



REPUBLIC OF KENYA



**Njenga v Mbugua & another (Environment & Land Case 110
'B' of 2021) [2022] KEELC 3161 (KLR) (20 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3161 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 110 'B' OF 2021**

BM EBOSO, J

JULY 20, 2022

BETWEEN

TERESIAH WAIRIMU NJENGA PLAINTIFF

AND

RICHARD MBUGUA 1ST DEFENDANT

SPRINTER REAL ESTATES INVESTMENTS LTD 2ND DEFENDANT

RULING

1. The plaintiff, Teresiah Wairimu Njenga, initiated Nairobi HCCC No E227 of 2021 through a plaint dated 16/9/2021. Her case was that the 1st defendant, Richard Mbugua, was a director of the 2nd defendant. On 12/2/2019, she entered into a joint venture agreement with the 2nd defendant, pursuant to which they agreed that she would convey to the 2nd defendant, by way of sale and transfer, parcel numbers Kiambaa/ Ruaka 6495 and Kiambaa/ Ruaka/ 6496, at a purchase price of Kshs 40,000,000. The 2nd defendant was to pay her Kshs 8,000,000 upon execution of the joint venture agreement. The 2nd defendant was to pay her the balance of the purchase price [Kshs 32,000,000] in sixteen (16) consecutive monthly instalments, effective from the end of February 2019 and at the end of every subsequent month till payment in full.
2. The plaintiff contended that, in pursuance of the joint venture agreement, she caused the two parcels of land to be transferred to the 2nd defendant. She further contended that the 2nd defendant committed various acts of dishonesty, among them, failure to remit monies owed to her in terms of the joint venture agreement. She alleged various other acts of dishonesty on part of the 1st defendant. In addition, she alleged that the two defendants had committed various breaches of the joint venture agreement which she itemized.
3. The plaintiff sought, among other reliefs, an order rescinding / revoking and/or cancelling the joint venture agreement and the addendum thereto, and an order cancelling/revoking/annulling and/or



- reversing all the entries made in the relevant land parcel registers in pursuance of the joint venture agreement and the addendum thereto. In the alternative, she sought orders of specific performance, compelling the defendants to pay her monies owed to her under the addendum, among other alternative reliefs.
4. Upon being served with the suit papers, the two defendants filed a notice of appointment of advocates dated 27/9/2021, a notice of preliminary objection dated 28/9/2021 and grounds of opposition dated 28/9/2021. The notice of preliminary objection dated 28/9/2021 is the subject of this ruling.
 5. The notice of preliminary objection raised two key grounds of objection to the jurisdiction of the court, namely: (i) Clause 23(b) and (c) of the joint venture agreement ousted the jurisdiction of the courts to adjudicate the disputes relating to or arising out of the agreement; and (ii) under Article 162(2) (b) of *the Constitution* as read together with Section 13 of the *Environment and Land Court Act*, the High Court lacked jurisdiction to adjudicate the dispute.
 6. When the matter was placed before Thurania J [may the Almighty Lord rest her soul in eternal peace], the Learned Judge transferred the suit to Milimani Environment and Land Court. The suit was subsequently placed before Okongo J on 30/9/2021. On the same day, Okongo J transferred the suit to Thika environment and Land Court where it was registered as Thika ELC Civil Case No. E110B of 2021.
 7. The preliminary objection was canvassed through written submissions dated 21/2/2022, filed through the firm of Kamuti Waweru & Company Advocates. Counsel identified the following as the two issues that fall for determination in the preliminary objection: (i) Whether the court has jurisdiction to entertain this suit in view of the arbitration clause contained in Clause 23 of the parties' contract; and (ii) Whether summons to enter appearance were issued to give effect to Section 6 of the *Arbitration Act*.
 8. Counsel for the defendants cited Section 10 of the *Arbitration Act* and the High Court decision in *Euromec International Limited v Shandong Taikai Power Engineering Limited* [2021] eKLR and contended that this court did not have jurisdiction to entertain this dispute. Counsel added that since the plaintiff had not taken out summons to enter appearance, the defendants were entitled to apply to strike out the suit altogether.
 9. On her part, the plaintiff filed written submissions dated 24/3/2022 through the firm of Gatheru Gathemia & Co Advocates. Counsel for the plaintiff submitted that the addendum and variation agreement granted the plaintiff the liberty to enforce her contractual remedies as contemplated under the Law Society Conditions of Sale. Counsel contended that it was within that context that the plaintiff instituted this suit.
 10. Counsel for the plaintiff further submitted that this suit contained "a mixed grill" claim and that the High Court had, in the interest of justice, transferred the suit to the Environment and Land Court. Counsel added that under Section 6 of the *Arbitration Act*, the defendants were required, at the time of entering an appearance in the suit, to simultaneously file an application seeking a stay of the proceedings. Counsel contended that the preliminary objection was improperly filed after the defendants had already taken steps in the suit.
 11. Citing the decision in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, counsel for the plaintiff argued that the preliminary objection offended the law on points that that can be properly canvassed on the platform of a preliminary objection. Counsel faulted the defendants for raising issues that were not outlined in the preliminary objection. Lastly, counsel submitted that an arbitration clause "is not sufficient to strip this court of and/or out its jurisdiction over the adjudication and determination of this suit."



