



FAPCL Group Limited v Neferset Holdings Limited (Environment and Land Appeal E025 of 2022) [2023] KEELC 17788 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17788 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E025 OF 2022**

**LN MBUGUA, J
MAY 25, 2023**

BETWEEN

FAPCL GROUP LIMITED APPELLANT

AND

NEFERSET HOLDINGS LIMITED RESPONDENT

(Being an appeal against the Ruling of the Nairobi Magistrate's Court at Milimani (Honourable Gathogo Sogomo Principal Magistrate) dated 11th March 2022 in Milimani E.L.C. Suit No. E261 of 2021)

JUDGMENT

1. Vide a plaint dated July 27, 2021, the Appellant instituted a suit MCELC E261 of 2021 before the magistrate's court claiming that they were appointed as estate agent of the estate known as "Kihingo village" through a judgment of Komingoi, J in ELC 1225 of 2013 Kifaru Investment limited & others v Kihingo village (Warindi Gardens) Ltd & another on February 6, 2019. That on March 1, 2021, the share holders of Kihingo village entered into an agreement with the Plaintiff for the latter to be managing common areas and to collect service charge. The director of the Defendant who was in occupation of house no. 5L declined to remit service charge hence the suit.
2. The Respondent/Defendant filed a statement of defence on October 14, 2021 contending that the relationship governing the residents and the management was anchored on a lease document which is binding on all parties, adding that the Plaintiff was not the duly authorized estate manager. The Plaintiff was to file an Application dated November 16, 2021 seeking orders to have the above mentioned defence struck out.
3. In rejoinder, the Defendant filed a Preliminary Objection dated January 27, 2022 seeking the striking out of the entire suit along with the above application on the following grounds;



- a) That this Honourable Court does not have the jurisdiction to hear the Application and the entire suit on the basis of Section 5 and 59 *Civil Procedure Act*, Section 6 of the *Arbitration Act* and the lease agreement between the Defendant and the developer which the Plaintiff seeks to enforce which provides that all disputes arising from the lease are to be settled vide arbitration.
 - b) That the Plaintiff/Applicant has not exhausted the dispute resolution avenues established under the lease agreement and the *Arbitration Act*.”
4. In a ruling delivered on March 11, 2022, the court gave orders as follows:
- “The Defendants/Applicant’s preliminary objections vide Notice dated January 27, 2022 is upheld to the extent that the Plaintiffs/Applicant’s Motion of November 16, 2021 is struck out with costs with either party directed to move the court accordingly to refer the matter for arbitration as per the relevant lease agreement.”
5. The Plaintiff/ Appellant filed the Memorandum of Appeal dated March 31, 2022 which is based on the following grounds;
1. The Honourable Magistrate erred in law and fact by relying on a non-existent arbitration clause and finding that the matter should be resolved by way of arbitration.
 2. The Honourable Magistrate erred in law and fact by misapplying the provisions of Section 6 of the *Arbitration Act*.
 3. The Honourable Magistrate erred in law and fact in dismissing the Appellant’s Notice of Motion dated November 16, 2021 without any plausible reasons and failed to bear in mind order 2 Rule 15 of the *Civil Procedure Act*, the Respondent’s defence dated October 14, 2021 and Order 7 Rule 5 of the *Civil Procedure Rules*.
 4. The Court erred in law and fact by failing to appreciate that there was not in fact any dispute between the parties that could be referred to arbitration and the issue would be beyond the scope of arbitration as there is no actual dispute.
 5. The Honourable Court erred in law and fact by failing to appreciate the Respondent has simply failed to pay the service charge to the estate manager.
 6. The Appeal was canvassed by way of written submissions.
 7. The Appellant’s written submissions are dated March 10, 2023 where they address the following issues;
 - i. Whether the Hon. Magistrate erred in law and fact in holding that the matter should be referred to arbitration.
 - ii. Whether the Trial Court misapplied the provision of Section 6 of the *Arbitration Act*.
 - iii. Whether the Trial Court erred in dismissing the Notice of Motion dated November 16, 2021.
 8. On the question of reference to arbitration, the Appellant submits that the lease agreement dated June 16, 2011 relied upon by the Trial Court is not binding upon the Appellant who was not a party to the same. Thus the arbitration clause is not applicable to the Appellant. On this point, reference was made to the case of *Mark Otanga Otiende v Dennis Oduor Aduol* [2021] eKLR.



