



REPUBLIC OF KENYA



**Kimani v Wanjohi & 3 others (Miscellaneous Case E183 of 2024)
[2024] KEHC 14704 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14704 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CASE E183 OF 2024
DO CHEPKWONY, J
NOVEMBER 22, 2024**

BETWEEN

JECINTA WAMBUI KIMANI APPLICANT

AND

JOHN KAHORO WANJOHI 1ST RESPONDENT

AGNES WAMBUI 2ND RESPONDENT

JAMES NGOTHO KIRONGOTHI 3RD RESPONDENT

ANNIE MUTHONI NDIRANGU 4TH RESPONDENT

RULING

1. What is before this court for determination is the Notice of Motion application dated 17th September, 2024 filed pursuant to Article 159 (2) (c) of *the Constitution* of Kenya, Section 12 (2), (3), (4) and (5) of the *Arbitration Act*, Order 51 (1) and (15) of the Civil Procedure Rules. The Application seeks the following orders:-
 - a. Spent.
 - b. That the Honourable Court be pleased to grant the Applicant leave to commence arbitration proceedings.
 - c. That this Honourable court be pleased to issue an arbitration order.
 - d. That the Honourable Court be pleased to issue an order directed at the Chair of the Chartered Institute of Arbitrators, Kenya to assign an arbitrator to take conduct of the arbitral proceedings.
 - e. That the court be at liberty to make such further orders that it deems just to meet the ends of justice.



- f. That the costs of this application be borne by the Respondents.
2. The Application is based on the grounds set out on its face and reiterated in the Supporting Affidavit of Jecinta Wambui Kimani sworn on the instant date.
 3. The court notes that the application was served upon the Respondents personally on 21st September, 2024 as confirmed by the Affidavit of Service sworn by Teddy Kaburu on 23rd September, 2024. And although the 1st Respondent attended court on 28th October, 2024 and 13th November, 2024, and indicated they would instruct an advocate to come on record and file a response to the application, none has been filed to date. The application is therefore unopposed, hence unchallenged. That notwithstanding, although the application is unopposed the court is still obliged to consider its merits in the interest of justice.
 4. According to the Applicant, she entered into a lease agreement dated 1st January, 2021 with the Respondents over Land Reference No. 12825/44 (Original Number 12825/244(Original Number 12825/240/5) situated South West of Kiambu Municipality at Thindigua, for an annual rent of Kshs. 3,180,000/- payable on quarterly basis on or before every 10th day of the due month. It is the Applicant's case that the Respondents have persistently breached the terms of the lease agreement by defaulting in rent payment despite numerous demands and reminders, a result of which the total rent arrears is Kshs.1,510,000.—exclusive of penalties. The Applicant argues that under Clause 6.11, 6.11.2 and 6.11.3 of the agreement, it is expressly stated that in the event of a dispute the same should be referred to arbitration for determination by a simple Arbitrator. The Applicant contends that the Respondents have been reluctant to participate in the process of appointing the Arbitrator and it would be in the interest of justice that the court allows the application.
 5. To determine this application, the court has considered the legal provision upon which the same is anchored. Article 159 (2)(c) of *the Constitution* provides that:-

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

- a. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

This provision of *the Constitution* requires that courts be guided by the need to promote Alternative Dispute Resolution (ADR). This is encouraged so as to improve access to justice for Kenyans and to ease the burden of numerous disputes and help reduce backlog in the formal courts.

6. Section 12 of the *Arbitration Act* which provides as follows:-

“1.

2. The parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairman and failing such agreement—

- a. in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the arbitrator;



- b. in an arbitration with two arbitrators, each party shall appoint one arbitrator; and
 - c. in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.
 3. Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party (“the party in default”)—
 - a. has indicated that he is unwilling to do so;
 - b. fails to do so within the time allowed under the arbitration agreement; or
 - c. fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party), the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.
 4. If the party in default does not, within fourteen days after notice under subsection (3) has been given —
 - a. make the required appointment; and
 - b. notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.
 5. Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.
 6. The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.
 7. The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator.
 8. A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.
 9. The High Court in appointing an arbitrator shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.



7. A reading of Section 12 of the *Arbitration Act* is aimed at maintaining the integrity of the arbitration process by safeguarding impartiality and independence, promoting transparency and accountability in the same.
8. Order 51 of the Civil Procedure Rules governs how a court should determine an application. Order 51 Rule 1 of the Civil Procedure Rules provides for the procedure to be followed in filing an application in court. Order 51 Rule 15 is about setting aside ex parte orders.
9. Sections 1A, 1B and 3A of the *Civil Procedure Act* speak to the overriding objective of the said Act and Rules, made under it. This objective requires disputes to be resolved in a just, expeditious, proportionate and affordable manner.
10. It is trite that the power of the High Court to appoint an arbitrator only come in when the parties do not agree on an arbitrator or that either party is not willing to participate in the appointment of the said arbitrator. This court had read through the Lease Agreement attached to the Supporting Affidavit and confirms that it is a term of the lease agreement under Clause 6.11, 6.11.2 and 6.11.3, that in the event of a dispute, the same shall be referred to Arbitration for determination by a single arbitrator.
11. According to the Applicant, the Respondents have blatantly refused to participate in the appointment of the Arbitrator despite all efforts she has put. The Applicant has availed correspondences between the Respondents' Counsel on the issue of appointment of Arbitrator dated 22nd August, 2023, 12th September, 2023 and 30th November, 2023 and 9th April, 2024 referenced appointment of arbitrator. The court notes that there is no responses attached to the said letters which confirms the reluctance on the Respondents to appoint an arbitrator of choice. There being no response, it is clear that the said communication has not been.
12. For that reason and in exercise of the powers granted to this court under Section 12 (6) of the *Arbitration Act*, and guided by the provisions of Article 159(2)(c) of *the Constitution* and Sections 1A, 1B and 3A of the *Civil Procedure Act*, this Court proceeds to allow the application and make the following orders:-
 - a. Leave be and is hereby granted to the Application to commence arbitral proceedings.
 - b. An order is hereby issued to the Chair of the Chartered Institute of Arbitrators, Kenya to assign an arbitrator to take conduct of the arbitral proceedings in this matter.

It is so ordered.

**RULING DATED AND SIGNED AT KIAMBU THIS 22ND DAY OF NOVEMBER , 2024.
(UPLOADED VIA ELECTRONIC MAIL)**

D. O. CHEPKWONY

JUDGE

