



**Mwakisha & 2 others v Maghanga & another (Environment & Land
Case 303 of 2017) [2023] KEELC 18134 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18134 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 303 OF 2017**

NA MATHEKA, J

JUNE 20, 2023

BETWEEN

SAMUEL VENANT MWAKISHA (CHAIRMAN) 1ST PLAINTIFF

ESTHER B. WAMBUGAH (SECRETARY) 2ND PLAINTIFF

LEWIS D. PIKO (TREASURER) 3RD PLAINTIFF

AND

EMMANUEL CHOMBO MAGHANGA 1ST DEFENDANT

AHMED ALI SATI 2ND DEFENDANT

RULING

1. The 1st Defendant raised a preliminary objection to the Competency of the Plaintiffs' suit and seek its striking out on the following points of law;
 1. That clause 10 of the agreement for sale has an arbitral clause for resolution of disputes through arbitration.
 2. That the suit is therefore in contravention of the arbitration clause.
 3. That parties are bound by Section 6 of the *Arbitration Act* to resolve the dispute by way or arbitration.
 4. That by dint of arbitral clause in the agreement between the Plaintiff and the 1st Defendant which forms the subject matter of the dispute between parties, this honorable court lacks the requisite jurisdiction to entertain the Plaintiff suit.
2. The Plaintiffs stated that in early March, 2015, while looking for a piece of land to purchase at Mishomoroni where their Church was established since around 2010, they were taken by an Agent, Fabian Maghanga to the suit land and found a board indicating that the land was for sale. They saw the



land, liked the same and thereafter, the Agent, introduced them to the owner thereof, who turned out to be the 1st Defendant. That after several meetings and deliberations, the 1st Defendant agreed to sell the suit land to them at Kshs 1,900,000.00 as detailed in the Sale Agreement made on the 19th March, 2015, a copy whereof is hereto annexed and marked "SVM". That before executing the Agreement above, they asked the 1st Defendant for title documents, but he said he had a Sale Agreement but the process of getting the Title Deed was ongoing. He showed them the original of the said Sale Agreement made on May 5, 2005 between him and the 2nd Defendant. The 1st Defendant also introduced them to his Advocate Mr F M Mwawasi, who confirmed that the land had been sold by the 2nd Defendant to the 1st Defendant and that the said Advocate is the one who had prepared the said Agreement for Sale, which was also executed before him. Annexed hereto and marked "SVM 2" is a copy of the Agreement made on May 5, 2005. That having been convinced by the 1st Defendant and his Advocate that there was a valid Sale Agreement aforesaid, they proceeded to purchase the land and have since build a Church in 2015, as evidenced by copies of photographs hereto annexed and marked "SVM 3"

3. That the 2nd Defendant processed the Deed Plan for the suit land as evidenced by a copy thereof hereto annexed and marked "SVM 4". However, the 2nd Defendant has not transferred the suit property to the 1st Defendant, who should thereafter or concurrently and/or simultaneously transfer the same to them. That though it is true their Agreement with the 1st Defendant had an Arbitration Clause, this matter is incapable of being resolved through the said process, this is because, the Agreement is tied to the one the 1st Defendant had with the 2nd Defendant, which did not have Arbitration Clause. The 1st Defendant's position is thus an attempt to frustrate the hearing of this matter because subjecting the Agreement with him to the arbitral process will not resolve all the issues in this matter and will be tantamount to litigating in instalments. In the premises, this Honourable Court will be the best arbiter in hearing and determining this matter, given the inter-connection of the two sale agreements herein. That since the filing of the suit herein, they have had about seven meetings with the 1st Defendant and during all those meetings, he would always promise to process the Title documents from the 2nd Defendant so that he may hand over the same to them, in the premises, the desire now to go for arbitration is clearly an afterthought and delaying tactic. That further to the foregoing, and without prejudice thereof, the Notice of Preliminary Objection herein offends the mandatory provisions of the Arbitration Act, and thus should be dismissed with costs.

4. This court has considered the Preliminary Objection and submissions therein. According to the Black Law Dictionary a Preliminary Objection is defined as being:

In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

5. The above legal preposition has been made in the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd.* (1969) E.A. 696 where the court held that;

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer it 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 in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”



