REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: F. MUGAMBI, J

INSOLVENCY PETITION NO. 21 OF 2024

BETWEEN

CATHERINE EUPHAN WATERER ..... 1ST PETITIONER VANESSA MARY STRONG ..... 2ND PETITIONER

VERSUS

GORDON ECCLES ..... RESPONDENT

RULING

Introduction and Background

1. This Ruling determines the application dated 2nd December 2024 filed by the respondent to the petition, in which he seeks to have the dispute(s) between the petitioners and himself, as shareholders of Pepo Place Ltd (the Company), referred to arbitration and for the insolvency proceedings to be stayed pending referral, hearing and determination of the arbitral proceedings. The application is supported by the affidavits sworn by

the applicant on 2nd December 2024 and 22nd January 2025. It is opposed by way of a Replying Affidavit sworn by **Catharine Euphan Waterer**, the 1st petitioner on 18th December 2024. I have equally considered the written submissions filed by the parties in respect of their positions.

Analysis and Determination

2. ***Section 6 of the Arbitration Act***, pursuant to which the present application has been brought, provides for the procedure under which the Court may, upon being satisfied that a dispute is properly referable to arbitration, stay the proceedings before it and direct that the matter be referred to arbitration.

3. The jurisprudence on this subject is settled that where there is a clear intention by parties to have their dispute resolved by way of arbitration, the scope of intervention available to this Court is narrowly circumscribed. In ***Blue Limited V Jaribu Credit Traders Limited, Nairobi (Milimani) HCCS No. 157 of 2008*****,** Kimaru, J. *(as he then was)* observed, *inter alia*, that:

> ***"It is now settled law that where parties have agreed to resolve any issue arising out of a commercial agreement, the courts are obliged to give effect to the said agreement of the parties by staying proceedings and referring the dispute for resolution by arbitration."***

4. Likewise, in ***Kenya Pipeline Company Limited V Datalogix Limited and Another, [2008] 2 EA 193***, Warsame, J *(as he then was)* held that the Court must respect the sanctity of arbitration agreements and refrain from usurping the jurisdiction of the arbitral tribunal, save in circumstances expressly provided for under the Act. The learned Judge stated as follows:

> ***"It is clear from the reading of section 6(1) that … the court must give effect to the terms of the contract which provide for arbitration and as a matter of course the court has a duty to honour the plea of the parties so***

as to give effect to the wishes of the parties and their contractual relationship… It is against public policy to deprive parties of their choice and hinder their attempt to resolve their disputes through arbitration…Our system of law and dispute resolution should not countenance the existence and continuation of two parallel processes in respect of the determination of an issue arising between the same parties or parties claiming under them over the same subject matter."

5. The Court of Appeal in ***Niazsons (K) Ltd V China Road & Bridge Corporation Kenya, [2001] eKLR*** provided authoritative guidance on the considerations that a court must bear in mind when determining an application under ***Section 6 of the Act***. The Court emphasized three critical factors, namely:

i. *Whether the applicant has taken any step in the proceedings other than the steps allowed by section 6 of the Act;*
ii. *Whether there are any legal impediments on the validity, operation, or performance of the arbitration agreement; and*
iii. *Whether the suit indeed concerns a matter agreed to be referred.*

6. Further, in ***Civil Appeal No. 10 of 2015; Geoffrey Muthinja & Another V Samuel Muguna Henry & 1756 others [2015] eKLR***, the Court of Appeal reinforced the doctrine of exhaustion of alternative dispute resolution mechanisms. It held that where a dispute resolution mechanism exists, and its language is clear, such mechanism must be exhausted before the jurisdiction of the courts is invoked. The Court aptly observed that courts ought to be the fora of last resort and not the first port of call.

7. Turning to the present matter, and against the backdrop of the foregoing principles, it is not in dispute that the petitioners and the respondent are shareholders of Pepo Place Limited. The principal

object for which the Company was incorporated was the acquisition and development of the property known as **Land Reference Number 192/50** (original number 192/18/5), situated to the northeast of Ngong Township in Kiambu District, now within Nairobi County (hereinafter 'the Pepo Property').

8. The petitioners instituted the present petition dated 31st July 2024, arising from a disagreement among the shareholders as to whether the Pepo Property ought to be disposed of with a view to recouping their respective investments, and thereafter winding up the Company on the basis that its substratum has dissipated. They seek to have the Company liquidated under ***section 424(1)(g) of the Insolvency Act***, which ground grants powers to liquidate a Company if the Court is of the opinion that it is just and equitable that the company should be liquidated.

