



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lenana Innovative Solutions Limited & 2 others v Wlb Asset II Pte Ltd & another (Constitutional Petition E078 of 2025) [2025] KEHC 12470 (KLR) (Constitutional and Human Rights) (14 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 12470 (KLR)

**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS**

**CONSTITUTIONAL PETITION E078 OF 2025**

**AB MWAMUYE, J**

**AUGUST 14, 2025**

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015**

**AND**

**IN THE MATTER OF THE BANKING ACT, 2010**

**AND**

**IN THE MATTER OF THE CONSUMER PROTECTION ACT**

**AND**

**IN THE MATTER OF THE BILLS OF EXCHANGE ACT**

**AND**

**IN THE MATTER OF FOREIGN INVESTMENTS PROTECTION ACT**

**AND**

**IN THE MATTER OF SECTION 10 MOVABLE PROPERTY SECURITY RIGHTS ACT, 2019**

**AND**

**IN THE MATTER OF THE TAX PROCEDURE ACT**

**BETWEEN**

**LENANA INNOVATIVE SOLUTIONS LIMITED ..... 1<sup>ST</sup> PETITIONER**



**WILFRED KAMAU ..... 2<sup>ND</sup> PETITIONER**

**ERIC WACHIRA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**WLB ASSET II PTE LTD ..... 1<sup>ST</sup> RESPONDENT**

**WLB ASSET VI PTE LTD ..... 2<sup>ND</sup> RESPONDENT**

## **RULING**

(On The Respondents' Notice Of Preliminary Objection Dated 28/04/2025 And The Chamber Summons Application Dated 15/04/2025)

1. The Respondents filed the present Chamber Summons application dated 15<sup>th</sup> April 2025 for orders that:
  - i. The Applicants' Chamber Summons Application dated 15<sup>th</sup> April 2025 seeking to refer the dispute to arbitration be admitted for hearing during the current High Court vacation; and
  - ii. The costs of this application be provided for.
2. The application was accompanied by a supporting affidavit dated 15<sup>th</sup> April 2025 and sworn by Zillah Moka, an advocate of the High Court of Kenya, who avers that the dispute between the Respondents and the Applicants is subject to the promissory notes dated 21<sup>st</sup> December 2022 and 4<sup>th</sup> January 2024 which provides that the parties to the Promissory Notes agree that any dispute arising out of or in connection with the Promissory Notes, including a dispute relating to the existence, validity, or termination of the Promissory Notes shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre in accordance with the rules of the Singapore International Arbitration Centre.
3. They further aver that the matter should be resolved through arbitration in accordance with the terms of the Promissory Notes, Subordination Agreements, Account Charges, Deed of Assignment and Personal Guarantees.
4. According to her it is imperative that the proceedings filed in this suit be stayed pending the inter-parties hearing and determination of their Chamber Summons Application so that no further proceedings will be taken in breach of the arbitration clauses contained in the Promissory Notes, Subordination Agreements, Account Charges, Deeds of Assignment and Personal Guarantees.
5. In response and in opposition to the Chamber Summons Application, the Petitioners filed a Notice of Preliminary Objection dated 28<sup>th</sup> April 2025 on the ground that the Respondents lack locus standi to file the application or in any event to commence and or sustain suit in the Republic of Kenya.
6. They equally filed a Replying Affidavit dated 28<sup>th</sup> April 2025 and sworn by Eric Wachira, the 4<sup>th</sup> Petitioner herein who avers that the Petition is properly before this court and that the Arbitration body proposed, Singapore International Arbitration Centre (SIAC), lacks the constitutional mandate to interpret and enforce the Bill of Rights or determine violations of Article 40 relating to the protection of their proprietary rights under the *Constitution* of Kenya, 2010 or address the issue of the legality of securities registered by a non-existent person under Kenyan law as pleaded in the Petition.



