

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

COMMERCIAL CASE NO. E002 OF 2025

IN THE MATTER OF THE ARBITRATION ACT NO. 4 OF 1995

**IN THE MATTER OF THE ADJUDICATION RULES FOR THE
CONSTRUCTION INDUSTRY, 2003**

**IN THE MATTER OF A DISPUTE ARISING OUT OF A
CONTRACT DATED 18TH MARCH 2025**

AND

**IN THE MATTER OF SUBCLAUSE 67.1 TO 67.4 OF THE
GENERAL CONDITIONS OF CONTRACT**

BETWEEN

**AMBI FINCH
LIMITED.....PLAINTIFF/APPLICANT**

VERSUS

**MANGU
LIMITED.....DEFENDANT/RESPONDENT**

GARDENS

R U L I N G

Brief facts

1. Coming up for determination is the defendant's Notice of Preliminary Objection dated 16th January 2026 on the grounds that

this court lacks jurisdiction to hear and determine the application dated 26th November 2025 as the applicant has not registered a serialized arbitral award issued by a competent arbitrator and/or arbitral tribunal or panel of arbitrators in the current court or any court pursuant to Sections 2 and 3 as read with section 36 of the Arbitration Act; and all other enabling provisions under the said Act that touch on the issue of enforcement of an arbitral award thus the holding in **Irish Properties & another vs Nairobi City Council Civil Case No. 947 of 1999**. The defendant further states that the applicant has not commenced any arbitral proceedings under Order 46 of the Civil Procedure Rules to legitimize and facilitate the adoption and enforcement proceedings. As such, there is no decree capable of enforcement in the current proceedings and confirmation of the current proceedings can only embarrass and bring the court into disrepute.

2. The defendant states that the orders issued on 24th December 2025 are bad in law, incurably defective, inconsequential, unlawful, in violation of the law and due process and are incapable of enforcement for lack of an arbitral award that has been issued by a competent arbitrator.
3. Parties put in written submissions.

The Defendant's Submissions.

4. The defendant submits that under the Arbitration Act, the only application that can be filed in pursuit of the enforcement of an

award is an application to enforce an arbitrator's award and not an adjudicator's finding. The Arbitration Act defines an award only in reference to arbitration and the decision of a sole arbitrator or a panel of arbitrators. The defendant relies on **Order 46 of the Civil Procedure Rules** and the cases of **Dhanjal Brothers Limited vs The Director General of Kenya National Highways Authority Mombasa High Court Judicial Review Application No. 47 of 2017** and **Iris Properties & Another vs Nairobi City Council Civil Case No. 947 of 1999** and submits that the applicant has not commenced any arbitration proceedings to trigger enforcement proceedings under the Arbitration Act. The defendant argues that the current proceedings are only meant to abuse the court process and to bring the court into disrepute. The defendant further relies on the case of **Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)** and submits that the court cannot make any further step forthwith as there is no arbitral award or decree registered and filed in the High Court capable of enforcement to activate the jurisdiction of the court.

The Plaintiff's Submissions.

5. The plaintiff submits that the adjudicator's decision dated 22nd September 2025 (as corrected on 2nd October 2025) was rendered pursuant to the contract and applicable adjudication rules and it is therefore a binding contractual determination. The plaintiff submits that parties subscribed to the adjudication process and to the authority of the appointed adjudicator and the decision rendered on

22nd September and corrected on 2nd October 2025 is in conformity to Rule 26 of the Adjudication Rules. The plaintiff submits that Rule 8 of the Adjudication rules for the Construction Industry (2003), an adjudicator's decision is binding on parties unless and until set aside by agreement, arbitration or litigation as provided by the contract. Further Rule 10 provides that such a decision is enforceable and operational notwithstanding any intention to refer the dispute to arbitration or litigation.

