

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
CIVIL SUIT NO. 160 OF 2019

YOUTH LIMITED
PLAINTIFF

-VERSUS-

DANIEL NJOROGE KHIKO **1ST**
DEFENDANT

HENG YU INTERNATIONAL LIMITED **2ND**
DEFENDANT

KENYA RAILWAYS CORPORATION **3RD**
DEFENDANT

RULING

Background

1. The court is seized of two applications, one by the Plaintiff and the other by the 3rd Defendant. The 3rd Defendant's application is dated 3rd July, 2025. The Motion is brought pursuant to the provisions of **Articles 22, 50, 159 and 259** of the **Constitution of Kenya** and **Section 3A** of the **Civil Procedure Act** seeking the following reliefs:

- i. That this Honourable Court do set aside the ruling of the arbitrator delivered on 2nd July, 2025.***

ii. That there be stay of the proceedings before the arbitrator pending the outcome of the appeal and the present suit.

iii. Any other order that this Honourable Court deems fit.

iv. Costs of this Application be provided for.

2. The Motion is supported by the grounds on the face thereof and the affidavit of Philip Mainga, the 3rd Defendant's Managing Director of an even date. He deposed that vide the Motion dated 5th March, 2025, the 3rd Defendant sought a stay of the arbitration proceedings before Mr. Peter M. Gichuhi, who had been appointed as an arbitrator in the dispute between the parties.
3. It was deposed that the application was anchored on the ruling of the Court of Appeal delivered on 12th July 2024 in **Nairobi Court of Appeal Civil Application No. E019 of 2024**, which made a finding that the Applicant had satisfied the requirements under **Rule 5(2)(b)** of the **Court of Appeal Rules, 2022**.
4. The Court of Appeal, it was deposed, equally stayed the proceedings and all consequential orders pending the determination of the intended appeal. This position was subsequently endorsed by this court vide the ruling of 14th

November, 2024, where the 3rd Defendant had similarly sought a stay of the arbitral proceedings.

5. According Mr. Mainga, on 2nd July 2025, the arbitrator dismissed the application for stay on the ground that the Court of Appeal orders did not extend to the arbitral proceedings. It was contended that the arbitrator failed to consider the finding by the court that the proceedings in ELC 392 of 2022 and the arbitration proceedings had already been stayed by the Court of Appeal and that such orders had not been reviewed, varied or set aside.
6. It was further contended that the arbitrator failed to appreciate that proceeding with the arbitration in the face of existing court orders amounts to contempt, and instead faulted the 3rd Defendant for allegedly failing to demonstrate prejudice. According to Mr. Maingi, he is apprehensive that unless the court intervenes, the arbitral proceedings will continue in defiance of subsisting court orders, thereby exposing the 3rd Defendant to prejudice and undermining the authority of the court. It was also alleged that the arbitrator's conduct bordered on bias and offended the principles of natural justice.
7. In response, the Plaintiff filed a Notice of Preliminary Objection dated 10th July, 2025 premised on the grounds that:

i. The application by 3rd Defendant dated 4th July, 2025 is an abuse of the court process and improperly filed in this suit.

ii. A decision of an Arbitrator can only be challenged as is provided in the Arbitration Act by way of filing an independent and separate action for such challenge.

iii. The application has no legal foundation to stand on hence should be struck out.

8. The Plaintiff further responded through a replying affidavit sworn on 10th July 2025 by its Director, Dr Samuel Kamau Macharia. He deponed that the 3rd Defendant initially obtained orders referring **ELC No. 392 of 2022** to arbitration. The aforesaid orders, he asserted were not issued in the present suit. Consequently, the present Motion ought to have been filed in **ELC No. 392 of 2022**.

9. He explained that the present matter has been ongoing with the last court appearance having been on the 14th May, 2025 with the active participation of the 3rd Defendant. Further, the arbitrator's ruling being challenged relates to **ELC No. 392 of 2022**, in which the Court of Appeal had stayed contempt proceedings only, and not the arbitral proceedings themselves. He deposed that the arbitrator had correctly so found.

