Olive Hills Surgical Centre Limited v BOM National Health Insurance Fund (Civil Suit E013 of 2023) [2025] KEHC 4328 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4328 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL SUIT E013 OF 2023

DKN MAGARE, J

MARCH 20, 2025

BETWEEN

OLIVE HILLS SURGICAL CENTRE LIMITED ..... PLAINTIFF

AND

BOM NATIONAL HEALTH INSURANCE FUND ..... DEFENDANT

RULING

1. This is a ruling arising from the defendant's preliminary objection to this court's jurisdiction. The Objection states that arbitration is the appropriate forum for determining this suit, and so this court has no jurisdiction. The parties submitted orally the preliminary objection. It is contained in the defence to the effect that:

   20. In response to paragraph 23 of the Plaint, we deny the jurisdiction of this court based on clause 35.1, 35.2 and 35.3 of the agreement dated 21st June, 2021 and clause 37.3, 37.4 and 37.5 of the agreement running from 2022-2024 as the matter should be adjudicated upon by an arbitrator and not the honourable court.

   21. The Defendant upon denying the jurisdiction of this Honourable court above, the Defendant shall raise sufficient Preliminary Objection touching on the Court's jurisdiction to hear and determine the matter.

2. The Plaintiff maintained that this court has jurisdiction and that the Preliminary Objection was not a true preliminary objection as it did not raise pure points of law. The Defendant, on the other hand, argued that the preliminary objection raised a pure point of law as the court had no jurisdiction.

3. The court was left musing whether parties were dealing with the same case. Having perused the Plaint, I did not see any pleading that could give rise to the preliminary objection. nevertheless, I am bound to analyze the arguments by the parties and come to an informed decision.

Analysis

4. The issue before me is whether the Preliminary Objection that this court has no jurisdiction is merited. The question of jurisdiction must be addressed at the earliest possible opportunity. The court is cognizant that without jurisdiction, it must down its tools. In Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, Justice Nyarangi JA, as he then was stated as doth;

> " With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what
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> I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

5. On the other hand, the court cannot expand its jurisdiction through judicial craft or innovation. The Supreme Court addressed this issue in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, where they stated that:

> " This Court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

6. The court will, therefore, assume jurisdiction where it has and eschew jurisdiction where none exists. The court recognizes that in every case, there are three types of jurisdiction: jurisdiction ratione temporis (time), ratione materiae (subject matter), and personae (over the person). Two other types are not relevant in municipal law. The defendant has to establish one of the three types of jurisdiction is lacking in order to succeed.

7. In addressing jurisdiction, including the 4th type, Jurisdiction ratione soli, that rarely arises in domestic disputes, in the case of Et Timbers PTE Limited v Defang Shipping Company Limited (A claim in rem against the owners of the motor vessel 'Dolphin Star' of the Port of Panama); Kenya Ports Authority as

the Harbour Master (Interested Party) (Admiralty Cause E003 of 2021) [2024] KEHC 6270 (KLR) (24 May 2024) (Judgment, this court posited as doth:

> " 125. Before proceeding, it is imperative that the court satisfies itself that it has jurisdiction. Jurisdiction is usually divided into four
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> a. Jurisdiction ratione personae.
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> b. Jurisdiction ratione temporis
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> c. Jurisdiction ratione materiae
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> d. Jurisdiction ratione soli.
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> 126. Jurisdiction rational personae is upon parties themselves. That is to say whether parties are in a position to be bound by the decision. Having noted that the ship MV dolphin star was arrested in Kenya, the parties are subject to the jurisdiction ratione personae.
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> 127. Whether this was a towage or salvage, the voyage ended with motor tanker Joey in Kenya. The court, therefore, has jurisdiction ratione personae over the ship.
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> 128. The ship was arrested at the time it docked in Kenya and remained in Kenya; throughout hence, jurisdiction ratione temporis was in place. This was not challenged. This also applies to jurisdiction ratione materiae over the subject matter. The ship is docked or came to Mombasa within the jurisdiction of Kenya. This court has jurisdiction over it. The court notes that the happenings occurred or ended in Kenyan territory. Therefore, this court sitting in Mombasa has jurisdiction ratione soli over the ship."

8. In order to be satisfied that the matter is properly raised, the court has to determine whether the Preliminary Objection meets the test of what a preliminary objection is. Thereafter, the court shall determine the same on its merit. A preliminary objection was defined by Law JA in the locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, made the following observation:

> " So far as I am aware, 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."
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> Sir Charles Newbold, President stated in the same judgment as follows:-
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> "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."

9. Preliminary Objection consists of a matter of law that has been pleaded or arises by clear implication out of pleadings and which, if argued as a preliminary point, may dispose of the suit. In the case of Martha Akinyi Migwambo v Susan Ongoro Ogenda [2022] eKLR, Justice Kiarie Waweru Kiarie,

summarized the preliminary objection as seen from two of the judges in Mukisa Biscuit Manufacturing Co. Ltd(supra) as follows: -

> " A preliminary objection must be on a point of law. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 at page 700, paragraphs D-F Law JA as he then was had this to say:
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> "…. 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."
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> At page701 paragraph B-C Sir Charles Newbold, P. added the following:
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> A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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…."

