



Cementers Limited v Multichoice Kenya Limited (Environment and Land Case E174 of 2023) [2025] KEELC 5333 (KLR) (14 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5333 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E174 OF 2023**

**JA MOGENI, J
JULY 14, 2025**

BETWEEN

CEMENTERS LIMITED APPLICANT

AND

MULTICHOICE KENYA LIMITED RESPONDENT

RULING

1. The Plaintiff/Applicant filed the Notice of Motion Application dated 15/11/2023. It is brought under Section 7 (1) of the [Arbitration Act](#), Sections 1A, 1B, and 3A of the [Civil Procedure Act](#) Order 40 Rule 1(a) and (b) and Order 51 of the [Civil Procedure Rules, 2010](#) and all other enabling laws.
2. The Applicant seeks orders:-
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That pending the hearing and determination of this Suit, this Honorable Court be pleased to issue a Prohibition Order restraining the Defendant by its directors, employees, servants, agents or any other person whomsoever from advertising to sell, selling, transferring, charging, further charging, leasing, alienating, possessing, renting further demolishing structures or registering any further dealings or otherwise dealing with LR No. Nairobi Block 13/415 (previously known as LR No. 3734/21 before conversion) situate along Oloitoktok Road within the Lavington areas Nairobi City County.
 - e. That this Honorable Court be pleased to make such other or further orders as the circumstances of this case may require



- f. That the costs of this Application be provided for
3. The grounds in support of the Motion are set out on its face. The Application is also supported by the Affidavit of Ramesh Vishram a Director of the Plaintiff.
 4. The Respondent filed Replying Affidavit sworn on 14/02/2024 by one Ruth Omondi Finance Director of the Respondent who stated that she had authority to represent the Respondent. She stated that despite disagreeing with the Court order dated 17/11/2023 and suffering immense prejudice as a result of the same, they had fully and diligently complied with it.
 5. Despite their complying with the order they still hold that the Applicant is before this Court with unclean hands and therefore he does not deserve to be granted the orders sought because according to her:
 1. Mr Ramesh Vishram the Plaintiff commits perjury in his Supporting Affidavit sworn on 15th November 2023
 2. The Applicant has gravely misrepresented facts before this Honorable Court.
 3. That by knowingly filing a matter before this Honorable Court, the Applicant is forum shopping
 4. The Applicant was agile when it sought and, on 17th November 2023, obtained orders of this Court under a certificate of urgency. Thereafter, the urgency ceased as it Only served the orders on the Respondent on 8th January 2024.
 6. She further contended that this Honorable Court lacks the jurisdiction to hear and determine this matter since it emanates from an alleged breach of a commercial agreement between the parties dated 18th March 2015 and primarily seeks liquidated damages of breach of contract. That subject to the provisions of the Arbitration Act, 1995, the matter should be at the Commercial and Tax Division of the High Court of Kenya.
 7. She averred that the commercial dispute between the parties is currently before an Arbitrator, which arbitration has been ongoing for over 4 years. Further that in addition to the jurisdiction challenge mentioned above, barred by the express provisions of the Arbitration Act 1995 and the Agreement between the parties, the Plaintiff cannot file a substantive claim before this Honourable Court based on the same facts and seeking the very remedies it seeks before the Arbitrator even augmenting the same.
 8. She therefore stated that any dispute regarding the alleged breach of contract between the parties must be referred to arbitral proceedings for hearing and determination, as was the binding agreement between the parties. According to the Respondent, she pointed out that the Applicant willingly concluded an agreement that stipulates that a dispute between the parties would be referred to arbitration. Therefore, the Applicant cannot now be heard complaining about an issue that they willingly agreed to.
 9. According to the Respondent Mr Ramesh Vishram by swearing his Replying Affidavit has committed perjury because at the time of swearing his Affidavit there was no building erected on LR No. 374/21 a fact that Mr Ramesh was very aware of since he had deponed before on this issue at several other tribunals including the arbitral proceedings. Thus the Applicant misled the Court that there was a building erected on the suit property which needed to be preserved for evidential purposes.
 10. That these misrepresentations are solely intended to improperly sway this Honourable Court to grant it interim orders and to force jurisdiction of this Honourable Court - a clear indication of forum



shopping which according to the Respondent, the Plaintiff is unashamedly attempting to forum shop, even if it means approaching a Court with no jurisdiction (as is the case here).

