



**Mogaka v Mochoge (Environment & Land Case . E068 of 2021)
[2023] KEELC 15809 (KLR) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15809 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE . E068 OF 2021
MN GICHERU, J
MARCH 1, 2023**

BETWEEN

TOM NYAYIEMI MOGAKA PLAINTIFF

AND

PIUS NYABUGA MOCHOGE DEFENDANT

RULING

1. This ruling is on the Preliminary Objection dated November 2, 2021. It is to the effect that this court lacks the requisite jurisdiction to entertain this matter for the simple reason that clause 16.2 of the Sale Agreement July 5, 2016 provides that any dispute between the parties be resolved through arbitration.
2. The Preliminary Objection is opposed by the Plaintiff who has filed a replying affidavit dated November 24, 2021, in which he deposes, inter alia, that the Sale Agreement is mired in several inconsistent issues affecting the root of the legal title and consideration on the Plaintiff's part.
The said inconsistencies are listed in the replying affidavit. Needless to state, the Defendant filed an affidavit to support his Notice of Motion dated April 5, 2022.
3. Counsel for the parties filed written submissions dated July 27, 2022 and October 24, 2022 respectively. They have identified a number of issues in the said submissions.
4. I have carefully considered the Preliminary Objection in its entirety and I find that only three issues arise as follows.
 - i. Whether a Preliminary Objection needs to be supported or opposed by affidavits?
 - ii. Whether the sale agreement is binding on the parties?
 - iii. Whether the suit should be stayed and referred to arbitration?



5. On the first issue, I find that a Preliminary Objection should not be bolstered by any evidence in form of affidavits. This is because it is on a pure point of law disclosed by the pleadings already on record. See the holding of Sir Charles Newbold J in the case of *Mukisa Biscuit Manufacturing Limited v West End Distributors* (1969) EA 696, where he stated,

“A preliminary objection consists of a point of law which has been pleaded...it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

In this case, the sale agreement dated July 5, 2016 is the first document in the list of documents filed by the Plaintiff. The Plaintiff cannot deny his own document.

6. On the second issue, I find that the agreement is binding on the parties in this case. The Plaintiff cannot run away from the said agreement as it forms the core of his case against the Defendant. His case defends on the agreement. Without the agreement, he has no cause of action against the Defendant.

7. On the third issue, I find that this suit should be stayed as required by Section 6 of the [Arbitration Act](#). It provides 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 the 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”.

8. In this case, I find that clause 16 of the agreement dated July 5, 2016 is valid and applicable and that being the case the proceedings herein are stayed and the case referred to arbitration as per clause 16.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 1ST DAY OF MARCH, 2023.

M.N. GICHERU

JUDGE

