



Ndung'u v Rwaikamba Rwatha Trading Co Ltd & another (Environment & Land Case 78 of 2009) [2022] KEELC 2916 (KLR) (16 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2916 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 78 OF 2009
JA MOGENI, J
JUNE 16, 2022
IN THE MATTER OF REGISTRAION OF TITLE
ACT CAP 281 LAWS OF KENYA (REPEALED)**

AND

**IN THE MATTER OF LAND PARCEL NUMBERS 209/4401/73-81,
209/4401/110-124AND 209/4401/131 – 133 MAKADARA NAIROBI**

BETWEEN

ZEPHANIAH GICHURE NDUNG'U APPLICANT

AND

RWAIKAMBA RWATHA TRADING CO LTD 1ST RESPONDENT

CITY COUNCIL OF NAIROBI 2ND RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 14/01/2022 under Article 159 of the *Constitution*, sections 1A, 1B, 2, 3, and 3A, of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, and Orders 46 and 51 of the *Civil Procedure Rules*, and all other enabling provisions of the law. The application is supported by the affidavit of Silas Ndung'u Gichure the administrator of the estate of the plaintiff herein. The applicant is seeking to have the land case referred to Arbitration by a single Arbitrator to be agreed by all counsels for the parties within twenty-one days or three arbitrators each appointed by counsels for the plaintiff, 1st and 2nd defendants and costs of the application.
2. Before the Notice of Motion Application could be heard, the 2nd Defendant/Objector filed a Notice of Preliminary Objection dated 9/02/2022 through the Law Firm of Ongoro & Agong Company Advocates filed with its written submissions dated 23/02/2022 and sought to have the Application dated 14/01/2022 dismissed with costs.



3. The Preliminary Objection raised the following issue:
 - a) That the Application dated 14th January, 2022 is in breach of Section 6(1) of the Arbitration Act which obligates the Applicant to apply not later than the time when the party enters appearance or files any pleadings or takes any other step in the proceedings.
4. The Notice of Motion Application and the Preliminary Objection were canvassed by way of Written submissions by the parties who relied on various decided cases.
5. Having a Preliminary Objection raised against the Notice of Motion means that I must pause and consider the legality of the preliminary objection first. In determining the preliminary objection, I am aware that the Notice of Motion dated 14/01/2022 sought to have this matter referred to an arbitrator.
6. Earlier on 05/10/2021 the matter had been referred to court annexed mediation at the request of the 1st and 2nd respondents but when the Court Mediator called for the mediation on 23/11/2021 the plaintiff was not willing to participate. The report states that the plaintiff preferred that the issues in question being matters of law that the court would deal with the matter. There is now an application for the matter to be referred to arbitration which is opposed by the 1st respondent and the 2nd Respondent who has also filed a Preliminary Objection.
7. The 2nd Respondent opposed the application through a replying affidavit sworn on 9/02/2022. The 2nd Respondent contend that the Nairobi City County will suffer prejudice if the matter is referred to arbitration and that there is no existing agreement on arbitration and this being the case then the matter cannot be referred to arbitration because parties can only go for arbitration if it was part of an agreement.
8. Further that the instant application has been brought to court 13 years after the applicant had filed a memorandum of appearance and that the applicant has also not provided any evidence to show the existence of a dispute that should be referred to arbitration. The 2nd Respondent opposed the application on the ground that Section 6(1) of the Arbitration Act does not permit an application for stay of proceedings after appearance has been entered, contending that the applicant lost the right to make the application the day it entered appearance.
9. On his part and in opposition to the application the 1st Respondent Mr Samuel Wangoto Chege in his replying affidavit sworn on 3/02/2022 averred that the application for arbitration is wrongfully before the court because the plaintiff rejected court annexed mediation. That the suit has been in court for the last 22 years and the plaintiff cannot now expect the matter to be stayed.

Analysis and Determination

10. Both the application and the Preliminary Objection were argued by way of written submissions. I have considered the applicant's application together with the affidavit filed in support thereof. I have also considered the 1st and 2nd Respondent's plaintiff's replying affidavits in opposition to the application. I have also considered the Preliminary Objection. Finally, I have considered the submissions by the advocates for the parties together with the authorities cited in support thereof.
11. I will first address myself to the preliminary objection. The often cited authority on objections in limine is the case of *Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors* (1969) E.A. 696 where Law JA at page 700 stated;

“ ... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose



of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701 Sir Charles Newbold P added;

“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 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 is the exercise of judicial discretion.”

12. The preliminary objection raised here relates to Section 6(1) of the [Arbitration Act](#), 1995 under which provides as follows:-

“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”.

13. According to the 2nd Respondent, he contends that the application by the Plaintiff has been made 13 years after the applicant filed the suit. On his part the 1st Respondent contends that there is no agreement between the parties that obligates them to go for arbitration. He however recognizes that the [Constitution](#) under Article 159 and Civil Procedure under Section 46 Rule 20 encourages parties to a suit to embrace alternative dispute resolution but this is not coached in mandatory language. He states that the plaintiff was referred to court annexed mediation which he declined.

