Gatimu & 8 others v Kanyi t/a Kenya Projects Budget & Executive Homes (Environment & Land Case E075 of 2022) [2023] KEELC 20659 (KLR) (4 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20659 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE E075 OF 2022

LL NAIKUNI, J

OCTOBER 4, 2023

BETWEEN

HANIEL KINYUA GATIMU ..... 1ST PLAINTIFF

HOLINESS SAMBO KICHOI ..... 2ND PLAINTIFF

MOSES WELIME SIBWECHE ..... 3RD PLAINTIFF

BENARD WAMBUA MAKENZI ..... 4TH PLAINTIFF

ROSE NDANU MWANZAU ..... 5TH PLAINTIFF

PATRICK WILSON OBOGO ..... 6TH PLAINTIFF

BELLAH QUEEN OKOTH ..... 7TH PLAINTIFF

PAUL KARIUKI NGUNJIRI ..... 8TH PLAINTIFF

MARY WANJUGU WAWERU ..... 9TH PLAINTIFF

AND

DAVID MUREITHI KANYI T/A KENYA PROJECTS BUDGET & EXECUTIVE HOMES ..... DEFENDANT

RULING

Introduction.

1. The Defendant/Applicant, Mr. David Mureithi Kanyi T/A Kenya Projects Budget & Executive Homes, formally moved this Honorable Court urging it to make a determination of a Notice of Motion application dated 16th August, 2022 and a Preliminary Objection dated even date. The application was premised under the provisions of Sections 1A, 1B, 3A, 63(c) & (e) of the *Civil Procedure Act* CAP 21 Laws of Kenya, Order 40 Rule 1& 4 Order 51 Rules 1, 3 & 12 of the Civil

Procedure Rules,2010 and provisions of the *Arbitration Act* (No.4 of 1995, Laws of Kenya). The Preliminary Objection is premised on the provision of Section 6 of the *Arbitration Act* (Cap 49).

2. Pursuant to that and upon service the Plaintiff/Respondent while opposing the said application, filed their replies dated 8th November, 2022 and filed on the same day.

II. The Defendant/Applicant's case

3. The Defendant/Applicant in the Notice of Motion Application sought for the following orders: -

    a. Thatthis Honourable Court lacks jurisdiction to hear and determine the Plaintiffs' suit as the parties have their choice of forum as arbitration.

    b. Thatthe costs of this Application be in the cause.

4. The application is premised on grounds, testimonial facts and the averments found on the 10th Paragraphed Supporting Affidavit of David Mureithi Kanyi, the Defendant/Applicant herein sworn on the same day where he averred that:

    a. On 8th July 2022, the Plaintiffs herein filed suit against him for alleged breach of contract for the alleged failure to issue leases for various housing units constructed on Land Reference Number MN/1/343 and purchased on various dates between the years 2015 to 2018.

    b. The subject matter of the said breach of contract suit was Sale Agreements executed on various dates between the years 2015 to 2018.

    c. Clause R of the Sale Agreements, forming the subject matter of the suit, provided for the resolution of disputes through arbitration.

    d. Clause R of the said Sale Agreement contained unequivocal and clear provisions on the choice of the dispute resolution forum as captured below:-

        > " Clause R: Any dispute, difference or question whatsoever which may arise between the parties including the intervention of rights and liabilities or either party shall be referred to an arbitrator under the rules of the *Arbitration Act* 1995 of Kenya(Act No 4 of 1995) as amended by the *Arbitration Act* 2009 (Act No 11 of 2009) or other Act or Acts for the time being in force in Kenya or any statutory modification or re-enactment for the time being in force, such arbitrator to be appointed by agreement of both parties and in the absence of agreement, within2009)or other Act or Acts for the time being in force in Kenya or any statutory modification or re-enactment for the time being in force, such arbitrator to be appointed by agreement of both parties and in the absence of agreement, within fourteen (14) days of the notification of the dispute by either party to the other then on the application of any one party to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) and the decision of such arbitrator shall be final and binding on the parties hereto."

