

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
HCCOMM NO. E178 OF 2024

ARK CONSTRUCTION LTD.....PLAINTIFF/RESPONDENT
VERSUS

FEDHA PLAZA LIMITED.....DEFENDANT/APPLICANT
RULING

1. This ruling concerns the Defendant’s Notice of Motion dated 2nd May 2024, brought pursuant to Section 6 of the Arbitration Act, Rule 2 of the Arbitration Rules 1997, and Sections 1A, 1B and 3A of the Civil Procedure Act.
2. In the application, the Defendant seeks orders that these proceedings be stayed pending referral of the dispute to mediation and/or arbitration in accordance with the parties’ agreement, and that the costs of the application be provided for.
3. The application is premised on the grounds set out on its face and supported by the affidavit of Abraham M. Munene, the Defendant’s Executive Director. He depones that the parties entered into a construction contract dated 19th September 2016 in respect of the Capital “M” Residential Development in Westlands, Nairobi. He avers that the contract incorporates a binding dispute resolution clause, namely Clause 20, which provides for a multi-tier mechanism commencing with determination by the Project Manager, followed by amicable settlement, mediation, and ultimately arbitration.

4. The deponent states that whereas the contractual completion date was 21st February 2020, the works were completed on 28th April 2021, resulting in a delay of 62 weeks which the Defendant attributes wholly to the Plaintiff. On that basis, the Defendant claims entitlement to delay damages in the sum of Kshs. 124,000,000.00 pursuant to the contract. He further depones that upon reference of the dispute to the Project Manager, a determination dated 26th October 2022 was rendered in favour of the Defendant, affirming that the delay damages due to the Defendant exceeded any sums payable to the Plaintiff, and the parties were advised to pursue an amicable settlement. He avers that the present suit is premature, the parties having failed to exhaust the agreed dispute resolution mechanism. And that the dispute falls within the ambit of arbitration.
5. The Plaintiff opposes the application through the Grounds of Opposition dated 28th June 2024 and the Replying Affidavit sworn by Esther Waweru on the same date. It is contended that the dispute resolution clause is inoperative and incapable of implementation, having resulted in a deadlock due to its vagueness and dependence on mutual agreement.
6. She further avers that the multi-tier mechanism cannot be partially invoked and that arbitration cannot proceed in the absence of mediation, which has failed to commence. It maintains that it has acted in good faith to resolve the dispute, while the Defendant has not meaningfully engaged.
7. She contends there is no valid basis for referral of the matter to arbitration and urges that the application be dismissed.

8. The parties filed written submissions.

Analysis and determination

9. The issue for determination is whether this Court should stay the proceedings and refer the dispute to mediation and/or arbitration.

10. The application was brought pursuant to Section 6 of the Arbitration Act, Rule 2 of the Arbitration Rules 1997, and Sections 1A, 1B and 3A of the Civil Procedure Act

11. I am of the understanding that the **Arbitration Act** having provided for the mode for hearing and determination of arbitral disputes, the provisions of the Civil Procedure Rules are not applicable. I am guided by the position taken by the Court of Appeal in **Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR** wherein the Court observed that:

“...All the provisions including the Civil Procedure Act, and Rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and Rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states; “Except as provided in this Act no court shall intervene in matters governed by this Act.”

12. The procedure and authority for referring matters to arbitration is provided for under section 6(1) of the Arbitration Act:

6 (1) A court before which proceedings are brought in a matter which is 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 proceedings is sought, stay the proceedings and refer to arbitration unless it finds:

a. That the arbitration agreement is null, 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.

13. It is now settled that where there exists a valid and binding arbitration agreement, the court is enjoined to stay proceedings unless the exceptions set out under Section 6(1) of the Arbitration Act are established.
14. The underlying principle is that courts must respect and give effect to arbitration agreements as an expression of party autonomy. It is equally trite that a party seeking to invoke an arbitration clause must do so timeously, that is, not later than the time of entering appearance.
15. In the present case, it is common ground that the parties entered into a contract containing Clause 20, which provides for a multi-tier dispute resolution mechanism culminating in arbitration. The existence and validity of the arbitration agreement is therefore not in dispute.
16. The record shows that the Defendant/Applicant entered an appearance on 2nd May 2024 and contemporaneously filed the present application seeking referral of the dispute to mediation and/or arbitration. Although attempts at mediation

were made, the same did not yield a settlement. In my view, the failure to conclude the preliminary steps under a multi-tier dispute resolution clause does not, of itself, render the arbitration clause inoperative or incapable of performance. Rather, it reinforces the obligation of the parties to adhere to the agreed contractual process.

17. Further, the Defendant has not filed a defence, which, in the circumstances of this case, is indicative of its intention to have the dispute resolved through the agreed arbitral mechanism before the Court assumes jurisdiction over the merits of the suit.
18. In light of the foregoing, I am satisfied that the dispute herein falls within the ambit of the arbitration clause and that the Applicant has properly and timeously invoked the same. Accordingly, I find merit in the Defendant's Notice of Motion dated 2nd May 2024 and hold that this is a proper case for the Court to stay the proceedings and refer the dispute to arbitration in accordance with the parties' agreement.
19. Consequently, these proceedings are hereby stayed, and the dispute is referred to arbitration. There shall be no order as to costs.

RULING delivered virtually, dated and signed at **NAIROBI**

This **30th** day of **April** 2026.

P.M. MULWA
JUDGE

In the presence of:

Mr. Isahi for Plaintiff/Respondent

Ms. Wachira for Defendant/Applicant

Court Assistant: *Lispa*