6. Relying on the case of **Intex Construction Limited vs Kenya Rural Roads Authority (2020) KEHC 3446 (KLR)**, the plaintiff submits that it has properly brought before the court an enforceable adjudicator's decision for adaptation/enforcement. Further, the plaintiff submits that the present application is anchored on the contract between the parties (FIDIC Conditions as amended) dated 18th March 2025 which expressly adopts and binds the parties to comply with the adjudicator's decision. The

plaintiff argues that parties are bound by the terms of their bargain and a court of law cannot re-write a contract between parties unless coercion, fraud or undue influence are pleaded or proved. To support its contentions, the plaintiff relies on the case of **National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd and Another (2001) eKLR.**

7. The plaintiff further relies on the case of **SBI International Holdings AG vs Kenya National Highways Authority (Civil Case E968 of 2022) [2023] KEHC 20793 (KLR)** and submits that parties are bound by the dispute resolution procedures they have freely

chosen and the courts role is to give effect to those choices. The plaintiff submits that from the wording of the contract, it is clear that the contract anticipated that the adjudicator's decision would become final and binding pursuant to sub clause 67.1 within 28 days of the decision. Further, Rules 10 and 27 of the Adjudication Rules for the Construction Industry (2003) an adjudicator's decision is binding and enforceable whether or not the dispute is subsequently referred to arbitration.

8. The plaintiff submits that the court's role is not to interrogate the merits of the dispute but rather give the parties' contractual bargain by enforcing the adjudicator's decision. The plaintiff further submits that what is before the court is an adjudication decision and not an arbitral

award and thus the application is seeking enforcement of a contractually binding adjudicator's decision. Thus the defendant's reliance on arbitration jurisprudence is misplaced.

9. The plaintiff cites subclause 67.1 and submits that the defendant has neither issued a notice of dissatisfaction or referred the dispute to arbitration within the prescribed period of 28 days. Therefore the adjudicator's decision is final and binding and no longer subject to arbitration. To support its contentions, the plaintiff refers to the case of **SBI International Holdings AG vs Kenya National Highways Authority [2025] KEHC 12434 (KLR)** and submits that the adjudicator's decision became final and binding on 30th October 2025 after the lapse of 28 days of the adjudicator's decision and is no longer open for challenge. Thus, the respondent's belatedly

attempt to refer the matter to arbitration vide their letter dated 16th January 2026 to the Chartered Institute of Arbitrators is time barred and legally ineffective. Further no arbitral proceedings have been commenced to revise the decision of the adjudicator.

10. The plaintiff submits that adjudication decisions are premised on the principle "pay now, argue later." Thus the plaintiff seeks preservative relief in the nature of a *mareva* injunction and an order for security. Relying on the decision in **Uhuru Highway Development Ltd vs Central Bank of Kenya & 2 Others [1996] eKLR**, the

plaintiff argues that the purpose of a mareva injunction is to prevent dissipation of assets so as to avoid rendering a judgment nugatory, which this court is empowered to issue. The plaintiff further relies on the case of **International Air Transport Association & Another vs Akarim Agencies Company Limited & Others [2014] eKLR** and submits that it has satisfied all the limbs in order to be granted a mareva injunction. At the first instance, the plaintiff sought orders that a mareva injunction be issued ordering the amount of Kshs. 11,595,454/- plus accrued interest at the rate of 12% per annum compounded monthly from 2nd October 2025 be deposited in an interest earning account in the joint names of the parties' advocates pending the hearing and determination of the application dated 26th November 2025. The court granted the said orders on 24/12/2025 on interim basis but the respondent protested leading to the lifting of the orders on 19/01/2026.

The Law

Whether the preliminary objection is sustainable

11. The case of **Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696** is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

12. Sir Charles Newbold P. stated:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

13. Similarly the Supreme Court in the case of **Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR** held that:-

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

14. Further in the case of **Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others, [2014] eKLR** the court held that:-

Thus a preliminary objection may only be raised on a ‘pure question of law.’ To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

15. Evidently, a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

16. The respondent argues that the instant court lacks jurisdiction to hear and determine the application dated 26th November 2025 as the applicant has not registered any serialized arbitral award issued by an arbitrator or panel of arbitrators capable of enforcement.

17. The issue of jurisdiction is a fundamental one as was held in the case of **Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd (1989) eKLR**, the Court of Appeal held:-

Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

18. It is on record that the parties entered into a contract dated the 18th March 2005 for construction of infrastructure works on LR. No. 31724/2 Mangu Gardens in Kiambu County. The agreement provided for the following documents which formed part of the contract which included the Conditions of Contract; the Standard and Special Specification; the Priced Bill of Quantities; the Letter of Acceptance; Schedules of Supplementary Information and the Drawings. The Conditions of Contract for works of Civil Engineering Construction known as FIDIC Conditions of Contract provide very elaborate provisions for settlement of disputes between parties under subclauses 67.1 to 67.4.

