



REPUBLIC OF KENYA



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Oltukai Mara Limited v Tuyu & 7 others (Environment & Land Case E004 of 2022) [2022] KEELC 13379 (KLR) (11 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13379 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E004 OF 2022
CG MBOGO, J
OCTOBER 11, 2022

BETWEEN

OLTUKAI MARA LIMITED APPLICANT

AND

SAMSON OLE TUYA 1ST RESPONDENT

DANIEL OLE MPOE 2ND RESPONDENT

MAKOI OLE KYRINGOT 3RD RESPONDENT

STANLEY OLE LENJIR 4TH RESPONDENT

ROBERT OLE TIPIS 5TH RESPONDENT

NOAH OLE SAYAGIE 6TH RESPONDENT

SAMSON OLE LETURA 7TH RESPONDENT

PAUL OLE LAPORE 8TH RESPONDENT

RULING

1. Before this court for determination are two notice of preliminary objections dated 27th June, 2022 and 6th July, 2022 respectively.
2. The notice of preliminary objection dated 27th June, 2022 and filed by the defendants is seeking to have the instant suit struck out on the following grounds: -
 1. That the honourable court lacks jurisdiction to hear and determine the instant suit in compliance with provisions of Section 4 of the *Arbitration Act* 1995.
 2. That there was no authorization by the plaintiff duly authorizing the director of the company by way of resolution to lodge the instant suit nor the application dated 27th May, 2022 thereby



rendering both the application and the instant suit fatally defective, incompetent and bad in law for offending the provisions of Order 4 Rule 1 (4) of the Civil Procedure Rules 2010.

3. That the instant suit contravenes the provisions of Section 3A of the Civil Procedure Act.
4. The further notice of preliminary objection dated 6th July, 2022 is filed by the defendants seeking to have the instant suit struck out with costs on the grounds: -
 1. That the instant suit filed by the plaintiff is fatally defective and incurable for reasons that the plaintiff has sued the 2nd, 3rd, 4th, 6th and 8th defendants who are deceased. The instant suit is therefore rendered a nullity ab initio for purporting to sue the deceased persons who cannot tender any defence before this honourable court.
5. The plaintiff filed a replying affidavit in response to the preliminary objections which was sworn on 18th July, 2022 by James Mwangi Wainaina. The plaintiff deposed that the grounds challenging jurisdiction are misplaced and are an apparent misinterpretation and misapprehension of the expressly worded clause 6 of the Second Further Lease which is specifically limited to the issue of the market rent and that in instances where the parties have failed to agree on a fair rate for the extension of the lease, then the same can be referred to an arbitrator.
6. The plaintiff further deposed that the arbitration clause in the Second Further Lease is limited to a dispute regarding the value of new rent upon renewal which is not the case here. Further that nothing deprives this court of jurisdiction to hear and determine this matter as the Arbitration Act does not apply to the matter present before this court.
7. The plaintiff further deposed that as a matter of fact, there is no controversy as to whether or not the plaintiff wished to file the present suit and due to the urgency of the matter, the board resolutions were left out at the point of filing the suit since the chairman was unavailable to execute the same. Further, that the plaintiff's counsel informed the defendants' counsel that he would be seeking leave of the court to produce the same when the matter came up next in court and this omission is excusable and curable by subsequent production.
8. The plaintiff further deposed that the defendants are tenants in common in equal shares and owners of the suit property and therefore sued in their capacity as such and that the Second Further Lease and the Variation of the Lease defines the lessors to include their respective personal representatives and assigns and the information seemingly within the 1st 5th and 7th defendants knowledge should be tabled to enable substitution of the deceased defendants. Further, that the notice of appointment of advocates filed by the defendants' advocates clearly states that the firm of Maina Ngaruiya has been appointed to act on behalf of all the defendants and it is improbable that counsel could have received instructions to act from dead people and that counsel must have been instructed by the lessors themselves and if not by their legal representatives. In addition, the plaintiff further deposed that striking out of pleadings is a drastic remedy that should be resorted to only where a pleading is a complete sham.
9. Parties agreed to dispose the two notices of preliminary objection by way of written submissions. Both parties highlighted on the written submissions on 20th September, 2022. The defendants' filed their written submissions dated 1st August, 2022. Mr Tuyu, the counsel holding brief for Maina Ngaruiya for the defendants submitted that the preliminary objections raised 3 issues. The first issue is on jurisdiction. Secondly, there is no authorization on record by the plaintiff. Third, the suit is fatally defective and incurable due to the fact that 5 out of 8 of the defendants are deceased. The respondents submitted that a preliminary objection ought to be determined before any other issue is determined. The counsel relied on the case of *Boniface Waweru versus Mary Njeri & Another* HC Misc. Application No. 639 of 2005 (UR), Misc. Civil Application No. 719 of 2004 and the case of



