Basil & another v Safari Leisure Motels Ltd & 5 others (Environment & Land Case 229 of 2020) [2023] KEELC 18926 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18926 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 229 OF 2020

LL NAIKUNI, J

JULY 5, 2023

BETWEEN

SURJEET SINGH BASIL ..... 1ST PLAINTIFF

DR SEEMA BASIL ..... 2ND PLAINTIFF

AND

SAFARI LEISURE MOTELS LTD ..... 1ST DEFENDANT

ELIUD MATU WAMAE ..... 2ND DEFENDANT

PATRICK WAMAE ..... 3RD DEFENDANT

KAMAU NJENDU ..... 4TH DEFENDANT

THE LAND REGISTRAR, MOMBASA ..... 5TH DEFENDANT

THE PUBLIC TRUSTEE (ADMINISTRATOR OF THE ESTATE OF ELIUD TIMOTHY MWAMUNGA (DECEASED) ..... 6TH DEFENDANT

RULING

I. Introduction.

1. The 4th Defendant/Applicant, Mr. Kamau Njendu, formally moved this Honorable Court urging it to make a determination of a Notice of Motion application dated 3rd March, 2023. The application was premised under the provisions of Order 46 and 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A,1B, 3A, 59 and 63(e) of the *Civil Procedure Act* (Cap 21) Laws of Kenya and Section 6 of the *Arbitration Act* 1995.

2. Pursuant to that, while opposing the said application, upon service the Plaintiff/Respondent filed their replies dated 11th March, 2023 and filed on 13th March, 2023

II. The 4th Defendant's case

3. The 4th Defendant/Applicant sought for the following orders: -

    a. That this Honourable Court be pleased to stay this suit and refer the matter and/or dispute to Arbitration.

    b. That costs of this Application be provided for.

4. The application is premised on grounds, testimonial facts and the averments found on the 12th Paragraphed Supporting Affidavit of James Kamau Njendu, the 4th Defendant/Applicant herein sworn on the same day where he averred that:

    a. On 2nd September, 2022, the Plaintiff filed in court a further list and bundle of documents dated 1st September, 2022.

    b. Further to the foregoing, upon perusal of the said Plaintiff's further list and bundle of documents, together with his Advocates on record, he discovered that at Clause 25 of the Agreement of Sale dated 23rd September, 2016 entered between the Plaintiff/Respondent and the 1st Defendant herein, parties therein agreed to resolve their disputes vide Arbitration at first instance.

    c. On 30th September, 2022, he instructed his Advocate to file an Application seeking leave to amend his defence to respond to the said Arbitration clause.

    d. On 7th February, 2023 the said application was allowed by consent of all parties and he had since filed his Amended Defence.

    e. Pursuant to the existing rules and procedure, once parties had chosen their forum, for resolving their dispute, they are bound by that choice.

    f. Further to the foregoing, the doctrine of exhaustion mandated parties to resolve their disputes in a manner mutually agreed upon.

    g. Parties to the Agreement of Sale dated 23rd September, 2016 could not litigate a dispute arising therefrom before this court having chosen their forum.

    h. The existing laws and/or procedures were not meant for cosmetic purposes and every party must adhere to them.

    i. The Plaintiffs/Respondents had prematurely invoked the jurisdiction of this court, which as per the said Agreement, ought to sit on an Appeal over a dispute escalating from arbitration should there arise one.