- 10.** He further stated that an earlier application seeking to stay the arbitration had been struck out by this court in a ruling delivered on 14th November 2024, and that the present suit has no nexus with either the arbitration or the Court of Appeal proceedings.
- 11.** According to Mr. Macharia, this Motion is an attempt to mislead the court into determining issues arising in **ELC No. 392 of 2022**, thereby creating confusion across several suits involving the parties *to wit* the present suit, ELC 342 of 2019 and ELC 392 of 2022. It was maintained that the arbitrator correctly interpreted the Court of Appeal ruling and that the application was merely an attempt by the 3rd Defendant to avoid proceeding with the arbitration.
- 12.** The Plaintiff's Notice of Motion dated 10th July, 2025 has been brought pursuant to the provisions of **Section 6** of the **Arbitration Act 1995**, **Rule 2** of the **Arbitration Rules, 1997** and **Section 3A** of the **Civil Procedure Act** seeking the following reliefs.
- i. This Honourable Court be pleased to refer this matter to Arbitration as provided for in the Lease agreement subject of this suit as between the Plaintiff and the 3rd Defendant.*
 - ii. This Honourable Court does stay any further proceedings in this suit pending the hearing and determination of the arbitration proceedings.*

iii. This Honourable Court be pleased to review, vacate, and set aside its orders issued on 3rd July 2025 pending the hearing and determination of the arbitration proceedings.

- 13.** The Motion is supported by the affidavit of Samuel Kamau Macharia, the Plaintiff's Director of an even date. He deponed that the Plaintiff instituted this suit vide a Plaint dated 16th May 2019, seeking, *inter alia*, a permanent injunction restraining interference with the property known as LR No. 209/6445, orders of eviction, and a declaration that its proprietary rights had been infringed.
- 14.** He further deponed that in 2024, the 3rd Defendant was joined to the suit, which joinder introduced a new dispute relating to ownership of the suit property, the resolution of which is, according to the Plaintiff, in an arbitration as provided for in clause 3.7 of the lease agreement. He averred that although the Plaintiff has endeavored to prosecute the matter since 2019, the suit has not proceeded to hearing due to multiple interlocutory applications and the subsequent joinder of the 3rd Defendant.
- 15.** On the basis of the arbitration clause, the Plaintiff seeks leave of the court to refer the dispute between itself and the 3rd Defendant to arbitration. He asserts that **Section 6** of the **Arbitration Act** empowers the court to stay proceedings and refer the parties to arbitration. In this case, he asserted,

none of the statutory exceptions applies. He urged that unless the matter is referred to arbitration, the Plaintiff will suffer prejudice.

- 16.** The 1st Defendant, filed a replying affidavit dated 4th August 2025. He deponed that the application is unmerited, frivolous, prejudicial, and constitutes an abuse of the court process. He stated that the 2nd and 3rd Defendants are not privy to the alleged lease relied upon by the Plaintiff and referring the dispute to arbitration will prejudice the 1st Defendant and DDM Legal Consult, who are parties to a separate lease agreement with the 3rd Defendant over a different parcel of land known as WK14 KRC No. 19168 in Kileleshwa, Nairobi (formerly Inviolate Siboe-BR/CTL/NBI/WKL/3) and not LR No. 209/6445, which is the subject of the Plaintiff's alleged lease.
- 17.** According to the 1st Defendant, the suit property herein is separate and distinguishable from LR No. 209/6445, which is the subject of the Plaintiff's alleged lease.
- 18.** He maintained that it would be improper to subject the 1st Defendant to arbitration in respect of a lease to which it is not a party; that the suit was initially filed against the 1st and 2nd Defendants only, and that the Plaintiff has never amended the Plaint to plead any cause of action or seek any relief against the 3rd Defendant. He noted that the Plaintiff had previously deponed that it had no claim against the 3rd

Defendant and that the dispute concerned only the 1st and 2nd Defendants.

