



REPUBLIC OF KENYA



**KENYA LAW**  
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**Asiko & 11 others v Kanji & 5 others (Environment & Land Case  
69 of 2021) [2022] KEELC 3276 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3276 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 69 OF 2021**

**M SILA, J**

**JULY 27, 2022**

**BETWEEN**

**WILLIAM ASIKO & 11 OTHERS ..... APPLICANT**

**AND**

**AMYN KANJI & 5 OTHERS ..... RESPONDENT**

**RULING**

1. What is before me is the amended motion dated 8 February 2022, which is more or less an application for injunction, filed by the plaintiffs against the defendants, and a preliminary objection raised by the 3<sup>rd</sup> – 6<sup>th</sup> defendants which objection more or less contends that this court has no jurisdiction owing to an arbitration clause in the agreement of the parties. Although the application as drawn appears to only seek the order of injunction pending hearing of the application inter partes, this is clearly an error, and indeed all parties appreciate that this is an application for an injunction pending hearing of the suit. The applicants are owners of 12 units in the residential area of the development known as the English Point Marina in Mombasa. Their main complaint in this suit is that the respondents have denied them full access to their units for themselves, their friends, their families and their guests, as occasion may arise, with a permanent access key, without any hindrance, and without any indirect hindrance, such as through cutting off of electricity, amenities and air conditioning where accurate bills have been paid.
2. The case of the applicants is set out in the plaint and in the application before me. The applicants individually purchased from the 6<sup>th</sup> respondent, 12 apartments at English Point Marina (EPM). The 1<sup>st</sup> – 5<sup>th</sup> respondents (respectively being Aryn Kanji, Leila Kanji, Alnoor Kanji, Nafisa Kanji, and Nazir Jinah) are the directors of the company that undertook the development, Pearl Beach Hotel Limited, which upon amendment of the plaint, is now the 6<sup>th</sup> defendant/respondent. There is said to be a neighbouring hotel, English Point Marina Hotel also under the management of the defendants. The applicants contend that since they have purchased apartments, they are homeowners and not tenants. They allege that they are victims of abuse, racism, trespass, and lock-outs committed against



them by the respondents. They claim that the 5<sup>th</sup> defendant (Nazir Jinnah) masquerades as the assigned lawyer of the 6<sup>th</sup> respondent and issues the applicants with improper and unsound ultimatums, and that he sometimes patrols the premises to inspect which homeowners have guests so as to find a way of forcefully barring or evicting them from the premises. They complain that the 5<sup>th</sup> defendant harasses and insults the homeowners, using racist, demeaning, intimidating and pejorative language. They applicants plead that they are now highly distressed and living in fear. They fear for the safety of their Kshs. 50 million apartments and their person as they have been physically barred from accessing their homes by the defendants.

3. The applicants plead that they opted to become proprietors at English Point Marina (EPM) on the marketing pitch that their units would be “investment properties”, well suited for home owners to reap high returns on their investments. It is said that while advertising the project, the representation made by the respondents to the investors was that the owners of the apartments would have an opportunity to earn an income from the units by renting them out to local and international tourists. It is stated that the picture created was that the buyers would own the apartments under sectional property, where each buyer would have a title for each unit, and that they were assured that they would be accorded peaceful and quiet enjoyment. They complain that the respondents have not complied with setting up a management company, issuing homeowners with share certificates, nor complied with the reporting requirements stipulated in the Sectional Properties Act. They aver that they purchased the units at an average cost of Kshs. 50 million for each apartment. They executed an agreement for sale and a sublease document between 2012 and 2017. They contend that they are therefore at liberty to sublet their units as holiday homes or short stay locations. They plead that from 2016 to mid - 2019, the EPM management took a hands-off approach to sub-letting, with minimal inquiry as to owners’ guests, lengths of stay by sub-lessees, letting rates and advertising. However, since 2019, the applicants claim that they cannot freely access their homes, and have been barred from entering, despite countless requests for keys and access. They plead that the respondents bar them and their guests from entering their homes and have obstructed the applicants’ business ventures. It is stated that when they visit, they are informed that their security keys to access the apartments have not been activated. Their guest are also turned away at the gate and denied entry without any valid reason. They are also denied to sublet their apartments through Air BnB and other online platforms. They also complain of harassment and mistreatment by EPM staff. They complain of strict and unreasonable conditions that hinder their access, such as a requirement to serve a notice to management before visiting their apartments, which they consider absurd. They state that some applicants have had their electricity cut off despite having fully paid their service charge. Their servants are also denied access to the properties for purposes of cleaning. They complain of poor service delivery, where common areas like the staircases are not cleaned, which they say is a health hazard. They say that most apartments have faulty air conditioners, and despite reports being made, the management does not respond swiftly, and technicians take too much time to repair the same. They complain of being treated in a dehumanizing and embarrassing manner despite them being senior citizens who should be treated with dignity. They point to a leaked internal memo where the staff of EPM management were asked to black list all “Black African” apartment owners and impose strict rules to prevent the said owners from accessing their apartments. They have expressed their disappointment that such racist and derogative treatment and racism is happening in this country in broad daylight. They complain that service charge is exorbitant and the same has never been accounted for by EPM management despite their several requests so that there can be transparency and accountability. They allege that the respondents are using their own management company as a tool to oppress the apartment owners and deny them opportunity to earn income from their apartments. They allege further that this is also the mechanism used by the respondents to keep business to themselves since the hotel security keys are always easily and readily available at any time whenever a guest wishes to rent out a room in the hotel but the apartment keys



