



**Kimemia v Ngumi (Environment and Land Miscellaneous Application
E083 of 2023) [2024] KEELC 1187 (KLR) (5 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1187 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E083 OF 2023**

JA MOGENI, J

MARCH 5, 2024

BETWEEN

FRANCIS MAHIGA KIMEMIA APPLICANT

AND

ISAIAH WAWERU NGUMI RESPONDENT

RULING

1. This Ruling is in respect of the Respondent’s Preliminary Objection dated 29/01/2024 and the Applicant’s Chamber Summons dated 21/09/2023 seeking the following orders:
 1. That the arbitrator’s final award dated 31/08/2018 between Isaiah Waweru Ngumi and Francis Mahiga Kimemia be adopted as an award of this Honourable court.
 2. That a Decree is issued to reflect the orders of the Arbitrator.
 3. That the costs of this application be provided for.
2. The Respondent filed a Notice of Preliminary Objection dated 29/01/2024 which seeks to strike out the Applicant’s Chamber Summons Application dated 21/09/2023 on the following grounds:
 1. The Applicant’s chamber summons application dated 21/09/2023 is bad in law, fatally defective and incurable by an amendment as inter alia offends Order 46 Rule 10 of the *Civil Procedure Rules* 2010.
 2. The Applicant’s chamber summons application dated 21/09/2023 offends section 15 of the *Civil Procedure Act*.
 3. The Applicant’s chamber summons application dated 21/09/2023 offends Section 13 of the *Environment and Land Court Act*.



4. The Applicant's chamber summons application dated 21/09/2023 is an abuse of the process of Court and it should be dismissed and expunged from the court's records with costs to the Respondent.
5. The jurisdiction of the Honourable Court is denied.
3. The Application is premised on the grounds cited at the foot of the Application and it is further grounded on the Supporting Affidavit of Francis Mahiga Kimemia, the Applicant herein, sworn on 21/09/2023.
4. The Court gave directions that both the Notice of Preliminary Objection and the Application be canvassed by way of written submissions. The Respondent filed his written submissions dated 17/02/2024 and the Applicant filed his written submissions dated 12/02/2024. A Ruling date was scheduled.

Issues for determination

5. Having considered the Chamber Summons Application, Preliminary Objection together with the rival submissions and the authorities cited to me, the following arise as the issues for determination before this court.
 - a. Whether the preliminary objection raised is merited.
 - b. Whether the chamber summons application dated 21/09/2023 is merited.

Analysis and Determination

Whether the Preliminary Objection raised is merited

6. Considering the fact that the Preliminary Objection challenges the jurisdiction of this court to entertain the suit, I will consider it first and depending on its outcome, proceed to tackle the application dated 21/09/2023.
7. It is trite law that any preliminary objection should be filtered, weighed and balanced on the measurements of the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] 1 EA 696 where Law J. stated as follows:

“.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit.....”
8. In the instant matter, the Respondent has based his Preliminary Objection on the ground that this court lacks jurisdiction to hear and determine the Applicant's application dated 21/09/2023. The Respondent has also stated that the application is an abuse of the Court process. The question of jurisdiction of is a pure point of law which can determine the matter without having to consider the merits of the application. Needless to say, it is trite that jurisdiction is everything without which a court must down its tools. see *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1. I therefore find and hold that the Preliminary Objection raised in the instant case is on a point of law, and the same is validly and properly taken.
9. The Respondent submitted that the Application was not compliant to Order 46 Rule 10 of the *Civil Procedure Rules*, that this Court does not have the statutory mandate and jurisdiction to entertain and determine the Applicant's Application as stipulated by Section 13 of the *Environment and Land Court*



Act and lastly that this Court lacks territorial jurisdiction in accordance with Section 15 of the Civil Procedure Act.