19. According to Mr. Kihiko, the 3rd Defendant denies the alleged lease and has raised allegations of fraud, in the counterclaim; that the dispute concerns ownership and interests in land and therefore falls squarely within the court's jurisdiction and that the application should be dismissed.
20. The 3rd Defendant, through Mr. Mainga, its Managing Director opposed the application through a replying affidavit sworn on 19th September 2025. At the onset, he asserted that the application is frivolous, misconceived, and an abuse of the court process and ought to be dismissed in limine.
21. He conceded that the 3rd Defendant was joined in these proceedings in December, 2024, well over eight (8) months prior to the filing of the present Application. Notably, he stated, Clause 3.7 of the Lease Agreement the Plaintiff purports to rely upon, and to which the Plaintiff is a consenting party, envisions the appointment of an arbitrator within fourteen (14) days upon issuance of a notice of dispute and that the decision to invoke arbitration mechanisms eight (8) months after is a clear indication that the Motion is an afterthought.
22. Equally, he contended, **Section 6(1)** of the **Arbitration Act** requires an application for stay and referral to arbitration to

be made at the time of entering appearance or otherwise acknowledging the claim, and that the Plaintiff, having allowed the proceedings to progress and actively participated in litigation, had waived any right to invoke arbitration.

- 23.** Mr. Maingi averred, on a without prejudice basis that the 3rd Defendant expressly denies the existence and validity of the alleged lease agreement and maintains that it was irregularly and fraudulently procured. Further, the said lease was procedurally flawed and contrary to the 3rd Defendant established internal land allocation policies and it has filed a Counterclaim alleging fraud.
- 24.** It was further deponed that the dispute concerns ownership and proprietary interests in land, where there have been allegations of fraud and illegality which fall within the exclusive jurisdiction of the Environment and Land Court under **Article 162(2)(b)** of the **Constitution** and the **Environment and Land Court Act**. These issues are not arbitrable.

Submissions

- 25.** The Plaintiff, through Counsel, filed submissions in opposition to the 3rd Defendant's Motion on 11th November, 2025. Counsel submitted that the same constitutes an abuse of the process of the court. This matter, it was asserted, has nothing to do with arbitration and the current Motion ought

to have been filed in ELC 392 of 2022. As regards the stay by the Court of Appeal, Counsel submitted that the same was with respect to the issue of contempt and not the arbitration.

- 26.** The 1st Defendant filed submissions on 12th November, 2025 opposing the Plaintiff's plea to have the matter referred to arbitration. Counsel submitted that the same is unmerited, frivolous, misconceived, and an abuse of the court process. Further, the same was brought in bad faith and was intended to delay the fair and expeditious determination of the suit.
- 27.** It was submitted that notwithstanding the Plaintiff's contention that the joinder of the 3rd Defendant introduced a new cause of action grounded on a lease containing an arbitration clause, the Plaintiff nonetheless filed a reply to defence and a defence to counterclaim on 11th April 2025, approximately two months before filing the present application. This, it was urged, contravened **Section 6(1)** of the **Arbitration Act** which is explicit that an application for stay of proceedings pending arbitration must be made no later than the time of entering appearance or filing pleadings.
- 28.** Counsel pointed the court to the decision in **Eunice Soko Mlagui vs Suresh Parmar & 4 Others [2017] KECA 736 (KLR)**, where the court held that even where the substantive conditions for referral to arbitration are satisfied, a court is entitled to reject an application made after the filing of a

defence, the purpose of **Section 6(1)** being to regulate and facilitate the constitutional objective of promoting alternative dispute resolution. Also cited was **Diocese of Marsabit Registered Trustees vs Technotrade Pavilion Limited (HCCC No. 204 of 2013)**, and **Standard Group PLC vs Wesley Kiptoo Yegon & another [2019] KEHC 9435 (KLR)**.