7. He asserts that the issues raised in the Petition are public law matters that can only be dealt with under the purview of the Petition and automatically oust the jurisdiction of Arbitration.
8. According to him, the Petitioners are challenging the constitutionality of Section 6(4) of the Movable Properties Act and the constitutionality of the agreements entered into without the Respondents first complying with the relevant statutory and constitutional provisions.
9. He further avers that the Arbitration agreement is incapable of being performed as the Respondents are not registered in Kenya and have no locus standi to commence suit let alone enforce the legal rights. The Petitioners contend that the charges registered against their movable properties was illegal and interfere with their constitutional right to property.
10. He contends that this Honourable Court cannot countenance the enforcement of English law instead of the Kenyan statutes as doing so would be in violation of the Constitution and fundamental public policy. Thus, the Respondent's application must fail as the Singapore Arbitral Tribunal does not have the powers to interpret and enforce Kenya's Constitution or grant constitutional remedies under Kenyan law as sought in the Petition.
11. The Application was canvassed by way of written submissions, and in compliance all parties filed and served their submissions.

### **Petitioners' Submissions**

12. The Petitioners filed their submissions dated 4<sup>th</sup> June 2025, where they reiterated contents of their replying affidavit dated 28<sup>th</sup> April 2024 and further submitted that the Respondents lack locus standi being that they are non-registered foreign companies in Kenya and therefore a non-existent person for purposes of Kenyan law. For these reasons, they lack capacity to sue, defend or enforce contractual rights. Reliance was placed on the following cases: *Stitching Rabo Bank Foundation vs Ava Chem Limited* (2018) eKLR, *Global Tours & Travel Ltd v Five Continents Stationers Ltd & Another* [2015] eKLR, *Kimanthi Muiu v Africa Nazarene University* [2021] eKLR and the Supreme Case of *Kensalt Limited vs Water Resources Management Authority* Petition No. 8 of 2016.
13. They further submitted that the arbitration agreement is null and void, inoperative and incapable of being performed as the Respondents are in breach of mandatory statutory provisions precedent to contracting. They further stated that statutory compliance is conditions precedent for contracting and since the conditions precedent were not met, all actions thereof were null and void.
14. They also contend that the Respondents have not met the conditions for reference of the matter to Arbitration as provided under Section 6 of the Arbitration Act. They aver that the Petition oscillates on the violation of the Petitioners right to property as guaranteed under Article 40 of the Constitution. Further, that the Petition raises public law and statutory compliance issues including registration and enforcement of securities interest by a non-existent legal person contrary to the provisions of the Company Act, undertaking financial business without registration contrary to the Banking Act and undertaking business in Kenya without obtaining a Kenya Revenue Authority Personal Identification Number contrary to the Tax Procedure among others. They cited the following cases in support of the same: *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* (Petition 15 of 2020) [2023] KESC 14 (KLR), *Maina v Kenya Commercial Bank PLC & another* (Constitutional Petition E003 of 2023) [2024] KEELRC 2287 (KLR) (26 September 2024) (Ruling), *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR and the *Kenya Anti-Corruption Commission v Deepak Kamani & Others* [2014] eKLR.