12. I have considered the two grounds set out in the notice of preliminary objection. I have also considered the parties' respective submissions. Further, I have considered the relevant legal frameworks and jurisprudence.
13. In their written submissions, the defendants did not pursue the second limb of their objection which focused on the jurisdiction of the High Court in the context of Article 162(2) (b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*. This may perhaps be because that limb of the objection was overtaken by events when the High Court, suo motto, transferred this suit to the Environment and Land Court. The single issue that remains to be answered in the preliminary objection is whether, in the circumstances of this suit, the arbitration agreement in the joint venture agreement ousts the jurisdiction of this court.
14. I have considered the gist of the defendants' objection. They relied on Clause 23 (b) and (c) of the joint venture agreement and Section 10 of the *Arbitration Act* and contended that the dispute in this suit should be adjudicated by an arbitral tribunal as provided for in the arbitration agreement. The objection by the defendants would be merited were it not for two reasons which are outlined below.
15. First, this suit has one plaintiff and two defendants. The plaintiff has made allegations and claims against the two defendants. At this stage, the joinder of the two defendants has not been challenged by either of the defendants. Secondly, only one defendant is bound by the arbitration agreement, that is, Sprinter Real Estate Investments Ltd [the 2nd defendant]. The 1st defendant, though a director of the 2nd defendant, was not a party to the arbitration agreement. He cannot, in the circumstances, be compelled to submit to the jurisdiction of the arbitral tribunal contemplated under Clause 23(b) and (c) of the joint venture agreement where the arbitration agreement is contained. It is to be noted that the 2nd defendant is a body corporate and a legal person distinct from the 1st defendant. For this reason, the preliminary objection cannot succeed.
16. The second reason why the preliminary objection cannot succeed is that, Section 6 of the *Arbitration Act* obligates a party invoking an arbitration agreement to do so not later than the time of entering appearance in the suit. From the Milimani ELC e-file docket, it does emerge that the defendants entered appearance on 27/9/2021 through a joint notice of appointment of advocates dated 27/9/2021. They subsequently filed the notice of preliminary objection on 28/9/2021. Subsequently, they filed grounds of opposition on 30/9/2021. From the foregoing, it emerges that the defendants lost the opportunity to invoke the arbitration agreement when they failed to invoke it at the time of filing the notice of appointment on 27/9/2021. There is a legion of decisions of the superior courts which have clearly outlined the above legal position. [See the Court of Appeal decisions in: (i) *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] eKLR; and (ii) *Mt. Kenya University v Step Up Holding (K) Ltd* [2018] eKLR.
17. The result is that the notice of preliminary objection dated 28/9/2021 is rejected for lack of merit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 20TH DAY OF JULY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Kamata for the Plaintiffs

Mrs Muhuhu for the Defendants



Court Assistant: Ms Lucy Muthoni