- 29.** Further, it was submitted, **Section 6(1)** of the **Arbitration Act** primarily contemplates applications by Defendants seeking stay of proceedings, and that a Plaintiff who voluntarily instituted and prosecuted a suit could not subsequently approbate and reprobate by seeking to remove the matter from the court's jurisdiction after years of litigation. By filing and prosecuting the suit, the Plaintiff had waived any right to arbitrate the dispute.
- 30.** According to Counsel, the 1st Defendant, not being privy to the purported lease, cannot be compelled to submit to arbitration founded on an agreement to which he was not a party. Reliance was placed on **Scales and Software Limited vs Web Commercial Systems Limited & Another [2021] KEHC 9060 (KLR)**, where the court affirmed that an arbitration agreement binds only the parties to it and cannot be imposed on non-parties.
- 31.** The 3rd Defendant filed submissions addressing both Motions on 22nd September, 2025. Counsel submitted that the

arbitrator's refusal to defer to the subsisting stay orders amounted to a fundamental misdirection, given the settled principle that court orders are binding on all persons and bodies, including tribunals. Reliance was placed on **Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] eKLR** and **Econet Wireless Kenya Limited vs Minister for Information and Communication [2005] eKLR**, for the proposition that obedience of court orders is a foundational tenet of the rule of law and that proceedings undertaken in defiance of such orders are impermissible.

- 32.** Counsel argued that allowing the arbitration to proceed in the face of express stay orders would place the parties and the arbitrator in contempt of court, undermine the supervisory jurisdiction of the court, and expose the proceedings to nullification. Further, this court's intervention is consistent with **Section 7** of the **Arbitration Act**, which empowers the court to grant interim measures in support of arbitration. Reliance was placed on **Safaricom Limited vs Ocean View Beach Hotel Limited & 2 Others [2010] eKLR**.
- 33.** It was urged that the 3rd Defendant has demonstrated prejudice, including exposure to contempt, duplicative costs, and the risk of conflicting outcomes, and urged that the

arbitral proceedings be stayed and the arbitrator's ruling set aside.

- 34.** As regards the Plaintiff's plea, Counsel submitted that **Section 6(1)** of the **Arbitration Act** is couched in mandatory terms and requires a party seeking stay of proceedings and reference to arbitration to apply not later than the time of entering appearance or otherwise acknowledging the claim. A position consistently enforced by the Court of Appeal.
- 35.** The cases of *Adrec Limited vs Nation Media Group Limited [2017] KECA 106 (KLR)*, *Mount Kenya University vs Step Up Holdings Limited [2018] eKLR*, and *Corporate Insurance Company Limited vs Loise Wanjiru Wachira (Civil Appeal No. 151 of 1995)*, were cited for the proposition that the right to rely on an arbitration clause is lost once a party files substantive pleadings or otherwise submits to the jurisdiction of the court.
- 36.** It was urged that these principles apply with greater force to a Plaintiff who elected to institute proceedings and prosecute them over a prolonged period before belatedly seeking refuge in arbitration. It was contended that the Plaintiff, having chosen the judicial forum and actively prosecuted the suit to an advanced stage, had waived any right to invoke arbitration under **Section 6(1)**. The timing of the

application, brought after the joinder of the 3rd Defendant and long after the Court of Appeal had issued stay orders, was characterized as an afterthought of the very kind **Section 6(1)** was designed to forestall.

37. Without prejudice to the foregoing, Counsel argued, the purported lease containing the arbitration clause is fraudulent, rendering the arbitration clause inoperative as against the 3rd Defendant. Reliance was placed on **UAP Provincial Insurance Company Limited vs Michael John Beckett [2013] eKLR** for the proposition that, in considering an application under **Section 6**, the court must be satisfied that a valid arbitration agreement exists and that there is an arbitrable dispute. Counsel contended that where the existence and validity of the arbitration agreement itself was contested, it would be improper to compel arbitration in advance of such determination.

38. It was further submitted that the dispute raises questions of land ownership, title, and public interest falling within the exclusive jurisdiction of this court under **Article 162(2)(b)** of the **Constitution** and **Section 13** of the **Environment and Land Court Act**. In any event, Counsel argued that the subsisting stay orders issued by the Court of Appeal and endorsed by this court preclude any reference to arbitration while those orders remained in force.

Analysis and Determination

39. Having considered the Motion, responses and submissions, the issues that arise for determination are:

- i. Whether the Motion dated 3rd July, 2025 constitutes an abuse of court process and if not, whether it is merited?*
- ii. Whether this matter should be referred to arbitration and the present proceedings stayed?*

40. Vide the notice of preliminary objection together with the replying affidavit both dated 10th July, 2025, the Plaintiff seeks to impugn the Motion of 3rd July, 2025. In substance, the Plaintiff contends that the same has been filed in the wrong file, lacks any nexus with the proceedings herein, and improperly invites this court to determine issues arising from ELC No. 392 of 2022 and related matters.

