

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL CASE NO. E014 OF 2025

**COFFEE MANAGEMENT SERVICES LIMITED.....
PLAINTIFF**

VERSUS

**RWAMA CO-OPERATIVE SOCIETY.....
.....DEFENDANT**

R U L I N G

Brief facts

1. Coming up for determination is the defendant's Notice of Preliminary Objection dated 21st July 2025 on the grounds that the Honourable court lacks jurisdiction to hear and determine the plaintiff's application dated 18th June 2025 for it offends Section 6 and 49 of the Arbitration Act and the agreement dated 10th July 2005 entered by the parties.
2. Parties put in written submissions.

The Defendant's Submissions.

3. The defendant refers to the decisions in **Nyutu Agrovet Limited vs Airtel Networks Kenya Limited; Chartered Institute of Arbitrators - Kenya Branch (Petition 12 of 2016) [2019] KESC 11 (KLR) (6**

December 2019) (Judgment); Industrial Credit Limited vs

Cape Holdings Limited (Petition 2 of 2017) [2019] KESC 12 (KLR) (6 December 2019) (Judgment) and APA Insurance Limited vs Tarus & 2 Others (Miscellaneous Application 244 & E231 of 2023 (Consolidated) [2024] KEHC 4683 (KLR) (16 April 2024) (Ruling) and submits that there is an arbitration clause in the agreement between the parties dated 10th July 2005, a fact not denied by the plaintiff. As such, the matter is not for determination before the court as it is *forum non conveniens*.

The Plaintiff's Submissions.

4. The plaintiff argues that Section 6 of the Arbitration Act is clear that for a matter to be referred to arbitration, the court must be satisfied that a genuine dispute exists between the parties which is not the case herein. The defendant through its unequivocal admission contained in the letter dated 3rd May 2024 expressly acknowledged the debt forming the subject matter of the proceedings. Thus, there is no dispute warranting arbitration within the meaning of Section 6(1)(b) of the Act. To support its contentions, the plaintiff relies on the cases of **Abdul Aziz Suleiman vs South British Insurance Co. Ltd Civil Appeal No. 779 of 1964 [1965]; Niazsons (K) Ltd vs China Road Bridge Corporation Kenya [2001] KECA 376 (KLR)** and **UAP Provincial Insurance Company**

Ltd vs Michael John Beckett (2013) eKLR and submits that arbitration should not be invoked to delay undisputed claims.

5. The plaintiff further argues that the defendant has not filed the agreement it relies on thus weakening its position. Further, the debt

in question arises due to a transaction that occurred in 2023 and thus the issues raised are factual and not pure points of law which can only be addressed in a trial. To support its contentions, the plaintiff refers to the cases of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696; Avtar Singh Bhamra & Another vs Oriental Commercial Bank, Kisumu HCCC No. 53 of 2004 and Oraro vs Mbaja [2005] KEHC 3182 (KLR)** and submits that the defendant's objection is anchored on contested issues of fact including questions of licensing, productivity and interpretation of the agreement between the parties. Thus the issues are not matters of law and they require evidence, argument and judicial evaluation.

The Law

Whether the preliminary objection is sustainable.

6. The case of **Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696** is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

.....a preliminary objection consists of a 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.

7. Sir Charles Newbold P. stated:-

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 or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

8. Similarly the Supreme Court in the case of **Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR** held that:-

A preliminary objection consists of a 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.

9. Further in the case of **Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others, [2014] eKLR** the court held that:-

Thus a preliminary objection may only be raised on a 'pure question of law.' To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

10. Evidently, a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

11. The defendant argues that the instant court lacks jurisdiction to hear the plaintiff's suit on the grounds that it offends Section 6 of the Arbitration Act.

12. **Section 6(1) of the Arbitration Act** provides:-

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 claims 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.

2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter agreed to be referred to arbitration.

3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

13. I have perused the Security Agreement between the parties and noted that Clause 12.3 provides for amicable resolution by way of arbitration at the first instance in the event of a dispute.

14. The plaintiff herein instituted the suit by way of Plaint dated 18th June 2025 on 4th July 2025 and filed a Notice of Motion application alongside seeking for orders of judgment by admission to be entered against the defendant for the sum of Kshs. 22,750,000/-. The

defendant entered appearance on 14th July 2025 and filed Grounds of Opposition and Notice of Preliminary Objection on 21st July 2025.

15. Section 6 of the Arbitration Act however envisions an application for stay and not a preliminary objection. In my view, a preliminary objection is it ought to be one that finally disposes off a matter. The Court of Appeal in **Niazsons (K) Ltd vs China Road & Bridge Corporation Kenya (2001) eKLR** held that:-

A finding as to whether or not there exists a dispute capable of being referred to arbitration cannot in my view be the subject matter of a preliminary objection. Likewise, the finding one way or the other whether an arbitration agreement is inoperative or incapable of being performed also requires an examination of the evidence.

16. Similarly in **Havas Media limited vs Switch TV Limited [2021] eKLR** the court held that....”it remains for the party ought to comply with Section 6 of the Arbitration Act and not raise a preliminary objection as there is set legal procedure to invoke the arbitration clause.

17. Thus, the defendant instead of filing a preliminary objection ought to have filed an application for reference to arbitration. The Court of Appeal in **Mt. Kenya University vs Step Up Holding (K) (Ltd) [2018] eKLR** referred to the case of **Adrec Limited vs Nation Media**

Group Limited [2017] eKLR where the court stated as follows:-

Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.

18. The preliminary objection states that this court has no jurisdiction to hear this suit which is not the case. The issue herein is that the parties in their agreement in clause 12:3 agree that in the event that a dispute arises between them and has not been resolved mutually, the dispute shall be referred to arbitration in the first instance. This is admitted by both parties in that the plaintiff annexed the said agreement to the plaint while the defendant relies squarely on the same clause in his preliminary objection and in the grounds of opposition.
19. This being the position, it is imperative that the parties ought to go for arbitration first in the event of a dispute. However, this does not justify the defendant's prayer for dismissal of the suit. The preliminary objection is only sustainable to the extent that the parties ought to go for arbitration before approaching the court. The call in the objection to dismiss this suit is in my view, misconceived. As such, I decline to uphold the objection dated 21st July 2025 in this regard.
20. This court makes the following orders: -

a) That in accordance with the parties agreement clause 12:3, the dispute between the parties is hereby referred for arbitration by an arbitrator to be agreed on by the parties.

b) That the arbitral award be filed in court within 90 days.

21. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED
AT THIKA THIS 20TH DAY OF NOVEMBER 2025.***

**F. MUCHEMI
JUDGE**