

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 36 OF 2017

**TULSI CONSTRUCTION
LIMITED.....PLAINTIFF/APPLICANT**

-VERSUS-

**NATIONAL HOUSING
CORPORATION.....DEFENDANT/
RESPONDENT**

RULING

The Notice of Motion

1. Tulsi Construction Limited (hereafter the Applicant) has brought the Notice of Motion dated 30.04.2025 and amended on 16.06.2025 (the Motion) under Section 12(9) of the Arbitration Act, Cap. 49, Laws of Kenya; Legal Notice No. 188 of the Architects and Quantity Surveyors Act, Fourth Schedule Part 1, A. 7(c); and Order 8, Rule 5 of the Civil Procedure Rules (CPR). The Applicant is seeking the following orders:

(i) THAT this Honourable Court appoints the Arbitrator in this matter, who is either an architect, engineer or quantity surveyor in accordance with

Legal Notice No. 188 of the Architects and Quantity Surveyors Act, Fourth Schedule Part 1, A. 7(c).

(ii) THAT in the alternative, this Honourable Court be pleased to order that the Chartered Institute of Arbitrators Kenya Branch appoints an arbitrator who is either an architect, engineer or quantity surveyor in accordance with Legal Notice No. 188 of the Architects and Quantity Surveyors Act, Fourth Schedule Part 1, A. 7(c).

(iii) Deleted.

(iv) THAT the Plaintiff proposes that this Honourable Court either appoints Architect Julius Muthui Mutunga of FCIARB or Engineer Howard Mmayi FCIARB as the sole arbitrator in the suit herein.

(v) THAT the arbitration file be availed to the appointed arbitrator and the Plaintiff's and Defendant's counsel by the firm of Dr. Mutubwa Law Advocates.

(vi) THAT the costs of this application be costs in the cause.

2. In support of the Motion, the Applicant has advanced grounds set out on the face of the Motion and in the Supporting Affidavit sworn by **Mr. Lee Muchiri Waititu**, who has deposed that he was engaged by the Applicant to undertake the design and architectural drawings for Kisumu Kanyakwar Phase 1 (the subject project) on behalf of **National Housing Corporation** (the Respondent); that a dispute arose between the parties leading to the appointment of **Dr. Wilfred Mutubwa** (deceased) as the sole arbitrator through a court order issued on 30.06.2023; that the abovementioned arbitrator died on 26.11.2024 thereby necessitating the instant Motion.

The Replying Affidavit

3. The Motion is opposed by the Respondent through a Replying Affidavit sworn by **David Mathu Mjuguna**, the Respondent's Managing Director, on 16.06.2025 in which he has deposed that the proper procedure under Section 12 of the Arbitration Act is for a party to propose intended nominees of the arbitrator to the other party for consideration, which

procedure has not been followed by the Applicant herein and that the Applicant's proposal to have either **Architect Julius Muthui Mutunga** or **Engineer Howard Mmayi** appointed as a sole arbitrator in the matter, was never put before the Respondent for consideration.

4. The Respondent has stated, further, that the primary issue arising in this matter is whether the Respondent appointed the Applicant to render professional services on its behalf in respect of the subject project; that this dispute constitutes a legal issue which would be best arbitrated upon by a professional with legal qualifications as opposed to an arbitrator with architectural or engineering qualifications and that the Respondent proposes appointment by this Court, of legal practitioners with legal background. The Respondent, in paragraph 15 of the Replying Affidavit, has proposed the appointment, by this court, of any of the following legal practitioners to act as sole arbitrator in the matter:

a) Dr. Kenneth Kiplagat - Partner at Okoth & Kiplagat Advocates

b) Mr. Chacha Odera - Senior Partner at Oraro & Co. Advocates

c) Mr. Collins Namachanga - Namachanga & Mbugua Advocates

5. The Applicant filed a rejoinder through a Supplementary Affidavit sworn by **Lee Muchiri Waititu** on 16.06.2025, in which it is deposed that the Respondent did engage the professional services of the Applicant vide a letter dated 28.11.2014 followed by a letter dated 30.04.2015; that the issue touching on appointment and engagement of professional services is covered under Legal Notice No. 188 of the Architects and Quantity Surveyors Act, Fourth Schedule Part 1, A. 7(c) and as such, constitutes a matter suitable for arbitration before an arbitrator who is either an architect, quantity surveyor or engineer and consequently that, either of the proposed nominees would be a suitable candidate for appointment as an arbitrator.