III. The Grounds of Opposition by the Plaintiffs/Respondents*

5. The Plaintiffs/Respondents opposed the application through grounds of opposition dated 11th March, 2023 on the following grounds:-

    i. The Application was incompetent under the provision of Section 6(1) of the *Arbitration Act*,1995.

    ii. There was not in fact any dispute requiring referral to arbitration as between the Plaintiffs/ Respondents and the 1st Defendant who were the only parties to the agreement within the

context of the meaning of the word "party" and the phrase "arbitration agreement" in Section 3 of the *Arbitration Act*, No.4 of 1995.

iii. The 4th Defendant/Applicant could not file a Defence and file and prosecute applications and then sought an order of stay of proceedings pending arbitration. The said application ought to have been filed together with and not later than the Memorandum of Appearance.

iv. In the agreement upon which the application was dated and which was annexed to the 4th Defendant/Applicant's affidavit, the 1st Defendant warranted in Clause 12 (ii) and (iii) that there was no decree or order which would conflict with or prevent it from performing the terms of the agreement and that it was not engaged in or threatened by any litigation or arbitration. It also warranted that it had disclosed to the Plaintiffs all material information relating to the property. All these warranties were breached. The 4th Defendant/Applicant had registered Caveats against the suit properties in the year 1990s and was and remained engaged in arbitral proceedings with the 1st Defendant. Accordingly, the said application was a gross abuse of the process of court.

v. The Application was self - defeating after the 4th Defendant amended his Defence to plead the Arbitration Clause.

vi. An arbitrator would have no jurisdiction to issue an award under prayer(a), (b), (c) and (f) of the Plaint.

vii. The 4th Defendant/Applicant was not a party to the Sale Agreement dated 23rd September, 2016 and could not file any application on the basis of an arbitration clause in that agreement.

viii. Likewise, the 5th and 6th Defendants were not parties to the Sale Agreement dated 23rd September, 2016 and would not be bound by any arbitral award.

ix. There was no Doctrine of Exhaustion between the Plaintiffs/Respondents and the 4th Defendant/Applicant herein.

x. The parties to the arbitration clause being the Plaintiffs/Respondent and the 1st Defendant never referred the dispute to arbitration and were participating in this suit.

xi. Any arbitration would not determine the dispute as between the Plaintiffs/Respondent on one hand and the 2nd, 3rd, 4th, 5th and 6th Defendants on the other hand.

xii. The 4th Defendant/Applicant was involved in a dispute with the Plaintiffs/Respondent and the 5th Defendant for the removal of his caveats. Jurisdiction on removal of caveats is exercisable by the Court and not by arbitrators.

xiii. This suit was part heard

VI. Submissions

6. On 17th May, 2023 while all the parties were present in Court, the Honourable Court directed that the parties file their hard copies of their written submissions. Pursuant to that all the parties obliged and a ruling date was reserved on Notice by Court accordingly.

A. The Written Submissions by the Plaintiffs/Respondents.

7. On 23rd May, 2023, the Plaintiff through the firms of Messrs. Kinyua Muyaa & Co Advocates filed their written submissions dated 22nd May, 2023 where the Learned Counsel submitted that they make reliance to the grounds of Opposition dated 11th March, 2023 and filed on 13th March, 2023.

8. The Learned Counsel went on to submit that the main suit is set for trial from tomorrow 23rd May, 2023. The 4th Defendant waited until 27th April, 2023 to file his submissions which he then sat on up to 17th May, 2023 when his advocates emailed them to us giving him only 3 days to prepare these submissions in time for tomorrow's hearing of the main suit. The 4th Defendant knew that there was a weekend between 17th May, 2023 and 23rd May, 2023. The service of submissions practically on the eve of the hearing of the suit leaves the Judge with no time to consider those submissions. This is sharp practice designed to continue delaying this matter endlessly.

