



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE 385 OF 2010**

**MICHAEL N. MUIGAI KENYATTA.....1<sup>ST</sup> PLAINTIFF**

**NJOMAITHA INVESTMENTS LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT**

**AND**

**SURAYA PROPERTY GROUP LIMITED .....1<sup>ST</sup> INTERESTED PARTY**

**JOHN MAINA CHEGE T/A MAARIFA ASSOCIATES .....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. This is a ruling on two Notices of Preliminary Objections raised by the Plaintiff against the Interested Parties' applications dated 2<sup>nd</sup> August, 2010 and 4<sup>th</sup> April, 2012 wherein the Interested Parties sought orders, inter alia, for the appointment of an Arbitrator and preservation of some properties owned by the Plaintiff pending arbitration.

2. The Preliminary objections are dated 22<sup>nd</sup> September, 2010 and 20<sup>th</sup> April, 2012 respectively. They are to the effect that the Interested Parties are non-suited in parties in this suit, that the prayers sought in the applications were premature as the Interested Parties had not been joined in the proceedings, that the agreement sought to be enforced is un-enforceable and overtaken by events, that the application for appointment of an Arbitrator was premature as the prayer for reference of the matter to arbitration had not been determined, that there was no adjudicable claim by the Interested Parties against the Plaintiffs, that by a ruling of this court made on 13<sup>th</sup> December, 2011 the Court had observed that the Interested Parties had not formulated a claim, that the suit had been settled and there were no proceedings pending in respect of which the applications can hinge on.

3. Mr. King'ara, learned Counsel for the Plaintiff's submitted that Section 6 of the Arbitration Act presupposes that there be pending proceedings before a matter can be referred to arbitration, that the suit herein had been settled and there was no pending suit, that the joint venture agreement relied on by the Interested Parties offends Section 19 of the Stamp Duty Act and cannot be acted on by the court. Counsel urged that the objections be upheld and the applications be struck out.

4. Mr. Regeru for the Interested Parties opposed the objections. He submitted that the Preliminary objections were not proper Preliminary Objections in that they were based on disputed facts, that although

the suit as between the Plaintiffs and the Defendant had been settled, the consent recoded in court recognized that the dispute between the Interested Parties and the Plaintiffs subsisted that the Interested parties had not come to court under Section 6 of the Arbitration Act but rather under Section 7 of that Act, that what was subsisting was an application for reference and preservatory orders on the "Gatanga Property", that the passages in which the Plaintiffs were relying on in the ruling of this court of 13<sup>th</sup> December, 2011 were as between the interested Parties and the Defendant and not the Plaintiffs and that the admissibility or otherwise of the documents to be relied on is an issue to be determined by the Arbitrator and not this court. Counsel urged that the preliminary Objections be dismissed.

5. I have carefully considered the objections and the respective Counsel's submissions. In the classical case of **Mukisa Biscuits Manufacturing Company Ltd –vs- West End Distributors Ltd (1969) EA 696** Sir, Charles Newbold President of the East African Court of Appeal held at page 701:-

***"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 had to be ascertained or what is sought is the exercise of judicial discretion."***  
***(Emphasis mine)***

6. I have looked at the preliminary Objections of the Plaintiffs. They include both matters of law and fact. In so far as they relate to matters of fact which are in dispute, it cannot be said that the objections were properly taken. For example, there is the issue of whether there is really any dispute between the parties capable of being referred to arbitration, on what basis the Interested Parties are making a claim against the Plaintiffs either on the Deed of Settlement or Joint Venture Agreement or whether the Joint Venture Agreement was stamped or not and therefore whether it was in breach of Section 19 of the Stamp Duty Act. My view is, these as are others are disputed facts that have to be ascertained before the court can make a decision one way or another.

7. If I am wrong on the foregoing, I need to look on the merit of the objections. The first objection is that the Interested Parties are non-suited and that the prayers sought in the applications are premature as the Interested Parties have not been joined in these proceedings. I have looked at the record. When the Interested parties first approached the court under a certificate of urgency on 6<sup>th</sup> August, 2010, Hon. Njagi J ordered, inter alia, that:-

***"For the same reasons, the intended Interested Parties are hereby joined as Interested Parties to this matter pursuant to prayer 2 of the said application."***

It is therefore clear that the Interested Parties were joined and are proper parties in these proceedings.