- Owners of Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd* [1989] KLR 1. The counsel further submitted that parties entered into a total of four leases and consented that in case of disputes i.e. all disputes, the same should be referred to arbitration. The counsel further submitted that the plaintiff does not want to pursue arbitration and instead, it opted to move this court through a plaint. The counsel submitted that the provisions in the first lease which is the principal lease are applicable to the current lease and that Section 6 of the [Arbitration Act](#) requires the court not to entertain such a suit. The counsel relied on the case of [Pius Kimaiyo Langat versus Co-operative Bank of Kenya Limited](#) [2017] eKLR where it was held that it is not the business of the court to rewrite contracts between parties and therefore this court lacks jurisdiction.
10. On the second issue, the counsel submitted that every party in a suit has the right to be heard and five out of the eight defendants are deceased and the estates of the five deceased defendants have not been served and as such they have not been able to file a defence, denying them an opportunity to be heard. The counsel submitted that Order 1 Rule 3 of the Civil Procedure Rules states that all persons may be joined as defendants and deceased persons are not parties in a suit. Further that there is no suit against a dead person. The counsel relied on the case of [Japhet Nzila Muangi versus Hamisi Juma Malee](#) ELC Case No. 71 of 2016 (OS) [2022] eKLR. On the third issue, the counsel submitted that it must be understood that the plaintiff is a public limited company under Order 4 Rule 1 of the Civil Procedure Rules. This was clarified in the case of [Bugerere Coffee Growers Limited versus Sebaduka & Another](#) [1970] EA 147. The counsel submitted that there was no resolution and the same was sent after the plaintiff was served with the defendants' pleadings. The counsel relied on the case of [East African Portland Cement Limited versus Capital Markets Authority & 4 Others](#) [2014] eKLR where the court stated that a company can only take decisions through the board of directors and shareholders.
 11. The plaintiff filed its written submissions dated 16th August, 2022. Mr Atonga, the counsel for the plaintiff while relying on the affidavit of James Mwangi Wainaina sworn on 18th July, 2022 submitted that a preliminary objection is as is stated in the case of [Mukhisa Biscuit Manufacturing Co. Limited versus West End Distributors Limited](#) (1969) EA 696. On the issue of whether the inadvertent omission to file a resolution, the counsel referred the court to paragraphs 9-11 of Mr. Wainaina's affidavit and submitted that from Mukhisa's decision, the court will have to ascertain the disputed facts. Further that the obtaining legal position is that the omission is excusable. The counsel relied on the case of [Republic versus Registrar General & 13 Others](#) [2005] eKLR and submitted that the objections lack pure point of law, and it will not be fair to dismiss the suit because the plaintiff has explained the omission and that the so called incurable omission has been cured.
 12. On misjoinder or non-joinder of deceased defendants, the counsel submitted that as at the time of filing the suit, the names of the deceased defendants appear in the Land Registry as registered owners of the suit property and therefore this ground must fail since death is a fact to be ascertained and that even if the court were to reach the conclusion that the defendants are deceased, the court can direct that the same be cured.
 13. The counsel further submitted that the suit would still proceed against the remaining defendants and that as per Order 1 Rule 6 of the Civil Procedure Rules, the court can order for rectification. The counsel urged the court to consider the deposition in paragraph 13 of Mr. Wainaina's affidavit that the counsel entered appearance for all the 8 defendants and a defence was subsequently filed by the same firm for all the defendants.
 14. On jurisdiction, the counsel submitted that the lease currently governing the relations between the parties is the current lease and that the only issue for arbitration is determination of the fair market rate. The counsel relied on the case of [Dhanjal Investments Limited versus Kenindia Assurance Company Limited](#) [2018] eKLR and submitted that arbitration rely on consent and good will of both parties and



that when there is ambiguity between the previous contract and current contract, the latter contract prevails. The counsel relied on the case of *Blueshield Insurance Company Limited versus Joseph Oguttu Mboya* [2009] eKLR.