    e. Despite the above-cited clear, elaborate and clear arbitration provisions of the Sale Agreement signed by the parties, the Plaintiffs had neither formally written to him to mutually appoint an arbitrator nor made any application to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) to appoint an arbitrator.

    f. The provision of Section 6 of the *Arbitration Act* (Act No 4 of 1995, Laws of Kenya) empowers a Court before which proceedings were brought in a matter which was subject to an arbitration agreement, to strike out the proceedings and refer parties to arbitration.

g. In light of the foregoing, the Plaintiffs instituted this suit in violation of the *Arbitration Act* (Act No 4 of 1995) and Clause R of the Contract (cited above) and was therefore improperly before the Court.

h. This Court lacked jurisdiction to hear and determine the Plaintiff's suit as the parties had their choice of forum as arbitration

5. The Defendant/Applicant also raised a four (4) paragraphed Notice of Preliminary Objection dated the 16th August, 2022 on a point of law as follows:-

a. The Honourable Court lacks jurisdiction to hear and determine the matter herein by virtue of the express provisions of arbitral Clause R of the Sale Agreement, forming the subject matter of the suit, which provides for the resolution of disputes through arbitration.

b. The suit is therefore in contravention of the aforementioned arbitration clause.

c. Parties are bound by Section 6 of the *Arbitration Act* (Cap 49) to resolve the dispute by way of arbitration.

d. The present suit is therefore an abuse of the process of this Honourable Court for the foregoing reasons.

III. The Plaintiffs/Respondents' response

6. The Plaintiffs/Respondents' opposed the application through a 13th Paragraphed Replying Affidavit dated 8th November, 2022 sworn by Mary Wanjugu Waweru where she deposed:-

i. She had authority of the 1st and to 8th Plaintiffs to swear the affidavit on their behalf.

ii. She admitted the contents of Paragraphs 1, 2, 3, 4 and 5 of the Supporting Affidavit.

iii. Before filing of the suit, the Plaintiffs/Respondents issued a demand notice and also served the Defendant/Applicant with a notice to appoint an arbitrator, but he failed to do so. Annexed hereto and marked "MWW - 1(a)" was a copy of the demand letter and "MWW-1(b)" is a copy of a notice to appoint an arbitrator.

iv. The Defendant/Applicant never responded to the said letter and notice and the current application was an attempt at delaying the conclusion of this matter.

v. The Plaintiffs/Respondents were served with a Memorandum of Appearance in this matter on 1st August 2022.

vi. The matter was then set down for Pre - trial conference on 1st November 2022 and on that day in the morning, the Defendant/Applicant vide an email served the Advocate for the Deponent with the current application. That was a delay of ninety (90) days.

vii. Under the provision of Section 6 of the *Arbitration Act*, the same never provided for striking out of a suit as demanded by the Defendant/Applicant.

viii. The Defendant/Applicant had not complied with the mandatory requirements of the provision of Section 6 of the *Arbitration Act* hence the application herein was a non-starter.

ix. The contents of Paragraphs 6, 8 and 9 of the application were false.

x. The Defendant/Applicant's application lacked merit and was brought in bad faith with the intention of perpetuating a delay and should be dismissed with costs.

VI. Submissions

7. On 1st November, 2022 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. On 5th June, 2023 a ruling date was reserved on Notice by Court accordingly.

A. The Written Submissions by the Defendant/Applicant.

8. On 12th January, 2023, the Defendant/Applicant through the Law firm of Messrs. Maina Kale Advocates filed their written submissions dated 22nd December, 2022. Mr. Maina Advocate commenced the submission by stating that on 8th July 2022, the Plaintiffs/Respondent herein filed suit against the Defendant/Applicant herein for alleged breach of contract on account of the Defendant/Applicant's alleged failure to issue leases for various housing units constructed on Land Reference Number MN/1/343 and purchased on various dates between the years of 2015 and 2018.

