Pink Pearl Investments Limited v Esteel Construction Limited (Miscellaneous Application E805 of 2025) [2026] KEHC 2772 (KLR) (Commercial and Tax) (27 February 2026) (Ruling)

Neutral citation: [2026] KEHC 2772 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E805 OF 2025

FG MUGAMBI, J

FEBRUARY 27, 2026

BETWEEN

PINK PEARL INVESTMENTS LIMITED ..... RESPONDENT

AND

ESTEEL CONSTRUCTION LIMITED ..... CLAIMANT

RULING

Introduction and Background

1. On 1st August 2025, the applicant, PINK PEARL, filed an Originating Summons under Sections 17(6) and 17(8) of the *Arbitration Act*, Rules 3(1) and 25 of the Arbitration Rules 2020, and Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*. Through this application, PINK PEARL seeks the intervention of this Court in resolving a jurisdictional issue in ongoing Arbitration proceedings. Specifically, the applicant seeks a determination as to whether the Sole Arbitrator has jurisdiction to hear and decide its counterclaim, proceedings.

2. The applicant further seeks that the court sets aside the Ruling delivered by the Sole Arbitrator, Hon. Oundo on 11th July 2025 (the impugned Ruling), in which the tribunal held that it lacked jurisdiction over the counterclaim. Finally, the applicant seeks a declaration that the counterclaim is properly before the arbitral tribunal and falls within its jurisdiction.

3. At the heart of the dispute is a construction contract dated 4th February 2020 between the parties and the interpretation of Clause 45 of the Joint Building Council (JBC) Contract, which governed the contractual relationship between them.

4. The application is supported by the affidavits sworn by SADHU SINGH. It is opposed by the Replying Affidavit sworn by PUNIT BHADIA. I have equally considered the written submissions filed by the rival parties.

Analysis and Determination

5. The first issue as identified by the Applicant is whether a Counterclaim requires a separate, pre-arbitral Notice of Dispute, specifically regarding the interplay between Clause 45.1 and Clause 45.7 of the JBC Contract.

6. The Applicant contends that the Learned Arbitrator wrongly imported the 90-day notification requirement of Clause 45.1 into a dispute that properly fell under Clause 45.7, thereby rewriting the contract and creating a jurisdictional barrier that does not exist in its text.

7. The Applicant argues that the contract establishes two distinct gateways for arbitration under Clauses 45.1 and 45.3, which deal with disputes arising during the progress of the works and require rapid notification to avoid disruption, and Clause 45.7, which expressly reserves post-completion disputes for arbitration after practical completion. The counterclaim, concerning consequential damages for delay and costs of rectifying defects, is inherently a post-completion dispute and therefore falls squarely within Clause 45.7.

8. By insisting on a 90-day notice period calculated from an earlier stage of construction, the Arbitrator imposed a condition precedent that the parties never agreed to. He conflated the commencement of arbitration proceedings with the filing of pleadings, overlooking that arbitration had already been validly commenced by ESTEEL, the respondent herein. A counterclaim is not the initiation of a new arbitration but a pleading within an existing reference. To require a separate request for arbitration for the counterclaim would lead to an absurd duplication of proceedings.

9. PINK PEARL further submits that Rule 25 of the CIArb Arbitration Rules (2020), which were adopted by the parties, explicitly treats a counterclaim as a responsive pleading requiring the same information as a claim, but not a separate notice of dispute or request for appointment. By imposing a condition precedent that the Rules do not require, the Arbitrator acted ultra vires.

10. The Respondent, ESTEEL, on the other hand, contends that counterclaims, being independent causes of action, must each have their own jurisdictional foundation. In this case, the tribunal rightly declined jurisdiction because the Applicant failed to comply with the mandatory procedural steps set out in Clause 45 of the contract. These steps include issuing a written notice of dispute within 90 days, attempting amicable resolution, waiting 90 days before commencing arbitration, and giving 30 days' notice requesting concurrence on the appointment of an arbitrator. None of these conditions were satisfied, and therefore there was no valid reference to arbitration for the counterclaims in question.

11. Without prejudice to this position, the Respondent submits that if the Honourable Court is inclined to uphold any aspect of the Applicant's challenge, its jurisdiction remains limited to reviewing the Tribunal's finding on jurisdiction. The Court cannot assume the Tribunal's mandate.

Analysis and Determination

12. In light of the pronouncement of the Supreme Court in Nyutu Agrovet Limited V Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch, [2019] KESC 11 (KLR), together with subsequent jurisprudence, it is now firmly established that the jurisdiction of this Court to intervene in matters arising under the *Arbitration Act* is circumscribed and governed strictly by the provisions of the Act. In the present matter, the supervisory jurisdiction of this Court to address questions of jurisdiction is expressly conferred by section 17(6) of the Act, which forms the foundation of the application brought by PINK PEARL.

13. The substratum of the dispute before me is, without doubt, contractual in character. The principles governing the interpretation of contracts are well settled that it is not within the province of the Court to recast or rewrite agreements voluntarily entered into by parties. Rather, the Court's duty is confined to construing such agreements and enforcing them in accordance with their terms, save where vitiating elements such as fraud, misrepresentation, or illegality are demonstrated. This position finds firm support in the decision of the Court of Appeal in National Bank of Kenya Ltd V Pipelastic Samkolit (K) Ltd & Another, [2004] eKLR, wherein it was emphatically held that Courts must respect the sanctity of contracts and give effect to the intentions of the parties as expressed therein.

14. In this respect, Clause 45.1 of the JBC contract provides for a 30-day notice period, requiring that where a dispute arises, whether during the progress of the works or after their completion, such dispute shall be duly notified by one party to the other. Clause 45.3, further prescribes a 90- day notice of dispute, to be issued by one party to the other, specifying the matter or issue giving rise to the dispute. These requirements are not in contention. The question that falls for determination is whether these notice provisions apply equally in circumstances where a counterclaim is filed in response to a claim, thereby necessitating compliance with both notice periods in respect of the claim and the counterclaim alike.

