



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CORAM: F. MUGAMBI, J
MISC APPLN NO. E1019 OF 2025

BETWEEN

**QAMBI GROUP LIMITED
APPLICANT**

VERSUS

**AVIATION CAPITAL LLC
RESPONDENT
FINTECH AVIATION LLC ... 1ST INTENDED INTERESTED
PARTY
CA TERRA AVIA SRL 2ND INTENDED INTERESTED
PARTY**

RULING

Background and Introduction

1. There are presently two applications pending determination before this Court. The first application, dated 7th October 2025, has been brought pursuant to ***Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 2, 3 and 4 of the Civil Procedure Rules, and Section 7 of the Arbitration Act.*** The said application has been filed by QAMBI GROUP

LIMITED, wherein the applicant seeks interim measures of protection restraining AVIATION CAPITAL LLC from repossessing aircraft registration number ER-BCT/MSN 26850, pending the hearing and determination of the application and the subsequent referral of the dispute to arbitration.

2. The second application, which would have been dated 11th November 2025, was effectively withdrawn by AVIATION CAPITAL LLC through a Notice of Withdrawal dated 13th January 2026. The final application on record is dated 17th December 2025, filed by the intended interested parties. In that application, the parties seek leave to be enjoined in these proceedings and further pray for an order vacating the interim ex parte orders issued by this Court pursuant to the application dated 7th October 2025.
3. AVIATION CAPITAL LLC, through its Replying Affidavit and Grounds of Opposition dated 17th December 2025, filed in response to the first application, has raised a preliminary objection. I do consider it prudent to address the said objection *in limine*, as its determination bears directly upon the

jurisdiction of this Court to entertain the substantive prayers sought in the pending application. The respondent contends that the application before this Court is fatally and incurably defective, on the basis that it contravenes **Rule 2 of the Arbitration Rules, 1997**, which is couched in mandatory terms.

4. QAMBI GROUP LIMITED, in its rejoinder, has urged this Court to disregard the preliminary objection raised by AVIATION CAPITAL LLC, contending that the same amounts to a mere technicality which ought not to be elevated above the dictates of substantive justice. I am therefore confronted with a question that epitomizes the perennial tension between procedural propriety and substantive justice.

Analysis and Determination

5. Applications under **Sections 6 and 7 of the Arbitration Act** are, by express statutory command of **Rule 2 of the Arbitration Rules**, required to be instituted by way of summons in the suit. The purport and essence of **Rule 2** is clear and unequivocal. QAMBI GROUP LIMITED does not

controvert the existence of the statutory provisions, nor does it deny the mandatory tenor of **Rule 2**. It has however not proffered any justification for its non-compliance with the procedural requirements prescribed therein.

6. While it may be tempting to dismiss such a lapse as a mere technicality, the jurisprudence of our superior courts has consistently held otherwise. The Court of Appeal in **Scope Telematics International Sales Limited V Stoic Company Limited & Another, [2017] eKLR** was categorical in its pronouncement that the manner of initiating a suit is not a trivial procedural issue but one that goes to the very foundation of jurisdiction. The Court observed as follows:

“The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction... There can be no other interpretation of Rule 2. The application should have been anchored on a suit. It was not about what prejudice the appellant or and 2nd respondent

would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective”.

7. The Court of Appeal went further to underscore that such a transgression cannot be salvaged by recourse to **Article 159 of the Constitution**, which enjoins courts to administer justice without undue regard to procedural technicalities, nor by reliance on the “Oxygen principles” under **Sections 1A and 1B of the Civil Procedure Act**. These provisions, laudable as they are in promoting substantive justice, cannot be stretched to cure defects that strike at the root of jurisdiction. As the Court of Appeal made clear, judicial discretion cannot be deployed to override a mandatory statutory requirement.

8. This position was reaffirmed in **Machiri Limited V Sogea-Satom Kenya Branch [2020] eKLR**, where the Court again reiterated that compliance with **Rule 2 of the Arbitration Rules** is not optional but a jurisdictional prerequisite.
9. The objection before me must therefore be determined against the background of this settled jurisprudence. The record is unambiguous. The application dated 7th October 2025 was not anchored upon any suit, nor was it brought by way of Chamber Summons as required by **Rule 2 of the Arbitration Rules, 1997**. In the circumstances, I am constrained to find that the application is fatally and incurably defective. It cannot be sustained. Having reached this determination, it follows inexorably that the other application, which is predicated upon or consequential to the application of 7th October 2025, cannot stand.

Disposition

- i. For the foregoing reasons, the application dated 7th October 2025 is***

hereby struck out for being incurably defective.

ii. The interim ex parte orders issued consequent to the said application are hereby vacated forthwith.

iii. Costs of the application are awarded to the Respondent, AVIATION CAPITAL LLC.

iv. All other pending applications are rendered otiose and are accordingly marked as spent.

**DATED, SIGNED AND DELIVERED IN NAIROBI
THIS 23RD DAY OF MARCH 2026.**

**F. MUGAMBI
JUDGE**

Delivered in presence of:

Mr Mahinda for the applicant
Ms Luther and Mr Okwach for the respondent
Ms Odera for the IPs
Court Assistant: Lillian