10. A preliminary objection must be based on current law and undisputed facts pleaded in the plaint or the originating pleadings. Though pleaded in the responding pleadings, it must arise out of clear implication from the plant. The facts should not be disputed. It is paramount for this court to discern whether the issues raised by the Defendant in the Preliminary Objection can dispose of the Plaintiff's suit.

11. Even in matters such as limitation of time, where it does not arise out of clear implication from pleadings, the best case is to apply to strike out the suit for being time-barred and introduce relevant facts. This cannot apply to a preliminary objection. no facts are to be introduced.

12. Justice prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro v Mbaja [2005] eKLR:

> " I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point

13. The proper contents of a preliminary objection would be allegations that relate but are not limited to objection to the jurisdiction of the court; a plea of limitation, when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from. In the Tanzania Court of Appeal sitting in Dar Es Salaam, in Karata Ernest & Others v Attorney General (Civil Revision No. 10 of 2020) [2010]

TZCA 30 (29 December 2010), Luanda, J.A, Ramadhani, C.J., Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

> " At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists o f a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings."

14. The Objection is premised on Section 6 of the *Arbitration Act*. The question is whether there is an agreement to arbitrate the dispute. the defendant's is if the view that section 4(1) of the *Arbitration Act* provides of what an arbitration agreement is.

15. It may well be true that the dispute herein ought to have been arbitrated. However, the jurisdiction relating to arbitration falls within a narrow window of the Jurisdiction ratione temporis. That is to say, arbitration rises and falls on the timelines and acceptance or otherwise of the court's jurisdiction.

16. A Preliminary Objection is not the legal procedure to seek a stay of proceedings under Section 6 of the *Arbitration Act* for parties to pursue Arbitration. The application of Article 159(2) (c) of *the Constitution* as read with Section 6(1) of the *Arbitration Act* is to the effect that it behooves the court to protect and promote alternative dispute resolution mechanisms.

17. However, parties must keep abreast of the procedures for approaching the court. The procedure for moving a matter from litigation to arbitration Is set out in Section 6 of the *Arbitration Act*, 1995 as hereunder:

    (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 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.

    (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

    (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

18. Though the defendant indicated that the preliminary objection was made under section 4(1) of the *arbitration act*, such submissions are otiose. The said section cannot be a basis of a preliminary objection; the same section provides as follows:

    1. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

19. However, as Plaintiff herein elected to come to court and Defendant sought to invoke the arbitration agreement, Defendant is obligated to do so not later than the time of entering appearance. In other words, section 6(1) provides that there has to be a simultaneous filing of the memorandum of appearance and an application under section 6(1) of the *Arbitration Act*. Filing a notice of appointment and not filing the section 6(1) application automatically ousts the arbitral process. taking any step in the proceedings ousts the arbitral process. Furthermore, even where, the step is filing the memorandum of appearance without section 6(1) application, the arbitral process is ousted. it does not matter, that the memorandum of appearance is accompanied with a preliminary objection.

20. The defendant raised the issue of Arbitration after acknowledging the suit by filing a defence. upon filing the defence, the defendant ousted the arbitral process. This is because taking a step in the proceedings is acknowledging jurisdiction. it is irrelevant that it may be indicated to be under protest. in Mt. Kenya University v Step Up Holdfing (K) Ltd [2018] eKLR, the court of Appeal [Waki, Nambuye & Kiage JJA] observed as follows in respect to the issue of taking a step in the proceedings:

    We have construed section 6 of the *Arbitration Act* on our own and considered it in light of the case law highlighted above. We adopt the position taken by the Court in the above pronouncements as in our view; they represent a correct interpretation of the provision. Considering the above in light of the findings of the trial Judge, it is our finding that the trial Judge correctly exercised his discretion and properly appreciated both the facts and the law and arrived at the correct conclusion on the matter. We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter. The appellant herein entered appearance, and then responded to the respondent's application for injunction before filing the application seeking an order for reference to arbitration. Critically the appellant's response to the respondent's application for injunction amounted to the taking of a procedural step in the matter before the initiation of the reference process. We therefore find no error in the Judge's findings. They are accordingly affirmed.