9. The Learned Counsel submitted that he had explained in the 16th paragraphed grounds of opposition why the hearing of this suit should not be stayed. Orders of stay of this suit would be unconstitutional and would be invalid under Article 2 (4) of *the Constitution*. He made this submission on the following grounds:-

    a. The Plaintiffs were guaranteed the right to a fair trial under Article 25 (c) of *the Constitution*. They could not enjoy that right if the trial was stayed as there could not be a fair trial without a hearing. Article 25 (c) was specific and express that the right to a fair trial could not be limited. A stay of the suit would constitute a limitation and would be null and void.

    b. The Plaintiffs are guaranteed access to justice under Article 48 of *the Constitution*. Stay of proceedings would be a limitation of that access and would be null and void.

    c. The Plaintiffs have the right to have the dispute heard and decided in this Court under Article 50(1) of *the Constitution*. Stay of the suit would be a violation of that right and would be null and void. Any issue the 4th Defendant has can be raised and determined by this Court. There was no allegation that an arbitrator would be more competent to do so than a Judge of this Court.

    d. Stay of this suit would violate Article 159 (2)(b) that justice shall not be delayed. Stay of the suit would constitute a delay in violation of that provision and would be null and void.

10. The Learned Counsel submitted that in view of those four Articles of *the Constitution* the Court has no discretion to order stay of the suit. The Court will also consider that the 4th Defendant amended his Defence just the other day and one could not seek stay pending arbitration after filing Defence. There was no dispute between the Plaintiffs and the 4th Defendant that could be referred to arbitration. There is no agreement between the Plaintiffs and the 4th Defendant. The only issue between the 4th Defendant and the Plaintiffs concerned the illegal Caveat registered by the 4th Defendant against the suit premises as Chargee of a fictitious Charge as well as damages. That was not an issue agreed by any party to be referred to arbitration.

11. The 4th Defendant filed arbitral proceedings against the 1st Defendant arising from the same property way back in year 1994, almost 24 years ago. His intention is to similarly take this dispute to arbitration where it would sit gathering dust. The Learned Counsel begged the Honourable Court on behalf of his clients to put a stop to these delaying tactics and to hear the suit. The Plaintiffs acquired the suit premises, paid the full purchase price, took possession but they still did not own it as they cannot register the transfer.

12. In conclusion, the Learned held that in exercise of the discretion of the court in furtherance of the overriding objectives expressed a wish to deal with the suit the Plaintiffs withdrew the application they had filed under Certificate of Urgency, 2 years on, that noble intention on the part of the Court remains a mirage. He urged the Honourable Court to find that the application for stay lacks merit and to dismiss it with costs.

VII. Analysis and Determination

13. I have carefully read and put into account all the filed pleadings, the written submissions, the cited authorities relied on and the relevant provisions of *the Constitution* of Kenya, 2010 and the appropriate and enabling laws with regard to the applications filed in this court.

14. In order to arrive at an informed, reasonable and just decision, I have framed the following three (3) salient issue for determination. The issue are:

    a. Whether the court should refer this matter to arbitration in accordance with provisions of Section 6 of the *Arbitration Act* of 1995.

    b. Whether the parties are entitled to the relief sought.

    c. Who will bear the costs of the application

Issue No. A).Whether The Court Should Refer This Matter To Arbitration In Accordance With Provisions Of Section 6 Of The *Arbitration Act* Of 1995?

15. Under this sub heading, the main substratum of this application is making reference of the matter before the Court for Arbitration. Therefore, it is imperative to interrogate and extrapolate the issues and facts surrounding this matter. The 4th Defendant/Application urged the Court to give effect to the intentions of the parties herein expressed in their agreement. According to the 4th Defendant/ Applicant, the clear intentions of the parties was that in case of any dispute arising they would submit it for arbitration in accordance with the Clause 25 of the agreement which mandates parties to the agreement to resolve their dispute through negotiations and/or arbitration.

16. Kenya ratified the United Nations Commission on International Trade Law (UNCITRAL Model Law) which obligates courts to uphold the principle of party autonomy in resolving commercial disputes. The essence of the principle of party autonomy is that, where parties to a contract have consensually and in unequivocal terms provided for the forum through which to resolve their disputes, the courts are obligated to give effect to that choice of dispute resolution forum. The Court of Appeal in the case of "Nyutu Agrovet Limited – Versus Airtel Networks Limited (2015) eKLR" reaffirmed the supremacy of the principle of party autonomy in the resolution of commercial disputes in the following words:-

> " Our Section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to recognize this autonomy, we would become a pariah state and would be isolated internationally."