15. In rejoinder, the counsel for the defendants submitted that a preliminary objection must raise a pure point of law which is argued on the facts that all the facts pleaded are correct. Further that they have raised issues for the court's observation from the pleadings and do not require additional elucidation of evidence.
16. I have carefully analysed and considered the preliminary objections, replying affidavit and the written submissions filed by both parties and the issue for determination is whether the two notices of preliminary objection have merit.
17. A preliminary objection was described in *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696* to mean: -

“So far as I am aware, 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 a 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”.

Further Sir Charles Nebbold, JA stated that: -

“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 if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

18. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd Vs Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, the court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

19. In this case, the defendants raised three grounds in the preliminary objections which was on jurisdiction, failure to obtain authorization of the board of directors to lodge the instant suit and non-substitution of the 2nd, 3rd, 4th, 6th and 8th defendants who are deceased.
20. I will first and foremost deal with the issue on jurisdiction as it core in determining whether this court will proceed to entertain this matter any further. I have perused the pleadings and the dispute in this matter is that the parties entered into a Lease dated 2nd December 1989 for a term of 13 years from 1st October, 1989 for the operation of a tourist camp on such terms, conditions and covenants stipulated in the lease. The parties entered into a Further Lease sometime in the year 1991 for a further term of 9 years from 1st October, 2002 and a Second Further Lease on 18th November, 1998 for a further



period beginning 1st October, 2011 and expiring on 27th September, 2022. The plaintiff is aggrieved that it expressed its intention to renew the lease terms but the defendants declined to do so without lawful cause and without advancing any reasons for declining to do so. The plaintiff has formally and informally sought audience with the defendants to have the said lease renewed in vain and the obtaining position as at the date of filing the suit, is that the defendants have refused to renew the lease without giving any reasons and the plaintiff is of the view that it has a preemptive right of renewal which has been infringed upon or otherwise violated by the defendants.

21. The plaintiff contends that it has not breached any of the covenants in the lease and the defendants have neither alleged breach of the lease terms nor given any reason for refusal to renew. In their replying affidavit sworn by Samson Ole Tuya on 6th July, 2022 the defendants do not dispute having entered into the Lease agreement, Further Lease, Second Further Lease and Variation of the Lease on diverse dates but are of the view that any dispute between the parties ought to be resolved through arbitration.
22. I have perused the leases entered into by the parties. Both parties entered into a Lease dated 2nd December, 1989 to lease property known as Land Reference number 14898 situate in South West of Narok town and measuring approximately 19.70 hectares subject to the covenants, agreements, conditions, restrictions, stipulations and provisions therein. This Lease provided for the rules of engagement between the parties. Clause 3 (e) provides as follows: “All questions hereafter in dispute between the parties hereto and all claims for compensation if any or otherwise not eventually settled and agreed between the parties hereto shall be referred to the Chairman of the Law Society of Kenya for arbitration in accordance with the provisions of the Arbitration Act or other acts for the time being in force in the Republic of Kenya in relation to arbitration proceedings.”
23. Both parties entered into a Further Lease dated 16th October, 1991. Clause 1 of the Further Lease provides as follows:- “Except as to the rent and the term granted this lease is made upon the same terms and subject to the same covenants (other than the covenant for renewal) on the parts of the Lessors and the Lessee respectively and to the same stipulations and provisos and conditions as were expressed in an instrument of lease (hereinafter called ‘the Principal Lease’) registered as aforesaid as Number I.R 48066/2 and I.R 49091/1 as if the same were herein set forth at length with such modifications only as are necessary to make the same applicable to the present lease.” The Further Lease essentially was entered into between the parties for extension of the lease period for a further term of 11 years.
24. Again, the parties entered into a Second Further Lease and Variation of Lease dated 18th November, 1998. In this lease, parties agreed to variation of the principal lease and further lease which gave effect to the variation of the Principal Lease and further lease on deletion of the Lessee rent and substitution of the Computed Rent which was to be read and construed accordingly. Clause 8.2 of this lease reads in part:- “...and the lessee agrees that the conditions for re-entry contained in the Principal Lease and Further Lease shall be exercisable as well any breach of such covenant as on the happening of any of the events mentioned in such conditions of re-entry and the Lessors and Lessee confirm that the covenants and conditions contained in the Principal Lease and Further Lease (save as varied by this Second Further Lease and Variation) shall continue in full force and effect.”
25. From the leases, it is clear that the relationship subsisting between the parties herein is contractual in nature and the dispute between the parties arose out of a commercial agreement where the plaintiff now claims it has a preemptive right to renewal of the lease. In Mary Joy Wangui Gitau v Umberto Paoletti & 2 Others [2021] eKLR, the court observed as follows:- “Nearer home in the case of *Corporate Insurance Co. v Wachira* (1995-1998) 1 EA 20 it was held that “the arbitral clause in the contract in question was in the nature of Scott v Avery Clause which provides that disputes shall be referred to arbitration.” This caution is of greater significance to accord autonomy to the parties who have entered into a contract and clearly outlines the model to be followed on dispute resolution. In the case of