Ground 1 – Order 46 Rule 10 of the Civil Procedure Rules

10. The Respondent submitted that Order 46 Rule 10 of the Civil Procedure Rules is mandatory and that the Applicant has failed to adduce any evidence that they complied with the said Order. That the Applicant's Application is being sneaked in for adoption by this Court without complying with the mandatory provisions of Order 46 Rule 10 of the Civil Procedure Rules.
11. On the other hand, the Applicant submitted that the enforcement of arbitral awards is governed by the Arbitration Act. In relation to paragraph 1 of the Respondent's Preliminary Objection, they state that the enforcement of arbitral awards is not time barred. They relied on the provisions of Section 2 of the Limitation of Actions Act. That Section 2 of the Act clearly stipulates that actions to enforce an award may not be brought after the end of 6 years from the date on which the cause of action accrued. The Applicant submits that they are within the stipulated time to enforce an award in a court of law.
12. The Applicant also submitted that the crux of their application is the enforcement of a valid arbitral award which was neither disputed or an appeal therefrom instituted. As a result, the preliminary objection by the Respondent is unmerited and a waste of judicial precious time. The Respondents in their preliminary objection cite the issue of jurisdiction to which they submit that the Honorable Court is clothed with the requisite jurisdiction.
13. Order 46 Rule 10 of the Civil Procedure Rules provide;
 - “ 10. Where an award in a suit has been made, the persons who made it shall sign it, date it and cause it to be filed in court within fourteen days together with any depositions and documents which have been taken and proved before them.”
14. Order 46 of the Civil Procedure Rules provides a guideline for the conduct of matters referred to arbitration by the court. It is important to note that in Kenya, there are two substantive routes under which arbitration may generally be commenced and employed as a dispute resolution mechanism. The first is arbitration through court as court ordered or court referred arbitration. It is commenced under Part VI, “Special Proceedings” of the Civil Procedure Act in Section 59 and Order 46 of the Civil Procedure Rules. This is the contextual framework of arbitration in Kenya by court order as stated by the Court of Appeal in Kenya Shell Limited v Kobil Petroleum Limited Civil Appeal (Nairobi) No 57 of 2006:
 - “ Arbitration is one of several dispute resolution methods that parties may choose to adopt outside the courts of this country. The parties may either opt for it in the course of litigation under Order XLV of the Civil Procedure Rules or provide for it in contractual obligations, in which event the Arbitration Act, No 4 1995 (the Act) would apply and the courts take a back seat.”
15. In this type of arbitration under Order 46, the court has a more extensive involvement in the arbitral process. On the contrary, arbitration that is wholly consensual at inception proceeds under the Arbitration Act. Such arbitration emanates from an arbitration agreement entered into in a contract or other writing by the parties in terms of Section 4, signifying the clear intent of the parties to resolve their dispute through arbitration. It also signifies the parties' intent that should any legal proceedings be commenced in court by any of the parties the proceedings should be stayed by the court to enable arbitration to proceed as provided under Section 6 of the Act. The Act provides for both the



substantive and procedural law for the arbitration. Further, section 10 has the all-important provision that:

“Except as provided in this Act, no court shall intervene in matters governed by this Act”

16. The clear intention of the statute is that the court is to be involved in a consensual arbitration only under the limited circumstances prescribed in the Act or the Rules made under the Act. This matter was not referred to arbitration by the Court. The arbitration was wholly consensual at inception. The Respondent herein through his advocates wrote a letter dated 30/10/2012 to the Chairman of the Chartered Institute of Arbitrators requesting for the appointment of an arbitrator in respect to the dispute arising from the caution placed by the Applicant here on his parcel of land, LR Sigona/1632. The Chairman subsequently appointed a sole arbitrator under the sale agreement dated 31/05/2010. The sole arbitrator published his final arbitral award on 31/08/2018 ultimately concluding the arbitration. It is my considered view that Order 46 Rule 10 of the *Civil Procedure Rules* is not applicable in these circumstances. Ground 1 therefore lacks merit.