9. The Learned Counsel submitted that the subject matter of the Plaintiffs/Respondent suit was founded on various Agreements executed between the years of 2015 to 2018. Other than the details of the contracting parties, contract price and unit purchased, all the details of the Agreements were the same. These submissions were made in support of the Defendant/Applicant's Notice of Preliminary Objection and Notice of Motion dated 16th August 2022 that the court lack jurisdiction on account of the arbitration provisions of the contract forming the subject matter of the suit.

10. On the issues for determination before this Honourable Court, the Learned Counsel contended that the key issue for determination was whether this court has jurisdiction to hear the determine the suit on account of the arbitration clause(s) in the contracts forming the subject to the dispute between the parties.

11. The Learned Counsel further averred that the preliminary objection was on the grounds that there existed an arbitration clause in the parties' agreement, in which case, this court lacked the jurisdiction to entertain the suit. The Learned Counsel for the Defendant/Applicant placed reliance on the case of:- "Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696" that the Preliminary Objection consists of a point of law.The Plaintiffs/Respondents instituted this suit in violation of both the provision of Section 6 of the *Arbitration Act* (Act No. 4 of 1995) and Clause R of the Contract (arbitration agreement) and was therefore improperly before the Court. This Court lacked jurisdiction to hear and determine the Plaintiffs/Respondents' suit as the parties had their choice of forum as arbitration.

12. Clause R of the Agreements forming the subject matter of the dispute contains unequivocal and clear provisions on the choice of the dispute resolution forum as captured below:-

> "Clause R:Any dispute, difference or question whatsoever which may arise between the parties including the intervention of rights and liabilities or either party shall be referred to an arbitrator under the rules of the *Arbitration Act* 1995 of Kenya (Act No 4 of 1995) as amended by the *Arbitration Act* 2009 (Act No 11 of 2009) or other Act or Acts for the time being in force in Kenya or any statutory modification or re-enactment for the time being in force, such arbitrator to be appointed by agreement of both parties and in the absence of agreement, within fourteen (14) days of the notification of the dispute by either party to the other then on the application of any one party to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) and the decision of such arbitrator shall be final and binding on the parties hereto."

(the said Clause R is set out on pages 89, 104,122,149,168 and 186 of the Plaintiffs' Bundle of Documents)

13. Despite the above-cited elaborate and clear arbitration provisions of the contracts signed by the parties, the Plaintiffs had never made any application to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) to appoint an arbitrator. It was not disputed that the Plaintiffs, in the absence of an agreement on the arbitrator, did not make any application to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) to appoint an arbitrator in accordance with the contract (refer to paragraph 5 of the Plaintiff Replying Affidavit dated 8th November 2022 where the Plaintiff acknowledged they only wrote to the Defendant). The provision of Section 6 of the *Arbitration Act* empowers a Court before which proceedings were brought in a matter which was subject to an arbitration agreement, to strike out and/or stay proceedings and refer parties to arbitration.

14. The Learned Counsel relied on the case of "Niazsons (K) Ltd v China Road Bridge [2001] eKLR" the Court of Appeal held:-

> "All that an applicant for a stay of proceedings under Section 6 (1) of the *Arbitration Act* of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things: (a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section; (b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and (c) Whether the suit intended concerned a matter agreed to be referred to arbitration."

15. The Defendant moved with speed in filing his preliminary objection after entering appearance and before filing its defence or further pleadings. In the case of:- "Gourmet Meats Producers & Importers Limited -Versus - Paul Lainan Nkina 12021] eKLR", the court held, inter alia,

> "...a Defendant who wishes to take on the Plaintiff for stay of proceedings pending referral of dispute to arbitration must do so not later that at the time that it enters appearance and before delivering any further pleading..."

16. The provision of Article 159 2(c)of *the Constitution* of Kenya provides that:

> "(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted."

17. The tenor and import of the provision of Article 159(2)(c) of *the Constitution* as read together with Section 6(1) of the *Arbitration Act* is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement.