8. The Plaintiff contended that the Agreement sought to be enforced was unenforceable and had been overtaken by events as there was no longer any suit pending since the suit herein had been settled. Firstly, it was not very clear how the Agreement sought to be enforced had been overtaken by events. To my mind, whilst the original Deed of Settlement between the Plaintiffs and the Defendant may have come to an end as between themselves after the execution of a subsequent Deed of Settlement among themselves, my view is, the obligations and rights of the Plaintiffs and the Interested parties in that Deed of Settlement was subsumed in and remain alive by virtue of the Joint Venture Agreement between the Plaintiffs and the Interested Parties. For that reason, it cannot be true that that agreement had been overtaken by events.

9. On the issue that there is no pending suit and that the Interested Parties cannot ride on the Plaintiff's suit yet they have no independent claim, I have seen the consent order recorded by the Parties on 22<sup>nd</sup> June, 2012. The order was recorded in the following terms:-

***"1. THAT the suit between the Plaintiffs and the Defendant be and is hereby marked as settled in terms of Deed of Settlement dated 31<sup>st</sup> May, 2012.***

***2. THAT the Applications between the Plaintiffs and the Interested Parties dated 2<sup>nd</sup> August, 2010***

**and 4<sup>th</sup> April, 2012 to proceed only to the extent that they will be subject to the order of the court dated 13<sup>th</sup> December, 2011.**

**3. THAT the applications be fixed at the registry.”**

**10.** From the said order, it is quite clear that this suit was not withdrawn. The parties settled the suit as between the Plaintiffs and the Defendant. However, the parties were alive to the fact that a portion of the suit in respect of the applications by the Interested Parties remained to be prosecuted. Therefore, I am of the opinion that the Plaintiffs cannot now turn around and allege that there is no suit pending in respect of which the subject applications can be proceeded with. Once the Interested Parties were joined in these proceedings, their right to participate in the proceedings inured and cannot be taken away by the actions of the Plaintiffs and the Defendant. I therefore reject that point.

**11.** It was urged for the Plaintiffs that the application dated 4<sup>th</sup> April, 2012 for appointment of particular arbitrators was premature for the reason that no reference had been ordered yet. My view is that an application under either Section 6 or 7 of the Arbitration Act, Chapter 49 2010 Edition (1995) of the Laws of Kenya can be made in an omnibus way i.e. the prayer for injunction, reference to arbitration and appointment of an arbitrator simultaneously. That being the case, I do not see any prejudice suffered in the Interested Parties having filed the 2<sup>nd</sup> application dated 4<sup>th</sup> April, 2012 before the earlier application had been heard and determined. No law or any authority was cited to show that such an application cannot be made the way the Interested Parties had made it.

**12.** The Plaintiff also submitted that there was no adjudicable claim herein by the Interested Parties for which the subject applications can be maintained. The Plaintiff relied on passages from the ruling delivered on 13<sup>th</sup> December, 2011. In that ruling, the court held at pages 21 and 23 thus:-

***“Accordingly, at this stage I hold the view and do not make final findings, that the Interested Parties having not been parties to the said Deed they could not and cannot sue on it. They cannot seek to enforce the same against the Defendant. They can only do so in a case and against the Plaintiffs on the basis of the Joint Venture and the said Deed (since it had been incorporated therein) but not as against the Defendant.”***

And

***“Apart from the fact that they have no right to sue the Defendant (probably the Plaintiffs) under that Deed, as I have already held, they had not formulated their claim from which this court can ascertain the sort of decree that may emanate therefrom that will or may ultimately bind the purchaser pendent elite.”***

**13.** It is crystal clear from the above passages that the court was dealing with the claim by the Interested Parties against the Defendant and their contention that Section 52 of the Transfer of Property Act was applicable. Those findings by the Court did not relate to the Plaintiffs at all. Indeed if the court’s opinion in that ruling was sought as to the claims by the Interested Parties as against the Plaintiffs, it would be found at pages 37 and 38 which led to the issuance of a preservative order against LR. No.10884/3, Thika District. Accordingly, I reject that objection.

**14.** Finally, the Plaintiffs have contended that the Joint Venture Agreement relied on by the Interested Parties cannot be relied on by this court as the same breaches Section 19 of the Stamp Duty Act. On this, I will agree with the Interested Parties’ submission that that is a disputed matter of fact. Mr. Regeru said that the Interested Parties could, if given notice, produce a stamped copy and indeed such is an issue of admissibility of evidence to be canvassed before the arbitral tribunal and not before this court.

**15.** The foregoing being the position, my view is that the Preliminary Objections dated 22<sup>nd</sup> September, 2010 and April, 2012 respectively are not meritorious and they are hereby dismissed with costs to the Interested Parties.

**DATED** and **DELIVERED** at Nairobi this 12<sup>th</sup> day of October, 2012.

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**A. MABEYA**  
**JUDGE**