



**Arcoverde (K) Limited v Minju & another (Civil Suit E0004 of 2024)  
[2024] KEHC 11983 (KLR) (Commercial and Tax) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11983 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E0004 OF 2024  
PM MULWA, J  
OCTOBER 3, 2024**

**BETWEEN**

**ARCOVERDE (K) LIMITED ..... PLAINTIFF**

**AND**

**NJERI MINJU ..... 1<sup>ST</sup> DEFENDANT**

**WILLIAM GATHECHA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before the court are two applications which are to be determined together. The first one is a Notice of Motion dated 5<sup>th</sup> January 2024 seeking summary judgment in favour of the plaintiff and upon entry this judgment the respondents to handover vacant possession of Town House Number 46 situate on Land Reference Number 12825/342 to the plaintiff.
2. Additionally, an order of injunction is sought to restrain the defendants from causing any further alterations to Town House Number 46 and direct the defendants to liaise with the plaintiff and remove the goal posts, trampoline cars together with the artificial lizards and spiders and the conduits/ducts installed/set up on Town House 46 situate on LR Number 12825/342 named “Iguta Paradise Homes”.
3. The said application was supported by the grounds on the face of it and by the sworn affidavit of William K. Gitau.
4. The defendants opposed the application vide a replying affidavit sworn on 17<sup>th</sup> January 2024 stating that the plaintiff is guilty of circumventing the alternative dispute resolution mechanisms before approaching the court thus rendering all the prayers sought incapable of being granted.
5. The second is a Notice of Preliminary Objection (PO) dated 17<sup>th</sup> January 2024, on the grounds that:



- a. The Court lacks jurisdiction to entertain the instant suit and the application.
  - b. The suit as well as the application offends the provisions of Article 162(2)(b) of the Constitution.
  - c. The suit as well as the application offends the provisions of section 13 of the Environment and Land Court Act No 19 of 2011 Laws of Kenya.
  - d. The suit has been filed prematurely and in violation of the express provisions of Section 9(2) & (3) Fair Administrative Action Act, the lease agreement dated 21<sup>st</sup> June, 2021 at clause 21.3, 25.1, 25.3, 25.4, 25.5, 25.6 25.7, 25.9, 25.11 and the principles of exhaustion.
  - e. The suit as well as the Application offends the provisions of Section 4 of the Arbitration Act No 4 of 1995.
  - f. The suit, as filed, is incompetent and go against known procedure laid down in the law.
  - g. The suit and the application is incompetent, fatally defective, misconceived, frivolous and an abuse of Court process as it negates the principles and essence of rules governing the institution of suits generally.
6. In response to the objection, the applicant filed a further affidavit sworn on 17<sup>th</sup> May 2024.
  7. The application and the PO were canvassed by way of written submissions by parties which the court has carefully considered. The court frames the following issues for determination;
    - a. Whether the PO is merited
    - b. Whether an injunction should issue
    - c. Whether summary judgment should be entered
  8. The essence of a preliminary objection was well enunciated in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* (1969) EA 696.
  9. The court must first establish whether it has jurisdiction over this matter. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. As has been stated time and again jurisdiction is everything. The Court cannot confer jurisdiction to itself as was held in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989):
 

“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...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”
  10. It was the defendants’ submission that the provisions of Article 159(2)(d) of the Constitution enjoins the court to promote alternative dispute resolution mechanisms as is provided under Clause 25.1 to 25.6 of the lease dated 21<sup>st</sup> June 2021, which is to the effect that:

Dispute Resolution

- 25.1 Any Dispute (as hereinafter defined), arising out of or relating to this Lease shall first be resolved by way of consultation held in good faith between the



parties. Such consultation shall begin immediately after one party has delivered to the others written notice of dispute (the "Dispute Notice") and a request for such consultation.

25.2 For purposes of this clause 25, the following terms shall be interpreted as hereunder:

25.2.1 "Dispute" means any disagreement, difference or conflict that arises between the parties as a result of the formation, existence, performance, interpretation, nullification (or consequences thereof), termination or invalidation of this Lease or arising from, out of or related to this Lease in any manner whatsoever; and

25.2.2 "Dispute Notice" means a notice given in writing by one party to the other and that describes in reasonable and sufficient detail the Dispute arising out of or relating to this Lease.

25.3 Where the parties further fail to resolve the dispute by amicable consultation within twenty-eight (28) days of service of the Dispute Notice, then the Dispute shall be submitted to arbitration upon request of any party by written notice to the other party.

25.4 The arbitration shall be conducted by one (1) arbitrator to be appointed jointly by the parties.

25.5 If the parties fail to agree on the Arbitrator within fourteen (14) days, they shall refer the matter to the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch who shall nominate the arbitrator who shall be an advocate of the High Court of Kenya of not less than fifteen (15) years standing with significant experience in and knowledge of the real estate and construction practice. The appointment of the arbitrator shall be final and binding on the parties.

25.6 The place of arbitration shall be Nairobi - Kenya and the language of arbitration shall be English.

11. The plaintiff argued that the defendants herein purported to commence a parallel dispute over the same matter before this Court by writing a letter dated 16<sup>th</sup> May 2024 to the Chartered Institute of Arbitrators requesting for appointment of a Single Arbitrator to hear and determine the very same dispute before the Court. The applicant added that such conduct amounts to gross abuse of the Court process and urged the Court to reject the said conduct by the defendants. The court disagrees with the plaintiff on this argument as it is evident that the defendants rightly proceeded to file a PO raising an issue with the jurisdiction of the court.

12. Section 6 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.”



13. In *Lofry v Bedouin Enterprises Ltd* [2005] 2 EA, the Court of Appeal addressed the issue of Section 6(1) of the *Arbitration Act*, thus:

“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 pleadings or at the time of taking any step in the proceedings.”

14. The filing of the PO herein was the step taken by the defendants in response to the plaintiff’s suit and in their response to the application the defendants equally disputed the jurisdiction of the court in this matter.

15. The court also acknowledges that vide a letter dated 9<sup>th</sup> January 2024 the defendants invoked the arbitrator’s jurisdiction by issuing a notice in accordance to the arbitration clause. On the other hand, the plaintiff did not dispute that there exists an arbitration clause as a mode of dispute resolution between the parties.

16. In light of the above, Article 159 2(c) of the *Constitution* encourages disputants to explore alternative forms of dispute resolution including mediation, arbitration and others.

17. The upshot is that the Preliminary Objection is allowed. Parties are to proceed to arbitration for the settlement of their dispute. Costs in the cause.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2024.**

.....

**P. MULWA**

**JUDGE**

In the presence of:

Mr. Isaac Renee for plaintiff

Mr. Odhiambo Isaac for defendants

Court Assistant: Carlos

