



**Gedi & another v Theuri (Environment & Land Case E418 of 2022)
[2023] KEELC 17686 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17686 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E418 OF 2022
EK WABWOTO, J
MAY 25, 2023**

BETWEEN

ABDIFATAH ADAN GEDI 1ST PLAINTIFF

MOHAMED ADAN GEDI BOSS 2ND PLAINTIFF

AND

NESTER WANJA THEURI DEFENDANT

RULING

1. This ruling is in respect to the Plaintiffs' application dated December 14, 2022 and the Defendant's preliminary objection dated January 27, 2023.
2. The Plaintiffs' application sought the following:
 - i) Spent.
 - ii) That pending the interparties hearing and determination of this application, a temporary order of injunction be and is hereby issued restraining the Defendant/Respondent whether acting in person or through her agents from selling the suit property to 3rd parties, putting up and or advertising the property for sale;
 - iii) That pending the interparties hearing and determination of this application a temporary order of injunction be and is hereby issued to the Defendant/Respondent whether acting in person or through her agents from retaining 10% of the Purchase price and or charging any interest on balance of the Purchase price.
 - iv) That this application be heard interparties on such a date and time as this Honourable Court may direct.



- v) That pending resolution of the dispute between the Parties by arbitration, a temporary order of injunction be and is hereby issued restraining the Defendant/ Respondent whether acting in person or through her agents from selling the suit property to 3rd parties, putting up and or advertising that Property for sale;
- vi) That pending resolution of the dispute between the Parties the Parties by arbitration, a temporary order of injunction be and is hereby issued restraining the Defendant/Respondent whether acting in person or through her agents from retaining 10% of the Purchase price and or charging any interest on balance of the Purchase price.
- vii) That costs of this Application be in the cause.
3. In opposition to the said application, the Defendant raised a Preliminary Objection in the following terms:
- a. There exists an arbitration clause in the parties' Agreement for sale in which case, this Court lacks the jurisdiction to entertain the suit.
 - b. The Respondents shall consequently be seeking for striking out of the Plaintiffs/Applicants Application and suit with costs to her.
4. On February 2, 2023, the Court ordered that the preliminary objection be considered as a response to the application. The two applications be heard together by way of written submissions.
5. In submissions dated December 14, 2022, the Plaintiffs' argued that the arbitration proceedings would be nugatory without preserving the property. It was further argued that since the process of appointment of an arbitrator was not a straight forward process the Court ought to take judicial notice and therefore move to preserve the suit property. Relying on the case of *Mapema Holdings Limited v Thika Dairies Limited & 4 others [2020] eKLR* it was specifically argued that they were likely to suffer irreparable harm and were equally apprehensive of losing the property vide disposal by the Defendant to 3rd parties. On a balance of convenience, it was submitted that the Applicants were greatly inconvenienced by forfeit of the 10% deposit that was occasioned by the Defendant's breach.
6. The Defendant submitted that parties were bound by the Sale Agreement in which Clause 18.2 expressly outlined arbitration as the appropriate dispute resolution mechanism. Relying on Nairobi Elc Case NO E418 OF 2022 Page 4 Article 159(2)(c) of the *Constitution* and Section 6(1) of the Arbitration Act, it was argued that the Court should find that parties were bound they their mutually agreed agreement and exhaust the given remedies with the Agreement.
7. I have considered the application, the preliminary objection filed, the respective written submissions and the authorities cited. The issues for determination are:
- i) Whether the preliminary objection is merited?
 - ii) Whether the threshold for grounds for an injunction have been met.
8. It is clear that a Preliminary Objection must be raised on a point of law as reiterated in the case of *Mukbisa Biscuits Manufacturing Co Ltd v West-End Distributors Limited [1969] EA 696*. Having raised the objection on a specific provision of the law, the preliminary objection would be alive and within the jurisdiction of this court.



9. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR* highlighted the principle when it stated:

' A Preliminary Objection 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 has to be ascertained or if what is sought is the exercise of judicial discretion.'

10. In respect to the arbitration, Section 6 of the *Arbitration Act* stipulates as follows:

' 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.

Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined. 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. The tenets for granting of stay of proceedings are well established in the case of *Esmaj v Mistry Shamji Lalji & Co [1984] KLR*, where the Court of Appeal considered the following: -

- a) The court is not bound to grant stay but has discretion to grant or not to grant.
- b) The discretion to grant should not be exercised when strong cause for doing so is shown.
- c) The burden of proving such strong cause is on the plaintiff.
- d) In exercising discretion, the court should take into account the circumstances of the particular case.
- e) A mere balance of convenience is not enough.

12. This Court has considered that although the use of 'shall' places a mandatory action for reference to arbitration and consequent stay of proceedings, this is pegged upon a party's swift action to present the given application. In the case *Mt Kenya University v Step Up Holding (K) Ltd [2018] eKLR*, the Court of Appeal held that:

' All that an applicant for a stay of proceedings under section 6 (1) of the *Arbitration Act* of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:(a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;(b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and(c) Whether the suit intended concerned a matter agreed to be referred to arbitration.'

13. My perusal of Clause 18 of the Sale Agreement dated July 29, 2022, outlines the dispute resolution mechanisms firstly through negotiation and then arbitration as a mechanism to resolve 'any dispute, controversy or claim arising out of or in connection with this Agreement'. To my mind, this confirms



that the parties did intend not only to be bound by the Agreement in its entirety but also adhere to their out of court settlement processes.

14. At this juncture, the Court is duty bound to down its tools and allow parties to exhaust remedies availed by the Sale Agreement. I find that the preliminary objection dated January 27, 2023 is merited and wholly extinguishes all interim prayers sought in the application dated December 14, 2022 as the suit stands struck out with no orders as to costs.

15. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF MAY 2023

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Muchangi for the Plaintiffs.

Ms. Kaberia h/b for Mr. Maina for the Defendant

Court Assistant; Caroline Nafuna.

