispute resolution mechanism set out in the lease agreement. They further argue that the application is premature as the appointed Arbitrator is yet to accept the appointment and no notice of the challenge to his appointment has been served as set out by the provisions of the Arbitration Act and the law in

   general.

8. I have looked at the lease agreement and specifically at clause 25 therein. I note that said Clause 25 provides as follows: -

> *25.1 Any dispute (as hereinafter defined), arising out of this Lease shall first be resolved by way of consultation held in good faith between the Parties. Such consultations shall begin after the Party has delivered to the others written notice of dispute (the "Dispute Notice") and a request for such consultation.*
>
> *25.2 For purposes of this clause 25, the following shall be interpreted as hereunder;*

25.2.1 "Dispute" means any disagreement, difference or conflict that arises between the parties as a result of the formation, existence, performance, interpretation, nullification (or consequences thereof), termination or manner whatsoever; and

25.2.2 "Dispute Notice" means a notice given in writing by one party to the other and that describes in reasonable invalidation of this Lease in any

25.2.3 and sufficient detail the Dispute arising out of or relating to this Lease.

25.3 Where the parties further fail to resolve the Dispute by amicable consultation within twenty – eight (28) days of service of the Dispute Notice, then the Dispute shall be submitted to arbitration upon request of any party by written notice of the other Party.

25.4 The arbitration shall be conducted by one (1) arbitrator to be appointed jointly by the parties.

25.5 If the Parties fail to agree on the Arbitrator within fourteen (14) days, they shall refer the matter to the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch who shall nominate the arbitrator who shall be an advocate of the High Court of Kenya of not less than fifteen (15) years standing with significant experience in and knowledge of the real estate and construction practice. The appointment of the arbitrator shall be final and binding on the parties.

25.6 The place of arbitration shall be Nairobi, Kenya and the language of arbitration shall be English."

I agree with the Respondents that the above clause has laid out an elaborate procedure on how disputes arising from the said agreement were to be resolved.

9. As argued by the Respondents in their response, section 13 and 14 of the Arbitration Act has sets out the procedure to be used by a party challenging the appointment of an Arbitrator. The said sections provide as follows: - "

> ***"13.Grounds for challenge-*** *(1)When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.(2)From the time of his appointment and throughout the arbitral proceedings, an arbitrator shall without delay disclose any such circumstances to the parties unless the parties have already been informed of them by him.(3)An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence,* ***or if he does not possess qualifications agreed to by the parties*** *or if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so.*

(4)A party may challenge an arbitrator appointed by him, or in whose appointment that party has participated, only for reasons of which he becomes aware after the appointment.[Act No. 11 of 2009, s. 9.]

14. Challenge procedure- *(1)Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.(2)Failing an agreement under subsection (1),* ***a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13 (3), send a written statement of the reasons for the challenge to the arbitral tribunal****, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge,* ***the arbitral tribunal shall decide on the challenge.(3)If a challenge under agreed procedure*** *or under subsection (2) is unsuccessful, the challenging party may,* ***within thirty days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.****(4)On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.(5)The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.*

(6)The decision of the High Court on such an application shall be final and shall not be subject to appeal.(7)Where an arbitrator is removed by the High Court under this section, the Court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid. (8)While an application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful."

10. A reading of the above provisions of the law limits the role of the High Court to only determine the same only when the procedure set out therein has been fully exhausted. I therefore agree with the Respondents that the present application is premature and that it indeed offends the doctrine of exhaustion as set out under sections 9(1), (2) & (3) of the Fair Administrative Actions Act, which provides as follows; - "*9**. Procedure for judicial review***

*(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, **apply for judicial review of***

any administrative action to the High Court or to a subordinate Court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) The High Court or a subordinate Court under subsection (1) ***shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted****.*

(3)The High Court or a subordinate Court shall, ***if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that Applicant shall first exhaust such remedy before instituting proceedings under subsection (1)****.*

(4)Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the Applicant, exempt such person from the obligation to exhaust any remedy if the Court considers such exemption to be in the interest of justice.(5)A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal."

11. In arriving at this finding, I am guided by the Court of Appeal decision in **Geoffrey Muthinja & Another vs Samuel Muguna Henry & 1756 others (2015) eKLR,** where the Court held that: -

> *"it is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before jurisdiction of the Courts is invoked. Courts ought to be a for a of last resort and not the first port of call the moment a storm brews……. The exhaustion doctrine is a sound one and* serves *the purpose of ensuring that there is opportunity of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts*."

12. I agree with the Respondents that indeed Article 159 of the Constitution has urged the Court to promote alternative disputes resolution mechanism. From the agreement it is clear that parties at clause 25 of the lease agreement set out an elaborate mechanism to be applied in resolving disputes arising from the said agreement. It has not been demonstrated to this Court by the Applicant that the same have been fully exhausted before inviting the Court to step in and intervene with the present dispute as to the qualifications or lack thereof the duly appointed Arbitrator.

13. I therefore find and hold the application dated 3rd February is without merit and the same is dismissed forthwith. The Respondents application of 24th February 2025 is allowed as prayed. The interim conservatory orders issued herein are vacated and costs of this application awarded to the Respondents.

DATED SIGNED and DELIVERED virtually at NAIROBI this 18TH DAY of NOVEMBER 2025

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF:-

1. Mr. Isaac Rene for the Applicant.
2. Mr. Liech holding brief for Mr. Odhiambo for 1st and 2nd Respondents.
3. Amos - Court Assistant