

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

MISC. COMMERCIAL APPLICATION NO. E024 OF 2025

**SALENE CREDIT LIMITED.....
APPLICANT**

VERSUS

**OPTIMUM COMPUTER SYSTEMS LIMITED
RESPONDENT**

R U L I N G

Brief facts

1. The application for determination dated 19th September 2025 seeks for orders of directing the chairperson or vice chairperson of the Chartered Institute of Arbitrators to appoint an arbitrator to handle and determine the dispute between the parties. In the alternative, the applicant seeks for orders of declaration that there is no valid arbitration agreement between the parties having failed to disclose the appointing authority of the arbitrator in case of a dispute.
2. In opposition to the application, the respondent filed grounds of opposition dated 14th November 2025.

The Applicant's Case.

3. The applicant states that it entered into an agreement with the respondent on 27th January 2022 for supply, installation, training and implementation of ultimate micro-finance management system at its premises at Ruaka. Pursuant to the agreement, it was required to deposit Kshs. 150,000/- which it did and the balance of Kshs. 250,000/- was payable in three monthly instalments of Kshs. 100,000/- in March 2022, Kshs. 100,000/- in April 2022 and Kshs. 50,000/- in May 2022.

4. The applicant states that it paid the deposit but the respondent failed to supply, install, train and implement the said ultimate microfinance management system and refused to refund the deposit paid. The applicant avers that the respondent owes them a sum of Kshs. 150,000/- as at October 2023 but they have refused to make the said payments.

5. The applicant avers that it filed a claim in Thika SCCOMM No. E1857 of 2023 but the claim was referred to arbitration pursuant to an application by the respondent. The applicant states that it has made several attempts to urge the arbitration forward but the same has been in vain. Further, it states that it is aware that the said agreement is silent on the appointing authority of the

arbitrator hence the parties are unable to have their dispute referred to arbitration. Further, the applicant states that all efforts to propose an arbitrator have proved futile. Their advocates wrote to the

Chartered Institute of Arbitrators to appoint an arbitrator but it also cited the gap in the said agreement.

The Respondent's Case.

6. The respondent states that the question of appointment of an arbitrator was settled by correspondence when the applicant agreed on the appointment of Mr. Mang'erere James as the arbitrator in the dispute. The arbitral clause is valid and there is no ambiguity which would necessitate the intervention of the Honourable Court. Further, parties are bound by all of the terms of the contract and the court cannot rewrite such terms.
7. Parties disposed of the application by way of written submissions but the respondent opted not to file any written submissions.

The Applicant's Submissions.

8. The applicant submits that the agreement dated 27th January 2022 contains an arbitration clause however the mechanism for its implementation is flawed as it is silent on the procedure for appointing an arbitrator in the event of a disagreement. The applicant further submits that it proposed a specific arbitrator but that did not break the

impasse. The applicant therefore refers to Section 10(2) of the Arbitration Act and submits that the court shall make an order for the appointment of an arbitrator where parties have failed to agree.

9. The applicant submits that the allegations by the respondent that they agreed on the appointment of Mr. Mange'erere James as the

arbitrator is misleading as the respondent never confirmed the proposal despite the calls and emails to them. The applicant argues that it was then forced to write to the Chartered Institute of Arbitrators seeking their assistance. The applicant submits that the Chartered Institute of Arbitrators is willing to help but correctly identified that it lacks the authority to act without a clear mandate from the parties or an order of this court. As such, granting this order would provide that mandate allowing a neutral and expert body to select a qualified arbitrator thereby ensuring the integrity of the process.

10. In the alternative, the applicant submits that the court makes a declaration that there is no valid arbitration agreement which would lift the stay in SCCOMM No. E1857 of 2023 allowing the claim to be heard and determined on its merits. To support its contentions, the applicant relies on the cases of **Danki Ventures Limited vs Sinopec International Petroleum Services Limited (2014) eKLR** and **Wanjala & 2 Others vs Registrar of Companies & 2 Others; Okoa Finance Limited**

(Interested Party) (Petition E001 of 2021) [2022] KEHC 48 (KLR) (Commercial and Tax) (31 January 2022) (Ruling).

