

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION

CIVIL CASE NO. E136 OF 2024

NEIL SHAH.....
PLAINTIFF

VERSUS

FREENATION FILMS LIMITED.....1ST
DEFENDANT

ALLAN SCHELL NEIL 2ND
DEFENDANT

OLIVE TAMBWE.....3RD
DEFENDANT

AND

MIKE LARRY..... INTERESTED
PARTY

RULING

1. The Plaintiff filed this suit against the Defendants seeking orders for specific performance of a producer production **contract signed by and between the parties on 11/04/2022** but which the Plaintiff claims the Defendants breached causing him to suffer damages and loss in the **sum of Kshs. 23,000,000/=** for which sum he claims refund together with costs.
2. Further, the Parties executed an **Executive Producer/Director contract dated 25/05/2021** in which

they agreed that all disputes that may arise from the contract would be referred to arbitration in accordance with the **Arbitration Act, 1995**.

3. The Defendants in their statement of defence dated 14/05/2025 while admitting executing the producer production contract claims that the loss was occasioned by the Plaintiff's own inaction and breach of the said producer contract insisting that any harm occurring was as a result of the Plaintiffs inaction and thus denying liability.
4. By a **Notice of Preliminary Objection dated 12/06/2025**, the Defendants gave notice to raise the same on a point of law seeking dismissal of the suit with costs. The court gave directions that the Preliminary Objection would be determined by way of written submissions, which both parties have filed.

The Notice of Preliminary Objection

- 1) *The Plaintiff has failed to comply with the Doctrine of exhaustion of remedies as required by **Article 159(2)(c)** of the constitution of Kenya 2010 and previously determined by the court in **Mombasa High Court Constitutional Petition No. 159 of 2018** consolidated with **Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 Others v. Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR.***
- 2) *Clause 14 of the Executive Producer/Director contract dated 25th May, 2021 executed between the parties*

herein stipulates that disputes and/or differences arising from the contract ought to be subjected to Arbitration proceedings in the first instance. (Attached is the Executive Producer/director contract dated 25th May, 2021.)

3) *The filing of this suit is therefore premature, incompetent and in breach of the parties' contractual agreement, contrary to the provisions of **Section 6(1) of the Arbitration Act, CAP 49, Laws of Kenya.***

4) *Consequently, the suit ought to be dismissed with costs, as it offends both statutory and contractual principles governing alternative disputes resolution.*

Defendants Submissions

5. By their Advocates Moraa Muchira & Co. Advocates, the Defendants filed their submissions dated 12/09/2025.

They invoked clause 14 of the Executive Producer contract executed by both parties on 25/05/2021 that provides that any dispute controversy or claim arising out of the agreement contract shall be resolved by arbitration in accordance with the Arbitration Act, 1995.

The Defendants submit that the Plaintiff ignored and disregarded the dispute resolution mechanism and filed the suit hence various issues of jurisdiction of the court to entertain the suit citing the doctrine of exhaustion.

It is the Defendants submissions that **Mukhisa Biscuits Manufacturing Co. Ltd [1969] EA 696** case settled the

matter of Preliminary objection stating that their objection is a pure point of law.

6. On doctrine of exhaustion, it is submitted that the **Constitution Article 159(2) (c)** recognizes alternative dispute resolution, mechanisms, among them arbitration and that courts have recognized that parties ought to exhaust the mechanism before invoking court's jurisdiction.
7. Cited one the following cases **Samuel Kamau Macharia v. Kenya Commercial Bank 2 Others [2012] eKLR; Anne Mumbi Hinga v. Victoria Njoki Gathar [2009] eKLR Nutu Agrovet ltd v. Airtel Networks Ltd [2019]eKLR.**
8. The Defendants finally submit that the Plaintiffs failure to invoke arbitration constitutes a blatant violation of the doctrine of exhaustion and a circumvention of the arbitration agreement and accordingly seek dismissal of the suit with costs.

Plaintiff's Submissions

9. The Plaintiff represented by **Masaki & Gathu Advocates, LLP** filed its submissions dated 17/09/2025 in opposition to the Preliminary Objection.

On the onset, the Plaintiff submits that existence of an arbitration does not exhaust the court's jurisdiction, but merely compliments the court process citing the holding in **Maina v. Kenya Commercial Bank PLC [2024]eKLR,** whereof the holding in **Mukisa Biscuit Manufacturing Co.**

Ltd v. West End Distributors Ltd [1969] EA 696 that a Preliminary Objection should be raised on the assumption that all facts pleaded both parties and the save stating that in the present suit there are non-parties (3rd Defendant) and the Interested Parties who are not parties to the agreements and who are not bound by the arbitration clause.