18. In conclusion, the Learned Counsel submitted that in light of the foregoing, that this Court lacked jurisdiction to hear and determine the Plaintiff's suit in light of the Arbitration Agreement between the parties and the provisions of the *Arbitration Act*. Reasons wherefore, the Learned Counsel prayed that the Preliminary Objection dated 16th August 2022 be allowed and the matter proceeds to arbitration in accordance with the Arbitration Agreement and that the Costs to be in the cause.

B. The Written submissions by the Plaintiffs/Respondents

19. On 8th February, 2023, the Plaintiffs/ Respondents through the firm of Messrs. Jengo Associates Advocates filed their written submissions on 7th February, 2023 where Mr. Jengo Advocate commenced by stating that the Plaintiffs/ Respondents oppose the Defendant Notice of Motion and Preliminary Objection dated 16th August 2022. In doing so, we rely on the Replying Affidavit sworn on 8th November 2022 by the 9th Defendant and filed in court on 8th November 2022 whose contents they adopted in their entity.

20. After reading the Notice of Motion Application by the Defendant/Applicant, its supporting affidavit, the Preliminary Objection and the submissions, he submitted that the Defendant/Applicant had not made out a case to warrant the grant of any orders. Indeed, a reading of the Notice of Motion application and the Preliminary objection never at all disclosed what the Defendant/Applicant wanted other than listing the grounds of the objection. It never came out as an application under the provision of Section 6 of the *Arbitration Act* as it neither sought a stay of proceedings or a referral of the matter for arbitration nor even the striking out of the suit, neither did it seek any declaration. In a nutshell its lame vague and a nonstarter.

21. The Learned Counsel argued that it was trite that parties were bound by their pleadings as set out in "Muthoni Nduati v Wanyoike Kamau & 5 Others HCCC No.1661 of 1980" where the Court held:-

> " Pleadings play a pivotal role in litigation. As stated in Bullen & Leak (12th Edition) at page 3 under the rubric Nature of Pleadings;-
>
> "The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective case and upon which the court will be called upon to adjudicate between them. It thus serves the two told purpose of informing each other what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."
>
> My reading of a foregoing decision is that if a trial court deals with an issue which is not properly before it, that would be wrong."

22. The application and the preliminary objection failed in the cardinal objective of pleadings of telling the other party what the Defendant/Applicant decided the court to do.On the face of it, the Defendant/ Applicant's application never prayed for either of the following:-

    i. Stay of proceedings

    ii. Referral of matter for arbitration hence did not meet the threshold of the provision of Section 6 of the *Arbitration Act* 1995

23. The Learned Counsel submitted that even assuming that it's an application under that the Section which was not the case, the Defendant/Applicant had not met the strict threshold provided under Section 6 of the *Arbitration Act* 1995.From the court record, the Defendant/Applicant entered appearance on 1st August 2022 and served the Memorandum of Appearance on the same day hence was under an obligation to file a Defence by 15th August 2022 which it did not do. The matter was then set down for pre - trial session on 1st November 2022. But on that day, the Defendant/Applicant

served the Respondent with its current preliminary objection and Notice of Motion though the same had been filed on 17th August 2022.

24. The Learned Counsel contended that and based on the authority of "Niazsons (K) Limited v China Road Bridge (2002) eKLR", relied upon by the Defendant/Applicant, the same was no longer good law as Section 6 of the *Arbitration Act* was amended to remove the application for stay promptly and replaced it with the filing of the same simultaneously with the Memorandum of Appearance.

25. This legal position was clearly displayed in the Defendant/Applicant's submissions at Paragraph 13 in the case of "Gourmet Meats Producers & Importers Limited v Paul Lainan Nkina (2021) eKLR" where the High court held:-

> "…….a Defendant who wishes to take on the plaintiff for stay of proceedings pending referral of dispute to arbitration must do so not later that at the time that it enters appearance and before delivering any further pleading…"

26. Additionally, the learned Counsel averred that the court of appeal dealt with the issue in the case of:- "Charles Njogu Lofty v Bedouin Enterprises Ltd (2005) eKLR" where it held;-