9. This Court's attention has however been drawn by the respondent to **Article 32** of the Company's Memorandum and Articles of Association, which provides as follows:

"Whenever any difference arises between the Company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes, or touching anything then or thereafter done, executed omitted or suffered in the pursuance of these Articles, or of the statutes or touching any breach, or alleged breach, otherwise relating to the premises, to these Articles, or to any statutes affecting the company, or to any of the affairs of the Company, every such difference shall in the first instance be referred to Mediation and only thereafter referred shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, or if they

cannot agree upon a single arbitrator to the decision of two arbitrators of whom one shall be appointed by each of the parties in difference.

No party may commence any court proceedings or Arbitration in relation to such dispute until they have attempted to settle by Mediation and that Mediation has terminated."

10. The petitioners contend that the arbitration clause relied upon by the respondent envisages disputes between the Company on the one hand and its members on the other, and does not extend to disputes inter se between members. With respect, I am unable to agree with this contention. **Article 32** is drafted in broad and inclusive terms. The operative words *'otherwise relating to…any of the affairs of the Company'* are sufficiently wide to encompass disputes among members themselves, provided such disputes touch upon the affairs of the Company. The clause is therefore binding and

operative. To hold otherwise would be to defeat the clear contractual bargain of the parties and undermine the settled jurisprudence that courts must respect and enforce arbitration agreements.

11. The petitioners have further argued that the issue raised for determination, being an insolvency petition, can only be determined by this Court as an insolvency court and cannot be the subject of arbitration, since an arbitrator would have no jurisdiction to grant such orders. With respect, this argument conflates the statutory jurisdiction of the Court to order liquidation with the contractual obligation of the parties to first submit their disputes to arbitration.

12. It is indeed correct that the ultimate order of liquidation under ***Section 424 of the Insolvency Act*** lies within the prerogative of this Court. However, the petitioners' grievance, though framed as an insolvency petition, is in substance a shareholder dispute concerning the Company's sole asset and its future. The matter presently before the Court is not confined to the mechanical act of liquidation. Rather, it is the underlying

disagreement among shareholders as to whether the Pepo Property should be disposed of and whether the Company's substratum has dissipated. Such disputes, being quintessentially matters touching upon the affairs of the Company, are properly referable to arbitration under **Article 32** of the Company's Articles of Association.

13. It must be underscored that arbitration does not oust the jurisdiction of the Court in insolvency matters. Instead, it ensures that disputes which are contractual in nature and fall within the scope of an arbitration agreement are first resolved through the mechanism chosen by the parties themselves. Should the arbitral process establish that the Company's purpose has indeed dissipated and that liquidation is the appropriate course, the Court will then be properly moved to exercise its statutory jurisdiction under the Insolvency Act. To permit the insolvency petition to proceed in parallel would be to sanction a circumvention of the parties' clear contractual intention and to undermine the settled jurisprudence that courts are fora of last resort, not the first port of call.

14. I equally note that the respondent has invoked this mechanism at the earliest opportunity, before taking any substantive step in the proceedings, thereby satisfying the statutory threshold under ***Section 6 of the Arbitration Act***. There is no dispute that the mediation process contemplated under **Article 32** was attempted but proved unsuccessful.

15. The petitioners' submission that arbitration, like mediation, would inevitably fail is speculative and pre-emptory. The Court cannot endorse such conjecture as a basis for disregarding a binding arbitration agreement. The agreement belongs to the parties themselves, who knowingly and voluntarily bound themselves to its terms, and they cannot whimsically be permitted to renage from it.

16. In any event, even if the parties were unable to agree upon the appointment of an arbitrator, the Arbitration Act provides mechanisms to ensure that the arbitral process is not stymied, including Court intervention. In the circumstances, the Court is enjoined to give effect to the parties' contractual

bargain and to refrain from entertaining parallel proceedings that would undermine the sanctity of the arbitration agreement.

Disposition

17. Accordingly, the application dated 2nd December 2024 is allowed. The insolvency proceedings instituted by the petitioners are stayed forthwith, and the dispute between the parties is referred to arbitration. Costs of the application shall abide the outcome of the arbitral proceedings

DATED, SIGNED AND DELIVERED IN NAIROBI THIS *12TH* DAY OF *MAY* *2026*.

F. MUGAMBI
JUDGE

Delivered in presence of:
Wandabwa for petitioner/respondent
Otieno for Anzala for respondent/applicant
Court Assistant: Lillian & Gloria