6. In a further replying affidavit sworn by **David Mathu Njuguna** on 27.10.2025, it is deposed that no contractual

relationship existed between the parties herein, as alleged by the Applicant.

7. The deponent has reiterated that the issue of appointment is a legal issue which can only be properly determined by an arbitrator possessing legal qualifications, adding that the appointment of the late Dr. Wilfred Mutubwa as an arbitrator was only consented to because he was an established legal practitioner.

8. The Respondent has refuted, through the Further Replying Affidavit, the applicability of Legal Notice No. 188 of the Architects and Quantity Surveyors Act, Fourth Schedule Part 1, A. 7(c) to the dispute herein, in the absence of any conditions of engagement or contractual agreement between the parties. It has stated that in the absence of any arbitration clause, this dispute ought not to be referred for arbitration, rather, it should be determined by the court.

9. **Lee Muchiri Waititu** rejoined with a further supplementary affidavit sworn on 30.10.2025 reiterating the earlier averment that the Respondent procured the professional services of the

Applicant and that the matter was referred for arbitration vide a consent order made on 19.06.2023; that it is therefore untrue that no conditions of engagement existed between the parties, as alleged by the Respondent and that it was therefore proper and necessary for the matter to be referred for arbitration.

10. The deponent has also urged this court to be guided by Legal Notice No. 188 of the Architects and Quantity Surveyors Act, Fourth Schedule Part 1, A. 7(c) in appointing an arbitrator, given the technical nature of the subject matter to the dispute.

11. In a Further Replying Affidavit sworn by **Joel Kuria Gatune**, the General Manager-Finance and Accounting of the Respondent, on 25.11.2025, the Respondent specifically addressed the letters dated 18.02.2015, 31.03.2015 and 22.01.2016 which were annexed to the Supplementary Affidavit of Lee Muchiri Waititu.

12. Joel Kuria Gatune asserted that the engagement of a consultant by the Respondent is covered by the Public

Procurement and Asset Disposal Act 2015, adding that in the present instance, no such engagement existed between the parties herein and that in the circumstances, the above-referenced letters cannot constitute evidence of the existence of an engagement or contract.

Submissions

13. The Motion was canvassed through oral arguments on 02/12/2025. **Ms. Koki**, advocate for the Applicants, relied on the grounds supporting the Motion and the Supporting Affidavits. She submitted that the matter was earlier referred to arbitration and that it should not be heard by the court; that the dispute involves the appropriation of the Applicants' drawings and documents in relation to the subject project, for which the applicable legislation is Legal Notice No. 188 of the Architects and Quantity Surveyors Act, Fourth Schedule Part 1, A. 7(c) and that the dispute raises complex issues that surpass legal issues for which arbitration would be better suited.

14. She submitted that Section 12(7) of the Arbitration Act empowers the court to appoint an arbitrator where parties are disagreeable on a suitable arbitrator and that the Motion is properly before this court and that the prayers sought ought to be granted.

15. **Mr. Ngatia**, counsel for the Respondent, relied on the averments made in the various replying affidavits, and submitted that a matter can only be referred for arbitration either where it can be shown that an arbitration agreement exists, or where the parties have consented to the arbitration process and that in the present instance, none of those conditions have been satisfied and hence the legal process ought to be followed. She relied on the case of **Peter Ouma Onyango v Mats Karlsson [2021] KEHC 4155 (KLR)** where it was held that the jurisdiction of an arbitrator derives from the parties' agreement.

16. Counsel reiterated that no contract or conditions of engagement, exist(ed) between the parties herein and that the proposed nominees for sole arbitrator were never approved by

the Respondent. He urged this court not to delve into the merits of the matter but to find that the dispute is primarily legal in nature and therefore ought not to be referred for arbitration.