17. The exhaustion doctrine posits that where a dispute resolution mechanism exists outside the court, that mechanism should be exhausted before the court's jurisdiction is invoked. (See the Court of Appeal decision in "Geoffrey Muthinja Kabiru & 2 Others – Versus - Samuel Munga Henry & 1756 Others

[2015] eKLR). This is consistent with the provisions of Article 159 of *the Constitution* which enjoins the court to promote alternative dispute resolution mechanisms and where possible, the court to give it full effect.

18. In the case of "Nyutu Agrovet Ltd (Supra), the Court of Appeal was emphatic that Courts should uphold the party autonomy concept' where parties have incorporated an arbitration clause in their contract. The court stated that where parties incorporate the arbitration clause in the contract between them, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails.

19. The 4th Defendant/Applicant contends that the Court lacks the jurisdiction to handle this mater at this stage as it was instituted before exhaustion of the alternative dispute resolution mechanism being arbitration. They urge the court to lay down its tools and not to make one more step in this matter. The Plaintiff's position is that this court has the jurisdiction to hear this matter. An arbitration clause according to the Plaintiff, does not necessarily oust the jurisdiction of the court but only prescribes arbitration as a procedure that parties intend to adopt in settling their grievances.

20. The legal position is that a party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.

21. I agree with the court's holding in the case "Eunice Soko Mlagui – Versus - Suresh Parmar and 4 others (2017) eKLR. The court stated that section 6 of the *Arbitration Act* is a specific statutory provision on stay of proceedings and referral of a dispute to arbitration where parties had entered into an agreement with an arbitration clause. The provision of the law prescribes the conditions under which a Court can stay proceedings and refer a dispute to arbitration. Its intention is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution. The Court stated that there was nothing in that provision that could be said to be derogating or subverting the constitutional edicts as regards alternative dispute resolution.

22. Additionally, in the case of Raila Odiga – Versus - IEBC & 3 Others , the Supreme Court observed that Article 159 (2), (d) of *the Constitution* simply means that a court of law should not apply undue attention to procedural requirements at the expense of substantive justice. The provision of Article 159 (1) and (2) of *the Constitution* of Kenya, 2010 was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Courts.

23. I have seen the sale agreement dated 23rd September, 2016 between the parties. Critically, I feel imperative to refer to some of the provisions from the said Sale Agreement. Under Clause 25 therefore provided that:

> " 25.1 Should any dispute arise between the Parties hereto with regard to the interpretation, rights, obligations and/or implementation of any one or more of the provisions of this Agreement, the Parties to such dispute shall in the first instance attempt to resolve such dispute by amicable negotiation.
>
> 25.2 Should such negotiations fail to achieve a resolution within Fifteen (15) days, either Party may declare a dispute by written notification to the other, whereupon such dispute shall be referred to arbitration under the following terms:-
>
> i. Such arbitration shall be resolved under provisions of the Kenyan *Arbitration Act* 1995(as amended from time to time)

ii. The tribunal shall consist of one arbitrator to the agreed upon between the Parties failing which such arbitrator shall be appointed by the Chairman for the time being of the Law Society of Kenya upon the application of any Party.

iii. The Place and seat of arbitration shall be Nairobi and the language of arbitration shall be English.

iv. The award of the arbitration tribunal shall be final and binding upon the parties to the extent permitted by law and any party may apply to a court of competent jurisdiction for enforcement of such award. The award of the arbitration tribunal may take the form of an order to pay an amount or to perform or to prohibit certain activities; and

v. Notwithstanding the above provisions of this clause, a Party is entitled to seek preliminary injunctive relief or interim conservatory measures from any court of competent jurisdiction pending the final decision or award of the arbitrator."