11. She avers that the building was demolished in March 2022, a fact the Applicant is aware of, after it was condemned by the relevant authorities for poor workmanship and ordered the same to be brought down as a safety measure to the persons and properties adjacent to it. Following which the demolition was undertaken in strict and full compliance with statutory requirements and authorizations from the relevant authorities as evidenced by the attached copy of the notices marked RO 1(a) to 1(d).
12. The officer further stated that the building was erected on LR No. 374/21 which parcel is not a subject matter in the arbitration. The evidence in the arbitration has been adduced and nowhere is the parcel a subject matter and there is also no relief sought in the arbitral proceedings in respect of either the building or the suit parcel.
13. According to the Respondent, she avers that prior to the demolition of the building and in the course of the arbitration, the parties had ample opportunity which they were expressly given to obtain sample of any material that they would need as evidence in the arbitration process. It is her statement that at no point did the Applicant avail itself of that opportunity. Additionally that non-destructive tests were conducted on the building prior to the commencement of the arbitration and reports were developed and it is those reports that form a part of the evidence in the arbitral proceedings and not the building and/or the land as alleged by the Applicant
14. She further states that the Applicant did not disclose the nature of the “crucial evidence” that would be lost if the injunctive orders sought were not granted noting that the building, a fact within the Applicant’s full knowledge was long demolished. That following these allegations this Court is under obligation even on the mere face of the record to interrogate the factual accuracy of the claims and allegations made by the Applicant.
15. It is the Respondent’s contention that the Applicant has filed a multiplicity of cases arising from the alleged claim and this is an outright abuse of the Court process. Some of the cases include the following
 - i. Nairobi Chief Magistrate Criminal Case No. E007 of 2022 - R v. Stanley Kebathi & 4 Others;
 - ii. Nairobi Civil Appeal No. E352 of 2023 - Stanley Kebathi & 2 Others v. MultiChoice Kenya Limited & 6 Others;
 - iii. Nairobi High Court Civil Suit No. 307 of 2018 Cementers Limited v MultiChoice Kenya Ltd & 13 Others
 - iv. Milimiani Commercial Civil Suit No. 359 of 2018 MIH East Africa Limited v Cementers Limited & 3 Others (Previously Constitutional Petition No. 292 of 2018)
 - v. Arbitration between MultiChoice Kenya and Cementers Kenya Limited – which arbitration has had two arbitrators recuse themselves from the
 - vi. Nairobi High Court Civil Suit No. E384 of 2020 (OS), Cementers Limited v MultiChoice Kenya Ltd and Steven Oundo
 - vii. Nairobi High Court Civil Suit No. 049 of 2022 (OS), MultiChoice Kenya Limited v Cementers Limited and Steven Oundo;
 - viii. Nairobi Civil Appeal No. E352 of 2023, Stanley Kebathi & 3 Others v Inspector General of Police and 6 Others.