are not available when needed. They contend that their constitutional rights to dignity and to own and enjoy peaceful and quiet occupation of their properties is being openly violated by the respondents. They appreciate that there is an arbitration clause in their agreement but they state that the orders herein cannot be issued by an arbitrator. They have no problem if an arbitrator is appointed after the order of injunction is issued.

4. The applicants have filed supporting affidavits to the application. They more or less echo the above.
5. The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents have raised the following preliminary objection dated 5 April 2022 in response to the application :-
  1. That this Honourable Court has no jurisdiction to hear and determine the application and the suit.
  2. That Section 6 of the Arbitration Act which empowers a court before which proceedings are brought in a manner which is subject to an arbitration agreement, to strike out and/or stay proceedings and refer parties to arbitration.
  3. That this Honourable Court lacks jurisdiction to entertain this suit by virtue of Section 10 of the Arbitration Act No. 4 of 1995 and Article 12 of the Respective Sub-Leases executed between the plaintiffs/applicants and the 6<sup>th</sup> defendant/respondent that is the Head Lessor.
  4. That the application as filed and canvassed in the plaintiffs/applicants' application of 8 April 2021 is therefore fatally and incurable defective and as such cannot stand or be ventilated before this Honourable Court.
  5. That the suit contravenes mandatory provisions of the law and as such the application and the suit are ipso facto an abuse of the court process and ought to be struck out or dismissed.
6. The 1<sup>st</sup> and 2<sup>nd</sup> respondents entered appearance, filed defence, and a replying affidavit sworn by the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent is his wife. In his affidavit, he has deposed that they are shareholders of the 6<sup>th</sup> respondent and were previously directors before they were illegally suspended. He has averred that it was he and the 2<sup>nd</sup> respondent who put up the initial capital to purchase the 6<sup>th</sup> respondent from its initial owners and paid the construction costs for the English Point Marina development. Out of good faith, he offered his brother, the 3<sup>rd</sup> respondent a 50% equity stake in the 6<sup>th</sup> respondent, which the 3<sup>rd</sup> respondent split between himself and the 4<sup>th</sup> respondent who is his wife. He retained the remaining 50% which he shared with the 2<sup>nd</sup> respondent. Subsequently, he was told that some records cannot be traced. What followed is that a resolution was passed removing him and the 2<sup>nd</sup> respondent as directors, which resolution he considers to be illegal. He contested this through the suit Mombasa Civil Case No. 24 of 2020, Aryn Kanji & Leila Kanji vs Alnoor Kanji and Nafisa Kanji. He avers that neither he, nor the 2<sup>nd</sup> respondent are privy to, nor have they sanctioned or condoned, the acts, frustration and mistreatment complained of by the applicants. He himself avers that he and his wife have also been denied access to a penthouse within the development which was in their occupation. He and the 2<sup>nd</sup> respondent have therefore distanced themselves from the acts which the applicants complain of and have stated that they are also victims of abuse, indignity, unfair and unjust treatment by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents. He has deposed that the 5<sup>th</sup> respondent is a mastermind crook who specialises in fraud and has criminal cases against him in the Kenyan courts. He contends that he is masquerading as a lawyer and specialises in causing havoc among Asian families for personal gain. He has posed that he



liquidated his life savings to acquire the land where English Point Marina stands yet he is now a persona non grata. For the above reasons, he wishes that the application as against him and the 2<sup>nd</sup> respondent should be dismissed with costs.