## Respondents' Submissions

15. The Respondents herein filed submissions in support of their application for stay pending arbitration dated 15<sup>th</sup> April 2025 and submitted thus, that the Preliminary Objection to the Stay Application is fundamentally flawed as it fails to satisfy the established legal threshold for a proper preliminary objection as it neither raises a pure point of law nor is it capable of disposing the matter preliminary. Accordingly, in its substance and form, it is an evidentiary issue disguised as a legal one and ought to be dismissed. Reliance was placed on the following cases: *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*, 1969, *Kenya County Government Workers Union v County Government of Narok & another* [2024] KECA 1843 (KLR), *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu HCC No. 22 of 1999 (UR).
16. They stated that the fact that the Court is required to interrogate factual matters in order to make a determination on the issue of whether the Respondents have locus standi to defend the instant Petition, clearly shows that the Preliminary Objection has not met the legal threshold. They further stated that an assertion that a person has no locus standi does not mean that the person cannot file a suit before a given forum and but also, the said party has no right to appear or be heard before the said forum. This means that a party cannot sue or be sued therefore it means that the Petitioners cannot sustain the Petition against the Respondents.
17. In addition, they averred that if the Applicants truly had no legal standing, then the entire suit would be defective for having been instituted against non-existent parties. It would therefore mean that this Honourable Court would not be able to issue interim conservatory orders against non-existing persons. Reliance was placed on the case of *Law Society of Kenya v Commissioner of Lands & 2 others* [2001] eKLR.
18. They further contend that the Respondents are properly constituted juristic persons incorporated under their respective jurisdiction and therefore endowed with legal capacity irrespective of the jurisdiction which they were incorporated which includes the right to institute legal proceedings in Kenya to enforce contractual rights. They relied on the case of *Mission SOS International Incorporated v Mission Sos Africa Inc & 4 Others* [2024] KEHC 9498 (KLR).
19. On the application for stay, they submitted that it is anchored on Section 6 (1) of the *Arbitration Act* which vests this Court with the obligation to stay proceedings and refer the parties to arbitration where an *arbitration act* governs the subject matter of the dispute. They further stated that this Court is not permitted to delve into the merits of the dispute including dealing with any purported issues touching on the validity of the underlying contracts. They aver that the limits of Court's intervention into international arbitration are expressly limited under the Act and once established there is a valid arbitration agreement under Section 6, this Court must down its tools. They relied on several cases including; *Niazsons (K) Ltd v China Road & Bridge* [2001] KECA eKLR and *Mt. Kenya University v Step Up Holding (K) Ltd* [2018] KECA eKLR, *Titus Kitonga & another v Total Kenya Limited & another* [2018] KEHC eKLR, *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* [2021] KEHC 93 (KLR) and the Court of Appeal case of *Diocese of Marsabit Registered Trustees v Technotrade Pavilion Ltd* [2014] KEHC 4810 (KLR) among others.
20. They further filed Supplementary Submissions dated 11<sup>th</sup> June 2025 lodged to respond to the misleading authorities set out in paragraphs 13 to 15 of the Petitioner's submissions. The authorities being *Global Tours & Travel Ltd v Five Continents Stationers Ltd & Another* where the actual issue before the Court of Appeal was on the locus standi of the Respondent's status as a creditor not on compliance or non-compliance with registration requirements under the *Companies Act*.



21. They also contested the authority cited by the Petitioners namely *Kimanthi Muiu v Africa Nazarene University* [2021] eKLR mentioned in paragraph 14 of the Petitioner’s submissions and *Kenya Private University Workers Union v Africa Nazarene University* [2023] eKLR attached in their case digest. They stated that the first case does not exist in the Kenya Law Reports database and the second case contains no such holding as the one claimed by the Petitioners.
22. They further contested the citing of *Kensalt Limited v Water Resources Management Authority*, Petition No. 8 of 2016 where the Petitioners attempted to suggest that the Supreme Court has adopted a more lenient approach to locus standi and favours the ventilation of substantive grievances. The Respondents’ counsel however indicate that that was not the finding of the case as the Supreme Court solely focused on whether the Petition in the matter was properly placed before it pursuant to Article 163(4)(a) of the *Constitution*.
23. According to the Respondents’ Counsel, the mere invocation of alleged breaches of constitutional provisions does not in itself render the dispute non-arbitrable and the Petitioners’ attempt to recast what is, a commercial and contractual dispute into a constitutional claim is not only legally untenable but also a deliberate and transparent stratagem designed to circumvent the binding arbitration process and this court should not permit parties to escape their contractual obligation by cloaking ordinary disputes in the garb of constitutional rhetoric.

### **Analysis And Determination**

24. I have carefully considered the Notice of Preliminary Objection, the Chamber Summons application, the responses thereto as well as the relevant case law. The following issues arise for determination:

#### **i. Whether the applicant put forth a competent preliminary objection**

25. In the case of *Garden Square Ltd v Kogo & Anor* 2000 (KLR) 1695, Ringera J (as he then was) stated that what constitutes a true preliminary objection is a pure point of law which if successfully taken would have the effect of disposing of the suit or application. this was in line with the decisions of the then Court of Appeal for East Africa in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 in which Sir Charles Newbold, the President of that court stated as follows:

“A preliminary objection is in the nature of what used to be 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

26. Much more recently, the Supreme Court again considered the position of parties resorting to the use of Preliminary Objections and pronounced itself as follows in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR: -

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of



dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

27. The Petitioners/ applicants have submitted that the Respondents have no Locus Standi or capacity to defend this suit. That due to the lack of the said capacity, the Respondents’ application should be struck out.

