



REPUBLIC OF KENYA



**Shah v Chweya (Environment & Land Case E041 of 2023)
[2024] KEELC 5180 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5180 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E041 OF 2023**

**MAO ODENY, J
JULY 10, 2024**

BETWEEN

VIJAY LAXMI SHAH PLAINTIFF

AND

MERCY MAKENA CHWEYA DEFENDANT

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated 5th December, 2023 by the Defendant on the following grounds:
 - a. The contract upon which the Plaintiff's claim is founded expressly prescribes Arbitration as the parties' preferred dispute resolution mechanism.
 - b. The court therefore lacks jurisdiction to entertain the Plaintiff's suit.
2. The Preliminary Objection was canvassed by way of written submissions.

Defendant's Submissions

3. Counsel for the Defendant submitted that the arbitration clause is separable from the rest of the contract and can thus survive invalidity of the main agreement and relied on the cases of *Elite Earthmovers Limited v Machakos County Government & another* [2020] eKLR, *Kenya Pipeline Company Limited v Datalogix Limited and another* Nairobi HCCC No 490 of 2004 [2008] 2 EA 193 and *Shamji v Treasury Registrar Ministry of Finance* [2002] 1 EA 173.
4. Counsel urged the court to uphold the Preliminary Objection and refer the matter to arbitration.



Plaintiff's Submissions

5. Counsel for the Plaintiff submitted that the Defendant cannot be heard to dispute the court's jurisdiction on the basis of the arbitration clause in the agreement as the underlying contract has already been declared null and void by the court in Nakuru Environment and Land Court ELC No 359 of 2013.
6. Mr. Kisila submitted that since the subject contractual agreement was declared invalid, there is no provision capable of being enforced including the arbitration clause and the same perished with the agreement.
7. Counsel relied on Section 6(1) of the *Arbitration Act* No 4 of 1995 and submitted that courts would generally shun away from referring matters to arbitration in instances where the contract has been rendered null and void due to violation of statutory provisions.
8. Counsel relied on the case of Nairobi Civil Appeal No 165 of 2007 *D Njogu & Company Advocates v National Bank of Kenya Limited* [2016] eKLR where the Court of Appeal held reiterated that any contract that contrives a statute is illegal and the same is void ab initio and is therefore unenforceable.
9. Counsel further relied on the case of *Kenya Pipeline Company Limited v Datalogix Limited and another* Nairobi HCCC No 490 of 2004 [2008] 2 EA 193 (supra) where the court held that "it would be against public policy to enforce a contract including an arbitration clause where fraud was established.
10. Mr. Kisila urged the court to take judicial notice of the Judgment of the court in Nakuru Environment and Land Court ELC No 359 of 2013 where the court concluded that the defendant had fraudulently obtained the suit property and proceeded to sell the same to the plaintiff who was oblivious of the fraudulent means of the acquisition. That the Plaintiff had conducted due diligence and established that the defendant was the registered owner of the suit property and that the defendant did not disclose that there was an existing court case over the suit property Further that the defendant did not inform the plaintiff of any defects to the title.
11. It was Mr. Kisila's submission that the sale was declared null and void and therefore there would be no justification why the court would seek to enforce or refer to arbitration the terms of an illegal contract which violates statutory provisions of the *Law of Contract Act* Cap 23 Laws of Kenya. Further that the Defendant has not challenged the position relating to the invalidity of the agreement and urged the court to dismiss the preliminary objection.

Analysis and Determination

12. The issue for determination is whether the Preliminary objection as presented has merit.
13. Preliminary objections should only deal with points of law and not facts that require proof or adducing evidence to establish the same. Preliminary objections raised on a point of law are capable of disposing the matter without calling for additional facts as was held in the case of *Oraro v Mbaja* (2005) 1 KLR 141, where the court held that:

"Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence".



14. The gist of the matter in the preliminary objection is that the contract between the parties had an arbitration clause, which the parties are bound. Section 6 of the Arbitration Act Cap 4 of 1995 provides that:

“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.”

15. The catch phrase is provided for under clause (a) which states that stay of proceedings or referral to arbitration cannot be done where the arbitration agreement is null and void, inoperative or incapable of being performed.

16. The court takes judicial notice of the outcome of Nakuru Environment and Land Court ELC No 359 of 2013 where the court declared the contract null and void as the defendant had fraudulently obtained the suit property and proceeded to sell the same to the plaintiff who was oblivious of the fraudulent means of the acquisition.

17. The court can therefore not sanitize of breath life to an illegality. The Defendant is aware of this and should not be allowed to subvert justice by way of a preliminary objection. I find that the objection lacks merit and is therefore dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 10TH DAY OF JULY 2024.

M. A. ODENY

JUDGE