The Law

Whether the application has merit.

11. It is not in dispute that the parties herein entered into an agreement on 27th January 2022 for the supply, installation, training and implementation of ultimate micro-finance management system. Clause 14 of the said agreement refers any dispute arising out of the

contract to arbitration. It is clear that the parties did not in the agreement provide for how the arbitrator shall be picked. However the **Arbitration Act** in **Section 12** provides for appointment of arbitrators. It provides:-

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairman and failing such agreement-

(a) In an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the third arbitrator;

(b) In an arbitration with two arbitrators, each party shall appoint one arbitrator; and

(c) In an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.

(3) Unless the parties otherwise agree, where each of the two parties to an arbitration agreement is to appoint an arbitrator and one party (the party in default)-

(a) Has indicated that he is unwilling to do so;

(b) Fails to do so within the time allowed under the arbitration agreement; or

(c) Fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party) the other party,

having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

(4) If the party in default does not within fourteen days after notice under subsection (3) has been given-

(a) Make the required appointment; and

(b) Notify the other party that he has done so, the other party may appoint his arbitrator as sole

arbitrator and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.

- (5) Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party apply to the High Court within fourteen days to have the appointment set aside.**
- (6) The High Court may grant an application under subsection (5) only if it satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.**
- (7) The High Court, if it grants an application under subsection (5) may by consent of the parties or on the application of either party appoint a sole arbitrator.**

12. It is thus clear that the parties in appointing an arbitrator may agree to do so or if one party defaults on picking an arbitrator within fourteen days, the other party is at liberty to appoint an arbitrator to act as the sole arbitrator. In the present case, the email correspondence between the parties show that the applicant proposed to have P.K. Mbaabu as the arbitrator

and the proposed arbitrator wrote an email to both parties on 11th December 2024 to discuss on her appointment and proposal to schedule a preliminary meeting. Counsel for the respondent wrote to the applicant's advocates stating that they were amenable to their proposal of the arbitrator but after perusing the list of arbitrators from the Chartered Institute of Arbitrators, the proposed arbitrator's name was missing, thus they counter proposed to have Counsel Mang'erere James to arbitrate over the dispute. Counsel for the applicants wrote to the respondent's advocates on 14th January 2025 and stated that they did not have an objection to having Counsel Mang'erere James as the arbitrator but they were not agreeable to the issue of costs. Counsel for the applicants then wrote two emails to the proposed arbitrator dated 7th February 2025 and 15th April 2025 seeking his availability to arbitrate over the dispute but no response has been forthcoming thus bringing the dispute to a stalemate. It is therefore clear that parties had agreed on an arbitrator but the said arbitrator did not respond to their emails.

13. This being the position, the best way forward is to have the parties agree and pick another arbitrator so that the dispute can be arbitrated upon and avoid unnecessary costs of litigation and delay.

This court is informed by the evidence of the parties in this case that parties had agreed on an arbitrator but for reasons unknown to this court, the arbitrator failed to

engage the parties on the way forward. I am still hopeful that this matter can be resolved between the parties without this court ordering the Chartered Institute of Arbitrators to appoint an arbitrator. It is also not in the interests of the parties for this court to declare that there is no valid arbitration agreement between the parties.

14. Consequently, I decline to grant any of the orders sought and give

Orders as follows: -

a) That the parties have twenty-one (21) days to agree on an arbitrator to arbitrate on their dispute in accordance with Section 12(c) of the Arbitration Act which option is cost-effective for the parties. In default of the parties agreeing on a single arbitrator, the parties are at liberty to take the other options under Section 12 of the Act.

b) That each party shall meet their own costs.

15. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED

AT THIKA THIS 27TH DAY OF FEBRUARY 2026.

F. MUCHEMI
JUDGE