

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCCOMM NO. E188 OF 2023**

EVANSON CARRIERS LIMITED.....1<sup>ST</sup> PLAINTIFF/RESPONDENT  
DETAN ONDIEKI ANYANSA.....2<sup>ND</sup> PLAINTIFF/RESPONDENT  
YOBESH ONWONG’A OYARO.....3<sup>RD</sup> PLAINTIFF/RESPONDENT

-VERSUS-

GUANGXI HYDROELECTRIC  
CONSTRUCTION BUREAU  
KENYA LIMITED.....1<sup>ST</sup> DEFENDANT/4<sup>TH</sup> RESPONDENT  
MASTERWORK COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT/APPLICANT

**RULING**

1. The 2<sup>nd</sup> defendant/applicant filed a Notice of Motion application dated 29<sup>th</sup> April 2025 under the provisions of Sections 1A, 3 & 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules, 2010, seeking an order that the suit against it be dismissed for want of jurisdiction.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Griffin Odhiambo Owino, a Director of the 2<sup>nd</sup> defendant company. Mr. Owino averred that the 2<sup>nd</sup> defendant entered into a contract on 18<sup>th</sup> May 2022 with the 1<sup>st</sup> defendant through the Kenya Rural Roads Authority for the upgrading and maintenance of various roads. He deposed that the contract allowed the 2<sup>nd</sup> defendant to engage other parties to perform the works. That consequently, the 2<sup>nd</sup> defendant entered into a Joint Venture Agreement with the 1<sup>st</sup> plaintiff on 6<sup>th</sup> June 2022, which

Agreement contained a dispute resolution clause requiring parties to first attempt mediation and, failing that, arbitration.

3. Mr. Owino stated that an Addendum executed on 14<sup>th</sup> June 2022 incorporated the 2<sup>nd</sup> & 3<sup>rd</sup> plaintiffs into the joint venture while retaining all existing terms, including the dispute resolution mechanism. He asserted that the doctrine of exhaustion is applicable in this case, meaning that the plaintiffs were required to pursue mediation or arbitration before approaching the Court, which they failed to do. Mr. Owino contended that the Court lacks jurisdiction at this stage since this matter should first be resolved through the agreed alternative dispute resolution mechanisms. He urged the Court to grant the orders being sought herein.
4. In opposition to this application, the plaintiffs filed a replying affidavit sworn on 19<sup>th</sup> May 2025 by Mr Evans Ondieki Anyona, the 1<sup>st</sup> plaintiff's Managing Director. Mr. Anyona averred that an arbitration clause does not oust the jurisdiction of the Court, which can only be conferred or removed by the Constitution or Statute. He contended that the law does not allow dismissal of a contractual claim merely because the contract contains an arbitration clause. He further averred that under the Arbitration Act, the proper remedy is a stay of proceedings and referral to arbitration under Section 6, which must be sought promptly and before a party takes any substantive steps in the proceedings, yet the 2<sup>nd</sup> defendant did not seek such relief and instead asked for dismissal, which is not provided for under the Act.
5. Mr. Anyona stated that interim and substantive injunctive orders were issued in favour of the plaintiffs in May and October 2023 and remain in force, and only the Court can enforce those orders. He further stated that although the 2<sup>nd</sup> defendant was served earlier, it entered appearance in April 2024, filed a

defence in June 2024, and thereafter participated in case management, thereby submitting to the Court's jurisdiction and waiving any right to rely on the arbitration clause. Mr. Anyona contended that the application herein is an afterthought and a delaying tactic, noting that the 2<sup>nd</sup> defendant waited for over ten (10) months after filing its defence and took multiple steps in the proceedings, thus it waived any right to seek arbitration.

6. The application herein was canvassed by way of written submissions. The 2<sup>nd</sup> defendant's submissions were filed on 28<sup>th</sup> July 2025 by the law firm of Ogejo, Omboto & Kijala Advocates LLP, whereas the plaintiffs' submissions were filed by the law firm of Migos Ogamba & Waudo Advocates, on 14<sup>th</sup> November 2025.
7. Ms Odipo, learned Counsel for the 2<sup>nd</sup> defendant referred to Clause 8 of the Joint Venture Agreement dated 6<sup>th</sup> June 2022 and the case of **Nyakwara v Triviron Healthcare Africa [Kenya] Limited** [2024] KEELRC 1460 (KLR), and submitted that parties who agree to private dispute resolution mechanisms effectively reject the Court's jurisdiction until those mechanisms are exhausted. Counsel invoked the doctrine of exhaustion, as articulated by the Court of Appeal in the case of **Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others** [2015] eKLR and by a five-judge bench in **Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)** [2020] KEHC 10266 (KLR), which held that litigants should exhaust alternative remedies before approaching the Court, in line with Article 159(2)(c) of the Constitution of Kenya.
8. Ms Odipo also relied on the Supreme Court decision in **United Millers Limited v Kenya Bureau of Standards & 5 others** [2021] KESC 72 (KLR), and contended that the plaintiffs herein improperly filed this suit without first

pursuing mediation or arbitration as agreed. She urged the Court to dismiss the suit for failure to exhaust the agreed dispute resolution process.