16. It is the Respondent's averment that the claim by the Applicant of Kesh 466,747,895.16 is exaggerated, an afterthought and entirely made to sensationalize the issue before the Honorable Court. That the Applicant has made no special damages claim in the arbitral proceedings or any of the other proceedings mentioned in paragraph 18 above.
17. That given that the Applicant has no known right to lay a claim on the suit property allowing this Application will be acquiescing on a great injustice to the Respondent who has a constitutional right to deal with its property in whatever manner it deems fit. That the Respondent who was in the process of selling the land and had received offers on the same, a fact the Applicant is aware of would suffer real prejudice as it is unable to realize any benefits out of property it lawfully owns.
18. The Respondent concludes by stating that the Applicant will suffer no prejudice if the orders sought are not granted as its claim is not before this Court. In any case that his claim if any is not defeated by the denial of orders at an interlocutory stage. She implores the Court to consider the Respondent's replying affidavit.
19. Before the Notice of Motion Application could be determined the Respondent filed a Preliminary Objection dated 14/02/2024. In the Notice of Preliminary Objection the Respondent raised the following objections:
 1. This Court lacks jurisdiction to entertain the present claim as it is a commercial contract which does not fall under the scope delineated by Section 13 of the Environment and Land Court Act Cap 19 of 2011.
 2. This Court lacks jurisdiction to adjudicate the contractual dispute since it has been under the purview of a competent arbitrator for the past 4 years, hence barred by Section 6 of the Arbitration Act Cap 4 of 1995.
20. The Respondent in objecting to the jurisdiction of this Court dealing with the suit because as per the Plaintiff, the claim before this Court is a liquidated claim for damages resulting from an alleged breach of contract. That the suit property Nairobi Block 13/415 (previously known as LR No. 3734/21 before conversion) is not the subject of the suit.
21. Consequently, the Respondent prays that the entire claim be dismissed with costs.
22. The Respondent also stated that the Plaintiff (hereinafter Applicant) has not alleged nor sought the enforcement of any proprietary interest even equitable of the property that is in possession and ownership of the Respondent.
23. I have scrutinized the filed documents and it seems that the Plaintiff did not file any response to the Notice of Preliminary Objection instead, the Plaintiff filed a supplementary affidavit sworn by Ramesh Vishram on 23/04/2024 in response to the replying affidavit and stated that the Applicant made a full and frank disclosure of material facts and that the interim orders in place were issued in light of the imminent risk of the Defendant/Respondent disposing of the suit property.
24. He averred that the dispute between the Plaintiff and Defendant, has led to a mixture of causes of action involving substantial issues of law of a "mixed grill" nature. That as a result, the following cases have arisen out of the dispute being Civil Suit in the High Court (being High Court Civil Suit 307 of 2018 - Cementers Limited v. Multichoice Kenya Limited & 13 Others) praying for orders against Multichoice, Messrs S. K. Archplans, Messrs Interconsult Engineers Limited and their officers amongst other players, in order to search for and preserve documents, information and items relating to the fraudulent conspiracy during the construction, and in particular reports prepared by Engineers and laboratories in the construction and correspondence relating to the conspiracy.



