



REPUBLIC OF KENYA



**Kimuli v Morris (Environment & Land Case E016 of 2023)
[2025] KEELC 3433 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3433 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E016 OF 2023**

NA MATHEKA, J

APRIL 30, 2025

BETWEEN

NICODEMUS MWANZIA KIMULI PLAINTIFF

AND

CHRISTINA NDUNGE MORRIS DEFENDANT

RULING

1. The application is dated 15th May 2024 and is brought under Article 159 of the *Constitution* of Kenya 2010, Section 6 of the *Arbitration Act* 4 of 1995, Section 1A, 3A and 59 *Civil Procedure Act* Cap 21, Order 46 and Order 50 Rule 1 of the *Civil Procedure Rules, 2010* seeking the following orders;
 1. That this matter be certified as urgent and be heard ex parte in the first instance.
 2. That this Honourable Court be pleased to order temporary stay of execution of the orders made by this court on 14th December, 2023 pending hearing and determination of this Application inter partes.
 3. That this Honourable Court be pleased to order temporary stay of execution of the orders made by this court on 14th December, 2023 pending hearing and determination of this Application.
 4. That this Honourable Court be pleased to and set aside orders made by this court on 14th December, 2023 and all the consequential orders thereto.
 5. That this Honourable Court be pleased to order stay of the present proceedings pending hearing and determination of the arbitration proceedings.
 6. That upon grant of prayer 5 above, the Honourable Court to issue an order summoning the process-server one Peter Keli for purposes of cross-examination in respect to this Affidavit of Service on record.



7. That the cost of this Application be provided for.
2. It is based on the following grounds that this suit emanates from a Sale Agreement between the Plaintiff and the Defendant which Sale Agreement is dated 18th May, 2022. That Clause 25 of the aforesaid Agreement and which is part of the record in this court provided that in the event of any dispute between the parties in so far as satisfaction of the agreement, the such dispute is to be referred to arbitration first. That the said Clause further stated that if the dispute referred to arbitration is not resolved within 90 days from the date of its declaration, then either party may move to court for redress. That from the above, the contract clearly stipulated the mode of conflict resolution should a dispute arise under the contract. That by virtue of the agreement, the parties hereto are bound to and have agreed to proceed to arbitration on matters in dispute arising thereto. That Sections 6 of the Arbitration Act 1995 (the Act) empowers court before which proceedings are brought in a matter which is subject to an arbitration agreement, stay the proceedings and refer the parties to arbitration. That the Plaintiff/ Respondent has not sought arbitration as envisaged in the agreement dated 22nd May, 2022 and as such the interim orders issued by this court are not available to the Plaintiff. That the interim orders issued by this Honourable Court were obtained upon the Plaintiff misleading and lying to the court that the Defendant/Applicant had been served with the pleadings yet the correct position is that the Defendant was never served with any pleadings. That the Defendant/Applicant became aware of the present suit when she applied for the removal of the caution lodged by the Plaintiff against the suit property and she was given the said order given by this court on 14th December, 2023 by the Registrar of Lands Machakos. That the Affidavit of Service sworn by the said process-server Peter Keli is therefore a falsehood and the said process-server ought to be punished by this Honourable Court for perjury. That in the circumstances it is clear that the Defendant/Applicant has been condemned unheard and therefore the orders ought to be set aside.
3. This court has considered the application and the submissions therein. The applicant seeks to have the court orders set aside due to the fact that they were never served with summons. That the affidavit of service sworn by the said process-server Peter Keli dated 8th September 2023. He stated that he travelled from Nairobi to Machakos on the 8th September 2023. That the Defendants' homestead was located on the right side of Machakos – Kathiani Road from Machakos Town approximately 300 meters from Mumbuni Secondary School and which was visibly identifiable by blue gate that touches the main road. That it is situated in a vast piece of land and is further fenced with an inner gate. The Defendant was served in person but refused to sign on his copy as received. The Judge was certified with the service and proceeded with the application. I see no reason to set aside the orders issued by the court.
4. In determining this issue, Section 6(1) of the Arbitration Act No. 4 of 1995 is key. It provides that;
 - (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 files any pleadings or takes any other step in the proceedings, 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.”
5. The provision is mandatory but has a limitation. It is expressly provided that if the arbitration agreement is “null and void, in operative or incapable of being performed,” and where there is no dispute between the parties with regard to matters agreed to be referred to arbitration. Where a party



alleges these matters and they are proved, the court will not stay the proceedings and refer the matter to arbitration.

6. The intentions of the parties to a contract with an arbitration clause was that if any dispute arises they oust the jurisdiction of the court and have preference to have the dispute settled through arbitration. This is in line with Judicial Authority, under Article 159(2)(c) of the Constitution which states.
7. In exercising Judicial authority courts and Tribunals shall be guided by the following principles –
“alternative forms of dispute resolution including reconciliation, mediation, arbitration ----- shall be promoted.”
8. The court will therefore promote other forms of dispute resolution where the circumstances of the case so allows and the parties have agreed to an alternative mode of dispute resolution other than the court.
9. Blue Limited v Jaribu Credit Traders Limited Nairobi (Milimani) HCCS No. 157 of 2008 where Kimaru, J stated *inter alia* as follows;

It is now settled law that where parties have agreed to resolve any issue arising out of a commercial agreement, the courts are obliged to give effect to the said agreement of the parties by staying proceedings and referring the dispute for resolution by arbitration. Before staying proceedings, the court has to be satisfied that there is a valid arbitration clause in the agreement capable of performance. At the stage of the application for stay of proceedings, the court is not called upon to determine the merits or otherwise of the plaintiff’s suit nor the counterclaim filed by the defendant. The court is further not required at this stage of proceedings to consider the validity, legality or otherwise of the agreement that was entered between the plaintiff and the defendant. The court is only required to consider whether there was a valid arbitration clause in the agreement capable of being enforced by the court...That principle recognises the fact that where there is an arbitration clause in an agreement, such clause is considered as a separate and severable agreement between the parties who have agreed to resolve any dispute arising from the agreement by arbitration. A party to an agreement cannot raise issues relating to the validity or otherwise of the agreement to defeat the arbitration clause in the agreement. The issue as to whether the agreement which was entered between the plaintiff and the defendant is valid or not is an issue which can only be determined during the hearing of the dispute on arbitration. The court’s concern is whether the arbitration clause in the agreement is valid and therefore capable of being performed as envisaged by section 6(1)(a) of the Arbitration Act, 1995. Having considered the agreement, the court holds that the arbitration clause is valid and is capable of being performed...Section 7(1) of the Arbitration Act, 1995 grants to the court jurisdiction to grant interim measure of protection where it is established that there exists a valid and enforceable arbitration agreement.”

10. The rationale for respecting the parties’ agreement was explained in the case of Eunice Soko Mlagui v Suresh Parmar & 4 Others (2017) eKLR, where it was held that;

Section 6 of the Arbitration Act is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitrating where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution.”



11. Be that as it may, the tenor and import of Article 159(2) (c) of the *Constitution* as read together with Section 6(1) of the *Arbitration Act* is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement. Secondly, where a party elects to come to court and the other party to the arbitration agreement seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance which was not done in this case. This application was filed on 15th May 2024. I find that the application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF APRIL 2025.

N.A. MATHEKA

JUDGE