17. In a rejoinder, **Ms. Koki** submitted that there is a consent on record requesting that the matter be referred for arbitration, which consent is still valid. She submitted that the dispute raises complex issues and urged this court to exercise its discretionary power by allowing the Motion as prayed.

Analysis and Determination

18. I have considered the Motion; the Replying Affidavit, further affidavits filed herein and the submissions of the parties. To put this matter into perspective, I have read the court file record and understood its background.
19. Following a dispute between the parties, the Applicant instituted the present suit, vide a plaint dated 1.02.2017 seeking a sum of Kshs. 49,226,011.94 plus costs and interest thereon, being monies allegedly owed to it, pursuant to an alleged agreement for provision of professional services undertaken in relation to the subject project. The record

shows that the Respondent filed a statement of defence dated 31.03.2017 and amended on 12.10.2017.

20. The record shows that the dispute was referred for Court Annexed Mediation which was unsuccessful. The matter has been placed before the court for directions on several occasions. On 19.06.2023, advocates for the respective parties entered into a consent to the effect that the matter be referred for arbitration and that Dr. Wilfred Mutubwa be appointed as the sole arbitrator. The arbitration proceedings were commenced but were not concluded following the death of Dr. Wilfred Mutubwa. This turn of events necessitated return to court by the Applicant through the current Motion.

21. Upon my consideration of the averments and arguments of the parties in supporting and opposing the Motion, I have observed that a key issue which arose was whether the dispute herein ought to be referred for arbitration, with the Applicant taking the view that the dispute ought to go to arbitration and the, Respondent, while contending that they were not consulted on the issue of the appointment of the proposed arbitrators, took the view that this is a dispute

raising legal issues which ought to be arbitrator by a professional holding legal qualifications or by the court.

22. As the record shows, this dispute was originally brought before the court by way of the present suit. However, upon the consent of the parties', this court (**Meoli, J**), through the order made on 19.06.2023, referred the matter for arbitration. There is no dispute that the arbitration proceedings commenced before Dr. Wilfred Mutubwa preceding his death, with the participation of both the Applicant and Respondent and/or their advocates.

23. From the foregoing, it is apparent that while Mr. Ngatia, counsel for the Respondent, pointed out to the court on 22.05.2023 that no formal agreement had been executed by the parties, the said parties' respective advocates were in agreement that the dispute was amenable to arbitration. This prompted the consent and order referring it to for arbitration.

24. Upon my consideration of the foregoing circumstances and more particularly that the parties and/or their advocates both consented and submitted themselves to the arbitration process, I find that the Respondent cannot be allowed to

approbate and reprobate the validity of arbitration in these proceedings. In finding so, I am both guided and bound by the Court of Appeal's reasoning in the case of **Behan & Okero Advocates v National Bank of Kenya [2007] eKLR** on that point, when it observed that:

“In the case of Air Alfaraj Limited vs. Raytheon Aircraft Credit Corporation and Another - Civil Appeal (Application) No. 29 of 1999, this Court expressed itself thus on a similar situation:-

“Mr. Ahmednasir’s comment on the fact that he approved the order as drawn was that his approval could not have validated an irregular order. But he is an Advocate of the High Court of Kenya and therefore an officer of the court. He should not approve a wrongly drawn order, and then wait until an appeal against that order comes up for hearing and challenge the validity thereof. That is not being honest and amounts to a radical departure from the conduct expected of counsel. The conduct and etiquette at the Bar demands that a counsel ought not to approbate and reprobate. In the Sonko vs. Patel case (supra) the Court of Appeal for Eastern Africa said at page 26:-

“This is an interesting, if technical, point on which no authority was cited and on which we find it unnecessary to express our opinion, for we hold that the first respondent is estopped by his conduct from now questioning the form or substance of the decree which is annexed to the memorandum of appeal. It was, as we have said, submitted to his advocate and approved without any reservation. That was an express representation that he accepted the decree as being correct in form and substance and the appellants have acted upon that representation by grounding their appeal on that decree. In these circumstances it would be unjust to allow the first respondent to approbate and reprobate and this objection also fails.””