28. In the case of *Law Society of Kenya vs Commissioner of Lands & Others*, Nakuru High Court Civil Case No. 464 of 2000, the Court held that: -

“Locus Standi signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in Court of Law. Further in the case of *Alfred Njau and Others vs City Council of Nairobi* (1982) KAR 229, the court also held that: -

“the term Locus Standi means a right to appear in court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.”

29. It is therefore evident that locus standi is the right to appear and be heard in court or other proceedings and literally means ‘a place of standing’. Therefore, if a party is found to have no locus standi, then it means they cannot be heard even if they have weighty matters. It is further evident that if this court was to find that the Respondents have no locus standi, then the Respondents cannot be heard and, on that point alone will dispose of their application.

30. The Preliminary Objection by the Petitioners is mainly that the Respondents have no locus standi to defend this petition since the said companies are not recognized under the Kenyan Law as they are not registered either as foreign companies or as branches of foreign companies to be able to transact in Kenya as contemplated under the *Companies Act*.

31. To my mind these are facts that must be ascertained. They are facts that must be ascertained by the calling of evidence and not based on a pure point of law.

32. I agree with the sentiments of my brother Mrima J. in the case of *Akusala Borniface & another v Law Society of Kenya & 12 others; Law Society of Kenya Nairobi Branch (Interested Party)* [2021] eKLR where he stated:

“The validity of any preliminary objection is gauged against the requirement that it must raise pure point of law capable of disposing the dispute at once. It is, therefore, mandatory for a court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.”

33. In the circumstances and considering that the issue raised requires adducing of evidence, I find and hold that the Notice of Preliminary Objection dated 28<sup>th</sup> April 2025 does not raise pure points of law as it requires ascertainment of some facts. Instead, these are matters that are fit and proper for consideration in the substantive suit.

34. For the fore going reasons, I do dismiss the Notice of Preliminary Objection dated 28<sup>th</sup> April 2025 with no orders as to costs.



## ii. Whether the instant dispute should be referred to arbitration

35. I now turn to the second issue for determination whether the Respondents in their application dated 15<sup>th</sup> April 2025 seek to refer the dispute to arbitration in accordance with the terms of the Promissory Notes, Subordination Agreements, Account Charges, Deed of Assignment and Personal Guarantees.
36. It should be noted that parties to a commercial transaction cannot oust the jurisdiction of this court to adjudicate on disputes which may arise from the transaction. The presence of an arbitration clause in a contract does not operate to oust the court's jurisdiction to adjudicate on disputes which may arise from such contracts. That notwithstanding, the court is required to show deference to the principle of the party by allowing the parties the opportunity to resolve such disputes through arbitration. That is why the law requires of such disputes to be stayed pending arbitration as opposed to being struck out.
37. Any attempt to oust the jurisdiction of a court through private agreement is deemed as void. Consequently, arbitration agreements being contractual, are not considered as ousting the jurisdiction of a court. Otherwise, they would be deemed as null and void on account of violation of public policy. (See the judgment of Tunoi J in *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] eKLR.
38. It is noted that the Petition herein seeks enforcement of fundamental rights. Under Article 23(1), this Court has jurisdiction, in accordance to Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. This jurisdiction remains vested in the court notwithstanding the existence of an arbitration clause. An arbitration clause merely gives parties the option to pursue arbitration in the event of a dispute.
39. In that regard I concur with the holding in *Benson L Vioya v George Wasonga & 3 others* [2012] eKLR where Majanja J (as he then was) stated:
- “This petition concerns the enforcement of fundamental rights and freedoms under Article 22 of the *Constitution*. This is an independent and enforceable right and it cannot be taken away by the provision of the association's constitution. The arbitration clause is relevant as establishing a dispute resolution process within the association and may be given effect in other disputes than those concerning enforcement of fundamental rights. The High Court has jurisdiction to determine any matters concerning the threat, infringement, breach or violation of fundamental rights and freedoms protected by the Bill of Rights and that jurisdiction cannot be taken away by an arbitration clause.”
40. Similarly, Supreme Court in the recent case of *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* (Petition 15 of 2020) [2023] KESC 14 (KLR) (Constitutional and Judicial Review) (17 February 2023) (Judgment), expressed itself on the matter as follows: -
- “The jurisdiction of the arbitrator is limited by the appointing document and largely operates with the consent, cooperation and participation of the parties before it. This is commonly referred to as “party anatomy”. Breaches, violations and infringements of the *Constitution* do not fall within the jurisdiction of arbitrators...(see para 104).
- The mandate of an arbitrator largely proceeds on the basis of the agreement by parties, and is mainly tasked with the resolution of a dispute as set out in the governing agreement. Where the dispute, however, transcends the commercial dispute, well into the constitutional sphere, as is the case before us, every person is free to access courts and have their day in court. As we see it, there is no tension between the arbitration and enforcement of constitutional



