



**Muli v Karengata Academy Limited & another (Commercial Case E123 of 2024)
[2024] KEHC 10317 (KLR) (Commercial and Tax) (20 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10317 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E123 OF 2024
PM MULWA, J
AUGUST 20, 2024**

BETWEEN

FABIAN KYULE MULI PLAINTIFF

AND

KARENGATA ACADEMY LIMITED 1ST DEFENDANT

LYDIA WANGUI MBITHE 2ND DEFENDANT

RULING

1. There are two applications before the Court. Through the first motion dated 12th March 2024, the plaintiff, seeks:
 - a. An injunction restraining the defendants from evicting, levying distress, attaching or interfering with his peaceful enjoyment or occupation of the LR No. 13155 situated in Nairobi County, Karen, along East Bogani Road;
 - b. An order directing the defendants and/or their agents to return and/or release the plaintiff's motor vehicle registration number KDJ 179L unlawfully held in their custody;
 - c. A restriction be placed restraining the defendants either by themselves or agents, servants or employees from dealing with the suit property in any way.
2. The matter stems from a lease agreement dated 6th August 2021 entered into by the plaintiff as lessee and the defendants as lessors. The purpose of the lease was for the operation of a school. The plaintiff leased the property on the undertaking that the lessor had complied with all necessary County regulations and Ministry of Education guidelines and standards fit for the operation of a school.



3. In response to this application, the defendants filed a preliminary objection (PO) dated 18th April 2024, on the grounds that this Court lacks jurisdiction to hear and determine the plaintiff's motion and the entire suit pursuant to Clause 14 of the lease agreement which directs parties to arbitration in the event of a dispute and the prayers sought in the motion are permanent in nature and/or are not founded on the suit.
4. The defendants also filed the motion dated 22nd March 2024, under rule 3(2) of the *High Court (Practice and Procedure) Rules* and Section 6 of the *Arbitration Act* seeking that the proceedings be stayed and parties referred to arbitration under the terms of the agreement. The motion is supported by the grounds on its face and the annexed affidavit sworn by the 2nd defendant.
5. In opposing the defendants' application, the plaintiff put in a replying affidavit sworn on 18th April 2024.

Analysis and determination

6. I have considered the pleadings, the respective affidavits and submissions. The issues are whether the proceedings should be stayed and the matter be referred to arbitration, whether the Court has jurisdiction to hear the suit and whether the applications are merited.
7. The second application is brought under Section 6 of the *Arbitration Act*, which provides:
 - “6. Stay of legal proceedings
 - (1) 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.
 - (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
 - (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.”
8. It is not disputed that the defendants filed the application on 22nd March 2024 before entry of appearance or before acknowledgment of the claim. The plaintiff alluded to the illegality of the lease agreement in its submissions. He relied on the case of *County Government of Kirinyaga v African Banking Corporation Ltd* [2020] eKLR to support the proposition that if a contract is illegal and void, the arbitration clause must also perish along with it. However, from a study of the pleadings, the plaintiff confirmed that the lease was valid and that it contained an arbitration clause.



9. The plaintiff contended that there was no dispute between the parties concerning matters agreed to be referred to arbitration. He asserted that the matter concerns a dispute between the defendants and third parties (the County Government and Ministry of Education) not privy to the lease agreement. He contended that it is that dispute which has led to the collapse of the school business.
10. I reject this assertion as the record shows that the dispute is between the parties to the suit and are also parties to the lease agreement - the plaintiff as the lessee and the defendants as the lessor.
11. Clause 14 of the Lease Agreement reads as follows:

“If any dispute shall arise whether during the continuance of this Lease or upon or after its determination between the parties hereto touching or concerning this Lease or as to any other matter in any way connected with or arising out of or in relation to the subject matter of this Lease such dispute shall in accordance with and subject to the provisions of the Arbitration Act (1995) or any statutory modification or re-enactment thereof for the time being in force be referred at the request of either to the arbitration and final decision of an arbitrator or agreed upon by the parties appointed by the Chairman for the time being of the Chartered Institute of Arbitrators (Kenya Branch).”
12. It is evident from the above that it was the intention of the parties to refer any dispute directly or indirectly related to the lease to arbitration.
13. Section 10 of the Arbitration Act provides that:

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”
14. Having been satisfied that the dispute before the Court is covered by an arbitration clause, I find that the application dated 22nd March 2024 is merited.
15. As to the plaintiff’s application dated 12th March 2024, the defendants raised the PO on grounds that this Court lacks jurisdiction to hear and determine the plaintiff’s motion and the entire suit pursuant to Clause 14 of the lease agreement. By electing to have disputes arising from the lease agreement through arbitration, the parties chose to limit the Court’s jurisdiction to intervene.
16. Regarding the issue of whether the Arbitration Act ousts the Court’s jurisdiction, M’Inoti, JA observed as follows in Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR:

“Upon closer scrutiny, however, and in particular in the context of arbitral proceedings, the argument is not, in my opinion, easily sustainable. The decision to settle for arbitration as the dispute resolution mechanism of choice is one that is consciously and deliberately taken by the parties. In settling for that mode of dispute resolution, the parties know the limits that are placed on their right to resort to the courts once they have opted for arbitration. In other words, by settling for arbitration, it is the parties who have by their own deliberate choice opted to oust the jurisdiction of the courts or otherwise limit the right of the courts to intervene in their dispute...Parties cannot settle for arbitration, which they know very well does not readily brook judicial intervention and then turn round and complain that the limitations inherent in their chosen dispute-resolution mechanism is illegal or contrary to public policy. As the Court of Appeal of New Zealand stated in Cbi Nz Limited v badger Chiyoda [1990] LRC 621 in arbitral proceedings, there is nothing contrary to public policy in the finality of the arbitrator’s award.”



17. Accordingly, the PO succeeds in part as against the plaintiff's application dated 12th March 2024.
18. In conclusion, I make the following orders:
 - a. The application dated 12th March 2024 is dismissed with costs.
 - b. The application dated 22nd March 2024 is allowed.
 - c. Arbitration proceedings do proceed in the manner contemplated in Clause 14 of the Lease Agreement.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF AUGUST 2024.

P. MULWA

JUDGE

In the presence of:-

Ms. Kitonga & Mr. Kahama for plaintiff

Mr. S.N. Ng'ang'a for defendants

Court Assistant: Lilian/Julia