Having been satisfied that the applicant’s counsel approved the order he is now complaining about, we too feel, like the Court of Appeal for Eastern Africa felt in the *Sonko & Another vs. Patel & Another* (1955) 22 EACA 23, that the applicant cannot be allowed to approbate and reprobate.”

25. It is also important for me to mention that at this juncture, I am not concerned with the merits of the dispute, including the issue relating to the existence or otherwise, of a contract or

conditions of engagement between the parties herein. Any and all substantive issues in the matter can be raised and canvassed at the appropriate forum.

26. In my considered view, the issue arising for determination on the merits of this Motion is whether the Applicant is entitled to the prayers sought. I have considered the opposing positions taken up by the respective parties. Applicant has proposed names to be considered for appointment which names have been rejected by the Respondent, who has proposed suitable names, in its view, for appointment as arbitrator.

27. Both the Arbitration Act and the CPR empower the courts to appoint an arbitrator or arbitrators, whichever the case may be. Having already established that the arbitration process had commenced in the matter, I find relevance in **Order 46, Rule 5** of the CPR which provides that:

(1) In any of the following cases, namely-

(a) where the parties cannot agree within thirty days with respect to the appointment of an arbitrator, or

the person appointed refuses to accept the office of arbitrator; or

(b) where the arbitrator or umpire—

(i) dies; or

(ii) refuses or neglects to act or becomes incapable of acting; or

(iii) leaves Kenya in circumstances showing that he will probably not return at an early date; or

(c) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so, any party may serve the other or the arbitrators as the case may be with a written notice to appoint an arbitrator or umpire.

(2) If, within seven clear days after such notice has been served or such further time as the court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard,

appoint an arbitrator or umpire, or make an order superseding the arbitration, and in such case shall proceed with the suit.

28. Separately, **Section 12(9)** of the Arbitration Act expresses thus:

The High Court in appointing an arbitrator shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.

29. I have noted from the record of the court that the earlier order appointing Dr. Wilfred Mutubwa as the sole arbitrator rode on the consent of the parties. There is no evidence that the parties agreed on the appointment of Dr. Wilfred Mutubwa because the dispute required a legal professional. The record only shows that counsel for the Defendant/Respondent told the

court on 19/06/2023 that they wrote a letter on 22/05/2023 proposing appointment of one of the 3 senior legal counsel for arbitration.

30. Be that as it may, my consideration of the issues raised and upon perusal of the parties' respective pleadings, I have not come across anything to indicate that the dispute herein gives rise to legal issues that are so complex as to necessarily require an arbitrator with legal expertise. However, given the nature of the dispute and the documentation involved, it is apparent that the same may require or benefit from the expertise of a professional in the construction industry, such as an architect, a quantity surveyor or an engineer.

31. From reading the record and considering material placed before the court by the parties, I have observed that none of the parties have tendered any credible material to enable me ascertain the professional expertise of their respective proposed nominees. It would therefore be difficult for me to verify whether any of the proposed nominees possess the necessary qualifications to be considered as sole arbitrator.

further, it is apparent that there is no consensus between the parties, on a suitable nominee to be appointed a sole arbitrator.

32. In the circumstances, I am not persuaded that it would be a proper exercise of my discretion to make an appointment of a sole arbitrator. Rather, it is my considered view that it would prudent to order that the appointment process be undertaken by the relevant professional body equipped with the requisite expertise to know the professional qualifications required for a dispute like the one before the court.

33. Consequently, I find that the Amended Notice of Motion dated 16.06.2025 partly succeeds in the following terms:

a) That the Chartered Institute of Arbitrators-Kenya Branch be and is hereby ordered to appoint a person with requisite qualifications, in respect of the dispute presented in this case, as the sole arbitrator

b) That arbitration in this matter, upon such appointment under order (a) above, be undertaken within 60 days from the date of appointment.

c) That parties shall attend court on a date to be fixed in court to confirm the status of the arbitration proceedings.

d) That each party shall bear own costs of the Amended Motion.

34. It is so ordered.

Dated, signed and delivered this 5th day of February 2026.

**S. N. MUTUKU
JUDGE**

In the presence of:

1. Ms Koki for the Applicant
2. Mr. Ngatia for the Respondent