



**Mwananchi Credit Limited v Karanja (Miscellaneous Civil Suit
E007 of 2024) [2025] KEHC 11562 (KLR) (23 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11562 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CIVIL SUIT E007 OF 2024
DO CHEPKWONY, J
JULY 23, 2025**

BETWEEN

MWANANCHI CREDIT LIMITED PLAINTIFF

AND

MICHAEL NJENGA KARANJA DEFENDANT

RULING

1. Before the court for determination is the Originating Summons application dated 18th June, 2024 which seeks the following orders:
 - a. That this Honourable Court be pleased to declare that the Defendant created an informal charge in favour of the Plaintiff when he deposited the Original Title Deed over KIAMBAA/ RUAKA/3163 as security to the Plaintiff per the loan agreement dated 21st June, 2023.
 - b. That this Honourable Court be pleased to issue an order to sell all that property known as Title Number KIAMBAA/ RUAKA/3163 to recover fully or in part the outstanding loan balances of Kshs. 10,841,712.45 due and owing to the Plaintiff as of 21st February, 2024.
 - c. That this Honourable Court do issue an order of vacant possession over Title Number KIAMBAA/RUAKA/3163 to enable the Plaintiff to sell the property.
 - d. That the costs of and incidental to this application shall be borne by the Defendant.
 - e. Such other, further, incidental, or alternative orders as the Honourable Court may deem just and equitable.
2. The Originating Summons application is based on the grounds as set out on its face and the Supporting Affidavit of the Applicant's Legal officer SALEH JACKLINE sworn on the instant date. According to the Applicant, the Respondent applied and was granted loan facility of Kshs. 5,450,682.00 whose terms are enshrined in the letter of offer and loan agreement both dated 21st June, 2023 and which



were executed by the parties. That the Respondent deposited the original title deed of land known as Kiambaa/Ruaka/3163 with the Applicant to serve as security for the loan facility. That it was a term of the loan that the Defendant would repay the loan but he defaulted despite the Plaintiff making demands for the payment of the arrears.

3. The Applicant contends that it accepted to restructure the loan on condition that the Defendant executes the charge documents for the parcel of land to be charged and this would allow him twenty (24) months to repay the loan, which the Defendant failed to execute the charge instruments. It is the Applicant's case that the outstanding loan arrears is Kshs. 10,841,712.45/= and the Defendant has failed to pay, prompting the filing of the present suit wherein it seeks orders of sale of the subject property to recover the said monies.
4. The Applicant has urged that the act of the Defendant depositing the original title deed, created an informal charge over the property in its favour which is provided for in the Land Act and not he seeks leave of court to exercise its remedies and thus prays that the court allows the application.
5. The Defendant opposed the application through Notice of Preliminary Objection dated 8th November, 2024 on the following grounds:-
 - a. Condition 6 of the Plaintiff's Letter of Offer dated 21st June 2023 for the loan facility provides that should a dispute arise with respect to the provisions of the Agreement, parties are to resolve the dispute through negotiation at first instance and thereafter arbitration should the negotiations be unsuccessful. The decision of the Arbitrator is final and binding to the Parties herein.
 - b. In light of the forgoing, this suit is defective and has been improperly instituted before this Honourable Court which lacks the requisite jurisdiction to hear and determine this matter.
6. The Plaintiff further filed Grounds of Opposition dated 28th November, 2024 on the following grounds:-
 - a. The Defendant's Preliminary Objection is baseless and legally unsound.
 - b. The Plaintiff's claim cannot be enforced through arbitration.
 - c. The Defendant's Replying Affidavit to the claim waives their right to arbitration.
7. In view of these objections, the court directed that the Notice of Preliminary Objection should be handled in priority directed the parties to canvass the same by way of written submissions.
8. On the definition of a Preliminary Objection, the court in the case of Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors [1969]EA 696 held as follows:-

“----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 a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:-

“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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

9. The Plaintiff filed submissions dated 28th November, 2024 whereas the Defendant filed his dated 9th December, 2024, which the court has read in consideration of issues raised in the Preliminary Objection.
10. In its submissions, the Plaintiff formulated the following issues for determination:-
 - a. Whether the Defendant complied with the mandatory procedural requirements under Section 6(1) of the *Arbitration Act* and Rule 2 of the Arbitration Rules;
 - b. Whether the Plaintiff’s claim before the court is suitable for arbitration;
 - c. Whether the Defendant’s conduct constitutes a waiver of the right to arbitrate.
11. From the Defendant’s submissions, the issue for determination is whether this Honourable Court has jurisdiction to hear and determine the dispute.
12. From the two sets of submissions the court finds the main issue for determination is whether as follows:-
 - a. Whether this court has jurisdiction to handle the application in line with the arbitration clause.
Whether this Court has jurisdiction to handle the application in line with the Arbitration Clause.
13. It is the argument of the Defendant that condition No.(4) of the letter of offer dated 21st June, 2022 stipulates that in the event of a dispute the matter should be resolved through negotiations and thereafter arbitration if negotiations are unsuccessful. He holds that parties have not exhausted negotiations and the Plaintiff cannot void the Arbitration Clause. On this proposition, the Defendant has placed reliance on the cases of Paul Chemunda Nalyanya –vs- I. Messina Kenya Limited [2015] eKLR and Isaac’s Investments Company Limited –vs- First Community Bank Limited [2021] eKLR.
14. On its part, the Plaintiff holds that under Section 6 (1) of the Arbitration Act a party seeking to rely on arbitration agreement must apply for stay of proceedings before entering an appearance. Therefore, the fact that the Defendant filed a Replying Affidavit in response to its Originating Summons it automatically waived his right to arbitration and therefore the Notice of Preliminary Objection lacks merits and the same should be dismissed with costs to the Plaintiff.
15. The law under Section 6 (1) of the *Arbitration Act* provides as follows:
 - “(1) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when 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”

16. In the case of Adrec Limited –vs- Nation Media Group Limited [2017] eKLR, the Court added that:-

“ Any 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”

17. Generally, from the afore-stated statute and case law, the law requires the Defendant to file an application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter. However, the Defendant herein filed a Notice of Appointment of Advocates, a Notice of Preliminary Objection and a Replying Affidavit to the Originating Summons application. In consideration of each parties position on the Preliminary Objection, the court agrees with the Plaintiff that since the Defendant filed the Replying Affidavit to the application, it amounts to taking a step in the matter and has thus waived the right to proceed to arbitration and cannot now state that this court lacks jurisdiction to handle the matter.

18. For this reason, the court finds that the Notice of Preliminary Objection dated 8th November, 2024 lacks merits and the same is hereby dismissed.

19. In the circumstances, mention on 24th June, 2025 for parties to take directions on the hearing of the Originating Summons.

It is hereby ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 23RD DAY OF MAY __ 2025.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Muthoni Wambugu counsel for Applicant

Mr. Ngugi counsel for Defendant

Court Assistant - Martin