rights as distinct dispute resolution mechanisms. A court of law cannot turn a blind eye to alleged constitutional breaches in order to invoke the principle of party autonomy that binds parties to their agreements. This in itself does not mean that any person who sets out to petition the court alleging violation of fundamental rights and freedoms under the Bill of Rights must succeed, as cases are determined on their merits.”

41. The Supreme Court observed in the *Bia Tosha Distributors* case (Supra) that the mere fact that one has filed proceedings under the Constitution does not constitute an automatic bar to the matter being arbitrable. However, the Apex Court also observed that a court of law cannot turn a blind eye to alleged constitutional breaches in order to invoke the principle of party autonomy that binds parties to their agreements; and that questions of alleged breaches, violations, or infringements of the Constitution fall outside the jurisdiction of arbitrators.
42. In determining whether or not the Court should at the interlocutory stage decline to exercise its constitutional review jurisdiction and leave the matter for arbitration requires a case-by-case analysis. Each case is unique in terms of the circumstances of the parties, the nature of the dispute, the allegations leveled, and any possible wider public effects that transcend the four corners of the contractual relationship between the Parties to the contract.
43. In the present case, the Petitioners have levelled a number of allegations against the Respondents with regard to what the Petitioners see as grave violations of both the Constitution as well as Statute Law. Whether these assertions are merited cannot be determined at this stage. At this preliminary stage, the Court need only examine whether the circumstances, nature of the dispute, allegations leveled, and any possible wider public effects tilt in favour of the matter proceeding before this Court or before arbitration. On the face of it, the Petitioners have set out a prima facie case that is deserving of fully being heard and determined before this Court.
44. For the avoidance of doubt, in arriving at this conclusion this Court is in no way stating that the pending application on interim conservatory orders will necessarily succeed. Prima Facie case is only one consideration in determining whether or not an application for conservatory orders should succeed or fail.
45. The upshot of the foregoing is that I take the view that while the various contracts between the Petitioners and Respondents provide for arbitration in respect of disputes arising therefrom, this matter is not suitable for referral to arbitration. As a consequence, I decline to issue the orders sought in the Respondents/Applicants’ Chamber Summons Application dated 15/04/2025 and/or those sought in the Respondents’ Notice of Preliminary Objection dated 28/04/2025, and both are dismissed with costs in the cause.
46. After the delivery of this Ruling, the Court will separately issue Directions on the expedited hearing and determination of the Petitioners/Applicant’ Notice of Motion Application dated 19/02/2025 which is still pending and/or the Petition, after receiving input from the Parties.
47. As I conclude, the gist of the Petitioners Notice of Preliminary Objection dated 28<sup>th</sup> April 2025 on the ground that the Respondents lack locus standi to file the application or in any event to commence and or sustain suit in the Republic of Kenya has not been determined herein, and the same is reserved for full hearing and determination in the main stage.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14<sup>TH</sup> DAY OF AUGUST 2025.**

**BAHATI MWAMUYE**



## **JUDGE**

In the presence of: -

Counsel for the Petitioners –Mr. Charles Madowo

Counsel for the Respondents – Ms. Aisha Abdalla & Ms. Zilla Mokuia

Court Assistant –Ms. Lwambia

