



**Talent Academy Limited v Embu High School Limited (Civil Case E217 of 2023) [2025] KEHC 8992 (KLR) (Civ) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8992 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE E217 OF 2023**

**JN MULWA, J**

**JUNE 26, 2025**

**BETWEEN**

**TALENT ACADEMY LIMITED ..... PLAINTIFF**

**AND**

**EMBU HIGH SCHOOL LIMITED ..... DEFENDANT**

**RULING**

1. Before the court for determination is the Defendant's Preliminary Objection dated 30<sup>th</sup> January 2024 to the jurisdiction of this court to entertain the suit seeking for its striking out with cost to the defendant.
2. The grounds of objection are that: -
  - a. The Honourable Court lacks jurisdiction to hear and determine the matter herein by virtue of the express provisions of Clause 10 of the tenancy agreement dated 19<sup>th</sup> of December 2019 which requires the dispute be sent to mediation first and then arbitration where mediation fails. It, therefore, follows that the court should down its tools in line with the principles set out in *The Owners of Motor Vessel Lillian S V Caltex Oil Kenya Limited (eKLR 1989)*.
  - b. The present suit is therefore brought prematurely and is therefore an abuse of the process of this Honourable Court for the foregoing reason.
  - c. The Defendant requests this Honourable Court to refer this matter to a mediator appointed by consent of both parties and only if mediation fails then to an arbitrator under the laws of Kenya.



- d. The plaint dated 18th December 2023 and subsequent amended Plaint dated 5th February 2024 are incurably bad and defective and should be struck out in limine with cost to the defendant.
3. Parties filed submissions on the Preliminary Objection.

### **Plaintiff's Submissions.**

4. The Plaintiff gave a brief background of the facts.
5. On whether the arbitration agreements divest this court jurisdiction to hear and determine the Plaintiff's claim, the applicants submitted that it does not. The decision in Olivia Adong' George Lomoro v Spring Hillpark Limited [2022] KEELC 625 (KLR) was relied upon to buttress the submission.
6. The Applicant, while relying on the provisions of section 6(1) of the *Arbitration Act* submitted that a plain reading of provision would eliminate any doubt that existence of an arbitration agreement cannot oust the jurisdiction of the Court.
7. In reference to arbitration, it was submitted that the Defendant ought to have filed the application when it entered appearance.
8. That nowhere in the Preliminary Objection does the Defendant seek stay and reference of the matter to arbitration and therefore the court cannot, in the face of clear stipulations of section 6 of the *Arbitration Act* grant stay proceedings in the absence of an application. Counsel relied on the sentiments of the Court in of Stratogen Limited V County Government of Kisii [2023] KEHC 25071 (KLR) where the court dismissed the Defendant's notice of preliminary objection to stay proceedings in favour of arbitration. The court stated as follows;

“Ideally, the Defendant ought to have filed an application via summons, and not a preliminary objection, as it did herein. Rule 2 of the Arbitration Rules, 1997 provides that 'Applications under sections 6 and 7 of the Act shall be made by summons in the suit. My understanding of a preliminary objection is that it should be one that finally disposes of a matter. The law envisions an application for stay and not a preliminary objection.”
9. Rule 2 of the Arbitration Rules which came into force on 9<sup>th</sup> May 1997, states that; ‘applications under section 6 and 7 of the Act shall be made by summons in the suit, and further cited the provisions of Section 6 (1) of the *Arbitration Act* and Rule 2 of the Arbitration Rules.

### **Defendant's submissions.**

10. Counsel cited the provisions of Article 159(2) (c) of *the Constitution* of Kenya 2010, which recognizes mediation and arbitration as modes of dispute resolution and implores the court to promote them as methods for resolving disputes. While citing the case of Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited (1969), counsel submitted that a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, further on the case of Nyutu Agrovet Limited vs Airtel Networks Limited (2015) eKLR.
11. Additionally the Applicant suggested that that since mediation failed, the parties are therefore required to follow through and refer the matter to Arbitration pursuant to Clause 10 of its tenancy agreement and urged that Section 10 of the *Arbitration Act* implores the court not to intervene in a matter



governed by the Act except as provided under it urging that the dispute be referred to arbitration as it is the rightful jurisdiction in the circumstances.