10. The Plaintiff therefore submits that the arbitration clause cannot oust the court's jurisdiction and therefore the Preliminary Objection ought to be dismissed with costs.

Analysis and Determination

11. The fundamental principle embodied in the **Arbitration Act, 1995** is that where there is a valid arbitration clause, all issues falling within the jurisdiction of an arbitrator should be decided by the tribunal and the court should not intervene. However, it is trite that courts of law remain the ultimate guardians and protectors of justice and hence the cannot be completely shut off from any process of seeking justice - as held in the case of **synergy Industrial Credit Limited V. Cape Holdings Limited [2019] eKLR**.
12. In this case, the Producers contract dated 11/04/2022 was executed between the Plaintiff and the 1st Defendant Freenation Films Limited, by its two directors, apparently the 2nd and the 3rd Defendant as confirmed by the CR 12 annexed as "NS-2" - in the Plaintiffs affidavit.

13. **Clause 15** of the contract thereof provides that all disputes and differences shall be referred to a single arbitrator to be agreed upon by the parties. This is the same as in the Executive Producer/Director contract dated 25/05/2021.

Of concern is that there are two interested parties in the suit, the 1st and 2nd interested parties who are not parties to either of the two stated contracts.

Should the court refer their cases to arbitration without hearing them?

Every party in a suit should be heard before a competent court of their choice they have not raised a complaint or supported either of the two rival parties.

14. The holding in **Mukisa Biscuits case (supra)** presupposes that all facts pleaded by both parties are the same. The interested parties hereto are not, and therefore the assumption fails. They were not parties to the two contracts and therefore cannot be bound by the arbitration clauses in both contracts.

15. **Section 3** of the Arbitration Act defines a party in relation to arbitration as a party to an agreement and includes a person claiming through or under such party only. That being the position and being aware of the holding in the **Mukisa Biscuits case** that a Preliminary Objection being a pure point of law is capable of disposing the suit, what should be the position of parties in the suit is capable of disposing the suit,

what should be the position of parties in the suit - the interested parties cases, who are not bound by the arbitration clauses?

16. Needless to add that the doctrine of exhaustion of remedies requires that where a contract or statute provides for a dispute resolution mechanism it must be pursued before invoking the court's jurisdiction and has been upheld in numerous superior decisions **Geoffrey Muthiga Kabiru & 2 others V. Samuel Munga Henry & 1756 Others [2015] eKLR** and **Nyutu Agrovet Ltd v. Airtel Kenya Ltd (supra)** wherein the Supreme court affirmed that arbitration is intended to be final and binding.
17. **Section 6(1)** of the **Arbitration Act 1995** provides for stay of proceedings and referral of a dispute to arbitration where parties have entered into an arbitration agreement.
18. **In the case of Eunice Silo Mlagui V. Suresh Parma & 4 Other [2017] eKLR**, the court held that the provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution.
19. The court in the above case proceeded to state that the court is obliged to take into account equally important constitutional principle that justice shall not be delayed, by for example sending to arbitration parties who have otherwise elected to pursue proceedings in the court to belatedly

purport to opt for arbitration and in this case seeking striking out the suit.

20. The purport and import of **Article 159 (2) (c)** of the Constitution is that where parties to a contract consensually agree on arbitration as their dispute resolution mechanism of their choice, the court is obligated to give effect to their agreement.
21. However, where a party elects to come to court and the other party seeks to invoke the arbitration clause the party seeking to invoke the arbitration agreement is obligated to do so not later than the time of entering appearance.
22. In the instance case, the Defendants have filed their statement of defence.
23. They have therefore aired their right to arbitration by dint of **Section 6 (1)** of the **Arbitration Act**. They have submitted themselves to the court's jurisdiction they are prohibited from invoking the courts powers to refer the matter to arbitration as they have already taken proceedings to answer the substantive claim.
24. **For the going, it is evident that the Defendants Preliminary Objection lacks merit. It is therefore dismissed with costs to the plaintiff.**

Orders accordingly.

Delivered Dated and Signed at Nairobi this 19th day of February, 2026.

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JANET MULWA.
JUDGE

ORIGINAL