



**Kituo Cha Sheria v Abdalla & another (Civil Appeal
69 of 2022) [2023] KEHC 22178 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22178 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 69 OF 2022
F WANGARI, J
JULY 14, 2023**

BETWEEN

KITUO CHA SHERIA APPLICANT

AND

JASEEM ABDALLAH 1ST RESPONDENT

AMINA ABDALLA 2ND RESPONDENT

RULING

1. The Applicant via the Notice of Motion dated May 12, 2022 sought for the following prayers;
 - a. Spent
 - b. Spent
 - c. Pending the hearing and determination of the intended appeal, this Honourable court be pleased to stay the proceedings in Mombasa Chief Magistrates Court Civil Suit no 1096 of 2020, *Amina Abdalla & Jassem Abdalla v Kituo cha Sheria*.
 - d. Applicant be granted leave to appeal out of time against the whole ruling of the learned trial magistrate Mombasa Chief Magistrates Court Civil Suit no 1096 of 2020, *Amina Abdalla & Jassem Abdalla v Kituo cha Sheria*, delivered on the 9th August 201 without notice to the Applicant.
 - e. The memorandum of appeal annexed be deemed dully filed and served.
 - f. Costs of this application awarded to the Applicant
2. The application was opposed by the Replying Affidavit dated May 23, 2022 stating that the ruling date was taken by consent and the failure to attend court, following up on the outcome of the ruling and



making this application after 9 months after the ruling was delivered was an indication of indolence and inordinate delay on the part of the Applicant, hence the application ought to be dismissed.

3. Directions were taken that the application be disposed of by way of written submissions. The Applicant filed its submissions on June 21, 2022. They submitted that this suit was filed in contravention of the Arbitration Clause, hence challenging the jurisdiction of the Magistrates Court to hear the matter. It is the ruling on the Preliminary Objection raised that is the subject of the intended appeal.
4. On whether the ingredients of granting of stay were met, the Applicant relied on the case of *Kenya Power and Lighting Company Ltd v Esther Wanjiru Wokabii*, Civil Appeal no 326 of 2015 (2014) eKLR where the court quoted Ringera J (as he then was) in the case of Nairobi HC Winding-Up Cause no 43 of 20000 *Global Tours and Travels Limited*.
5. The Applicant also submitted that it has a right under Section 79 G of *Civil Procedure Act* to file an appeal out of time. It referred to the case of *Omar Shurie v Marian Rashe Yafar* [2020] eKLR, for the principles thereof, being: -
 - a. The length of the delay
 - b. The reason for the delay
 - c. The chances of the appeal succeeding if he applicant is granted
 - d. The degree of prejudice to the Respondent if the application is granted
6. The Respondents filed their submissions on July 18, 2022. They submitted that the Arbitration clause was optional but not mandatory. Further, it was submitted that the Applicant waived the reliance of the Arbitration Clause as it was in contravention of Section 6 (1) of the *Arbitration Act* as application for stay of proceedings were not made when appearance was entered.

Analysis and Determination

7. This is an application that should have never been filed. In matters arbitration there is not automatic stay or proof of jurisdiction. Jurisdiction is dealt with when Section 6 of the *Arbitration Act* is complied with. In this case an application to struck out the Notice of Motion was filed, but not under Section 6 above. There is not chance for success of the application.
8. Secondly the applicant conceded the fact that the date for the ruling on the Preliminary Objection was taken by consent. There is a nine month delay between the time the ruling was delivered and when this application was made. As much as the Applicant state that it was not aware of the delivery of the ruling, there is the duty to follow up on the matter. I find that the delay is inordinate and unreasonable.
9. In the addition to the above, this is an agreement over a lease. This is a matter governed by Section 13 of the *Environment and Land Court Act*. The said Act provides as follows
 - ' (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes—



- (a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) Relating to compulsory acquisition of land;
 - (c) Relating to land administration and management;
 - (d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) Any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) Deleted by Act no 12 of 2012, Sch.
- (6) Deleted by Act no 12 of 2012, Sch.
- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
- (a) Interim or permanent preservation orders including injunctions;
 - (b) Prerogative orders;
 - (c) Award of damages;
 - (d) Compensation;
 - (e) Specific performance;
 - (f) Restitution;
 - (g) Declaration; Or
 - (h) Costs.

10. Even if the leave to appeal out of time was granted, the appeal was not to this court. The entire application thus a nonstarter and lacks merit. It is begging for dismissal, which I hereby do issue.
11. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the Civil Procedure Act. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR. The Respondents having been dragged into these proceeding over 9 months after the lower court ruling was passed, I find it only fair to award them costs.
12. Following the foregone discourse, the upshot is that the following orders do hereby issue;



- a. The application dated May 12, 2022 lacks merit and thus hereby dismissed.
- b. Costs to the Respondents.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 14TH DAY OF JULY 2023.

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F. WANGARI

JUDGE OF THE HIGH COURT

In the presence of;

Magiya Advocate for Respondent

N/A for the Appellant

Abdullahi C/A