24. The Plaintiffs/Respondents in their filed Plaint dated 16th November, 2020 under Paragraph 15 (i) averred that:-

> "The Plaintiffs were engaged in a dispute in arbitration with Kamau Njendu, the 4th Defendant that was being handled by Justice Torgbor and the Caveat by the 4th Defendant related to the same claim, the subject of that arbitration."

25. Guided by the above legal philosophy, I proceed to determine the two issues in this application. The framework on stay of court proceedings and referral of disputes to arbitration is contained in the provision of Section 6(1) of the *Arbitration Act*, 1995 ("the Act") provides: -

> "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 –
>
> i. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> ii. that there is not in fact any dispute between the parties with regard to matters agreed to be referred to arbitration".

26. Indeed, it is instructive to note that for such a protracted duration now, the provision of Section 6 (1) of the *Arbitration Act* has been a subject of interpretation by Kenyan courts and the prevailing jurisprudence is that a party who does not comply with the timelines set out in Section 6 (1) of the *Arbitration Act* loses the right to seek stay and referral orders. The cases where this interpretation has been affirmed include: "Charles Njogu Lofty – Versus - Bedouim Enterprises Limited CA No 253 of 2003; Niaxons (K) Ltd – Versus - China Road & Bridges Corporation Kenya (2001) KLR 12 and Eunice Soka Mlagui – Versus - Suresh Parmer & 4 others (2017) eKLR.

27. It is the Plaintiffs/Respondents Contention that the Application is incompetent under the provision of Section 6 (1) of the *Arbitration Act*,1995. Strictly speaking its only the Plaintiff/.Respondents and the 1st Defendant who were parties to the said Sale Agreement. I fully concur with the Learned Counsel for the Plaintiff/Respondent to the effect that there has not been any dispute between the Plaintiffs and the 1st Defendant who are the only parties to the agreement within the context of the meaning of the word "party" and the phrase "arbitration agreement" in section 3 of the *Arbitration Act*, No.4 of 1995 requiring referral to arbitration as such. The 4th Defendant cannot file a Defence there thereafter seek to amend it and hence file and prosecute applications seeking for an order of stay of proceedings pending arbitration. The said application ought to have been filed together with and not later than the Memorandum of Appearance. In the agreement upon which the application is dated and which is annexed to the 4th Defendant affidavit, the 1st Defendant warranted in Clause 12 (ii) and (iii) that there was no decree or order which would conflict with or prevent it from performing the terms of the agreement and that it was not engaged in or threatened by any litigation or arbitration. It also warranted that it had disclosed to the Plaintiffs all material information relating to the property. All these warranties were breached. The 4th Defendant had registered Caveats in the years of 1990s against the suit premises and was and remains engaged in arbitral proceedings with the 1st Defendant. Accordingly, the said application is a gross abuse of the process of court.

28. The Plaintiffs argued that the Application is self-defeating after the 4th Defendant amended his Defence to plead the arbitration clause. I still wonder loudly what would have been the intention of applying for the said Amendment which was acting in good faith and mutual understanding all parties including the Plaintiffs/Respondents by consent agreed to allow the said application. I still wonder loudly what was in the mind of the 4th Defendant/Applicant all along if not harboring ill intentions – holding the Sword of Demacles over the shoulders of the Plaintiffs/Respondents. Plaintiffs/Respondents. All said and done, in all fairness, an arbitrator would has no jurisdiction to issue an award under prayer(a), (b), (c) and (f) of the Plaint. Thus, taking that the 4th Defendant was not a party to the sale agreement dated 23rd September, 2016, there is no way they could file any application on the basis of an arbitration clause in that agreement. Likewise, the 5th and 6th Defendants who were not parties to the agreement for sale dated 23rd September, 2016, they would neither participate in any such Arbitration proceedings nor be bound by any arbitral award. There is no doctrine of exhaustion between the Plaintiffs and the 4th Defendant. The parties to the arbitration clause being the Plaintiffs and the 1st Defendant did not refer the dispute to arbitration and are participating in this suit. Any arbitration would not determine the dispute as between the Plaintiffs on one hand and the 2nd, 3rd, 4th, 5th and 6th Defendants on the other hand.