25. There was also the dispute between Cementers and Multichoice in HCCOMM 307 of 2018 which was referred to arbitration (upon Application by Multichoice). That Multichoice is therefore not a party to HCCOMM 307 of 2018. HCCOMM 307 of 2018, which suit was proceeding against the other 13 Defendants for civil fraud, fraudulent misrepresentation, fraudulent intention and or conduct akin to fraud.
26. He stated that the Plaintiff/Applicant lodged a complaint with the Inspector General of Police against Multichoice, Stanley Kebathi, Wilson Munyu Karaba for criminal fraud and conspiracy to defraud with regard to altering/falsely doctoring the structural integrity report. As a result of the complaint, the Inspector General of Police conducted investigations and on the basis of those investigations, the Director of Public Prosecution preferred criminal charges against them in Criminal Case No. E007 of 2022. A copy of the charge sheet is annexed and marked as RV1
27. He further averred that the complaint by Cementers and subsequent arrest of the ex parte Applicants in Judicial Review Application No. E033 of 2022 stemmed from their participation in the alteration of professional documents in relation to the dispute between the Applicant (Cementers) and Multichoice in which they conspired to blame Cementers through altered/falsely doctored professional reports.
28. That by a Ruling delivered on July 4, 2023 by Hon. Justice Jairus Ngaah, the Court found the Applicants' Judicial Review Application No. E033 of 2022 lacking in merit and dismissed the same. A copy of the Judgment was annexed and marked as RV2.
29. Another Notice of Motion Application dated 12/04/2023 in Commercial Suit No. E049 of 2022 (OS) against Cementers Limited was also dismissed vide a Ruling dated Vide a Ruling delivered on June 16, 2023 by Hon. Justice Njoki Mwangi the Court found the Application dated April 12, 2023 devoid of merit and dismissed the same with costs to the Defendant and a copy is annexed marked RV3.
30. It was his contention that the Commercial Suit No. E049 OF 2022 (O.S) is a case filed by the Plaintiff (Multichoice Kenya Limited) through a Notice of Motion Application dated April 12, 2023 seeking inter alia an injunction against the 1st Defendant (Cementers Limited) from adducing or relying on the documents titled "Data Acquisition and Analysis pertaining to Cementers Limited" or further documents and or information filed in the impugned arbitration proceedings and an injunction against the 2nd Defendant from issuing any Rulings or order for directions.
31. That vide a Ruling delivered on June 16, 2023 by Hon. Justice Njoki Mwangi the Court found the Application dated April 12, 2023 devoid of merit and dismissed the same with costs to the Defendant
32. He avers that the Defendant has accused the Plaintiff of forum shopping which is far from the truth since the suit herein is not a purely commercial dispute, as the Defendant would want to project it to the Court. That in the suit the Plaintiff/Applicant has raised issues touching on inter alia the works done on LR No. 3734/421 the subject property, the subsequent demolition of the building erected on the suit property, the advertisement and imminent sale of the suit property during the pendency of ongoing arbitral, civil and criminal proceedings. The subject matter of the suit properly belongs to this Honourable Court and therefore, this Honorable Court is properly seized of the matter.
33. Therefore, it is the Plaintiff's contention that this Court has the jurisdiction to issue a prohibition order stopping inter alia the transfer, alienation and/or otherwise dealings with the property known as LR No. Nairobi Block 13/415 (previously known as LR No. 3734/421 before conversion) situate along Oloitoktok road within the Lavington area within Nairobi City County registered in the name of the Defendant/Respondent.



34. He further avers that in any event at paragraph 21 of the Replying Affidavit the Respondent confirms its intention to sell off the subject property thereby confirming the urgent need to safeguard the subject property and restrain its imminent sale pending the determination of the suit.
35. As a matter of fact, the Defendant/Respondent is a South African majority owned entity and media reports reveal that the Defendant has received an offer from French Media Company Canal to fully acquire the broadcasting Company. The acquisition of Multichoice by a non-resident organization will alter the ownership, directorship and definitely the assets ownership of the company and the Applicant is reasonably apprehensive that the Respondent is likely to lease/alienate/dissipate and/or remove its properties from the jurisdiction of this Court thereby defeating and/or obstructing the Plaintiff's/Applicant's execution of any decree that may be passed against the Respondent. The screen shot from Reuters of the offer by Canal+ to acquire Multi-choice is annexed and marked RV4.
36. The Plaintiff further avers that the Respondent has no other known assets within the jurisdiction of the Court save for the property known as LR No. Nairobi Block 13/415 (previously known as LR No. 3734/421 before conversion) and the Applicant is reasonably apprehensive that there is no other known realizable security for its claim. Therefore, that the Court should grant the prohibition order sought in the Application seeking to stop inter alia the transfer, alienation and/or otherwise dealings with the suit property, the Respondent will dispose off the property to the detriment of the Applicant. That the orders if issued will prevent the Respondent from dissipating or selling the property known as LR No. Nairobi Block 13/415 (previously known as LR No. 3734/421 before conversion) which is the substratum of the suit to the detriment of the Applicant.
37. That the Respondent will not be prejudiced if the orders sought herein are granted.
38. The Court directed that the Notice of Motion Application and the Preliminary Objection to be canvassed by way of written submissions.

