

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
MILIMANI LAW COURTS
CIVIL CASE NO. E177 OF 2023 (OS)

IN THE MATTER OF THE ARBITRATION ACT CHAPTER 49 OF THE LAWS
OF KENYA

BETWEEN

FUJITA CORPORATION - MITSUBISHI CORPORATION

CONSORTIUM.....PLAINTIFF/APPLICANT

VERSUS

MMC PETROLEUM LIMITEDDEFENDANT/RESPONDENT

RULING

1. This ruling concerns the Originating Summons dated 27th April 2023 brought by the Applicant under the Arbitration Act (Cap 49), seeking, inter alia:
 - i. an order setting aside the appointment of Mr. Paul Lilan as the sole arbitrator; and
 - ii. a declaration that any arbitral process between the parties must be commenced and conducted strictly in accordance with the

Rules of Arbitration of the International Chamber of Commerce
(ICC Rules).

2. The application is supported by affidavits sworn by **Mr. Lau Jeck Deng**, who deponed that the Service Agreement between the parties provided for a sequential dispute resolution mechanism comprising written notice of dispute, good faith negotiations through meetings, and ultimately arbitration strictly in accordance with ICC Rules.
3. The Applicant's case is that although a dispute arose between the parties, the Respondent disregarded the agreed contractual procedure by unilaterally proposing and later appointing **Mr. Paul Lilan** as the sole arbitrator. The Applicant objected to this appointment, maintaining that it was contrary to the arbitration clause.
4. The Applicant further deponed that the Respondent had earlier filed an Originating Summons seeking court appointment of an arbitrator, which was dismissed on 10th February 2023 for lack of merit. Despite that dismissal, the Respondent proceeded to appoint the same arbitrator through correspondence, and the arbitrator accepted the appointment and sought to convene a preliminary meeting.
5. According to the Applicant, the unilateral appointment violated the express terms of the contract; that parties are bound by the agreed procedure; and that the Court cannot rewrite the parties' agreement. It was also contended that the mandatory pre-arbitral negotiation requirements had not been satisfied, as only one meeting had occurred.

6. The Applicant therefore prayed for the intervention of the Court by staying the arbitral process and setting aside the impugned appointment.

Respondent's Reply

7. The application was opposed through a replying affidavit sworn on 19th May 2023 by Mr. George Morara Nyasimi, the Managing Director of the Respondent.

8. He confirmed the existence of the Service Agreement dated 14th November 2020 but asserted that clause 17.4 merely provided procedural rules and did not designate any arbitral forum. In his view, the clause did not mandate referral of disputes to the International Court of Arbitration.

9. He further contended that arbitration ought to be conducted locally in Kenya for reasons of accessibility and affordability, and that any ambiguity in the dispute resolution clause—having been drafted by the Applicant—ought to be construed against it under the doctrine of *contra proferentem*.

10. The Respondent also alleged bad faith on the part of the Applicant, stating that the Agreement was terminated on 8th October 2021 without prior negotiations, and that meetings only occurred post-termination.

11. It was further deponed that pursuant to an earlier court ruling, the parties were to appoint an arbitrator by consultation, and in default, either party could appoint one unilaterally. On that basis, the Respondent appointed a sole arbitrator on 27th March 2023.

Further Affidavit

12. In response, **Mr. Lau Jeck Deng** swore a further affidavit on 30th May 2023.

13. He reiterated that clause 17.4 of the Service Agreement expressly provided that disputes would be settled under the ICC Rules, which prescribe not only procedural rules but also the mechanism for appointment of arbitrators.

14. He clarified that while the International Court of Arbitration administers the process, the dispute itself is determined by arbitrators appointed strictly pursuant to the ICC Rules.

15. He denied any ambiguity in clause 17.4 and contended that the doctrine of *contra proferentem* was inapplicable, given the Respondent's full participation in negotiating the Agreement.

16. He further stated that the earlier ruling in **HCCC E016 of 2022 (O.S.)** did not displace the contractual dispute resolution mechanism and

did not sanction unilateral appointment of an arbitrator outside the ICC framework.

Analysis and determination

17. The parties filed written submissions dated 30th May 2023 and 20th June 2023, respectively. Upon consideration of the pleadings, affidavits, and submissions, the Court is of the view that the sole issue for determination is: *Whether the appointment of Mr. Paul Lilan as the sole arbitrator ought to be set aside.*

18. Clause 17 of the Service Agreement provides as follows:

“17.2 A Party must declare that there is a dispute by giving notice in writing, giving details of the dispute;

17.3 Within sixty (60) days after a notice is given under clause 17.2, each party must use its best effort and negotiate in good faith and arrange for their representative, who must have the authority to settle disputes, to meet, at least twice, with the representative for the other party to attempt to settle the Dispute;

17.4 if the parties are unable to resolve the dispute within the time provided in clause 17.3 hereof or any extended time agreed between the parties then any dispute, controversy or claim arising out of or in connection to this contract, or breach, termination or invalidity thereof shall be settled under the Rules of Arbitration of the

International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules.”

19. A plain reading of clause 17.4 admits of only one interpretation: that any arbitration must be conducted under the ICC Rules, and that the appointment of arbitrator(s) must strictly follow the mechanism prescribed therein.

20. The Respondent’s argument that the clause merely provides procedural rules and does not designate any forum is, with respect, untenable. The incorporation of institutional rules imports the entire procedural architecture, including the appointment process.

21. It is settled law that courts will not rewrite contracts for parties. In **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR**, the Court of Appeal held that parties are bound by the terms of their contracts unless vitiating factors such as fraud, coercion or undue influence are pleaded and proved.

22. Similarly, in **Machiri Limited v Sogea-Satom Kenya Branch [2022] KEHC 11914 (KLR)**, the Court reaffirmed that contracts belong to the parties, and courts cannot relieve a party from a bargain merely because it later appears onerous.

23. In the present case, there is no pleading or proof of coercion, fraud, misrepresentation, or undue influence. The Respondent voluntarily entered into the Agreement and is bound by its terms.

24. The decision in **Nyoro Construction Co. Ltd v Attorney General [2018] eKLR** is instructive. The Court held that where parties adopt the ICC Rules, the appointment of arbitrators is ceded to the mechanisms contained in those Rules, and neither party nor the Court may substitute that process.

25. Section 12 of the Arbitration Act enshrines party autonomy, while section 12(5) empowers the Court to intervene where an arbitrator is appointed otherwise than in accordance with the agreed procedure.

26. In this case, the unilateral appointment of **Mr. Paul Lilan** was made in clear breach of clause 17 of the Service Agreement and outside the ICC framework chosen by the parties.

27. In the result, the Originating Summons dated 27th April 2023 is allowed, and the Court makes the following orders:

- i. The appointment of Mr. Paul Lilan as sole arbitrator is hereby set aside.
- ii. A declaration is hereby issued that any arbitration between the parties shall be commenced and conducted strictly in accordance

with Clause 17 of the Service Agreement and the ICC Arbitration Rules.

- iii. The parties are hereby directed to comply with the pre-arbitral procedures under Clause 17, including negotiation requirements, prior to commencement of arbitration.
- iv. Costs of the Application are awarded to the Applicant.

28. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI
THIS 10TH DAY OF APRIL 2026



HON. MR. JUSTICE MOSES ADO
Judge of the High Court

In the presence of: -

C/A – Moses

Matara h/b for Aluvale..... for the Plaintiff

Omoke..... for the Defendants