29. Furthermore, from the pleadings, should there be any dispute between the 4th Defendant and the Plaintiff's/Respondents the same should be referred to arbitration. Clearly, the existing dispute between the Plaintiffs/Respondents and the 4th Defendant is with regard to registration and hence removal of a Caveat registered in the offices of the 5th Defendant. It is well established that the jurisdiction on removal of Caveats is only exercisable by the 5th Defendant and Court pursuant to the provision of Sections 57 (1), (2), (3), (3), (4), (5), (6), (7), (8), (9) and (10) of the Registration of Titles Act, Cap. 281 and certainly not by Arbitrators. To support this Court on this point, I have sought solace from the cases of Assanand – Versus – Pettit (No. 3) (1978 eKLR; "Tikeren Estates Limited – Versus Wearwell Limited (1974) 1ALL ER 209" and HCCC No. 512 of 1976 Baber Mawji – Versus – United States International University) .

30. According to the Plaintiffs the suit is part heard. That in the premises, this Court has jurisdiction to entertain the matter before it. I have already shown and indeed confirmed that the Sale Agreement

between the parties had an arbitral clause. The said clause required any dispute arising from the Sale Agreement be referred to arbitration. A perusal of the Sale Agreement shows that, it contains the names of the parties, the description of the property, the purchase price and the conditions thereto. The same was properly executed by the parties.

31. In my view, upon execution of the agreement, the same had the effect of validating the agreement. It made the parties thereto to be bound by the provisions thereof. It constituted a valid agreement. Whether there was consideration or not, that does not bring that agreement within the ambit of the provision of Section 6(1) of the Act. (See Nelson Kivuvani – Versus - Yuda Komora & Another, Nairobi HCCC No.956 of 1991). Indeed, the issue of whether there was consideration is a matter which should be determined by the arbitral tribunal.

32. However I am alive to the fact that the 4th Defendant in this suit filed a Memorandum of Appearance on 27th January, 2021. The present application by the 4th Defendant was filed on 3rd March, 2023, a period of over three (3) years later.In light of the mandatory requirements of Section 6 (1) of the *Arbitration Act*, it follows that the present application was brought three years and 34 days after closure of the window for bringing the application. Clearly, it is caught up by laches. The orders of stay and referral are therefore unavailable at this stage of the proceedings

33. The second issue is whether there is a dispute to be resolved through arbitration. The plaintiff in this suit seeks the following orders:

    a. A declaration that the 5th Defendant had no jurisdiction to register the caveats by Eliud Timothy Mwamunga dated 12th March, 1996 and by Kamau Njendu dated 8th April, 1999 against L.R. No. 13909/12 registered as CR. No. 25140 (herein after referred to as the suit premises) and that the registration of those caveats was null and void.

    b. A declaration that the Prohibitory Order dated 24th August, 2001 issue in Civil Suit No. 328 of 1997 and registered against the suit premises lapsed under the provisions of Section 4 (4) of the *Limitation of Actions Act* and had no force of law.

    c. A mandatory injunction compelling the 5th Defendant to remove the said Caveats and the Prohibitory Order and to register the transfer of the suit premises in favour of the Plaintiffs.

    d. A declaration that the 2nd and 3rd Defendants as directors of the 1st Defendant knew of the Prohibitory Order and the said caveats and that their failure to disclose those encumbrances to the Plaintiffs irrespective of their invalidity was fraudulent and constituted a breach of the 1st Defendant's warrantied under Clause 12 of the Sale Agreement dated 23rd September, 2016.

    e. General, punitive and aggravated damages against the 1st, 2nd and 3rd Defendants for maintaining his invalid caveat against the suit premises and refusing to remove it.

    f. General, punitive and aggravated damages against the 4th Defendant for maintaining his invalid caveat against the suit premises and refusing to remove it.

    g. Interests on General, Punitive and Aggravated Damages.

    h. Costs of and incidental to this suit to be paid by the 1st, 2nd, 3rd, 4th and 5th Defendants.