41. In any event, it was argued, an arbitrator's ruling can only be impugned in the manner prescribed under the **Arbitration Act** by a separate and independent action, and not through the present suit.

42. The Black's Law Dictionary, 10th Edition defines abuse as

“a departure from legal or reasonable use; misuse.” An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use”

43. Speaking to this, the Court of Appeal ***in Leitich vs Mwangi (Civil Appeal (Application) E147 of 2023) [2025] KECA 1279 (KLR) (11 July 2025) (Ruling)*** stated thus:

“Situations that may give rise to an abuse of Court process are indeed in exhaustive, but basically, it involves situations where the Court process has not been or resorted to fairly, properly, honestly to the detriment of the other party. In Patrick Macharia Nderitu vs. Director of Public Prosecutions & 2 Others; Dovey Pharma Limited (Interested Party) [2020] eKLR, the High Court citing authorities provided the following examples which constitute abuse of court process: a. Instituting multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action. b. Instituting different actions between the same parties simultaneously in different court even though on different grounds. c. Where two similar processes are used in respect of the exercise of the same right. d. Where an application for adjournment is sought by a party to an action to bring another application to court

for leave to raise issue of fact already decided by court below.e.Where there is no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action. f. Where a party has adopted the system of forum- shopping in the enforcement of a conceived right. g. Where an appellant files an application in respect of a matter which is already subject of an earlier application. h.Where two actions are commenced, the second asking for a relief which may have been obtained in the first.”

- 44.** Vide the present Motion, the 3rd Defendant seeks to set aside the ruling of the arbitrator delivered on 2nd July 2025 and to obtain a stay of the arbitral proceedings pending the hearing and determination of the intended appeal and the present suit. It asserts that the arbitrator erred in holding that the Court of Appeal orders did not extend to the arbitration, which, in its view, had stayed both the court proceedings and the arbitral process. This decision, it asserted, was affirmed by this court.
- 45.** The court has considered the record and evidence in its entirety. Vide the ruling of 14th November, 2024, rendered on the 3rd Defendant’s application dated 3rd May 2024, seeking

consolidation of this suit with ELC No. E392 of 2022 and a stay of proceedings therein, the court held that although both matters concerned L.R. No. 209/6445, the proceedings in ELC No. E392 of 2022 had already been referred to arbitration and were subject to pending appellate and arbitral processes.

46. On that basis, the court declined consolidation and further observed that the prayer to stay proceedings in ELC No. E392 of 2022 and the arbitration was misconceived, the same having been addressed by the Court of Appeal.
47. The court has also considered Civil Appeal No. E019 of 2024, adduced in evidence. From the ruling of the Court of Appeal, it is evident that the application before that court sought a stay of further proceedings and execution of orders arising from the ruling of 31st October 2023 in **ELC No. E392 of 2022**.
48. The court has also considered the Arbitral Tribunal's ruling of 2nd July 2025 on an application to stay the arbitration pending Civil Appeal No. E019 of 2024. The Tribunal found that the Court of Appeal had only stayed contempt proceedings in ELC No. E392 of 2022 and had not stayed the arbitral proceedings, either expressly or by implication.
49. It further held that the contempt proceedings were distinct from the arbitration, that no prejudice had been shown to justify halting the arbitral process, and that the arbitration

should proceed without delay. The application for stay was therefore dismissed.

50. Read together, the rulings of this court, the Court of Appeal, and the Arbitral Tribunal reveal a consistent position that the proceedings the 3rd Defendant seeks to have stayed are arbitral proceedings currently ongoing in ELC No. E392 of 2022. In effect, the 3rd Defendant is inviting this court to issue directions in one suit affecting another separate matter, yet the two have neither been consolidated nor otherwise brought within a common procedural framework.