9. Mr. Waundo, learned Counsel for the plaintiffs submitted that an arbitration clause does not oust the jurisdiction of the Court, as only the Constitution or Statute can confer or remove jurisdiction, and that under the Arbitration Act, the proper remedy where an arbitration clause exists is a stay of proceedings and referral to arbitration under Section 6, not dismissal of the suit. To this end, Counsel relied on the cases of **Murage v Lesedi Developers Limited** (Civil Appeal No. 196 of 2023) [2024] KEHC 8882 (KLR) and **Rawal v Mombasa Hardware Ltd** [1968] EA 398. Mr. Waundo also referred to the Court of Appeal cases of **Charles Njogu Lofty v Bedouin Enterprises Ltd** [2005] KECA 336 (KLR) and **Corporate Insurance Company v Loise Wanjiru Wachira** [1996] KECA 70 (KLR), and argued that a party who files a defence or takes other substantive steps in the proceedings without first applying for a stay of proceedings under Section 6 of the Arbitration Act such as is the case herein, loses the right to rely on the arbitration clause.
10. Applying these principles, Counsel contended that the 2<sup>nd</sup> defendant waived any right to invoke the arbitration clause by filing its defence on 4<sup>th</sup> June 2024, expressly admitting the Court's jurisdiction, and by thereafter participating in case management proceedings before the Deputy Registrar. Mr. Waundo cited the Court of Appeal case of **Eunice Soko Mlagui v Suresh Parmar & 4 others** [2017] KECA 736 (KLR), and submitted that the 2<sup>nd</sup> defendant's application filed a year after entering appearance and after taking multiple procedural steps is legally untenable, belated, and barred by waiver, and therefore the suit against the 2<sup>nd</sup> defendant cannot be dismissed or stayed on the basis of the arbitration clause.

**ANALYSIS AND DETERMINATION.**

11. I have considered the application filed herein, the grounds on the face of it, the affidavit filed in support thereof, the replying affidavit by the plaintiffs and the written submissions by Counsel for the parties. The issue that arises for determination is whether the suit should be dismissed for want of jurisdiction.
12. It is not in contest that the Joint Venture Agreement dated 6<sup>th</sup> June 2022 between the 2<sup>nd</sup> defendant and the 1<sup>st</sup> plaintiff, as varied by the Addendum of 14<sup>th</sup> June 2022, contained a dispute resolution clause providing for mediation in the first instance and arbitration in the second instance. This Court has been called upon to determine if the existence of such a clause divests this Court of jurisdiction and whether the 2<sup>nd</sup> defendant is entitled at this stage of the proceedings, to rely on it, and seek dismissal of the suit.
13. Jurisdiction of Courts is conferred by the Constitution and Statute. The proper statutory mechanism for giving effect to an arbitration clause in an agreement is found in Section 6 of the Arbitration Act, which states that –
  - 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.*

*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 is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.*

14. The import of the foregoing provisions is that in the event that parties to a dispute had an arbitration agreement, the party seeking to refer the dispute to arbitration ought to apply to Court to stay the proceedings and refer the matter to arbitration; provided that the application is made at the earliest opportunity and before the applicant takes any step in the proceedings. Once a party files a defence or takes any substantive step in the proceedings, it waives its right to insist on arbitration. This position has been affirmed by the Court of Appeal severally including in the case of **Eunice Soko Mlagui v Suresh Parmar & 4 others** (supra), cited by the plaintiffs herein, where it was held that –

*The main difference between the position before and after 2009 is that before 2009, a party was required to apply for referral of the dispute to arbitration at the time of entering appearance or before filing any pleadings or taking any other step in the proceeding. After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our minds, filing a defence constitutes acknowledgement of a claim within the meaning of the provision.....*

*In this appeal, by the time the appellant made the application for stay of execution and referral of the dispute to arbitration, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents had already filed and even amended their defence while the 4<sup>th</sup> and 5<sup>th</sup> respondents had entered appearance and filed their defences. As this Court explained in *Charles Njogu Lofty v Bedouin Enterprises Ltd (supra)* and *Niazons (K) Ltd v. China Road & Bridge Corporation Kenya (supra)* section 6(1) of the Arbitration Act obliges the party desiring referral of the dispute to arbitration to make the application promptly and at the earliest stage of the proceedings. We are therefore satisfied that the learned judge did not err in any manner when she refused, in the circumstances of this appeal, to stay proceedings and refer the dispute to arbitration.*

15. From the record in this matter, it is evident that the 2<sup>nd</sup> defendant entered appearance on 24<sup>th</sup> April 2024 and thereafter filed a statement of defence on 4<sup>th</sup> June 2024. Bound by the decision in the case of **Eunice Soko Mlagui v Suresh Parmar & 4 others** (supra), I am is satisfied that by filing a statement of defence immediately after entering appearance in this suit, the 2<sup>nd</sup> defendant admitted the jurisdiction of this Court. Subsequently, the said defendant filed its statement of defence and participated in case management proceedings before the Deputy Registrar. In the premise, I am satisfied that the 2<sup>nd</sup> defendant waived any right it may have had to insist on the dispute herein being determined through mediation or arbitration.
16. In the circumstances, the instant application having been filed approximately one year after the 2<sup>nd</sup> defendant entered appearance and (10) ten months after filing its defence, does not fall within the confines of Section 6 of the Arbitration Act.

17. At this juncture it is important to note that while the doctrine of exhaustion emphasizes the importance of exhausting alternative dispute resolution mechanisms, it does not override the express statutory framework under Section 6 of the Arbitration Act, which balances the promotion of arbitration with the equally important principle that parties must act promptly in invoking that right. A party who sleeps on its rights and actively participates in Court proceedings, cannot later invoke the doctrine of exhaustion to derail a suit.
18. It is my finding that the instant application is without merits. It is hereby dismissed with costs to the plaintiffs.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI on this 30<sup>th</sup> day of January 2026. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Ms Odipo h/b for Mr. Okweba for the 2<sup>nd</sup> defendant/applicant

Mr. Waudu for the plaintiffs/respondents

No appearance for the 1<sup>st</sup> defendant

Ms B. Wokabi – Court Assistant.