> "Section 6 (1) of the *Arbitration Act*, 1995, provides:- "6(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 that party enters an appearance or files any pleading or takes any other step in the proceedings, 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."
>
> On the plain reading of that section, before the court can consider the issues raised in paragraphs (a) and (b of section 6 (1) of the Act, the court has to satisfy itself that the party applying for reference to arbitration has applied to the court:- "…… not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings ……"
>
> In Civil Case No. 1756 of 2000 between Bedouin Enterprises Ltd. – Versus- Charles Njogu LoftyandJoseph Mungai Gikonyo t/a Garam Investmentswhich constituted another aspect of the present dispute now before us, Githinji, J, as he then was, had rejected the argument that an application for reference to arbitration can be made at three stages, namely at the stage of entering appearance or at the stage of filing any pleadings or at the time of taking any step in the proceedings. The Learned Judge had there held that:-
>
> "In my view, Section 6 (1) of the *Arbitration Act*, 1995, which court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance. It seems that the object

of Section 6(1) of the *Arbitration Act*, 1995, was, inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings.

Section 6 (1) of the *Arbitration Act*, Cap 49 (now repealed) allowed applications for stay of proceedings to be made at any time after the applicant has entered appearance. Section 6 (1) of the *Arbitration Act*, 1995, has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance. That is the only aspect of the law that has been changed."

We respectfully agree with these views so that even if the conditions set out in paragraphs (a) and (b) of Section 6 (1) are satisfied the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering an appearance, or if no appearance is entered, at the time of filing any pleading or at the time of taking any step in the proceedings. The dispute between Charles Njogu Lofty, the Appellant herein, and Bedouin Enterprises Ltd, the respondent herein, basically concerns the interpretation given by G.B.M. Kariuki, J. to Section 6 (1) of the 1995 Act, "the Act" hereinafter, in light of the circumstances surrounding the dispute."

27. The Learned Counsel submitted that without filing an application for stay of proceedings and referral of the matter for arbitration (which had not been done up to now) together or simultaneously with the Memorandum of Appearance, even a proper application under the provision of Section 6 of the *Arbitration Act* would not succeed. Thus, the upshot of all that was that the application should be dismissed with costs.

28. Lastly, the Learned Counsel submitted that the issue in dispute was a contract for sale of leasehold interests in land. They are issues which this court clearly has jurisdiction which can only be negated under the provision of Section 6 of the *Arbitration Act* 1995. However, since the Defendant/Applicant had not been able to negate it under the said Section 6, the court should dismiss the application and proceed with the matter.

VII. Analysis and Determination

29. 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.

30. In order to arrive at an informed, reasonable and just decision, I have framed the following four (4) salient issue for determination. The issue are:

    a. Whether the Preliminary Objection raised by Defendant/Applicant dated 16th August, 2022 meets the threshold of an Objection?

    b. Whether there is a competent Preliminary Objection before the Court.

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

    d. Who will bear the costs of the Notice of Motion application dated 16th September, 2022 and the Preliminary Objection dated 16th September, 2022.

Issue No. a). Whether the Preliminary Objection raised by the Defendant/Applicant dated 16th August, 2022 meets the threshold of an Objection?

31. According to the Black Law Dictionary a Preliminary Objection is defined as being:

> " In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."

The above legal preposition has been made graphically clear in the now famous case of Mukisa Biscuits (Supra) Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer 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 has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

32. I wish to cite the case of "Attorney General & Another –Versus- Andrew Mwaura Githinji & another [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

33. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the Defendant/Applicant herein are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the Defendant/Applicant were properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to the case of Mukisa Biscuits Manufacturing Co. Limited (Supra). Therefore, I shall proceed to consider them and determine them accordingly.

Issue No. b). Whether there is a competent Preliminary Objection before the Court .

34. Under this sub – heading, there is need to ascertain the competence of the objection raised by the Defendant/Applicant in the instant case. In addition to what was stated above in Mukisa Biscuits

(Supra), the case of "Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others, Petition No. 10 OF 2013, [2014] eKLR" the Court held thus:

> " A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... 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 has to be ascertained or if what is sought is the exercise of judicial discretion'."

