



Tamarind Meadows Ltd & another v Nyamu & 20 others (Miscellaneous Civil Application E038 of 2021) [2022] KEHC 12934 (KLR) (Commercial and Tax) (31 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12934 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS CIVIL APPLICATION E038 OF 2021

A MABEYA, J

AUGUST 31, 2022

N THE MATTER OF THE ARBITRATION ACT, 1995

AND

**IN THE MATTER OF AN APPLICATION UNDER SEC 2 AND 17(6)
OF THE ARBITRATION ACT- CHALLENGE TO THE ARBITRATION
ITSELF**

BETWEEN

TAMARIND MEADOWS LTD 1ST APPLICANT

TAMARIND PROPERTIES LIMITED 2ND APPLICANT

AND

JOSEPH G. NYAMU J.A (FCI ARB) 1ST RESPONDENT

EVANSON KARIUKI KAMAU 2ND RESPONDENT

STANLEY MUGAISI MBEHERO 3RD RESPONDENT

MARK EDDY KARUNGO 4TH RESPONDENT

JULIANNA OGGEMA 5TH RESPONDENT

HAGEN BERNARD FRANCIS MUTAMBI 6TH RESPONDENT

JANE OMWAMI BARRACK SULE 7TH RESPONDENT

ERIC KANG'ETHE 8TH RESPONDENT

**MARTIN KIMATHI WERU (SUING ON BEHALF OF AND AS
DONEE OF A POWER OF ATTORNEY FROM JOSEPHINE KAMBURA
WERU) 9TH RESPONDENT**



LUCY WANJIRU LAU-BIGHAM	10 TH RESPONDENT
CECILIA MWIKALI LAU	11 TH RESPONDENT
JOHN BOSCO WAINAINA LAU	12 TH RESPONDENT
ROBERT GITUMBO GATERU	13 TH RESPONDENT
FAITH WATIRI KAHONGE	14 TH RESPONDENT
CAROLINE WAIRIMU KIHARA	15 TH RESPONDENT
ALICE AUMA AGORO-MAJANI	16 TH RESPONDENT
EDWARD SANE LEPARAKUO	17 TH RESPONDENT
PETER ERIRI NYAGA	18 TH RESPONDENT
MATHEW TAGO	19 TH RESPONDENT
SUSAN KATHENYA IMUNGI	20 TH RESPONDENT
MAKENA KAARI IMUNGI	21 ST RESPONDENT

JUDGMENT

1. Before court is an originating notice of motion dated October 15, 2021 brought under sections 2, 7 and 17(6) of the *Arbitration Act* and rules 90 (c) and (d) of the *Arbitration Rules 2020*.
2. Prayers 1 - 4 are spent. The remaining prayers sought in the application are an order to terminate/stay the arbitral proceedings before the 1st respondent pending the hearing and determination of:-
 - a) Court of Appeal, Civil Appeal No E356/2020: *Tamarind Meadows Ltd v Wibeso Investments & Others*; and
 - b) High Court at Nairobi Civil Suit No 539/2012: *Kenya Commercial Bank v Tamarind Meadows Ltd & Others*.
3. Secondly, the applicants sought an order to set aside the ruling of the 1st respondent of 9/8/2021 which held that he has jurisdiction to serve as an arbitrator and to adjudicate on the merits of the 2nd-17th respondents' statement of claim filed on 15/5/2021. Costs were also sought.
4. The grounds of the application are found in its body and the supporting affidavit of Robert Darby, a shareholder in the 1st applicant and a member of its board of directors, sworn on October 15, 2021.
5. The grounds included that on 9/8/2021, the 1st respondent overruled the applicants' preliminary objection which was premised on the view that the matters referred to arbitration were the subject matter of a pending appeal in the Court of Appeal, in Civil Appeal No E356/2020 and in the High Court at Nairobi Civil Suit No 539/2012 ('the two cases').
6. That the arbitral proceedings are barred by the doctrine of mootness as it is designed to persuade the arbitral tribunal to speculate as to what the courts will in the two cases decide; that the issues in contention between the two matters are with regard to the title to and charge over LR No 18469 on which the 2nd to 17th respondents' houses stand is pending determination.