International Consultancy Co. Ltd suing by a Power of Attorney No. P/A 65175/1 of *Apex Vision Ltd v Telkom Kenya & Another* (2019) eKLR. The court held inter alia; -

“Needless to say, the parties herein, under clause 24 of the said agreement chose to bind themselves to the arbitration clause, and this Court cannot therefore be seen to remove them from the terms of their agreement by determining this case as to do so would be tantamount to rewriting the agreements between the parties.” See also *Musimba Investment Ltd vs Nokia Corporation* (2019) eKLR. In the *Anne Mwangi Hinga vs Victoria Njoki Gathara* (2009) eKLR, the Court of Appeal affirmed further that; “All the provisions including the [Civil Procedure Act](#) and Rules do not apply to arbitral proceedings, because section 10 of the [Arbitration Act](#) makes [Arbitration Act](#) a complete code and Rule 11 of the Arbitration Rules cannot override section 10 of the [Arbitration Act](#) which states; “Except as provided in this Act, no Court shall intervene in matters governed by this Act”

The Court also expressed the view that there is limited reach by the Court to interfere with a dispute resolution clause. The purpose of the model to be followed is as clearly stated by the Court in *UAP Provincial Insurance Co. Ltd V Michael John Beckett* where the guiding consideration and necessity for the parties to invoke section 6 of the [Arbitration Act](#) to compel and initiate arbitral proceedings on all circumstances surrounding the agreement. (See further discussion in the case of *Eunice Soko Mlagui V Suresh Parmar & 4 Others* (2017) eKLR). Given the principles in the above cases the Court should not create an exception to the rule of systematic referral.

In instant case the same principles elucidated in the cases cited applies to Mutatis Mutandis. There were no exceptions to the arbitration clause in the agreement that would have motivated the parties to depart from the general rule of referring the dispute on service charge to the arbitrator. That contract having incorporated the clause to arbitrate did not give room to mediation as varied by the parties in the course of the litigation. The arbitration clause in the agreements is founded on mutuality of the parties. Not only does this mean that they must have consented to arbitrate the dispute that may arise or has arisen between them. It also means that the authority of the arbitral tribunal is the first and last forum of convenience.”

26. While I place reliance on the above cited authority, I do also note that the Further Lease and the Second Further Lease and Variation of Lease did not vary the clause on dispute resolution. In my humble view, the principal lease which was express on referral of any question arising therefrom to arbitration, tied all other subsequent leases flowing from it. The applicant should have sought audience first with an Arbitrator before coming to this court.
27. As it is now, this court has no jurisdiction to hear and determine this matter at this stage and that being the case, this court must down its tools and proceed no further. Also, there would be no need for this court to delve further and address the other grounds as the first port of call which parties, by consent agreed to, was Arbitration.
28. Arising from the above, the Complaint dated 27th May, 2022 is hereby struck out with costs. The orders issued by this court on 20th September, 2022 are hereby vacated. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 11TH DAY OF OCTOBER, 2022.

HON. MBOGO C.G.

JUDGE

11/10/2022

In the presence of:-