Ground 2 – Section 15 of the *Civil Procedure Act*

17. The Respondent submitted that Section 15 of the *Civil Procedure Act* states that suits should be instituted where the Defendant (s) resides or where the cause of action arose. It is his submission that there exists the ELC court at Thika which is within the territory where the cause of action that gave rise to the Arbitration award arose. Counsel added that the Respondent resides in Kikuyu, Kiambu County outside the territorial jurisdiction of this Court and therefore it is an abuse of court process for the Applicant to file his Application in this Court.
18. In relation to paragraph 2 of the Respondent’s preliminary objection, the Applicant submitted that the cause of action arose within the jurisdiction of the court. The matter was adjudicated by the arbitrator, Mr. P. Gachuhi at Kaplan & Stratton, Nairobi where the Respondent was able to attend. Further, the subject matter of the dispute is also situated within the jurisdiction of the Honorable Court. That notwithstanding, the cause of action having arisen within the jurisdiction of the Honorable Court, the court is clothed with the territorial jurisdiction to adjudicate over the matter. In addition, the Respondent resides in Sigona, Kikuyu which falls under the jurisdiction of the court. It is also a fact that we are now in the era of virtual court sessions in line with the Practice Directions, 2022 issued by the Chief Justice of Kenya. Therefore, the Respondent can attend court at any desired location and at their convenience. The undisputed facts of the case are that indeed the parties were involved in an arbitration case of which an Arbitral Award has already been pronounced and that the applicant now wishes to enforce the Arbitral Award.
19. Section 15 of the *Civil Procedure Act* provides that every suit shall be instituted in a court within the local limits of whose jurisdiction the defendant or each of the Defendants at the time of the commencement of the suit actually and voluntarily resides or carries on business or personally works for gain.
20. The *Environment and Land Court Act* Practice Directions on proceedings in the Environment and Land Courts, and on proceedings relating to the environment and the use and occupation of, and title to land and proceedings in other courts provides as follows:
 - “ 14. All new cases relating to the environment and the use and occupation of, and title to land not falling under paragraph 8 above shall be filed in the nearest Environment and Land Court for hearing and determination by the said court and must be within the purview of the jurisdiction conferred upon



the Environment and Land Court with particular regard to the jurisdictional limitations set under Article 162(2) (b) of the *Constitution* and Section 13 of the *Environment and Land Court Act* No 19, 2011. 15. Where a matter has been wrongly filed at the Environment and Land Court Registry, the practice directions notably: - Practice Directions Relating to the Filing of Suits, Applications and References in Proper Court (Gazette Notice No 1756/2009) shall apply, and the matter shall be directed for filing in the appropriate court(s) in tandem with those practice directions.”

21. The properties that are the subject matter in this application are LR No Sigona/1667 and Sigona/1668. Parties herein agree that the suit property is located in Sigona, Kikuyu, Kiambu County. Having been invited to strike out the present application, this Court ought to consider the drastic nature of an order striking out the application. The question that then emerges is: should a matter which is filed in a court other than the court within the local limits of whose jurisdiction the property is situate be struck out?
22. Whereas it is true that Section 12 to 15 of the *Civil Procedure Act* gives the person suing the option of approaching the nearest Court with Jurisdiction to the place the cause of action occurred, immovable property is situated, or where the person sued actually and voluntarily resides or carries on business, or personally works for gain, this Court is guided by the provisions of Article 159 (2) (d) of the *Constitution* of Kenya, Sections 1A and 1B of the *Civil Procedure Act* as well as the provisions of Section 3 (1) of the *Environment and Land Court Act* which provides that this Court is mandated with the overriding objective to facilitate the just, expeditious, proportionate and accessible resolution of disputes.
23. The Court finds that to strike out the application, merely because it was filed before a Court that is not the one nearest to the suit property, would go against the overriding objective of this Court. The upshot of all these provisions is that while enforcing rules of procedure, the Court should not lose sight of the bigger picture: the court’s mission to render substantive justice. See *Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others* [2018] eKLR. Striking out the Application mean wasted judicial time in terms of the processes so far dealt with before this Court. I therefore find that the provision of Section 15 of the *Civil Procedure Act*, cannot oust the jurisdiction of this court as vested by Article 162 (2)(b) of the *Constitution*. I find no merit on this ground and appreciate that this Court is vested with the jurisdiction to hear and determine this application.

Ground 3 – Section 13 of the ELC Act

24. On this ground, it is the Respondent’s counsel’s submission that Section 13 of the *ELC Act* stipulates the jurisdiction of this Court. He submitted that adoption of an Arbitral Award is not one of the jurisdictions of this Court and therefore this Court lacks jurisdiction to entertain and determine the Applicant’s Chamber Summons dated 21/09/2023.
25. On the issue of jurisdiction, the Applicant submitted that the matter before this court arises out of an arbitration award. Subsequently, Section 36 of the *Arbitration Act* sets out the legal parameters governing enforcement and adoption of an arbitral award. That the ELC court is a court of equal status with the High Court as contemplated under Article 165 of the *Constitution* of Kenya and therefore it is clothes with the requisite jurisdiction.
26. It is their submission that this court has been conferred with the jurisdiction to adjudicate on matters relating to arbitral awards. They relied on the case of *Godfrey Mwampembwa v Nation Media Group Limited* [2021] eKLR and *Dartstar Limited v Kilifi Boatyard Limited* [2022] eKLR.