51. Notably, even as the 3rd Defendant seeks to stay the arbitration, it simultaneously and strenuously opposes the Plaintiff's application for a referral of this dispute to arbitration. Accordingly, the court is satisfied that the present Motion is an abuse of its process and the same is for dismissal.

52. The power of a court to stay proceedings and refer a matter to arbitration is provided for under **Section 6** of the **Arbitration Act Cap 49**. It provides that:

“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.

(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.”

53. Speaking to this provision, the Court of Appeal in *Mt. Kenya University vs Step Up Holding (K) Ltd [2018] eKLR* held as follows:

“The obligation of the court upon being moved in terms of the above provision has been crystalized by case law. We find it prudent to highlight a few

as follows. In the case of Niazsons(K) Ltd v China Road & Bridge (supra) the court held inter alia that: “All that an applicant for a stay of proceedings under section 6 (1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold being: (a)Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;(b)Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and(c)Whether the suit intended concerned a matter agreed to be referred to arbitration.”

In Corporate Insurance Company v Wachira (supra) the court held inter alia that existence of an arbitration clause is a defence to a claim filed against a party, save that a party seeking to rely on the existence of such an arbitration clause as a defence cannot be allowed to use it to circumvent a statutory requirement with regard to the mode of applying for a stay of proceedings. In UAP Provincial Insurance Company Ltd v Michael John Beckett (supra), the court added that the current legal position with regard to applications for stay of proceedings

pending arbitration was introduced by the 2009 amendment to section 6 of the Arbitration Act. In the said case, the court had this to say: “In our view, the issue with which Mutungi, J was concerned when dealing with the application under section 6 of the Arbitration Act was whether or not the arbitration clause would be enforced and whether the matter was one for reference to arbitration. Section 6 of the Arbitration Act provides an enforcement mechanism to a party who wishes to compel an initiator of legal proceedings with respect to a matter that is the subject of an arbitration agreement to refer the dispute to arbitration. Section 6 of the Arbitration Act under which UAP’s application for stay of proceedings was presented provides in the relevant part...It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6(1) (b) of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry, the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within

the scope of the arbitration agreement, and then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court. The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6 (1) (b), to the question whether there is in fact, a dispute. In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the Arbitration Act, to make an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings, and question whether there was a dispute for reference to arbitration, Mutungi J, was therefore within the ambit of section 6 (1) (b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute. The provisions in section 6 (1) (b) of the Arbitration Act are similar to the provisions of section 1(1) of the Arbitration

Act, 1975 of England before its amendment by the Arbitration Act, 1996.

- 54.** It is apparent from the foregoing that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement. Secondly, where a party elects to come to court and the other party to the arbitration agreement seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance or otherwise acknowledging the claim against which the stay of proceedings is sought.
- 55.** The Plaintiff urges this court to refer the present proceedings to arbitration on account of an arbitration clause in the lease between itself and the 3rd Defendant, and which came to its attention upon the 3rd Defendant's joinder into these proceedings.
- 56.** In opposition, the 1st and 3rd Defendants argue that the 1st Defendant is not a party to the alleged lease and cannot be compelled to arbitrate; that the Plaintiff invoked arbitration belatedly, long after actively participating in the proceedings, contrary to **Section 6(1)** of the **Arbitration Act**; and that the 3rd Defendant denies the existence and validity of the alleged lease, having raised allegations of fraud and illegality.

- 57.** The dispute, they assert, concerns ownership and proprietary interests in land and therefore falls within the exclusive jurisdiction of this court under **Article 162(2)(b)** of the **Constitution** rendering it not amenable to arbitration.
- 58.** By way of brief background, the present suit was instituted in 2019 against the 1st and 2nd Defendants. It is grounded on allegations of trespass and unlawful interference with the Plaintiff's proprietary rights over LR No. 209/6445. The reliefs sought include, inter-alia, a permanent injunction restraining interference with the property, eviction of the Defendants therefrom, declarations of illegality of their occupation, damages for trespass and loss of user, and mesne profits.
- 59.** Vide a Motion dated 14th December, 2023, the 3rd Defendant sought to be joined into these proceedings asserting, inter-alia, that being the Lessor, it ought to have been joined as a party to this suit to shed more light on the alleged dispute between the existing parties. It asserted that it had discovered anomalies in the lease document relied upon by the Plaintiff and wished to sustain a cause of action against the Plaintiff. Further, it claimed that the Plaintiff having deliberately refused to sue it was a calculated act of mischief and an abuse of court process.
- 60.** Pursuant to this joinder, the 3rd Defendant adduced into evidence a lease agreement between itself and the Plaintiff