35. From the above authorities, the Supreme Court has taken a more liberal approach to how courts should handle Preliminary Objections. Its view is that disputes ought not be summarily resolved. However, if a Preliminary Objection serve the public purpose of effective utilization of judicial time and other resources, then the court ought to entertain the Preliminary Objection. I am of the opinion that although the dictum in "Independent Electoral & Boundaries Commission –Versus - Jane Cheperenger & 2 Others" is progressive and will indeed utilize judicial time, it should be applied on undisputed facts that would not need the calling of additional evidence.

36. The Court has considered the pleadings and submissions by the parties herein. The Defendant/ Applicant raised a Preliminary Objection citing that the court lacks jurisdiction to entertain the suit herein and pray that the matter be referred to Arbitration.

Order 2 Rule 9 Civil Procedure Rules 2010 prescribes that; -

A party may by his pleading raise any point of law.

37. The Defendant/Applicant's Preliminary objection is with regards to the jurisdiction of this court, I will therefore endeavor to dispense with the same forthwith. Noting that jurisdiction is everything and the court or Tribunal derives its power, authority and legitimacy to entertain any matter before it from its jurisdiction. This to me is a noble legal question which goes to the root of the matter herein. It is a point of law which could dispose of the case depending on how it goes. I therefore find he issues raised satisfy the principle in the "Mukisa Biscuit Manufacturing Co. (Supra)". This Honourable Court however takes note that a Preliminary Objection is not the legal procedure to seek stay of proceedings under "Section 6 of *Arbitration Act*" for parties to pursue Arbitration.

38. Therefore, I shall proceed to consider the Notice of Motion application on the leave and stay of proceedings as per Section 6 of the *Arbitration Act* and the Preliminary Objection only on the jurisdiction of this Court to here this suit at this instant and determine them accordingly.

Issue No. b). Whether the Court should refer this matter to arbitration in accordance with provisions of Section 6 of the *Arbitration Act* of 1995?

39. Jurisdiction has been defined in Halsbury's Laws of England (4th Ed.) Vol. 9 at page 350 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

40. The issue of jurisdiction is well settled in "Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1", where Nyarangi J. of the Court of Appeal held that:

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending

other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

41. Both the Notice of motion application dated 16th September, 2022 and the Preliminary Objection dated the same day are making reference of the matter before this Honourable Court for arbitration. Therefore, it is imperative to interrogate and extrapolate the issues and facts surrounding this matter. The Defendant/Applicant urged the Court to give effect to the intentions of the parties herein expressed in their agreement. According to the 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 R of the sale agreement which mandates parties to the agreement to resolve their dispute through arbitration.

42. 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."

43. 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 v 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.

44. 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.

45. The 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 9th Plaintiff's position is that before filing of this suit, the Plaintiffs issued a demand notice and also served the defendant with a notice to appoint an arbitrator, but he failed to do so. Annexed hereto and marked "MWW -1(a)" is a copy of the demand letter and "MWW-1(b)" is a copy of a notice to appoint an arbitrator.

46. 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.

47. I agree with the court's holding in the case "Eunice Soko Mlagui v 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.

48. Additionally, in the case of "Raila Odiga v 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.

49. The objective of arbitration is to attain fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense. The second objective should be the promotion of party autonomy (arbitration being a consensual process in that the primary source of the arbitrator's jurisdiction is the arbitration agreement between the parties). The third objective should be balanced powers for the courts: court support for the arbitral process is essential, the price thereof being supervisory powers for the court to ensure due process. True to the principle of party autonomy the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal's statutory duty to conduct the proceedings in a fair and impartial manner.