### **Analysis and Determination.**

12. The Plaintiff/Applicant filed the application dated 5<sup>th</sup> February 2024 seeking summary judgment which motion provoked the instant objection. It is yet to be heard and determined.

### **Issues for determination**

- a. Whether the Defendant's Preliminary Objection is merited.
  - b. Whether the preliminary objection is sustainable.
13. In *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd (1969) EA 696*, Law J.A stated that:

“So far as I am aware, a preliminary objection consists of a pure 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. Examples are an objection on the jurisdiction of the Court, or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”
  14. Sir Charles Newbold, P in the *Mukisa Biscuits Case*(supra) further added that:-

“A preliminary objection is in the nature of what used to be a demurer. It raises a prime 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 ...”
  15. The sentiments cited above capture the basis of the Defendant's preliminary objection that jurisdiction of the court and reference of the dispute to arbitration in accordance with the contract ought to be granted.
  16. As was settled in the *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd*, it is trite that jurisdiction is everything and without it the court has no power to take any step in a suit.
  17. It is not disputed that mediation failed, nor that at Clause 10 of the tenancy agreement provides for arbitration if mediation failed.
  18. Section 6(1) of the *Arbitration Act* 1995 provides that;

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.
  19. A plain reading of section 6(1) of the *Arbitration Act* reveals that an arbitration agreement does not deny a court jurisdiction to hear and determine a suit based on the agreement and as courts have



- maintained, it merely gives the Defendant a defense to the claim which must be exploited by way of application for stay for the dispute to be referred to arbitration.
20. There is no evidence of the Defendant having applied for stay of proceedings despite having relied on section 6 (1) of the *Arbitration Act*, 1995.
  21. In *Stratogen Limited V County Government of Kisii* [2023] KEHC 25071 (KLR) the court dismissed the Defendant's notice of preliminary objection to stay proceedings in favour of arbitration. The court stated as follows:-

“Ideally, the Defendant ought to have filed an application via summons, and not a preliminary objection, as it did herein. Rule 2 of the Arbitration Rules, 1997 provides that 'Applications under sections 6 and 7 of the Act shall be made by summons in the suit. My understanding of a preliminary objection is that it should be one that finally disposes of a matter. The law envisions an application for stay and not a preliminary objection.'”
  22. In *Corporate Insurance Company vs Wachira* (supra), the Court held inter alia:-

“that existence of an arbitration clause is a defense to a claim filed against a party, save that a party seeking to rely on the existence of such an arbitration clause as a defence cannot be allowed to use it to circumvent a statutory requirement with regard to the mode of applying for a stay of proceedings.”
  23. It is noted that the Defendant has not made a formal application for stay of proceedings as is a requirement under the Act alongside an application filing an appearance to allow time to explore alternative dispute resolution by way of arbitration. It is not an automatic remedy, but at the discretion of the court upon application.
  24. In *Meshack Kibunja & 3 others v Kirubi Kamau & 5 others, Central Highlands Tea Co. Ltd (Interested Party)* (2021) eKLR, the court expressed itself thus;

“A Preliminary Objection is not the legal procedure to seek stay of proceedings under Section 6 of the *Arbitration Act* for parties to pursue arbitration.”
  25. The tenor and import of Article 159(2)(c) of *the Constitution* read together with section 6(1) of the *Arbitration Act* is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obligated to give effect to that agreement. Secondly, where a party elects to come to court and the other party to the arbitration agreement seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance.
  26. The Defendant being the party seeking compliance with the Arbitration clause ought to have sought stay of proceedings instead of raising the Preliminary Objection as provided at Section 6 (1) of the Act.
  27. For the foregoing, the court finds no merit in the Defendant's objection at numbers 1 and 2 of the Preliminary Objection. An arbitration clause in an agreement does not oust the court's jurisdiction to entertain the suit.
  28. As to objection number 3, the court is persuaded to allow the same and make an order referring this suit to arbitration. The arbitrator shall be appointed by consent of the two parties within 21 days. If they fail to agree, the Law Society of Kenya, upon application shall appoint an arbitrator within 21 days of such application.



29. This matter shall be listed for mention for further directions on 28/07/2025.

30. The Preliminary Objection having succeeded partially, each party shall bear own costs.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE 2025.**

.....

**JANET MULWA.**

**JUDGE**