Analysis & Determination

39. I have perused the Court file and checked on the CTS online filing platform and did not see any submissions filed by the Plaintiff on the Preliminary Objection. However, this Court is well aware that submissions are not evidence, they may be heard or dispensed with because the main basis of a decision in a case, is the claim properly laid, evidence fully presented and the law applicable. See Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another (2014) eKLR, where the Court of Appeal held that:-

“Submissions are generally parties’ “marketing language”, each side endeavouring to convince the Court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

40. That be as it may I have considered the pleadings, Preliminary Objection, and the authorities cited to me, the following issues arise for determination:
 - a. Whether the Preliminary Objection raises pure points of law
 - b. Whether the Court has jurisdiction to hear and determine this suit.

a. Whether The Preliminary Objection Raises Pure Points of Law

41. On what constitutes a Preliminary Objection, in the case of Hassan Ali Joho & Another - v- Suleiman Said Shabal & 2 Others SCK Petition No. 12013[2014] eKLR, the Supreme Court restated the



definition in the case *Mukhisa Biscuit Manufacturers Ltd v West End Distributors Ltd* (1969) E.A where the Court of Appeal said 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 needs to be ascertained or if what is sought is the exercise of judicial discretion.”

42. The Supreme Court again in the *Matter of Interim Independent Electoral Commission* [2011] eKLR held as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”[30] The *Lillian ‘S’* case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution*.”

43. I do therefore find that the Preliminary Objection raised by Defendant is one on pure point of law.

b. Whether The Court Has Jurisdiction To Hear And Determine This Suit

44. It is common ground that the jurisdiction of this Court is set out under Article 162(2) as read together with Section 13 of the *Environment and Land Court Act*, 2011 and that the same relates to the use, occupation and title to land.

45. Even though the provisions are clear that jurisdiction in land-related matters belongs to this Court, I note that the said provisions are less clear on what “land-related” means.

46. In order to make a determination as to whether the issues before are land related my attention has been drawn to the decision in the case of *Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & Another* [2016] eKLR, which decision I agree with. In the said case the Court stated that:

“In all honesty, it would not be possible for such direction to come from the *Constitution* or statute; it would have to be supplied by the Courts in a case by case basis. Such is our task here. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse. Ordinarily, the pleadings



give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue. In my view, the following factors are significant in determining the nature of the contract:

- a. The language of the contract;
- b. The nature of the business of the vendor;
- c. If the contract is mixed, the intrinsic worth of the two parts – land acquisition and other services or provision of materials;
- d. The gravamen of the dispute – whether rooted in contests about ownership, deficiency in title, occupation or use of the land or whether the genesis of the dispute is something else like the quality of services offered, construction, works and so forth; and the remedies sought by the Plaintiff.”

47. At the same time the Court of Appeal in the case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others [2017] eKLR, while determining the issue of jurisdiction for the Environment and Land Court stated that:

As for land use, the Black’s Law Dictionary, 9th Edn; gives the basic definition of the word ‘use’ as being: - ‘the Application or employment of something; esp. a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession or employment that is merely temporary or occasional.’ Emphasis added..... the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the Court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.”

48. It is therefore clear from the foregoing, that the Court of Appeal clearly settled for the ‘pre-dominant purpose test’ as opposed to the ‘predominant issue before the Court test.’

49. There is no dispute that the parties herein entered into an agreement for construction dated March 18, 2015 where the Plaintiff was engaged to erect, develop and complete an office development and associated works on LR Nairobi Block 13/415 (previously known as LR No. 3734/21 before conversion) at the agreed sum of Ksh 895,000,000 which agreement has been annexed herein as RV 1.

50. It is evident that the contract was for construction and not an agreement for use, occupation and alienation of land.

51. Applying the law and from the precedents cited above, it is clear that the dispute herein does not fall under the jurisdiction of this Court, and thus the Defendant’s Preliminary Objection succeeds entirely. Consequently, the Plaint and the Notice of Motion filed herein, both dated 15/11/2023 are dismissed. As costs follow the event and the Defendant has succeeded in its Preliminary Objection, the Plaintiff shall bear the costs of the Application as well as the suit herein.

It so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 14TH DAY OF JULY 2025 VIA MICROSOFT TEAMS.



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MOGENI J

JUDGE

In the presence of:

Ms. Muthoni holding brief for Mr. Gitonga for the Applicant

Mr. Eddy Omondi for the Respondent

Mr. Melita – Court Assistant

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MOGENI J

JUDGE