34. I have examined the materials placed before the court by the parties. None discloses evidence of any dispute as to the parties obligations and rights under the agreement for sale. The 4th Defendant has not raised any issue against the Plaintiffs.

35. Among the mandatory statutory requirements to be satisfied before a case is stayed and referred to arbitration is that there must be a dispute between the parties with regard to the matters agreed to be referred to arbitration. This requirement is contained in Section 6(1) (b) which is reproduced above. In the case of "UAP Provincial Insurance Company Limited – Versus - Michael John Beckett (2018) eKLR, the Court of Appeal made the following pronouncement in relation to the provision Section 6 (1)(b) of the *Arbitration Act*.

> " 17. It is clear from this provision that the enquiry that the court undertakes and is required to undertake under Section 6 (1) (b) of the *Arbitration Act* is to ascertain whether there is a dispute between the parties, and if so, whether such dispute is with regard to matters agreed to be referred to arbitration".

36. The Court of Appeal added thus:

> " The words "that there is not in fact any dispute between the parties" appearing in Section 6(1) (b) of the *Arbitration Act* are in our view not superfluous and require the court to consider whether there is in fact a genuine dispute when considering an application for stay of proceedings."

37. As observed above, the materials presented to the court do not disclose any dispute capable of being referred to arbitration. In the absence of a dispute, an application for stay of proceedings would not succeed.

38. In summary, the court's finding on the first issue is that the application for stay of proceedings and referral to arbitration was brought long after the defendant had entered appearance and the same is incompetent by dint of the mandatory requirement of Section 6(1) of the *Arbitration Act*. Secondly, the evidence before court does not disclose any dispute requiring arbitration within the framework of the material arbitration agreement.

Issue No. C). Who Will Bear The Costs Of The Application

39. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award that a party is granted upon the conclusion of any legal action or proceedings in any litigation. The proviso of the provision of Section 27 (1) of the *Civil Procedure Act*, cap 21 holds that costs follow the event. By event it means the result or outcome of any legal action or proceedings. See the Supreme Court decisions of "Jasbir Rai Singh – Versus – Tarchalans (2014) eKLR; Court of Appela decision of Rosemary Wambui Munene – Versus – Ihururu Daily Cooperatives Society Limited (2014) eKLR and Kenya Sugar Board Limited – Versus - Ndungu Gathini (2016) eKLR.

40. In the instant case, the application by the 4th Defendant/Applicant has not been successful. It follows that the Plaintiffs/Respondents who participated in defending themselves on matters raised from the application are rightfully entitled to the costs of the application. I therefore grant them accordingly.

VIII. Conclusion and Disposition

41. Ultimately, and following the elaborate analysis of the framed issues herein, the Honorable Court on the principles of preponderance of probabilities now proceeds to make the following orders: -

    a. That the Notice of Motion dated 3rd March, 2023 is hereby found to lack merit and the same is dismissed entirely.

b. That for expediency sake, the matter herein be set down for hearing and the same to be concluded and witnesses to be availed within Ninety (90) days from the delivery of this ruling being on 5th October, 2023.

c. That the Costs of the application to be awarded to Plaintiffs/Respondents to be bore by the 4th Defendant/Applicant.

It is so ordered accordingly.

RULING IS DELIEVERED THROUGH MICRO SOFT TEAMS VIRTUAL MEAN, SIGNED AND DELIVERED AT MOMBASA THIS 5TH DAY OF JULY 2023.

HON. JUSTICE L.L NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT, MOMBASA