27. Section 36(1) of the *Arbitration Act*, provides that:

“A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.”

28. In the case of *Godfrey Mwampembwa v Nation Media Group Limited* [2021] eKLR Nduma J while citing the cases below addressed these issues as follows:

“In Miscellaneous Application No 559 of 2016, *CMC Aviation Limited, Trident Enterprises Limited v Anastacio D Thomas Fred Ochieng J.* observed that: -

‘There is no doubt that the Employment and Labour Relations Court was established by Parliament, pursuant to the Constitutional imperative that a court, with the status of the High Court be established to hear and determine disputes relating to employment and labour relations.....I am also alive to the fact that the *Arbitration Act* in Kenya was enacted in 1995. At that time, the Courts with the status of the High Court did not exist. Therefore, it cannot be argued that by specifying the High Court as the court to which parties could have recourse against arbitral awards, the *Arbitration Act* intended to, inter alia, exclude the courts with the status of the High Court.’ In my considered view, the fact that the dispute was first registered at the Industrial Court, as a claim by an employee who believed that his employers had dismissed him unfairly or had unfairly terminated his services, is significant. ...

In *United States International University v Attorney General Nairobi* Petition No 170 of 2012(eKLR), Majanja J in the High Court stated that: -

“The Industrial Court contemplated under Article 162(2) was intended to be independent of the High Court. It is for this reason that it was bestowed the status of the High Court. Indeed, the Final Report of the COE affirms that giving Parliament power to establish the Industrial Court with the status of the High Court was aimed at addressing the competing jurisdictional issues that have historically existed between the High Court and the Industrial Court. It was the intention of the drafters of the *Constitution* to give the Industrial Court, though a specialized court in nature, full independence from the High Court.... the *Constitution* does not define what “status” means but in my view it implies that the court so created must have the same juridical incidents as the High Court. The jurisdiction bestowed upon the High Court under Article 165(3) is not absolute but ‘subject to clause (5)’ whose provisions forbid the High Court from exercising jurisdiction over matters falling within the province of the Supreme Court and the specialized court established under Article 162(2). This status is to be determined from a textual consideration of the provisions governing the judicature. First, under Article 162, the courts of status of the High Court are considered superior courts save that their functions are to be defined by Parliament rather than the *Constitution* itself. Second, Part 2 of Chapter Ten titled “Superior Courts” sets out the jurisdiction of the Superior courts, that is, the Supreme Court, the Court of Appeal and the High Court. Though the Courts of status of the High Court are not defined their jurisdiction is dealt with in negative terms under Article 165. The High Court shall not exercise jurisdiction in matters reserved for status courts contemplated under Article 162(2). This implies that



the High Court cannot deal with matters set out in section 12 of the Industrial Court Act, 2011. Third, the High Court does not have supervisory jurisdiction of superior courts, which includes courts with the status of the High Court.”

23. The Court in answer to issue (a) agrees with the Applicant that the issue of jurisdiction of the ELRC Court in relation to the setting aside of an award under section 35 of the Act is well settled, and returns that the Court in light of Article 162(2) of the Constitution, Section 12 of the Employment & Labour Relations Court Act, 2012 as well as the authorities foreshadowed, the Court has the jurisdiction to handle applications from an arbitral award.”
29. Similarly, the Environment and Land Court is established under Article 162 (2) of the Constitution of Kenya, 2010 and Section 4 and 13 of the Environment and Land Court Act, 2011, provides as follows:
- Jurisdiction of the Court
1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
 2. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.
 3. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.”
30. I have perused the Application and the final award and I note that the subject matter giving rise to arbitration was the ownership of properties known as LR No Sigona/1667 and Sigona/1668 as well as the removal of cautions placed thereon among others. It has been admitted that the matter was adjudicated upon and a final arbitral award was issued on 31/08/2018.
31. The dispute before the arbitrator was in relation to a sale agreement dated 22/04/2009 between the parties herein. The final arbitral award states that disputes arose between the parties with regard to the non-completion of the sale transactions, cautions placed by the Applicant on two of the new titles and the Applicant’s entitlement. In short, the dispute was with regard to ownership of the suit properties. I therefore find that this court has jurisdiction to hear and determine application from arbitral awards involving matters listed under Section 13 of the Environment and Land Court Act.



