



REPUBLIC OF KENYA



**Let's Do Business Company Limited; Koskey (Defendant) (Civil Case E222 of 2022)  
[2023] KEHC 21829 (KLR) (Commercial and Tax) (15 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21829 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E222 OF 2022  
JWW MONG'ARE, J  
AUGUST 15, 2023**

**IN THE MATTER OF  
LET'S DO BUSINESS COMPANY LIMITED ..... PLAINTIFF  
AND  
ALBINA GICHUKU KOSKEY ..... DEFENDANT**

**RULING**

1. The Applicant has moved this court by an Originating Summons application dated June 20, 2022 brought (under Sections 4 and 12 of the *Arbitration Act* and Rule3(1) of the *Arbitration Rules 1997*) seeking the courts determination of the following questions;
  1. Whether the appointment of Nyagah B Kithinji as the sole arbitrator by the defendant ought to be set aside.
  2. Which party is to bear the costs of this suit?
2. The Originating Summons is premised on the grounds that there does not exist an arbitration agreement between the parties that is capable of being acted upon by any person. Simultaneously with the filling of the Originating Summons, the Applicant filed a supporting affidavit sworn by Issa Fidow with the authority of the Applicant/Plaintiff. The Originating Summons seeks to challenge the appointment of an arbitrator to determine a dispute arising pursuant to an unregistered lease over LR No 11927/23 IR 59416/18 situated within Nairobi City in the County of Nairobi.
3. The challenge is premised on the fact the parties herein entered into a 25 year lease agreement for the suit property but failed to register the same. A dispute has now arisen and the Defendant pursuant to the lease agreement seeks to have the dispute resolved by a sole arbitrator and has moved ahead to nominate a sole arbitrator to preside over the dispute.



4. In objecting to the appointment, the Plaintiff alleges that the Defendant cannot to purport to rely on a document that has flouted the dictates of the law. It is the Defendant's argument that the lease between the parties has not been stamped as required by the Stamp Duty Act, Section 19(2). Subsequently, the Plaintiff contends that there is no valid lease capable of being relied on by the parties to refer the dispute to arbitration as is being sought to be done herein.

**Analysis and Determination:**

5. I have carefully considered the pleadings as filed by the parties herein and the responses thereto. I note that the only issue for determination is:-

' Whether there is a valid lease with an arbitration clause from which the dispute between the parties can be referred to an arbitrator for determination'

6. It is not disputed that the parties herein entered into a lease agreement for 25 years with the intention to redevelop the suit premises from a residential dwelling into a commercial one with malls and shops therein. It is also not contested that neither party has caused the said lease to be stamped as provided for by the Stamp Duty Act. The Defendant has vehemently argued that the said lease document is invalid for want of compliance with The Stamp Duty Act Section 19(1) and (2) which provides as follows:-

- (1) 1) Subject to the provisions of Subsection (3) of this section and to the provisions of Sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—
- (a) in criminal proceedings; and
  - (b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.
- (2) 'No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped'.

7. Several decisions emanating from the courts have however held that an unstamped and unregistered lease or document is still a contract binding upon the two parties to it and can be relied upon by a court of law to interpret the rights and obligations conferred upon the said parties by the document, irrespective. This interpretation seeks to remedy a situation where party to the said unstamped lease or agreement will hide behind the requirements of the Stamp Duty Act to avoid their obligations created by the unstamped instrument.

8. I have considered the arguments advanced by the Plaintiff in seeking to declare the lease agreement here invalid for failure to comply with the Stamp Duty Act requirements. I have equally considered the rival arguments advanced by the Defendants and the decided cases relied on. I note that Justice Angote faced with a similar situation where a document was not stamped under the Stamp Duty Act in the case of Prabhagauri Shashikant Maru v Martha Kalove Nzivo [2018] eKLR stated as follows:-

' 17. It is therefore not in dispute that the parties herein signed an assignment dated 30<sup>th</sup> September 1981. The said assignment was however neither registered nor stamped...

18. In any case, a document which ought to be registered by the law but is not registered is still binding upon the parties who signed it inter se, indeed, an unregistered document affecting immovable property under any law may



be received as evidence of a contract in a suit or evidence of any collateral transaction. Such a document can be relied upon to ascertain the nature of the transaction as between the parties, without binding third parties.

19. In the case of *Souza Figueiredo v Moorings hotel co. Ltd* [1920] EA 926 the Court of Appeal held that 'unregistered document operates as a contract inter-partes and can confer on the party in the position of intending lessee a right to enforce a contract.'

9. I have considered the above finding by the court and I am persuaded by the reasoning therein. I am therefore satisfied that the lease between the plaintiff and the defendant is valid for purposes of enforcing their obligations as between the two and an arbitrator sitting in an arbitral proceeding may rely on it to determine the dispute that has now arisen and been declared and for which an arbitrator has been appointed.

10. Section 6 of the *Arbitration Act* states as follows:-

' (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.'

11. In light of the above provisions and having identified that the unstamped and unregistered lease agreement is a valid contract for enforcement between the parties, the court is minded to allow the arbitration proceedings to continue and noting that an arbitrator has already been appointed, the court will therefore forthwith dismiss the Originating summons and the subsequent applications filed thereto and allow the process to continue.

12. Costs of this application are to the defendant to be paid by the plaintiff.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF AUGUST 2023**

.....

**J. W. W. MONG'ARE**

**JUDGE**

**In the Presence of:-**



- a. Ms. Nabayi for the Respondent.**
- b. Mr. Osodo for the Plaintiff/Applicant.**
- c. Sylvia- Court Assistant\***