9. On the application of Section 6 of the *Arbitration Act*, it was argued that the Respondent having filed a defence to the suit, had duly acknowledged the claim herein and the jurisdiction of the Trial Court. To this end, reference was made to the cases of *Eunice Soko Mlagui v Suresh Parmar & 4 others* [2017] eKLR, the case of *Adrec Limited v Nation Media Group Limited* [2017] eKLR, *Corporate Insurance Company v Loise Wanjiru Wachira* [1996] eKLR as well as the case of *China Sichuan Corporation for International Techno Economic Co-operative (Sietco) v Kigwe Complex Limited* [2013] eKLR.
10. In addition, it was submitted that the Respondent having submitted to the jurisdiction of the Trial Court is estopped by the doctrine of election from relying on the arbitration clause, if any, or insisting that the Trial Court does not have jurisdiction, or that the dispute should be resolved by arbitration. The case proffered on this point is; *James G.K. Njoroge t/a Baraka Tools & Hardware (a firm) v Kenya Cement Marketing Co Ltd & 2 others* [2019] eKLR.
11. On the dismissal of the Notice of Motion date November 16, 2021, it was submitted that the defence is ripe to be struck out as per Order 2 Rule 15 and Order 7 Rule 5 of the *Civil Procedure Rules* and should be struck out. It relies on the case of *Daniel Mathiu Mbiti v Standard Chartered Bank 9K0 Limited* [2013] e KLR.
12. The Respondent opposes the appeal vide its submissions dated March 9, 2023 contending that the learned Magistrate rightly upheld the Preliminary Objection in finding that there was an arbitration agreement between the parties and the matter should have been referred to arbitration by any party aggrieved in their relationship.
13. It was submitted that the agreement between the Appellant and the management company specifically sets out the nature of engagement that the management company and the Appellant entered into and the terms within which it could be enforced. It adds that the parties are bound by the arbitration clause in the lease; pointing out that clause 1 (i) sets out duties and powers of the Appellant, while Clause 5 (i) is the arbitration clause. It was also submitted that in its defence filed in Court, the respondent did not admit to the jurisdiction of the Honourable Court but asserted that there was no basis to maintain the proceedings against it by the Plaintiff before the trial Court.
14. In support of its case, the Respondent proffered the cases of; *Greenview Developers Limited v Suresh Mohanlal Fatnia* [2021] eKLR as well as *Techno service Limited v Nokia Corporation & 3 others* [2021] eKLR.

Determination

15. The issues falling for determination are whether there was a dispute between the parties that could be referred to arbitration, whether the Trial Court misapplied the provisions of Section 6 of the *Arbitration Act* and whether the Trial Magistrate erred in dismissing the Application dated November 16, 2021.
16. In determining whether to refer a matter to arbitration, a court is called upon to consider the validity of the arbitration agreement between the parties. In its ruling dated 11.3.2022, the Trial Court proceeded to strike out the suit on the basis that the Appellant had not exhausted the dispute resolution avenues established under the lease agreement governing the lease.
17. The claim of the Respondent as set out at paragraph 6 - 9 of its defence is that the Appellant was a stranger to the lease, of which the Respondent does not recognize the Appellant as the manager of the



estate property. At no point in their pleadings did the Respondent make an intention to invoke the terms of the lease, let alone an arbitration clause.

18. In *Mukisa Biscuit Company Limited v West End Distributors* 1969 EA 896, Law, JA stated that;

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings ...”
19. In the case of *Oraro v Mbaja* [2005] eKLR, it was stated that;

“anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence”
20. It is quite clear that the averments of the respondent as set out in their Preliminary Objection were inconsistent with their pleadings. Thus there was no basis for the Respondent to claim that the Appellant had not exhausted the dispute resolution mechanisms provided for under the lease. It follows that, as long as the defence of the Respondent existed, then there was no dispute to be referred for arbitration.
21. On the issue as to whether the court misapplied Section 6 of the *Arbitration Act*, the Appellant has argued that by filing a defence, the Respondent admitted the jurisdiction of the Trial Court. The Respondent denies this claim. The Plaintiff was filed on August 2, 2021, of which a defence was filed on October 14, 2021. The Appellant herein then filed a Notice of Motion dated November 16, 2021, while the Respondent herein filed a response to the said application on December 8, 2021, with the Preliminary Objection being filed on January 27, 2022.
22. In *Eunice Soko Mlagui v Suresh Parmar & 4 others* [2017], the Court of Appeal held that;

“In this appeal, by the time the Appellant made the application for stay of execution and referral of the dispute to arbitration, the 1st, 2nd and 3rd Respondents had already filed and even amended their defence while the 4th and 5th Respondents had entered appearance and filed their defenses. As this Court explained in *Charles Njogu Lofty v Bedouin Enterprises Ltd (supra)* and *Niazons (K) Ltd v China Road & Bridge Corporation Kenya (supra)*, Section 6 (1) of the *Arbitration Act* obliges the party desiring referral of the dispute to arbitration to make the application promptly and at the earliest stage of the proceedings. We are therefore satisfied that the learned judge did not err in any manner when she refused, in the circumstances of this appeal, to stay proceedings and refer the dispute to arbitration”
23. In the case of *Niazons (K) Ltd v China Road & Bridge Corporation Kenya* [2000] eKLR, it was held by majority that an applicant for a stay of proceedings under Section 6(1) of the *Arbitration Act* was obliged to bring his application promptly. The Court in *Corporate Insurance Company v Loise Wanjiru Wachira* [1996] eKLR reached a similar conclusion.
24. In another Court of Appeal decision, *Mt. Kenya University v Step Up Holdings (K) Ltd* [2018] eKLR, the court stated thus;

“We have construed Section 6 of the *Arbitration Act* on our own and considered it in light of the case law highlighted above.

We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter



take no further procedural steps in the matter. The appellant herein entered appearance, and then responded to the respondent's application for injunction before filing the application seeking an order for reference to arbitration. Critically the appellant's response to the respondent's application for injunction amounted to the taking of a procedural step in the matter before the initiation of the reference process..... Emphasize added"

25. The Respondent admitted the Jurisdiction of the trial court by way of filing a defence and even defending an application filed by the Appellant herein. It follows that the Trial Court misapplied the provisions of Section 6 of the *Arbitration Act*.
26. In light of the foregoing analysis, I find that the Trial Court also erred in striking out the Appellants application dated November 16, 2021, and the same is hereby reinstated.
27. In the final analysis, I find that the Appeal has merits. Since the Trial Court did not consider the Appellants application dated November 16, 2021, the same as well as the entire suit are remitted back to the Trial Court or any other magistrate of competent jurisdiction to hear the matter.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Muhizi for Appellant

Court assistant: Eddel