32. The issue of jurisdiction between the High Court and courts of Equal Status has always been a thorny issue in matters that are crosscutting and have a thin line. Many decisions have been rendered including by the Supreme Court in the Karissa Chengo case but the same has not yet come to rest. Many applications are still being made on the issue of jurisdiction between the two courts and courts have dealt with them on case-to-case basis.
33. Based on the above, my view is that the grounds in the Preliminary Objection are not sufficient enough to strike out the chamber summons application. The Preliminary Objection is dismissed with costs as it is devoid of merit.

Whether the Chamber Summons Application dated 21/09/2023 is merited

34. Having dismissed the Respondent's Preliminary Objection, I shall now focus my gaze on the Application dated 21/09/2023. Before this court is an application to recognize and enforce a final arbitral award published on 31/08/2018.
35. The Applicant deponed that this matter was instituted by the Respondent vide a statement of claim filed with the arbitrator on 19/08/2015. The Applicant herein filed a Defence and Counterclaim dated and filed with the arbitrator on 11/09/2015. A sole arbitrator, Mr. P.M, Gachuhi was appointed by the Chartered Institute of Arbitrators. The matter was heard and determined by the said sole Arbitrator Mr. P.M. Gachuhi and an award was made on 31/08/2018. He further deponed that the Applicant and the Respondent entered into an agreement where the Respondent would pay the Applicant's share of the Arbitrator's fee, collect both sets of the award, and release the Applicant's copy upon reimbursement. However, the Respondent became hostile and refused reimbursement despite the Applicant's offers. The Respondent even went to court seeking a refund but refused to release the award. Now, the Applicant seeks the court to adopt the award, enabling enforcement of their rights. They argue it's in the interest of justice to grant this application for enforcement.
36. Section 32A of the *Arbitration Act* provides that an Arbitral Award is final and is binding upon the parties. No recourse is provided against a Final Award otherwise than in the manner provided for in the Act itself.
37. This Court under Section 36 has the power to recognize and enforce domestic arbitral award. Section 36(1) of the *Arbitration Act* provides as follows: -

“ 36.

- (1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this Section and Section 37.
- (2) ...
- (3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish.
 - (a) the original arbitral award or a duly certified copy of it; and
 - (b) the original arbitration agreement or a duly certified copy of it.
- (4)
- (5)”



38. The Applicant has only annexed a certified copy of the Final Award. He has not annexed to the Summons a copy of the arbitration agreement dated 22/09/2015 in question. The Court notes that the final award is comprehensive and, in any event, both contract and the Final Award are not in dispute. From the material available I am satisfied that the Applicant has met the conditions requisite for the recognition of the Arbitral Award. Since the Applicant has established a case for recognition and enforcement of the Final Award, the burden is on the Respondent to demonstrate that the Court should not recognize the award based on the circumstances set out in Section 37 of the Act.
39. Section 37 of the *Arbitration Act* provides for the circumstances in which a Court may decline to recognize an Arbitral Award. In opposing this Summons the Respondent has not raised any of the grounds set out by Section 37 for the rejection of an Arbitral Award. Indeed, the Respondent has not challenged the Final Award dated 31/08/2018 nor has he taken any issue with the manner in which the Arbitral Tribunal conducted its proceedings.
40. It is manifest that the Applicant has met the conditions for recognition and adoption of the Final Arbitral Award. On the other hand, the Respondent has failed to demonstrate why the Final Award ought to be rejected by the Court.
41. The upshot of the foregoing is that the Applicant's application is merited and is allowed as prayed.

Disposal orders

42. To this end, I order as follows:
- a. The Preliminary Objection dated 29/01/2024 has no merit and I therefore dismiss it with costs to the Applicant.
 - b. The arbitrator's final award dated 31/08/2018 between Isaiah Waweru Ngumi and Francis Mahiga Kimemia be and is hereby adopted as an award of this Honourable court.
 - c. A Decree be and is hereby issued to be reflect the orders of the Arbitrator.
 - d. Costs are awarded to the Applicant.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MARCH, 2024.

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MOGENI J

JUDGE

In the virtual presence of: -

Mr Njoroge for the Applicant

None appearance for the Respondent

C. Sagina: Court Assistant

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MOGENI J

JUDGE