7. I directed that the application and the preliminary objection be canvassed together by way of written submissions. I have taken note of the submissions filed by Dr. Khaminwa for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 7<sup>th</sup> applicants, Mr. Gikandi for the 3<sup>rd</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> applicants, those of Mr. Maloba for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, and those of Mr. Esmail for the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
8. The issues that have been presented by the applicants, especially those that allege discrimination based on race are extremely grave and very very disturbing. No person should look down upon, or pass judgment, on anyone, on the basis of his/her race. Racism is a primitive and abhorrent practice. How it ever came to be in the first place is in fact beyond my comprehension. It should never have been given any whiff in the first instance, and it should never be given space now or in the future. If ever there was any issue that is repugnant to morality it is racism. Anyone practicing such forms of detestable practices should be ashamed of himself/herself. He/She is the scum of the earth. I have no kind words for such individual. The applicants of course complain of racial profiling by the respondents. For now, those claims remain unproven, and I will leave it at that.
9. What I have is an application for injunction, but before I delve into it, an issue of jurisdiction has been raised by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents, and I need to satisfy myself that I have jurisdiction to deal with this application and the suit.
10. In his submissions, Mr. Maloba, learned counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, cited clause 12 of the sublease agreement as divesting this court of jurisdiction. That clause is drawn as follows :-

12. Arbitration

In the event of any dispute arising between any two or more of the Lessor the Lessee and the lessees of the other apartments in the Marina Development out of the provisions of this Sub-Lease hereto or the equivalent provisions of the leases of the other apartments in the Marina Development including in particular but without prejudice to the generality of the foregoing any question whether any particular item such as is mentioned in the Third Schedule hereto has been provided to a reasonable standard or at a reasonable cost or whether the incurring of the cost of such an item was reasonable the same shall be referred to an arbitrator who shall not be a member or employee of the Lessor or the Managing agent being a Chartered Surveyor appointed by the Lessor under the provisions of the Arbitration Act of Kenya or any statutory re-enactment or modification thereof for the time being in force.

11. It is based on the above clause that the 3<sup>rd</sup> to 6<sup>th</sup> respondents contend that this court has no jurisdiction. In his submissions, Mr. Maloba, learned counsel, referred me to the case of Antony Munene Maina vs Student Organisation of The University of Nairobi (S.O.N.U) & Another, HC JR Misc, Civil Application No. 111 of 2015 where the court stated as follows :-

“What the applicant seeks in these proceedings is that this Court ought to take over the role of the arbitrator in the proceedings covered by an arbitration clause. With respect this Court cannot do that. To do so would amount to usurping the powers conferred on the arbitrator.”



12. Mr. Maloba submitted that the court would only have jurisdiction to grant interim protective measures under Section 7 of the Arbitration Act pending referral of a dispute to arbitration. He however submitted that this is not what is sought by the applicants. He submitted that parties are bound by their pleadings.
13. Dr. Khaminwa's position in his submissions was that the court has jurisdiction by dint of the provisions of Article 162 (2) (b) of the Constitution as read with Section 13 (7) of the Environment and Land Court Act. He also referred me to Article 159 (2) (d) that justice needs to be administered without undue regard to procedural technicalities. He submitted that this court has unlimited subject matter jurisdiction. He submitted that the preliminary objection raises matters of fact and not law contrary to the principles laid down in the case of *Mukisa Biscuits vs West End Distributors Limited* (1969) EA 700. He submitted that the prescription for arbitration does not preclude the applicants from legal redress in court.
14. Mr. Gikandi also opposed the preliminary objection. He submitted that they are alive to the arbitration clause but opined that an arbitrator is not conferred with powers to issue an injunction or police protection order, which powers cannot be ousted by Section 10 of the Arbitration Act.
15. Mr. Esmail's submissions do not appear to have addressed the preliminary objection.
16. I have considered the arguments regarding the preliminary objection. I have carefully gone through the clause. It is correct that Clause 12 of the agreement between the plaintiffs and the 6<sup>th</sup> defendant is an arbitration clause. Although Dr. Khaminwa and Mr. Gikandi made attempts to argue against the preliminary objection, they both seemed to appreciate that this was an arbitration clause, and despite attempting to assert that the court still has jurisdiction, I must say that their arguments on this were pretty feeble, and not backed up by any authority. The applicants at ground 9 (p) and (q) of the application, actually address themselves to the arbitration clause. They state as follows :-
  - (p) That the applicant(s) are alive to the fact that the purchase agreement executed between the parties herein provided for an arbitration clause in case of a dispute arising from the sale, use and ownership of the suit property. However, an arbitrator has no jurisdiction to issue permanent injunctive orders against a party as that is a reserve for the courts. The orders sought herein cannot therefore be issued by an arbitrator as the arbitrator cannot purport to usurp the powers conferred upon this court by the constitution. Moreover, one cannot be denied their right to access justice through courts.
  - (q) That once the injunctive orders sought for herein are issued, the parties can thereafter appoint an arbitrator to deal with the substantive issues raised in the petition.
17. From the above the applicants are certainly alive to the arbitration clause. What they say is that they have come to court for injunctive orders after which the parties can then appoint an arbitrator to deal with the substantive issues raised in the suit. These are the words of the applicants themselves. It is therefore apparent that I have no contest before me as to whether or not an arbitration clause exists. That is acknowledged as I have pointed out above.



