



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwamunga & another v Sagalla Lodge Limited (Environment & Land  
Case E105 of 2022) [2023] KEELC 18286 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18286 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E105 OF 2022**

**SM KIBUNJA, J  
JUNE 21, 2023**

**BETWEEN**

**SAMUEL MAZERA MWAMUNGA & ANOTHER ..... PLAINTIFF**

**AND**

**SAGALLA LODGE LIMITED ..... DEFENDANT**

**RULING**

[Notice of Motion Dated October 27, 2022 And Notice of Preliminary Objection Dated The January 23, 2023]

1. The plaintiffs filed the notice of motion dated the October 27, 2022 through Ms SM Righa & Company Advocates seeking for the consolidation of this suit with Mombasa E242 of 2021 and the suits to be heard and determined together. The application is based on the six (6) grounds on its face and supported by the affidavit of Jamuel Mwakandana Kiwinda, advocate, sworn on the October 27, 2022. It is the case of the plaintiffs that the two suits substantially involve the same facts, parties and witnesses. That their consolidation will serve the interests of justice for all parties by saving on expenses and time in keeping with the court's overriding objective.
2. The application is opposed by the defendant through the replying affidavit of David Maina Gaitho, a director to the defendant, filed through Ms Sharia Nyange Njuguna & Company Advocates, sworn on the February 20, 2023. It is the defendant's case that the court lacks the jurisdiction to hear and determine this suit as it has filed a notice of preliminary objection dated the January 23, 2023 that should be heard and determined first. That this suit was initially filed as E048 of 2021 Voi Principal Magistrate's Court, and transferred to this court in error, irregularly and unprocedurally. That the Magistrate Court at Voi cannot legally transfer a suit from the magistrate's court to this court, and that when the Voi Magistrate recused herself, she directed the matter to be transferred for hearing and determination another magistrate at Mombasa and not this court. That the plaintiffs in this suit have already filed a defence and counterclaim and do not stand to suffer any prejudice if the application is



disallowed. That the plaintiffs were aware of the existence of the other suit and should have lodged their claim through it instead of filing this suit.

3. The defendant filed the notice of preliminary objection dated the January 23, 2023 against the entire suit raising three (3) grounds that;
  - a. The court lacks requisite jurisdiction to hear and determine the suit.
  - b. That the suit as pleaded offends the express provisions of section 10 of the [Arbitration Act](#) No 4 of 1995, and as such it should be struck out in its entirety with costs.
  - c. That the entire suit is bad in law, incompetent, frivolous, vexatious and an abuse of the court process.
4. The learned counsel for the plaintiffs and defendant filed their submissions dated the March 31, 2023 and April 17, 2023 respectively.
5. The following are the issues for the court's determinations;
  - a. Whether the court has jurisdiction to hear and determine this suit.
  - b. Whether the suit is in contravention of section 10 of the [Arbitration Act](#).
  - c. Whether the suit is bad in law, frivolous and or an abuse of the process of the court.
  - d. Whether the plaintiffs have made a reasonable case for consolidation of this suit with Mombasa ELC No E242 of 2021.
  - e. Who pays the costs in the application and preliminary objection.
6. The court has carefully considered the grounds on the notice of preliminary objection and motion, affidavit evidence, submissions by both learned counsel, superior court decisions cited and come to the following findings;
  - a. The court proposes to deal with the question of whether it is with jurisdiction to hear and determine this suit first as raised in the preliminary objection by the defendant. The plaintiffs' submitted that contrary to the defendant's contention that the suit should be struck out because of clause 22 of the parties' lease agreement and section 10 of the [Arbitration Act](#), the provision does not prescribe striking out but staying of a suit upon application under section 6(1) of the said Act pending the outcome of the arbitration, where the court is satisfied the party invoking the arbitration clause has satisfied the requirements. That such an application for stay should be made at the time of entering appearance. that the defendant entered appearance on the October 26, 2021 through Ms John Bwire & Associates, without raising the issue of the arbitration clause and seeking to have the suit stayed. That the said advocates were later replaced by Ms Sharia Nyange & Company Advocates through the notice of change of advocates of February 24, 2022. The plaintiffs cited the decision in the case of [Lofty v Bedouin Enterprises Ltd \[2005\] 2 EA](#) quoted in the case of [Raymond Muindi Simon v Takaful Insurance of Africa Ltd \[2017\] eKLR](#), where the Court of Appeal stated as follows in relation to section 6(1) of the [Arbitration Act](#);

' We respectively agree with these views, so that even if the conditions set out in paragraphs (a) and (b) of sections 6(1) are satisfied, the court would still be entitled



to reject an application for stay of proceedings and referral thereof to Arbitration, if the application to do so is not made at the time of entering an appearance or if no appearance is entered, at the time of filing any pleadings or at the time of taking any steps in the proceedings.'

The plaintiffs also cited the decision in the case of *The Diocese of Marsabit Registered Trustees versus Technotrade Pavillion Ltd [2014] eKLR*, in which the court stated that;

' I should add that, the requirement in section 6(1) of the *Arbitration Act* is not a mere technicality which can be diminished by Article 159(2) (d) of the *Constitution* as claimed by the applicant. It is a substantial legal matter which aims at promoting and attaining efficacious resolution of disputes through arbitration by providing for stay of proceedings but only where a party desirous of taking advantage of an arbitration clause in a contract has applied promptly for stay of proceedings and made a request to have the matter referred to arbitration. By these provisions of the *Constitution* and the fact that the process of arbitration is largely consensual, a party who fails to adhere to the law such as section 6(1) of the *Arbitration Act* forfeits his right to apply for and have the proceedings stayed or matter referred to arbitration. And for all purposes, such is an indolent party who should not be allowed to circumvent the desire and right of the other party from availing itself of the judicial process of the court.'

