

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. E771 OF 2024

RYCE EAST AFRICA
LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

AEA
LIMITED.....DEFENDANT/APPLICANT

RULING

1. This Ruling relates to the Application by the Defendant dated 24th March, 2025. In it the Applicant seeks to stay all the proceedings herein and refer this matter to Arbitration.

Background Facts

2. The Defendant filed the Notice of Motion dated 24th March, 2025 seeking the following orders;

a) There be a stay of any and all Court proceedings herein pending the hearing determination of the application and pending the arbitration by an arbitrator.

b) The dispute between the Plaintiff and the Defendant be referred to arbitration.

c) Costs of this Motion be in the Cause.

3. The Application was supported by the Affidavit **of NICHOLUS KITHINJI**. He asserted that pursuant to a Master Lease Agreement dated 6th January 2020 between the parties, the Defendant engaged the Plaintiff for the supply and delivery of goods, with payment being contingent upon timely performance. The Defendant contended that the Plaintiff is in breach of the Agreement. That Clauses 20.1 and 20.2 require the parties to first pursue mutual negotiations, and if unresolved after 30 days, Clauses 20.3 to 20.8 mandate referral of the dispute to arbitration in accordance with the Arbitration Act, 1995. Although the Plaintiff issued a notice dated 1st August 2024 expressing intention to refer the matter to arbitration, the parties opted to invoke Clause 20.1 and engaged in negotiations, holding several meetings and temporarily shelving the dispute.
4. The Defendant further stated that in the event negotiations failed, the proper course was to issue a notice of arbitration,

which was not done. By virtue of the arbitration clause, the parties are bound to resolve the dispute through arbitration. That the Plaintiff's institution of the suit is said to be an attempt to circumvent and vary the agreed dispute resolution mechanism. The Applicant/Defendant maintained that it is ready and willing to proceed to arbitration as stipulated in the Agreement and prayed that the application be allowed in the interests of justice.

5. In reply, the Plaintiff vide the Replying Affidavit sworn on 6th May 2025 contended that the Defendant's Notice of Motion is incompetent under **Section 6 of the Arbitration Act**. This is because a stay of proceedings can only be sought before filing a Defence. Therefore, having already filed a Defence, the Defendant is statutorily barred from challenging the Court's jurisdiction in favour of arbitration. The Plaintiff further stated that it complied with Clauses 20.1 and 20.2 of the Master Lease Agreement by first pursuing amicable negotiations. That upon their failure, it issued a formal Notice of Intention to Refer the Dispute to Arbitration dated 1st August 2024. The arbitration did not proceed due

to the Defendant's failure to respond to the notice. This triggered Clause 20.3 of the Agreement, which confers jurisdiction upon the High Court where arbitration efforts lapse after 14 days. Consequently, the Defendant's conduct demonstrated disinterest in amicable resolution, and it should be estopped from asserting otherwise.

Issues for determination

6. The Court has carefully considered the Application, the Replying Affidavit, the written submissions and the oral highlights by Counsel for the parties. The Court frames only one issue for determination;

a) Whether an order of stay of proceedings under Section 6 of Arbitration Act should issue.

Analysis

7. It was the Applicant's contention **that Section 6(1) of the Arbitration Act** mandates a stay where there is a valid arbitration clause, unless the agreement is shown to be

inoperative. The Court's role is therefore not discretionary but obligatory once the statutory threshold is met.

8. In contrast, the Respondent explained that while the Defendant/Applicant seeks to rely on **Section 6 of the Arbitration Act** to support their application, the said section provides a clear guideline that must be strictly adhered to. In particular, where one party has already moved to Court, the other party must comply with the requirement to file an application for reference to arbitration at the time of entering appearance. Stay of legal proceedings is only allowed when a party enters appearance and files an application to refer the matter to arbitration and not when a party has already filed a defence to a suit.

9. **Section 6 (1) of the Arbitration Act** provides as follows:

“(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”

10. Under **Section 6(1)(a) and (b) of the Arbitration Act**, the Court may only decline to refer a matter to arbitration only when the arbitration agreement is null and void, inoperative or incapable of being performed; or there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

11. In the present case, it is common ground that there is indeed an arbitration agreement under Clauses 20.1 and

20.2. Indeed, a dispute exists between the parties whose intention was to refer such disputes to arbitration.

12. It is trite that the Court must stay the proceedings once the application is brought to Court not later than the time when the parties enters appearance or otherwise acknowledges the claim. This was well outlined in the case of **Niazsons(K) Ltd versus China Road & Bridge [2001] KLR 12** where 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 things:

(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.”

13. Following the lead of the above requirements, the Applicant entered an appearance and then proceeded to file

the Statement of Defence dated 6th March 2025. The Court acknowledges that in the Statement of Defence the Applicant stated “that whereas the cause of action arose in Nairobi as urged at Paragraph 25 of the Plaint, the jurisdiction of this Court is contested on the account of Clause 20.2 of the MLA”

14. However, a proper reading of **Section 6 of the Arbitration Act** and the relevant authorities makes it clear that where an arbitration agreement exists, a party seeking to rely on it must apply for a stay of proceedings and referral to arbitration at the time of entering appearance and before filing any pleadings in response to the suit.
15. In this instance, it is obvious that the Applicant herein did not file an application under Section 6 seeking a stay and referral. Instead, they entered appearance, filed a defence then this application, thereby demonstrating acceptance of this Court’s jurisdiction. By actively participating in the proceedings, they acquiesced or submitted to the authority or jurisdiction of this Court.

16. The Court reiterates the holding of the Court of Appeal in **Adrec Limited v Nation Media Group Limited** [2017] KECA 106 (KLR) where it stated;

“It should be emphasized that the right to seek and obtain stay of proceedings under section 6(1) of the Arbitration Act is lost the moment a defence is filed in the proceedings. By dint of the defence, the party filing it subjects itself to jurisdiction of the court and cannot thereafter resile from that position.

15. In FAIRLANE SUPERMARKET LIMITED VERSUS BARCLAYS BANK LTD NBI HCCC NO.102 OF 2011, this court held that -

“the option to refer to the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence. In the case of CORPORATE INSURANCE COMPANY VS. WACHIRA (1995-1998) IEA 20, it was held that if the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading and that the appellant had lost its right to rely on the arbitration clause by filing a defence ...

any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.”

17. It matters not that the Applicant in its Statement of Defence denied jurisdiction, the Applicant is faulted for filing a pleading, in this case the Defence, as opposed to seeking reference to arbitration at the time of entry of appearance.
18. In light of the above, the Application fails as the Applicant willingly subjected itself to the jurisdiction of this Court.
19. The Application is hereby dismissed.
20. As to costs, the same lie at the discretion of this Court. Costs ordinarily follow the event. There is no reason to depart from this sound legal principle and deny the successful Plaintiff/Respondent the costs of the Motion.

Determination

21. The Defendant/Applicant's application by way of a Notice of Motion dated 24th March, 2025 is HEREBY dismissed for lack of merits.

22. The costs of the Motion are awarded to the Plaintiff/Respondent.
23. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI
THIS 14TH DAY OF APRIL, 2026.**

**NJOROGE BENJAMIN K.
JUDGE**

In the presence of;

Mr. Ongoya for the Plaintiff/Respondent

N/A for Mr. Mwangi for the Defendant/Applicant

Mr. John Paul - Court Assistant