50. The principal purpose of an arbitration clause is to provide a specialized tribunal to hear the dispute falling within the ambit of the matters governed by the agreement. Parties are at liberty to contract and to vest arbitrability determinations in the arbitrator, but only if the agreement contains clear language to that effect. I have seen the sale agreements executed between 2015 to 2018 between the parties. Critically, I feel imperative to refer to some of the provisions from the said Sale Agreement. Under Clause R therefore provided that:

> "Any dispute, difference or question whatsoever which may arise between the parties including the intervention of rights and liabilities or either party shall be referred to an arbitrator under the rules of the *Arbitration Act* 1995 of Kenya (Act No 4 of 1995) as amended by the *Arbitration Act* 2009 (Act No 11 of 2009) or other Act or Acts for the time being in force in Kenya or any statutory modification or re-enactment for the time being in force, such arbitrator to be appointed by agreement of both parties and in the absence of agreement, within fourteen(14)days of the notification of the dispute by either party to the other then on the application of any one party to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) and the decision of such arbitrator shall be final and binding on the parties hereto."

51. A reading of the above clauses and the above tests leave no doubt that the parties chose arbitration as the preferred mode of dispute resolution, they not only agreed on the place of arbitration, but they also elected the applicable law and rules.

52. The 9th Plaintiff's argument is that the Defendant entered appearance on 1st August, 2022 and served the Memorandum of Appearance on the same day hence was under an obligation to file a defence by 15th August 2022 which it did not do. The matter was then set down for pretrial on 1st November 2022 and on that day the applicant served the Respondent with its current preliminary objection and Notice of Motion though the same had been filed on 17th August 2022. Without filing an application for stay of proceedings and referral of the matter for arbitration (which has not been done up to now) together or simultaneously with the Memorandum of Appearance, even a proper application under Section 6 of the *Arbitration Act* would not succeed.

53. The provision of Section 6 of the *arbitration Act* lays down the applicable tests in applications of this nature. The grounds in support of or against the application will stand or fall on the grounds laid down in the above section which provides as follows: -

> "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."

54. The tenor and import of "Article 159(2) (c) of *the Constitution*" as read together with "Section 6(1) of the *Arbitration Act*" is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement. Secondly, where a party elects to come to court and the other party to the arbitration agreement seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance. The Defendant raised the issue of Arbitration promptly. Since the Defendant filed the application promptly as set out in "Section 6 (1) of the *Arbitration Act*".

55. 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 v Bedouim Enterprises Limited CA No 253 of 2003; Niaxons (K) Ltd v China Road & Bridges Corporation Kenya (2001) KLR 12 and Eunice Soka Mlagui v Suresh Parmer & 4 others (2017) eKLR.

56. In the instant case, the Defendant contended that the Plaintiffs instituted the suit herein and filed it on 8th July, 2022 against the Defendant for alleged breach of contract on account of the Defendant's alleged failure to issue leases for various housing units constructed on Land Reference Number MN/1/343 and purchased on various dates between 2015 and 2018. The Plaintiffs instituted this suit in violation of both Section 6 of the *Arbitration Act* (Act improperly before the Court. This Court lacks jurisdiction to hear and determine the Plaintiffs' suit as the parties have their choice of forum as arbitration.

57. The Defendant submitted that it was disputed by the Plaintiffs that in the absence of an agreement on the arbitrator, did not make any application to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) to appoint an arbitrator in accordance with the contract (refer to paragraph 5 of the

Plaintiff Replying Affidavit dated 8th November 2022 where the Plaintiff acknowledged they only wrote to the Defendant). The Plaintiffs did not dispute this fact.

58. The Plaintiffs on the other hand argued in their submissions that the issue in dispute is a contract for sale of leasehold interests in land. They are issues which this court clearly has jurisdiction which can only be negated under Section 6 of the *Arbitration Act* 1995. However, since the Defendant/Applicant has not been able to negate it under the said provision of Section 6, the court should dismiss the application and proceed with the matter.