18. It is trite that where parties agree to an arbitration clause, then the dispute requires to be referred to arbitration. It is not correct, as argued by counsel for the applicants, that the court has discretion. This is brought out in Section 10 of the Arbitration Act which provides as follows :-

10. Except as provided in this Act, no court shall intervene in matters governed by this Act.

19. The intervention of court is thus curtailed, not because parties are being obstructed to access justice, but because it is the parties themselves who agreed, that in the event that there is a dispute over their contract, then the dispute would be referred to arbitration for a resolution of that dispute. In other words, it is a choice that parties make when entering into a contract. And arbitration should never be seen as a bar to access justice. It is actually one of the mechanisms recognized by the Constitution for purposes of settlement of disputes. Article 159 (2) (c) of the Constitution, 2010, provides as follows :-

“159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

(a) ...

(b) .....

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted...”

20. It will be seen from the above that arbitration is one of the dispute resolution mechanisms which is recognised, and indeed encouraged, by the Constitution.

21. A suit has already been filed and there is objection to it by some of the defendants. The Arbitration Act addresses this scenario and also makes provision for the extent to which the court may intervene in Sections 6 and 7 of the Arbitration Act, which are drawn as follows :-

6. Stay of legal proceedings

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.
7. Interim measures by court
  1. It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.
  2. Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.
22. It will be seen from Section 6 above, that where the party sued raises issue that the matter needs to be referred to arbitration, subject to the conditions therein, then the suit shall be stayed and the parties referred to arbitration unless the court finds that the vitiating factors in Subsection 1 (a) and (b) exist. None of the counsel for the applicants has submitted that the arbitration agreement is null and void, or inoperative or incapable of being performed. Neither has it been raised that in fact there is no dispute that falls within the arbitration clause. I will therefore refer the matter to arbitration in line with Clause 12 of the agreement of the parties. I however note that the said clause has no period within which an arbitrator needs to be appointed. I do not think that this means that the 6<sup>th</sup> respondent has an indefinite period to appoint an arbitrator. This court has inherent jurisdiction to make orders that may be necessary for the ends of justice to be met and to prevent an abuse of the process of court. With the utility of that power, I order that an arbitrator be appointed in line with that clause within 30 days of today's ruling. If no arbitrator is appointed, any of the parties is at liberty to apply.
23. However, from Section 7 above, it will be observed that it is not incompatible with an arbitration agreement for a party to request from the court, before or during arbitral proceedings, for interim measures of protection and the court has jurisdiction to grant these. Nothing therefore precludes me from granting orders of injunction pending hearing of the matter in an arbitration proceeding.
24. I have taken note of what the applicants state in their pleadings and in their application. I can see that the applicants are either owners or lessees (their status is in dispute) of apartments within the development made by the 6<sup>th</sup> respondent. It is not thus unreasonable for them to ask that they be given full access to what they purchased or leased, while the dispute between them proceeds for arbitration.
25. I am aware that the 1<sup>st</sup> and 2<sup>nd</sup> respondents made arguments that they are also victims and are not involved in the issues raised by the applicants. That may be so, but they have displayed interim orders in their favour which appear to me to be allowing them to continue being directors. If their position is true, then they stand to suffer no prejudice whatsoever if I make orders of injunction in favour of the applicants even if made against them.
26. Thus I am persuaded to make the following orders :-
  - i. That pending the hearing and conclusion of the arbitration proceedings, an order of injunction is hereby issued restraining the 1<sup>st</sup> – 6<sup>th</sup> defendants or



their servants, agents, third parties, employees, or proxies, from, impeding the plaintiffs and/or the plaintiffs' guests and servants, or other persons authorised by the plaintiffs, from accessing the apartments purchased or leased by the plaintiffs within English Point Marina development.

ii. That costs of this application abide the costs of the arbitration proceedings.

27. I will cause the matter to be mentioned, so as to be informed of whether or not an arbitrator has been appointed, which mention date I will give upon delivery of this ruling.

28. Orders accordingly.

**DATED AND DELIVERED THIS 27 DAY OF JULY 2022.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

