



REPUBLIC OF KENYA



KENYA LAW
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Waita v Venture Holdings Ltd; Koni (Interested Party) (Miscellaneous Case 4 of 2016) [2022] KEELC 15094 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15094 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS CASE 4 OF 2016
EK WABWOTO, J
NOVEMBER 24, 2022**

BETWEEN

EMILY MWENDE WAITA PLAINTIFF

AND

VENTURE HOLDINGS LTD DEFENDANT

AND

GRACE WANJIRU KONI INTERESTED PARTY

RULING

1. Before me for determination, is the application dated March 17, 2022 accompanied by the supporting affidavit sworn by Kwame Kariuki. The applicant sought the following orders:
 - i. That there be a stay of proceedings herein pending hearing and determination of this application.
 - ii. That this honourable court has no jurisdiction to hear and determine the originating motion application dated January 22, 2016.
 - iii. That the costs of this application be provided for
2. The application is premised on the following grounds:
 - a. The originating motion dated December 14, 2015 is principally based and founded on the sale agreement dated May 11, 2010
 - b. Clause 18 of the said agreement provides for reference to arbitration
 - c. The dispute between the parties herein arises out of their contractual relationship as enumerated in the sale agreement for the suit property LR No 330/356 –Apartment A7.



- d. It therefore follows that this honourable court does not have jurisdiction over the matters raised in the originating motion dated January 22, 2016.
 - e. This application has merit in law and ought to be allowed.
3. Pursuant to the directions issued by this court on May 11, 2022 this court directed the application to be disposed by way of written submissions. Parties were granted timelines to comply.
 4. In submissions dated July 20, 2022, the applicant submitted that none of the parties have disputed or questioned the legality, existence or relevance of the sale agreement. Relying on the cases of *Family Bank Ltd v Kennedy Moruri Mokua t/a Moco Auctioneers* and *Mabican Investment Lts v Maddalena Stucci & another* (2014) eKLR, it was further submitted that the dispute falls within the scope of arbitration and the court should uphold the tenets of the *Constitution* under article 159 2(c).
 5. The application was opposed by submissions dated August 3, 2022 and a replying affidavit by Anthony Akelo Okulo dated May 24, 2022. It was averred that the applicant had already entered appearance *vide* a replying affidavit dated March 14, 2016 and therefore had failed to move the court appropriately under section 6 of the *Arbitration Act*. Relying on the case of *Chevron Kenya Limited v Tamoil Kenya Limited* HCC (Milimani) No 155 of 2007, it was argued that the application for stay of proceedings should have been lodged no later than when the notice of appointment or reply to application was filed.
 6. Having considered the application and parties written submissions it is evident that the main issue for determination before this court is whether the court should stay all legal proceedings pursuant to the provisions under section 6 of the *Arbitration Act*.
 7. Section 6 of the *Arbitration Act* stipulates 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 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” [emphasis mine]
 8. The principles for granting of stay of proceedings are well established as in the case of *Esmaj v Mistry Shamji Lalji & Co* (1984) KLR, where the Court of Appeal considered the following: -
 - a) The court is not bound to grant stay but has discretion to grant or not to grant.
 - b) The discretion to grant should not be exercised when strong cause for doing so is shown.



- c) The burden of proving such strong cause is on the plaintiff.
 - d) In exercising discretion, the court should take into account the circumstances of the particular case.
 - e) A mere balance of convenience is not enough.
9. The Court of Appeal has further pronounced itself on the issue of stay as outlined in the case [Mt Kenya University v Step Up Holding \(K\) Ltd](#) [2018] eKLR:
- “...We find it prudent to highlight the case of Niazsons(K) Ltd v China Road & Bridge (supra) the court held *inter alia* that:
- “All that an applicant for a stay of proceedings under section 6 (1) of the [Arbitration Act](#) of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:
- (a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;
 - (b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and
 - (c) Whether the suit intended concerned a matter agreed to be referred to arbitration...”
10. See also [Eunice Soko Mlagui v Suresh Parmar & 4 others](#) [2017] eKLR, for similar reflections on this provision as follows;
- “Section 6 of the [Arbitration Act](#) is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitrating where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution. We do not therefore find anything in the provision that can be described as derogating or subverting the constitutional edict as regards alternative dispute resolution. The provision, for example, of section 6 which require parties to make an application for referral of a dispute to arbitration at the earliest opportunity and before taking any other action, or those that require the court not to refer a dispute to arbitration if the arbitration agreement is null and void, or is incapable of being performed, or if there is no dispute capable of being referred to arbitration, cannot be described as inconsistent with the constitutional principle of promoting alternative dispute resolution because the court is also obliged to take into account the equally important constitutional principle that justice shall not be delayed, by for example sending to arbitration a non- existent dispute, or allowing a party who has otherwise elected to pursue proceedings in the court, to belatedly purport to opt for arbitration.
11. This court must consider the balance of fairness for all parties and the overriding interest of justice to ensure expeditious disposal of the suit. In this circumstance, not only have the parties consistently participated in the suit but also confirmed their readiness to proceed to hearing, with this in mind, I align myself with the interpretation of the learned judges in the cases highlighted above and do find that the application is made late in the day and in bad faith aimed at subverting the due process of the court.



12. In the foregoing, the court finds that the application dated March 17, 2022 is unmerited and is hereby dismissed in its entirety with costs.

13. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Ndambiri for the Applicant.

Ms. Murigi h/b for Mr. Okulo for the Respondents.

Mr. Omoke for the Defendant in ELC No. 88 of 2019.

Court Assistant; Caroline Nafuna.

E. K. WABWOTO

JUDGE