over L.R 209/6445, Nairobi which forms the Plaintiff's plea in this regard. Clause 3.7 thereof provides as follows:

“Save as may be hereinbefore otherwise specifically provided, all questions hereafter in dispute between the parties hereto and all claims for compensation or otherwise not mutually settled and agreed between the parties hereto shall be referred to arbitration in accordance with the provisions of the Arbitration Act No. 4 of 1995 (or any statutory enactment in that behalf for the time being in force) by a single arbitrator to be appointed by agreement between the parties or, failing agreement within fourteen (14) days of the notification by either party to the other 7 4. 5. 6. of the existence of a dispute or claim, to be appointed by the Chairman for the time being of The Chartered Institute of Arbitrators, Kenya Branch, Nairobi on the application of any party to the claim or dispute.”

- 61.** To begin with, the arbitration clause relied upon applies to disputes “between the parties” arising under the lease. Its scope is therefore confined to contractual disputes between the contracting parties to that instrument.
- 62.** The 1st and 2nd Defendants are not parties to the alleged lease, and the primary reliefs herein are directed against the

1st and 2nd Defendants. Referral to arbitration would thus necessarily fragment the dispute and compel a non-party to submit to a private forum to which it never consented, contrary to the principle that arbitration is founded on party autonomy.

- 63.** It is also not in dispute that although the 3rd Defendant was joined in this suit in early 2024, the Plaintiff did not invoke the arbitration clause promptly upon such joinder. Instead, it continued to participate in the proceedings and only sought referral several months later, after the parties had substantially engaged the court's jurisdiction.
- 64.** The Court of Appeal has consistently held that **Section 6(1)** of the **Arbitration Act** must be strictly construed. In **Mount Kenya University v Step Up Holding (K) Ltd [2018]eKLR** the Court of Appeal stated:

“...We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter. The appellant herein entered appearance, and then responded to the respondent's application for injunction before filing the application seeking an order for reference to arbitration. Critically, the appellant's response to the respondent's

application for injunction amounted to taking of a procedural step in the matter before the initiation of the reference process.”

- 65.** Further, the Plaintiff had previously asserted that it had no claim against the 3rd Defendant and that its claim lay solely as against the 1st and 2nd Defendants. That position is inconsistent with its present invocation of the arbitration clause and reinforces the conclusion that it acquiesced to this court’s jurisdiction.
- 66.** In addition, the 3rd Defendant has denied the existence and validity of the alleged lease and has pleaded fraud and illegality in its counterclaim. The dispute therefore goes beyond a contractual disagreement and raises questions of ownership, validity of title, and alleged fraud in the creation of interests in land.
- 67.** These are matters falling within the exclusive jurisdiction of this court under **Article 162(2)(b)** of the **Constitution** and **Section 13** of the Environment and Land Court Act, and are ill-suited for referral to arbitration where the very foundation of the arbitration agreement is contested.
- 68.** Taken together, the court finds the Plaintiff’s plea to have the matter referred to arbitration, and consequently stayed pending the arbitration to be unmerited. In the end, the court makes the following final determination;

- i. The Notice of Motion dated 3rd July, 2025 is hereby dismissed.**
- ii. The Motion dated 10th July, 2025 is hereby dismissed.**
- iii. The parties shall bear their own costs.**

Dated, signed and delivered virtually in Nairobi this 19th day of February, 2026.

O. A. Angote
Judge

In the presence of:

Mr. Cherongis for Mr. Orenge for the Plaintiff

Mr. Ogango for the 1st Defendant

Mr. Semini for Ms Tusiime for the 3rd Defendant

Court Assistant - Tracy