



**Gituma & another v Skyview Gardens Limited (Civil Appeal E127 of 2021)
[2023] KEHC 1948 (KLR) (Commercial and Tax) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1948 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E127 OF 2021
JWW MONG'ARE, J
MARCH 20, 2023**

BETWEEN

JOHN GITUMA 1ST APPELLANT

FLORA AGNES GITUMA 2ND APPELLANT

AND

SKYVIEW GARDENS LIMITED RESPONDENT

(Being an appeal from the decision of the Small Claims Court at Nairobi (Martin N. Mutua, adjudicator) delivered on 19th November 2021 in Claim No. 1385 of 2021)

JUDGMENT

1. This is an appeal from the ruling by the adjudicator in the Small Claims Court Nairobi and delivered on November 19, 2021 in Claim No. 1385 of 2021 against a suit filed by the appellants, John Gituma & Flora Agnes Gituma against the respondent, Skyview Gardens Limited.
2. A brief background of this matter is that the Appellants herein filed in the Small Claims Court a suit against the Respondent for the sum of Ksh.489,900.00 being a claim for refund of legal fees incurred by them as a result of an agreement for sale entered on July 9, 2019 by and between the parties.
3. At the commencement of the suit in the Small Claims Court, the Respondent raised a Preliminary Objection dated October 16, 2021 asserting that the lower court lacked jurisdiction to entertain the claim on the ground that there was an arbitration clause in the operative agreement which reserved such matters for arbitration, in accordance with the provisions of the *Arbitration Act*.
4. In their Grounds of Opposition, the Appellants asserted that since the sale agreement was rescinded, the act of recession rendered the agreement null and void and therefore the Respondent could not rely



- on its provisions to pursue any claims through arbitration and that there was no dispute to refer to arbitration.
5. By a ruling delivered on November 19, 2021, the Adjudicator upheld the Preliminary Objection raised in the claim before it, and through which the Respondent challenged its jurisdiction and dismissed the suit.
 6. It is that decision of the adjudicator in the Small Claims Court that the Appellants, being dissatisfied with, appealed against it to this court on the grounds that:
 1. The adjudicator erred in law by failing to address the issues raised in appellants' grounds of opposition dated November 12, 2021.
 2. The Adjudicator erred in law by failing to address the issues raised in the Appellant's submissions dated November 12, 2021.
 3. The adjudicator erred in law by relying on a rescinded agreement to hold that the claim should have been referred to arbitration.
 4. The Adjudicator erred in law by relying on a non-existent arbitration clause to oust the jurisdiction of the Small Claims Court to hear the claim.
 5. The Adjudicator erred in law by finding that there was in fact a dispute to refer to arbitration despite there being no such dispute.
 6. The adjudicator erred in law by striking out the proceedings on the basis of a preliminary objection contrary to the provisions of the [Arbitration Act](#) 1995."
 7. Arising from the above grounds of appeal, the Appellants prayed inter alia for an order to have the ruling of the Small Claims Court delivered on November 19, 2021 set aside and an order to refer the matter back to the Small Claims Court for hearing of the same on its merits before a different adjudicator.
 8. The Respondent did not file pleadings in opposition in this appeal. Instead, both parties filed their respective submissions and presented oral highlights of the same in open court on March 1, 2023.
 9. Upon considering the material placed before me which include the memorandum of appeal and the written submissions and responses therein and upon listening to the oral highlights of the parties submissions, I find that the only issue for determination is whether the subordinate court erred by upholding the Preliminary Objection brought in the small claims court in SCCC No. 1385/2021.
 10. The Appellant submitted that once the Respondent rescinded the agreement between itself and the Appellant the said agreement ceased to exist and the Respondent could not rely on any of its provisions including the arbitration clause therein. The Appellant argued that subsequently, in light of the provisions of section 6 of the [Arbitration Act](#), the right forum for its claim for the recovery of legal fees was the Small Claims Court.
 11. On the other hand, the Respondent submitted that both parties can rely on the Sale Agreement dated July 9, 2019 based on rights which have already been unconditionally acquired notwithstanding the fact that it had been rescinded. That recession of the contract preserved rights acquired by the parties to the contract and that where a claim arising out of the rescinded agreement, the same should be resolved using the mechanism available to the parties to the contract, which was through arbitration. The Respondent argued that therefore the Small Claims Court lacked requisite jurisdiction to hear and resolve the dispute on the issue of refund of legal fees which remained unresolved.



12. It is important to note that Clause 21.1 of the sale agreement dated July 9, 2019 between the appellant and respondent states:-

“Any dispute, difference or question arising out of or in connection with this Agreement and which is not settled by direct negotiation between the parties thereto shall be referred in accordance with the Arbitration Act (No.4 of 1995) or any amendment or re-enactment thereof for the time being in force] to the decision of an Arbitrator to be appointed by the parties...”

13. The Respondent rescinded the subject agreement and refunded the Appellants for the deposit that they had earlier paid. However the Respondent sought an additional sum of Ksh.498,900.00 for a refund of legal fees incurred by them as a result of entering the agreement for sale.

14. Section 6 of the Arbitration Act urges courts to stay any proceedings before it where parties before it have contracted to have their disputes therein resolved by way of Arbitration. Indeed the said section 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.

15. I am guided by courts findings in the case of Diamond Hasham Lalji v Gargill Kenya Limited & 3 others [2017] eKLR where the court adopted a passage from the judgment of Dixon J. in Macdonald v Dennys Lascelles Ltd. (1933) 48 CLR 457:

“When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which



is not ‘void’ or ‘voidable’ at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executor only and the party in default is liable for damages for its breach.”

16. It is my understanding that in this case, the rights and obligations which arose from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. This means that although the contract was rescinded, a dispute that arose as a result of the agreement could be referred to arbitration as stipulated under paragraph 21.1 of the agreement. I therefore find that the subordinate court’s decision was sound in finding that it had no jurisdiction to hear the matter as the dispute ought to be resolved through arbitration as stipulated in the sale agreement.

17. The above holding is buttressed by the locus classica case on jurisdiction where Justice Nyarangi in the case of *Owners of the Motor Vessel “Lilian S” v Caltex Oil Kenya Ltd* where famously stated 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

18. In conclusion therefore I find no merit in this appeal and the same is dismissed with costs to the respondent. The parties have recourse to arbitration to resolve any outstanding issues in the contract. The appeal is therefore dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF MARCH 2023

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J. W. W. MONGARE

JUDGE

In the presence of:-

Mr. Mugambi for the Appellant

Mr. Omulama for the Respondent

Sylvia- court Assistant