The plaintiffs therefore submitted that as the defendant had failed comply with the provisions of section 6 of the *Arbitration Act*, its preliminary objection should fail. On its part, the defendant has submitted that the court is without jurisdiction as first, there exists an arbitration clause in the agreement between the parties that robs the court of jurisdiction. That section 6(1) of the *Arbitration Act* does not override the provision of Article 159 of the *Constitution*, and as the defendant has not filed a defence in this suit, it cannot be said to have submitted to the court's jurisdiction. That having considered the rival submissions by both parties as summarized above, and perusing the record, it is apparent that when the defendant filed the memorandum of appearance dated the October 25, 2021 and filed on the October 27, 2021 through Ms John Bwire & Associates Advocates, it did not invoked clause 22 of the lease agreement and seek to have the matter referred to arbitration or proceedings stayed at that time. That had the defendant moved the court towards that direction at the time of entering appearance, the court would definitely have given directions in terms of section 6(1) of the *Arbitration Act*. The objection being raised through the notice of preliminary objection dated the January 23, 2023 that appear to have been filed on the January 25, 2023 was coming too late in the day, that is about fifteen (15) months after entering appearance. That as was held in the Court of Appeal decision above, this court is entitled to reject the defendant's objection for not having been raised within the time provided by section 6(1) of the *Arbitration Act*.

b. The defendant further submitted that after the initial Voi magistrate recused herself, the file was placed before the Voi Chief magistrate who for reasons not disclosed directed it be brought placed before a magistrate in Mombasa. Strangely, the file was placed before this court without there being an application made to transfer the suit from Voi Magistrates court to this court. The court has perused the record and noted the following order in the proceedings of June 3, 2022 by Hon TN Sinkiyan;

' Court. The amended plaint filed 02/06/2022 claims Kshs 10,757,841.36. this is beyond the court's pecuniary jurisdiction. Matter be mentioned before court 1 [CM Obura] for reallocation.'



The proceedings of August 15, 2022 contains the following order by Hon AM Obura, Chief Magistrate;

' I perused the court record. Regrettably, I recuse myself from handling the matter due to conflict of interest. I direct that the Deputy Registrar places the file before the High Court on August 29, 2022 before the HON Judge for directions.'

That order is followed by the proceedings of September 29, 2022 in which this court, [Munyao], directed as follows;

' It appears there is no magistrate in Voi to hear the case. I transfer the case for hearing to ELC Mombasa. The case be given an ELC number.'

That while I agree with the defendant's position and submission by its learned counsel that a magistrate's court has no jurisdiction under section 18 of the *Civil Procedure Act* chapter 21 of Laws of Kenya to transfer a case from that court or any other magistrates court to this court, it is clear from the orders above that contrary to the defendant's contention, there was no order made by the Voi Chief Magistrates court to transfer this matter from any of the magistrate's in that station to Mombasa Chief Magistrates court before the it came to this court or to this court directly. The order by the Chief Magistrate Voi was for the file to be placed before the 'Hon Judge for directions' as opposed to transferred to the Hon Judge for hearing and determinations. The order transferring the suit from Voi Chief Magistrates Court to this court was made by this court, [Munyao J,] I have not seen any application by any of the parties made to this court to review and or set aside that transfer order and no appeal against that order has been preferred to date. The defendant's objection on that basis therefore fails.

- c. The remaining ground in the defendant's notice of preliminary objection is to the effect that the suit is bad in law, incompetent, frivolous, vexatious and an abuse of the court process. I have not seen any specific submissions in support of this ground, and I will take it to have been abandoned. In any case looking at the pleadings filed in this suit, that ground is without merit and is rejected.
- d. The defendant has submitted that by the time this suit was filed, it had already filed Mombasa ELC NO 242 of 2021 in which the plaintiffs herein filed a defence and counterclaim, and do not stand to suffer any prejudice if this suit is struck out. The provisions of section 6 of the *Civil Procedure Act* chapter 21 of Laws of Kenya on subsequently filed suits being subjudice must be alive to all parties in this suit as they are represented by legal counsel. None of the parties has moved the court to stay this suit to await the determination of ELC No 242 of 2021 that was reportedly filed before it. The plaintiffs have through their application moved the court to consolidate the two suits for hearing and determination for reasons that the parties, facts and witnesses are more or less the same and have extensively submitted that they deserve the prayer. Their contentions have not been challenged by the defendant either through the replying affidavit or submissions other than stating that the plaintiffs would not suffer any prejudice as their claim herein can easily be subsumed in their defence and counterclaim filed in the other suit. In a way, that amounts to an admission that the parties, subject matter and witnesses in both suits are the same. It would therefore serve the overriding objective of the court to have both suits heard and determined together as it would cut down on the time and costs expended by both the parties and the court. I find the application to consolidate to be meritorious.



- e. That under section 27 of the *Civil Procedure Act*, costs should follow the events unless for good cause to be recorded the court directs otherwise. I find no basis to deviate from that edict. As the plaintiffs have succeeded in their application and in defending the preliminary objection, they should have the costs.
7. Flowing from above, the court finds and orders as follows;
- a. The defendant's preliminary objections dated the January 23, 2023 is without merit and is therefore rejected.
- b. That this suit be and is hereby consolidated to Mombasa ELC CASE No 242 of 2021 for hearing and determination.
- c. The plaintiffs are awarded costs in their application and preliminary objection.
- It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 21<sup>st</sup> DAY OF JUNE 2023.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

**In The Presence Of;**

**Plaintiffs : Absent**

**Defendant : Absent**

**Counsel : Mr. Nyange For Defendant.**

**Wilson – Court Assistant.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