6. In the case of *Attorney General & Another vs Andrew Mwaura Gitthinji & another* (2016) eKLR the court outlined the scope and nature of preliminary objection as;
- (i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
7. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. I find that the filed preliminary objection by the 1st Defendant herein was properly brought before the court.
8. It is clear that, the Plaintiffs and the 1st Defendant entered into the said agreement dated March 19, 2015 which provides for an arbitration clause. Clause 10 states as follows;
- "That in case of a dispute the matter to be referred to arbitration and an arbitrator be appointed in accordance with the *Arbitration Act* No. 4 of 1995 Laws of Kenya."
9. The provisions of Article 159 (1) of the *Constitution* of Kenya, clearly stipulates that, Judicial authority is derived from the people and vested in, and shall be exercised by the courts and tribunals established by or under the *Constitution*. That, in exercising the judicial authority, the courts and tribunals shall promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism. Further, the statutory provisions of Section 10 of the *Arbitration Act* No 4 of 1995, limits the Court's intervention in arbitral process and states as follows:
- Except as provided in this Act, no court shall intervene in matters governed by this Act."
10. This means that the court's intervention in arbitral process is limited. I note the objection herein, is premised on the provision of Section 6 (1) of the Act, which states that;
- 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".
11. These provisions provide that, an Applicant seeking to stay proceeding and referral thereof to arbitration should make an application for the same at the time of entering appearance or before acknowledging the claim in question.
12. The issue is what constitutes an acknowledgement of a claim. In the case of *Eunice Soko Mlagui vs Suresh Parmar & 4 others* (2017) eKLR, the Court held that, the filing of a defence constitutes



acknowledgment of a claim, within the meaning of the provisions of Section 6(1) of the *Arbitration Act*. In that matter, the 1st, 2nd and 3rd Respondents had already filed and even amended their statements of Defences while the 4th and 5th Respondent had entered appearance and filed their statements of defences. The Court held that, the Defendants had already submitted to the jurisdiction of the Court and the matter could not be referred to arbitration.

13. In the instant case, it is alleged that the Plaintiff filed the matter on August 22, 2017. The 2nd Defendant entered appearance and filed their pleadings way back in October 2017. The 1st Defendant entered appearance in October 2022 and filed the Preliminary objection on November 21, 2022. The question that arises is; does the filing of memorandum of appearance amount to an acknowledgment of a claim? If so is the 1st Defendant barred from raising the issue of jurisdiction, as required by Section 6 (1) of the *Arbitration Act*.

14. The Court in Civil Case No 1756 of 2000, *Bedouin Enterprises Ltd vs Charles Njogu Lofty and Joseph Mungai Gikonyo T/A Garam Investments* where the Judge had rejected the argument that, an application for reference to arbitration can be made at three stages, namely: at the stage of entering appearance or at the stage of filing any pleadings or at the time of taking any step in the proceedings. The learned judge expressed himself as follows:

"In my view, section 6(1) of the *Arbitration Act*, 1995, which court is construing means that, any Application for stay of proceedings cannot be made after the Applicant has entered appearance or after the Applicant has filed pleadings or after the Applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the Applicant enters appearance. It seems that the object of section 6(1) of the *Arbitration Act* 1995 was, inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of proceedings".

15. The Court of Appeal in concurring with the sentiments above expressed itself on the issue and stated that:

"We respectfully agree with these views so that even if the conditions set out in paragraph (a) and (b) of section 6(1) are satisfied the court would still be entitled to reject an application for stay of proceedings and referral thereof for 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 pleading or at the time of taking any step in the proceedings".

16. Thus, case law on Section 6(1) of the *Arbitration Act*, is settled that an application thereunder should be filed promptly. In the case of *Eunice Soko Mlagui vs Suresh Parmar & 4 others* (2017) eKLR, (Makhandia, Ouko & M'noti JJA) held that:

"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."

17. I find that the 1st Defendant filed the Preliminary Objection promptly and did complied with the provision of section 6 *Arbitration Act*. Be that as it may, the Court laid down the grounds upon which a Court may refuse to stay proceedings and refer a matter to arbitration (see; Emden & Gills: Building Contracts and Practice 7th Edition, at page 363,):

- a) where there are questions of law involved;
- b) where there is multiplicity of proceedings and (it is necessary to avoid) inconsistent findings of facts;



- c) where the arbitration is appropriate, (as was obviously the case in the matter) for only a part of the dispute.
18. The issue for this Court to consider in the instant case is that, the 2nd Defendant is not a party to the arbitral agreement and cannot be subjected to the arbitral proceedings. It is noteworthy that, it is trite principle of law that, Arbitration is dependent on the existence of an agreement between the disputant parties. This is a reflection of the role of consent as the basis of arbitration.
19. In the case of Eunice Soko Mlagui vs Suresh Parmar & 4 others (*supra*) the court held that an arbitral clause in the subject contract applied in the event of disputes between members and the company and between members per se. That it did not apply to disputes with employees like the 4th and 5th Respondents, who were external auditors of the company. To that extent therefore, and as contemplated by Section 6 (1)(b) of the Arbitration Act, there was no dispute between the Appellant and the 4th and 5th Respondents, which the parties had agreed to be referred to arbitration. Thus the position seems to be that, where a third party is involved, the Court may refuse to stay or strike out the proceedings as the case will only be appropriate for only part of the dispute. It is not in dispute that the 2nd Defendant is not a party to the arbitral process and is not bound by the arbitral agreement. Therefore, the claim in relation to the 2nd Defendant cannot be referred to arbitration. For these reasons I find that the Preliminary Objection is unmerited and is dismissed. However, the costs thereof shall abide the outcome of the main suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH JUNE 2023.

N.A. MATHEKA

JUDGE