15. I have perused the impugned Ruling and it does appear that the Learned Arbitrator relied on a decision of this Court (Mabeya J) in Isaaka Advocates V China Qingjian International Group (K) & 3 Ors, [2022] KEHC 11945 (KLR) where the Court found that:

> " The independence of a counterclaim from the main suit is well buttressed by Rule 13 of Order 7. The same provides as follows:
>
> "If, in any, case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with."

16. Applying this finding, the Learned Adjudicator reached the conclusion that the counterclaim advanced by PINK PEARL constituted a separate and distinct claim, independent of the statement of claim lodged by ESTEEL. On that basis, the Adjudicator held that the counterclaim was required to undergo the same multi-step contractual processes and procedural events prescribed under the JBC conditions, prior to the appointment of an arbitrator.

17. The authority relied upon by the Learned Arbitrator is in my view, distinguishable. The decision in Isaaka Advocates v China Qingjian International Group (supra) arose in the context of civil litigation, where counterclaims may, by virtue of the Civil Procedure Rules, proceed independently even if the principal suit is discontinued. Arbitration, by contrast, is a consensual process, firmly rooted in contract and the procedural rules adopted by the parties. Unlike the Civil Procedure Rules, the *Arbitration Act* contains no provision permitting counterclaims to be treated as autonomous proceedings. Once arbitration has been validly commenced, counterclaims are properly filed within the same reference, as responsive pleadings.

18. To insist upon separate notices under Clauses 45.1 and 45.3 for counterclaims would amount to a misapprehension of their purpose. Clause 45.1 requires a thirty 30 day notice, which is designed to afford parties the opportunity to agree on submission to arbitration and on the appointment of an arbitrator. Should agreement not be reached within that period, the clause itself provides mechanisms for appointment. Clause 45.3, in turn, prescribes a ninety 90-day notice period, intended to allow parties to exhaust alternative means of resolving the dispute before resorting to arbitration. Both provisions serve a singular purpose: to initiate arbitration and lead to the appointment of an arbitral tribunal.

19. If these notice requirements were applied to counterclaims, the logical consequence would be the appointment of a separate arbitrator for each counterclaim. Such an approach would fragment the arbitral process, create parallel proceedings, and risk conflicting determinations on the same contract. This would not only undermine the efficiency and coherence of arbitration but also defeat its very objectives. A counterclaim does not commence a new arbitration but is a responsive pleading within an existing, validly constituted reference. To require a separate request for arbitration in respect of a counterclaim would therefore be procedurally absurd and ultra vires the contractual framework.

20. This position is reinforced by Rule 25 of the CIArb Arbitration Rules (2020), which were the chosen procedural rules by the parties. That Rule expressly treats counterclaims as responsive pleadings. The Rule requires that a counterclaim contain the same information as a claim, but it does not mandate separate notices of dispute or requests for appointment. It further provides that the claimant may file a reply to any counterclaim within a period agreed by the parties or determined by the tribunal. Read together with Rule 22, which sets out the particulars required in a claim, it is evident that the parties intended counterclaims to be addressed within the same arbitral reference, subject to the same procedural framework.

21. For the avoidance of doubt, Rule 25 provides that:

> " Where the Respondent wishes to make a counterclaim, the same kind of information that a claimant is obliged to give in his Claim shall apply. The Claimant shall be at liberty to file a Reply to any Counterclaim within a period of time to be agreed by the parties or determined by the Arbitral Tribunal failing such agreement the Arbitrator's imposition of a condition precedent not found in the contract or rules was therefore ultra vires."

22. In any event, it is evident that both the Statement of Claim and the Statement of Defence together with the Counterclaim emanate from the same contractual transaction, namely the JBC agreement governing the construction of the seven-storey office block with four levels of parking. The Counterclaim, as framed by PINK PEARL flows from the claim filed by ESTEE making them two sides of the same coin. To treat the Counterclaim as a wholly independent proceeding would be to ignore the fact that it is responsive in nature, arising from the same factual substratum and contractual framework.

23. For the foregoing reasons, it is my considered view that the Learned Arbitrator's position was not anchored in either the contract or the applicable procedural rules. The imposition of a condition precedent requiring separate notices for counterclaims was, therefore, ultra vires.

24. Finally, I am mindful of the limits imposed upon this Court under section 17 of the *Arbitration Act*. The supervisory jurisdiction conferred therein is narrow, and it does not extend to a wholesale re-examination of the merits of the dispute. Having found that the counterclaim constitutes a dispute properly falling within the jurisdiction of the Learned Arbitrator, this Court must refrain from making any further pronouncements on the substantive issues. Those matters are to be deferred to the arbitral tribunal duly chosen by the parties, in accordance with their contract and the governing rules.

Disposition

i. The OS dated 1st August 2025 is hereby allowed.

ii. The Ruling delivered by the Sole Arbitrator, Hon Steve Oundo, on 11th July 2025 in so far as it held that the Tribunal lacks jurisdiction to hear the Applicant's (Respondent's in the Arbitration Reference) Counterclaim be and is hereby set aside.

iii. A declaration is hereby issued that the Applicant's (Respondent's in the Arbitration Reference) Counterclaim is properly before the Arbitral Tribunal and within the jurisdiction of the Tribunal.

iv. The costs of this application shall be borne by the Respondent in the Originating Summons.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 27TH DAY OF FEBRUARY 2026.

F. MUGAMBI

JUDGE

Delivered in presence of:

Ms Deky for the applicant

Mr Mathenge for the respondent

Court Assistant: Lillian