19. Sub clause 67.1 to 67.4 provide that in the first instance, a dispute shall be referred to the engineer in writing who shall give his decision within 28 days after receiving the dispute. In the event the engineer fails to give the decision within the stipulated time or the parties are dissatisfied with the engineer's decision, parties may commence adjudication. The provisions further provide for an amicable settlement between the parties before

commencing adjudication. Thereafter the provisions provides for adjudication to

be conducted according to the Laws of Kenya and the Rules of the Chartered Institute of Arbitrators. The conditions further stipulates that the adjudication award is not final as any party to the contract can challenge the same through arbitration within 28 days from the date of the adjudicator's decision.

20. In the instant case, the parties underwent an adjudication process which culminated into an adjudication award dated 22nd September 2025. The FIDIC Conditions of Contract are very clear that any party can challenge the adjudication award through an arbitration process. I have perused the record and there is no evidence of arbitration having been initiated within the stipulated time by any of the parties who may have been dissatisfied by the award of the Adjudicator. Further, the respondent has not annexed any notice of dissatisfaction with the adjudicator's award. Additionally, the court has not allocated the letter dated 16th January 2026 allegedly referring the matter to arbitration. It is evident that the adjudicator's decision having been made on 22nd September 2025 and corrected on 2nd October 2025 ought to have been referred to arbitration by the respondent by 30th October 2025. A notice of dissatisfaction was not served on the applicant and the adjudicator as required. The respondent has not demonstrated that it referred the dispute to arbitration within the stipulated period of 28

days following the delivery of the adjudicator's award. In effect, the adjudicator's decision remains binding and enforceable. In the Court of Appeal decision in **National Irrigation Authority formerly the National Irrigation Board vs Satom SA (Civil Appeal E933 of 2023) [2025]**

KECA 1472 (KLR) (12 September 2025) (Judgment)

the court outlined the extent of judicial intervention in contracts entered under the FIDIC Conditions of Contract for Construction, MDB Harmonized Edition FIDIC 2010 (the FIDIC Pink Book) and stated:-

There is a common understanding by parties as to the following elements of the dispute resolution mechanism:-

a) A dispute of any kind whatsoever arising between the parties in connection with, or arising out of the contract or the execution of the works would be referred to the DB for a decision.

b) The decision of the DB shall be binding on both parties who shall give effect to it promptly unless and until it is resolved in an amicable settlement or by an arbitral award.

c) A party and it may be both, dissatisfied with a DB decision shall within 28 days after receiving the decision issue a notice of dissatisfaction

indicating its dissatisfaction and intention to commence arbitration.

d) No party shall be entitled to commence arbitration unless a notice of dissatisfaction is issued in accordance with sub clause 20.4.

e) Where no notice of dissatisfaction is issued in compliance with subclause 20.4 the DB decision shall be final and binding.

21. It is evident that no arbitration proceedings took place between the parties which leads to the conclusion that the parties were satisfied with the decision of the adjudicator. However, the failure by any party to move further proceedings does not take away the power of the court to enforce the decision of the adjudicator. As such, I reach the conclusion that this court has jurisdiction to hear and determine these proceedings.

22. In the interests of justice and to save the time of the court I hereby give the following orders/directions: -

a) That this preliminary objection dated 16th January 2026 has no merit and it is hereby dismissed with costs to the applicant.

b) That pending determination of this application, the following orders do hereby issue.

i. That a Mareva injunction do issue on interim basis restraining the respondent, whether by itself, agents, servant, directors, officers, employees and/or all persons acting on itself, from selling disposing off, alienating, removing charging, transferring dealing or in any way diminishing the value of the property

known as Title No. L.R. No.31724/2, Mangu Gardens pending the hearing and determination of this application or until further orders.

ii. That the respondent do furnish security for the adjudicated amount by depositing Ksh.11,594,454 plus accrued interest of 12% per sent into an interest-earning joint account in the names of the advocates on record for the parties within thirty (30) days pending the hearing and determination of this application.

iii. That parties do exchange submissions on this application within twenty (20) days starting with the applicant.

iv. That mention to confirm compliance be on 08/06/2026.

23. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED
AT THIKA THIS 30TH DAY OF APRIL 2026.***

**F. MUCHEMI
JUDGE**