7. Further, that the proceedings are barred by both the res judicata doctrine and/or the sub judice doctrine in that the issues raised in the arbitration have been raised by the applicants in the two cases; that this court has the jurisdiction to terminate arbitral proceedings and to stay them pending the determination of the two cases.
8. In opposition, the 2nd-17th respondents (“the respondents”) opposed the application through grounds of opposition dated November 19, 2021 and a replying affidavit of Stanley Mugaisi Mbehero sworn on November 19, 2021.
9. It was averred that the arbitrator was validly appointed and the arbitral clause has never been in dispute; that the applicants are estopped under section 5 of the Arbitration Act from challenging the arbitration itself.
10. The respondents further contended that the present application is *res judicata* as the issues raised therein had already been decided in Machakos HCC No 10 of 2020 Evanson Kariuki and 14 others vs Tamarind Meadows Limited and another where the suit was stayed and the matter referred to arbitration.
11. That the respondents were not party to Civil Suit No 539/2012: *Kenya Commercial Bank v Tamarind Meadows Ltd & Others* nor were they parties to the suit that led to the appellate case of Civil Appeal No E356/2020: *Tamarind Meadows Ltd v Wibeso Investments & Others*; that the parties, facts and issues in the aforementioned cases differ from the respondents’ claim before the tribunal.
12. That therefore the applicants are trying to have the court make a determination on matters which it has no jurisdiction to do so and that the instant application and orders sought amount to the usurping of the arbitral process by the court which the parties willingly consented to.
13. Finally, it was contended that the application had been filed outside the statutory timeline of 30 days and that it has been over 10 years since the contracts between the applicants and respondents were signed. That in the premises, the respondents continue to suffer loss which the tribunal can award relief.
14. The applicant lodged a further affidavit sworn on 12/4/2022, in response to the respondent’s replying affidavit. It was contended that the applicants filed this application to compel the respondents to respect the proposition that once a court of law has become ceased of a matter even where an arbitral clause exists, no party is allowed to engage a second forum. That the respondents are parties to Civil Appeal No E356/2020: *Tamarind Meadows Ltd v Wibeso Investments & Others*.
15. The court has considered the pleadings and affidavits on record.
16. The genesis of this matter is Machakos HCCC No 10 of 2020 Evanson Kariuki Kamau & 14 others v Tamarind Meadows Ltd & another [2021] eKLR. In that case, the respondents made a claim for breach of contract against the applicants herein. In answer to that suit, the applicants herein applied under section 6 of the Arbitration Act for the stay of that suit and reference to arbitration. The court acceded to the application and vide a ruling dated 29/9/2020, the matter was referred to arbitration.
17. The respondents thereupon instituted the arbitral proceedings in compliance thereof and in terms of arbitral clause in their respective agreements.
18. The applicants then raised a preliminary objection on 9/6/2021 alleging that since the two cases were pending, the tribunal lacked jurisdiction. The tribunal dismissed the objection on 9/8/2021 and found that it has the jurisdiction to hear the matter. Aggrieved by that decision, the applicants have approached this court for review thereof under section 17 of the Act.



19. The first challenge was that the application was filed out of time. Under section 17(6) of the *Act*, where an arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved thereby may apply to the High Court within 30 days after receiving notice of that ruling.
20. The award was dated 9/8/2021. However, annexure 'RD-2' in the applicants supporting affidavit indicate that the applicants were informed to collect the award on 16/9/2021 and that the applicants collected a copy of the same on 27/9/2021.
21. Therefore, the timeline for filing an appeal against the same would run from 16/9/2021. The present application was made on October 15, 2021 which is well within the statutory timeline of 30 days.
22. Having done away with the first objection, the- court is to consider the merit of the application. The applicant's case was that the tribunal lacked jurisdiction to entertain the claim of the respondents as it raised similar issues as in the two cases. That in the two cases, the issue in contention is the ownership of title and validity of the charge over LR No 18469 on which the respondents' houses stand.
23. On the other hand, the respondents contended that the matters before the tribunal are at variance with those in the two cases. That they are not party to the two cases and that the applicants failed to disclose that the issues raised in this application had already been adjudicated upon and determined in the Machakos HCCC No 10/2020.
24. In Civil Appeal No E356 of 2020: *Tamarind Meadows Ltd v Wibeso Investments & Others* (being an appeal from ELC Case No 226 of 2017, the issue in contention was ownership of title over LR 18469. In HCC 539 of 2012: *Kenya Commercial Bank v Tamarind Meadows Ltd & Others*, the issue in contention was a breach of payment of a principle loan amount and the charged interest on the same.
25. The issue before the tribunal is a claim by the respondents against the applicants for a breach of contract regarding executed sale agreements. In their statement of claim, the respondents particularized the alleged breach and sought reliefs from the applicants including rescission of the contracts, refund of the purchase price and damages.
26. After analyzing the cases above vis à vis the arbitration, the court finds that the issues in contention are distinct and do not overlap.
27. A peculiar fact is that the applicants themselves applied to have the dispute in HCC No 10 of 2020 *Evanson Kariuki and 14 others vs Tamarind Meadows Limited and another* referred to arbitration. Why would they now turn around and challenge that process? They are themselves who asked for it. How can they now turn around and say that it is not open to the respondents?
28. An inference can be made that the applicants are out to frustrate the respondents. The challenge is not *bona fides*. That is so because, the proper place to have raised the issue of *res-judicata* and sub-judice was in the suit that made the reference. That is an issue that is not open to either the tribunal or this court. It was supposed to be raised in HCC No 10 of 2020.
29. In this regard, the court finds that the applicants are approbating and reprobating at the same time. They told the court in HCC No 10 of 2020 that the dispute between the respondents and themselves should be referred to arbitration then turn around and tell the tribunal and this court that, no it belongs to the two cases. That won't do.
30. In this regard, there is no justifiable reason to interfere with the arbitrator's award. The upshot is that the originating notice of motion dated 15/10/2021 is without merit. The same is hereby dismissed with costs.



31. The order made on November 24, 2021 restraining the tribunal from making an award is hereby set aside

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY AUGUST, 2022.

A. MABEYA, FCI Arb

JUDGE