14. I have considered the Application and Preliminary Objection. I have also considered the applicable constitutional and statutory frameworks and the relevant jurisprudence on the key questions in the application. Two questions fall for determination in this application. The first question is whether the application is fatally defective by dint of the fact that it was brought long after the defendant had entered appearance in the suit. The second question is whether there is a dispute capable of being referred to arbitration. I will determine the two questions in the order in which they are framed. Before I pronounce myself on the two questions, I will make a few general observations about the place of arbitration as the alternative dispute resolution (ADR) mechanism in Kenya’s legal system.

15. The [Constitution](#) of Kenya 2010 at Article 159 recognizes arbitration as one of the alternative forms of dispute resolution. Secondly, promotion of arbitration is one of the principles that guide Kenyan courts when exercising judicial authority. Thirdly, under Article 2(5) of the [Constitution](#) of Kenya 2010, the general rules of international law form part of the law of Kenya. Fourthly, under Article 2(6) of the [Constitution](#) of Kenya 2010, any treaty or convention ratified by Kenya forms part of the law of Kenya.

16. Guided by the above legal philosophy, I proceed to determine the two issues in this application. The framework on stay of court proceedings and referral of disputes to arbitration is contained in Section 6 of the [Arbitration Act](#) which provides as follows:

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 proceeding 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.
17. This section is couched in mandatory terms, Parliament used the word “shall” in Section 6(1) of the Act. My understanding of the legal framework in Section (1) of the Act is that a party seeking to stay court proceedings and obtain an order referring the dispute to arbitration is required to bring the application not later than the time when the party files a memorandum of appearance. The Rules of Procedure under Section 6(1) cannot simply be wished away by Article 159 of the *Constitution*.
18. Indeed, this section has been a subject of interpretation by Kenyan courts and the prevailing jurisprudence is that a party who does not comply with the timelines set out in Section 6(1) of the *Arbitration Act* loses the right to seek stay and referral orders. The cases where this interpretation has been affirmed include: *Charles Njogu Lofty v Bedouim Enterprises Limited* CA No 253 of 2003; *Niaxons (K) Ltd v China Road & Bridges Corporation Kenya* (2001) KLR 12 and *Eunice Soka Mlagui v Suresh Parmer & 4 others* (2017) eKLR.
19. It is not in dispute that this Plaintiff filed this suit 13 years ago. In light of the mandatory requirements of Section 6(1) of the *Arbitration Act*, it follows that the present application was brought after closure of the window for bringing the application. The orders of stay and referral are therefore unavailable at this stage of the proceedings
20. The second issue is whether there is a dispute to be resolved through arbitration. The plaintiff in this application seeks the following orders:
- a) That this Land Case be referred to Arbitration by a Single Arbitrator to be agreed on by all Counsel for the Parties, within and in the Event of Disagreement by Counsel for the Parties to a Single Arbitrator, the suit be Referred to Arbitration by Three (3) Arbitrators, one to be appointed by Counsel for the Plaintiff, The Second one by Counsel for the 1st Defendant and the Third One by Counsel for the 2nd Defendant. Who shall constitute the Arbitral Tribunal, whose Decision shall be Final and Binding on all the Three (3) Parties
 - b) That the Arbitral Tribunal do proceed with the Arbitration as provided by the *Arbitration Act*, 1995, Cap 49 of the Laws of Kenya.
 - c) That the Costs of this Application be provided for.
21. I have examined the materials placed before the court by the parties. None discloses evidence of any dispute as to the parties obligations and rights under any agreement. Among the mandatory statutory requirements to be satisfied before a case is stayed and referred to arbitration is that there must be a dispute between the parties with regard to the matters agreed to be referred to arbitration. This requirement is contained in Section 6(1) (b) which is reproduced above. In *UAP Provincial Insurance*



Company Limited v Michael John Beckett (2018) eKLR, the Court of Appeal made the following pronouncement in relation to Section 6(1)(b) of the *Arbitration Act*.

“ 17. It is clear from this provision that the enquiry that the court undertakes and is required to undertake under Section 6(1)(b) of the *Arbitration Act* is to ascertain whether there is a dispute between the parties, and if so, whether such dispute is with regard to matters agreed to be referred to arbitration”.

22. The Court of Appeal added thus:

“The words “that there is not in fact any dispute between the parties” appearing in Section 6(1) (b) of the *Arbitration Act* are in our view not superfluous and require the court to consider whether there is in fact a genuine dispute when considering an application for stay of proceedings”.

23. As observed above, the materials presented to the court do not disclose any dispute capable of being referred to arbitration. In the absence of a dispute, an application for stay of proceedings would not succeed.

24. In summary, the court’s finding on the first issue is that the application for stay of proceedings and referral to arbitration was brought long after the plaintiff had entered appearance and the same is incompetent by dint of the mandatory requirement of Section 6(1) of the *Arbitration Act*. Secondly, the evidence before court does not disclose any dispute requiring arbitration within the framework of the material arbitration agreement.

25. In light of the above findings, the Preliminary Objection dated 9/02/2022 is merited because it raises a pure point of law. By dint of the law the Notice of Motion dated 14/01/2022 therefore fails. However, the costs thereof shall abide the outcome of the main suit.

26. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JUNE 2022

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MOGENI J

JUDGE

In the presence of

No appearance for the Applicant

Ms Matu for the 1st Respondent

Mr. Ongoro for the 2nd Respondent

Mr Vincent Owuor.....Court Assistant