21. The preliminary Objection is only based on paragraphs 20 and 21 of the Defence that raised an objection on the basis of referral to arbitration. This did not constitute an application for referral as it was a defence statement. The Defendant failed to file the application for referral to arbitration promptly as set out in Section 6(1) of the *Arbitration Act*. A mere fact that an arbitration clause exists does not automatically oust the jurisdiction of the court as a party who wishes to refer a matter filed in court to arbitration must comply with the conditions set out in section 6(1) of the *Arbitration Act*. In the case of CM & A Logistics Limited v Upland Premium Diaries and Foods Limited (Civil Appeal E295 of 2022) [2022] KEHC 14428 (KLR) (Civ) (21 October 2022) (Judgment), DAS Majanja J, posited as follows:

    Under section 6(1)(a) and (b) of the *Arbitration Act*, once a party has brought the application for stay of proceedings promptly, the court may decline to refer a matter to arbitration only when the arbitration agreement is null and void, inoperative or incapable of being performed; or there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration (see Niazsons (K) Ltd v China Road & Bridge Corporation Kenya NRB CA Civil Appeal No 157 of 2000 [2001] eKLR, Mt Kenya University v Step Up Holding (K) Ltd [2018] eKLR).

8.In addition, under rule 2 of the Arbitration Rules, 1997 a party invoking an arbitration clause must make an application in order for the court to satisfy itself that the matter deserves to be referred to arbitration. It is upon filing of the application that the court will consider whether to stay the suit by giving consideration to the factors set out in section 6 of the *Arbitration Act*.

9.The case of Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited [1969] EA 696 established that a preliminary objection is founded on a pure question of law or uncontested fact that may dispose of a matter. In the case at hand, a preliminary objection denies the Court the opportunity to interrogate the factors upon which the court may deny an application for stay. I hold that consideration of those factors in section 6 of the *Arbitration Act* is a factual inquiry that does not lend itself to disposition by a preliminary objection.

10.In addition, section 10 of the *Arbitration Act* provides that the court can only intervene in matters of arbitration in accordance with the Act. The only way provided for a party to object to jurisdiction on account of an arbitration agreement is by filing an application for stay pending reference to arbitration under section 6; a preliminary objection is not provided for as a means to contest jurisdiction under the *Arbitration Act*.

22. It is the finding of this court that a preliminary objection that denies the Court the opportunity to interrogate the factors upon which the court may deny an application for stay and referral of a suit to arbitration is not a pure point of law. The case of Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (supra) established that a preliminary objection is founded on a pure question of law or uncontested fact that may dispose of a matter.

23. In this case, the factors in section 6 of the *Arbitration Act* profer a factual inquiry that does not lend itself to disposition by a preliminary objection.

24. In this case, the Defendant did not file its application for stay but proceeded to file its Defence. In doing so, it waived its right to seek arbitration. Filing a notice of preliminary objection is not a substitute for an application for stay of proceedings pending reference to arbitration under the *Arbitration Act*. In Eunice Soko Mlagui v Suresh Parmar & 4 others [2017] eKLR, the Court of Appeal stated as follows:

> "After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our mind, filing a defence constitutes acknowledgement of a claim within the meaning of the provision. Be that as it may, to the extent that after amendment, Section 6(1) still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance, the pre 2009 decisions of our courts on the application of section 6(1) are still good law to that extent. In Charles Njogu Lofty v Bedouin Enterprises Ltd, *CA No 253 of 2003*, this court considered section 6(1) and held that even if the conditions set out in paragraphs (a) and (b) 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 appearance or is made after filing of the defense."

25. The Defendant herein seeking to rely on the existence of an arbitration clause as a defence cannot be allowed to use it to circumvent a statutory requirement under section 6 of the *Arbitration Act*. In Mt. Kenya University v Step Up Holdings (K) Ltd (supra) the court stated as follows:

> "In Corporate Insurance Company v Wachira (supra), the court held inter alia that existence of an arbitration clause is a defense to a claim filed against a party, save that a party seeking to rely on the existence of such an arbitration clause as a defence cannot be allowed to use

it to circumvent a statutory requirement with regard to the mode of applying for a stay of proceedings."

26. In any event, the court reiterates that a Preliminary Objection is not the legal procedure to seek stay of proceedings under Section 6 of the *Arbitration Act*. In Meshack Kibunja & 3 others v Kirubi Kamau & 5 others, Central Highlands Tea Co. Ltd (Interested Party) [2021] eKLR, Muigai J. expressed herself as follows:

> " A Preliminary Objection is not the legal procedure to seek stay of proceedings under Section 6 of the *Arbitration Act* for parties to pursue arbitration. The tenor and import of article 159(2)(c) of *the Constitution* 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 obligated 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 . . ."

27. The preliminary objection is therefore not merited and I disallow it.

Determination

28. The upshot of the foregoing is that I make Orders as follows:

    a. The preliminary objection to the jurisdiction of this court hearing the suit is dismissed.

    b. The Plaintiff shall have the costs of the Preliminary Objection of Ksh. 20,000/- to be paid within 30 days, failing which execution to issue.

    c. The directions shall be given upon hearing the suit after delivery of this ruling.

    d. Parties to address the court on the defendant's legal status before the next date for directions.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF MARCH, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Ms Muthui for Mr Ndichu for the Plaintiff

No Appearance for the Defendant

Court Assistant - Michael

M.D. KIZITO, J.