



Jai & another (Suing as the Executors of the Estate of the Late Bhanoo Shashikant Jai) v Waiyaki Way Shopping Centre Limited (Environment & Land Case E075 of 2021) [2023] KEELC 21748 (KLR) (23 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21748 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E075 OF 2021
MD MWANGI, J
NOVEMBER 23, 2023**

BETWEEN

PARESH SHASHIKANT JAI 1ST PLAINTIFF

TREKHAAL DESAI 2ND PLAINTIFF

SUING AS THE EXECUTORS OF THE ESTATE OF THE LATE BHANOO SHASHIKANT JAI

AND

WAIYAKI WAY SHOPPING CENTRE LIMITED DEFENDANT

(In respect of the Defendant's Preliminary Objection dated 20th June, 2023)

RULING

Background

1. This ruling is in respect of the Defendant's Preliminary Objection dated 20th June, 2023 on the ground that:
 - a. This Honourable Court lacks the jurisdiction proper to hear and determine this suit on account of the Arbitration Clause in the Lease Agreement, that forms the subject matter herein.
2. The Court directed that the preliminary objection be canvassed by way of written submissions. Both sides have complied and the court has had occasion to peruse the submissions and the precedents relied on in support of the submissions.



Defendant's submissions

3. The Defendant submits that there exists a Lease Agreement between Bhanoo Shashikant Jai and the Defendant herein. The Defendant avers that the Plaintiff's instant suit is based on the breach of the Lease Agreement between the Plaintiffs and the Defendant. The Lease Agreement under clause 6.10 stipulated that any dispute arising from the Lease Agreement be subjected to Arbitration.
4. The Defendant argues that pursuant to Section 6 of the Arbitration Act and subject to Clause 6.10 of the Lease Agreement, the Defendant has remained ready and willing to do all things necessary to the proper conduct of the arbitration. The Plaintiff has not referred the matter for arbitration before filing the suit in court. The existence of the Arbitration Clause in the Agreement between parties was raised in the First Instance at the time of filing the Defendant's Defence at Paragraph 22. The Preliminary Objection was therefore properly raised and the court lacks jurisdiction to hear and determine this matter.

Plaintiff's submission

5. The Plaintiffs in their submissions dated 21st July, 2023, submit that the Preliminary Objection is barred by Section 6 of the Arbitration Act which require anyone relying on the arbitration clause to make the application for referral of the matter to arbitration before filing a defence. The Defendant herein however has already filed a statement of defence, a witness statement and a list and bundle of documents.
6. Further, the Plaintiffs submit that the Preliminary Object has been filed over three years after the institution of the suit. The Defendant has fully participated in the proceedings all along. The Defendant did not oppose the application for substitution dated 7th April, 2022 whilst it filed an application dated 2nd February, 2023 to strike out the Amended Plaintiff which application was dismissed.

Issues for Determination.

7. The sole issue for determination is whether the court should refer this matter to arbitration in accordance with provisions of section 6 of the Arbitration Act of 1995.

Analysis and Determination.

8. I start by noting that the Court is satisfied the preliminary objection raises a point of law and therefore meets the threshold of what constitutes a preliminary objection as established in the case of Mukisa Biscuit Manufacturing Co. Ltd – Vs- West End Distributors Ltd (1969) EA 696 where Sir Charles Newbold, P. stated as follows: -

“...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all 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.”

9. The Objection is based on the fact that the Plaintiffs' suit is premised on the breach of a Lease Agreement that has an arbitration clause. The Court has gone through the said Lease Agreement dated 19th July, 2020 and confirms the Arbitration Clause at paragraph 6.10.



10. Section 6 of *Arbitration Act* states as follows:

6. (1) 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.
- (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
- (3) 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.

10. In the instant suit, the Defendant/Applicant argues that the Preliminary Objection is proper as the objection was raised in the first instance at the filing of the Defendant's Statement of Defence dated 16th March 2021 at Paragraph 22. The said paragraph states that "jurisdiction of this Honourable Court is denied by virtue of the Arbitration Clause"

11. The Plaintiff of the other hand contends that the objection has been brought late in the day as the Defendant has actively participated in the proceeding herein. The Plaintiff submits that the Defendant already filed a Statement of Defence, a bundle of documents as well as a witness statement. In fact, the Defendant previously filed an application seeking to strike out the Amended Plaint, which application was dismissed by the court.

12. This court in its decision in *Shaffie A. Weru -vs- Ganza Limited & Another* [2022] eKLR cited the case of *Adrec Ltd -vs- Nation Media Group Ltd* (2017) eKLR where the Court of Appeal restated and re-affirmed the position that in a suit founded on a contract containing an arbitration clause, a defendant ought to contemporaneously with his notice of appointment or appearance file an application to stay the proceedings and refer the matter to arbitration.

13. From the record, it is evident that the Defendant already filed its statement of Defence and the accompanying documents. It is clear that the Defendant has actively participated in the proceedings and even filed the application dated 2nd February, 2023.

14. The Defendant alleges that it raised an objection on jurisdiction in its Statement of Defence at Paragraph 22. The law however is that the Defendant ought to have separately raised the objection alongside the notice of appointment or memorandum of appearance and without filing a Defence. In the case of *Mt Kenya University vs Step Up Holding (K) Limited* [2010] eKLR, the Court of Appeal considered Section 6(1) of the *Arbitration Act* and held that even if the conditions set out in paragraphs (a) and (b) are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application is not made prior to or at the time of entering appearance or if the application is made after filing of the defence.



15. The legal position therefore is that a Defendant who wishes to take advantage of the arbitration clause in a contract, should, where a suit has already been filed, at the time of entering appearance or prior to entering appearance file an application to refer the matter to arbitration.
16. The upshot is that the preliminary objection by the Defendant is unmerited. I hereby dismiss it with costs to the Plaintiffs.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2023

M. D. MWANGI

JUDGE

In the virtual presence of:

Mr. Omondi for the Defendant

No appearance by the for the Plaintiff

Court Assistant: Yvette

M. D. MWANGI

JUDGE