59. The intention of the contracting parties in the Sale Agreements are to pursue Arbitration even if it is not spelt in mandatory terms. This court will not rewrite the terms of the parties' Sale Agreements. The Plaintiffs acknowledge that Clause R applied to this dispute but argue that they had already tried to get the Defendant to appoint an arbitrator which they allegedly ignored. From the surrounding facts and inferences of this case, I have taken Judicial notice that despite of these provisions be a life onto the Sale Agreements there has been some reluctance and lethargy, in particular by the Defendant/Applicant herein, in causing the initiative and the drive for the process of resolving the dispute through making reference to the Arbitration. I wonder why that is the case. Without belabouring on the point, but strongly feel that this has been unnecessary delay and one causing a travesty of Justice to the matter. Indeed, it is against the legal Maxim of "Justice Delayed is Justice Denied" as is founded under Article 159 of *the Constitution* of Kenya, 2010. In my own view, there will be need to compel parties herein to expedite the matter with a given stipulated time frame thereof. Suffice it to say, we are all required to adhere to Article 159 (1) and (2)(c) of *the Constitution*: -

> "(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted."

60. Be that as it may, the upshot is that the Defendant/Applicant's application and preliminary objection dated 16th September, 2022 are merited. The provision of of Section 6 (1) of the *Arbitration Act* provided that a court before which proceedings were brought in a matter which was the subject of an arbitration agreement was to, if a party so applied not later than the time when that party entered an appearance or otherwise acknowledged the claim against which the stay of proceedings was sought, stay the proceedings and refer the parties to arbitration unless it found that the arbitration agreement was null and void, inoperative or incapable of being performed; or that there was not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

Issue No. c). Who will bear the Costs of the Application and Preliminary Objection dated 16th September, 2022

61. 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 Appeal decision of Rosemary Wambui Munene – Versus – Ihururu Daily Cooperatives Society Limited (2014) eKLR and Kenya Sugar Board Limited v Ndungu Gathini (2016) eKLR.

62. In the instant case, the application by the Defendant/Applicant has been successful but the Court has the discretion when it comes to the costs. Thus, in the given circumstances there it is just fair and reasonable that there be no costs in the matter.

VIII. Conclusion and Disposition

63. Following the elaborate analysis of the framed issues herein, the Honorable Court on the principles of preponderance of probabilities proceed to make the following orders:-

    a. Thatthe Preliminary objection dated 16th September, 2022 be and is hereby found to have merit. Hence, it is upheld accordingly.

    b. That the Notice of Motion application dated 16th September, 2022 is hereby found to have merit and the same is allowed entirely.

    c. That the import of the above is that this Honourable Court in the meanwhile lacks jurisdiction to hear and determine the dispute as canvassed in the underlying suit in the Plaint dated 8th June, 2022.

    d. That the Honourable Court makes a finding that the issue in this suit ideally ought to be referred and to be determined by an Arbitration. Between the Plaintiffs and Defendants, they have their choice for an appropriate forum for the arbitration process to be initiated by the Defendant/Applicant herein.

    e. That the Defendant/Applicant be granted a grace period of thirty (30) days from the date of the delivery of this Ruling to have initiated and finalized the full process of identification and settlement on an a mutually agreed upon Arbitration Institution or individual to undertake the Arbitration process without fail. Should there be non compliance, the matter will proceed on for adjudication before this Honourable Court.

    f. That the instant proceedings are stayed and the dispute is referred to Arbitration under Clause R of the Special Conditions of the Sale Agreement by the Parties under the provision of Section 6 of *Arbitration Act*.

    g. That there be a Mention on 13th November, 2023 to ascertain full compliance of these orders and further direction whatsoever.

    h. Thatthere shall be no orders as to the Costs of the Notice of Motion application and the Preliminary Objection dated 16th September, 2022.

    It is so ordered accordingly.

RULING IS DELIEVERED THROUGH MICRO SOFT TEAMS VIRTUAL MEAN, SIGNED AND DELIVERED AT MOMBASA THIS 4TH DAY OF OCTOBER 2023.

.....

HON. JUSTICE L.L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT,

MOMBASA

Ruling delivered in the presence of:-

a. M/s. Yumna – the Court Assistant.

b. Mr. Jengo Advocate for the Plaintiff/Respondent.

c. No appearance for the Defendant/Applicant.