



**Sikotra & another v Glenwoods Gardens Limited & another (Miscellaneous Application 639 of 2021) [2023] KEHC 20312 (KLR) (Commercial and Tax) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20312 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION 639 OF 2021**

**FG MUGAMBI, J**

**JULY 7, 2023**

**BETWEEN**

**BHAVESH ASHOK SIKOTRA ..... 1<sup>ST</sup> APPLICANT**

**SNEHA KISHORE BHATTI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**GLENWOODS GARDENS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**THE COMPANY FOR HABITAT AND HOUSING IN AFRICA (SHELTER  
AFRIQUE) ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Brief Facts**

1. This ruling determines the application dated August 27, 2021 brought under section 7 of the [Arbitration Act](#), sections 1A, 1B and 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law.
2. The application seeks the following orders;
  - i. Spent
  - ii. Spent
  - iii. That this court be pleased to issue an order of injunction restraining the respondents from transferring suit property known as title No Kiambaa/Ruaka/674 pending the hearing and determination of this application.



- iv. That this court be pleased to issue an order of injunction restraining the respondents from transferring suit property known as title No Kiambaa/Ruaka/674 pending referral of the disputes herein to arbitration and determination thereof.
  - v. That the costs of this application be awarded to the plaintiff/applicants.
3. The application is premised on the grounds on the face of it, the supporting affidavit sworn by Bhavesh Ashok Sikotra and submissions dated November 22, 2021.
  4. The facts leading to the application are that the parties entered into a sale agreement for the sale of apartment number 1-19 located on land title No Kiambaa/Ruaka/674 for Kshs 7,000,000/=. The applicants' case is that they had paid a total of Kshs 4,100,000/= towards the purchase price, but the respondents failed to complete the project as per the agreement.
  5. The applicants further aver that they are apprehensive that the respondents may transfer the suit property and have therefore applied for interim orders of protection pending referral of the matter to arbitration. The applicants' apprehension is founded on the fact that the 1<sup>st</sup> respondent had no known assets, that it had deliberately closed its offices, changed its postal address and disconnected telephone lines with an aim to circumvent its contractual obligations.
  6. The 1<sup>st</sup> respondent did not respond to the application. The 2<sup>nd</sup> respondent in opposition to the application raised a preliminary objection on grounds that;
    - i. The application offends section 19 of the Civil Procedure Act cap 21 of the Laws of Kenya as read together with order 3 rule 1 of the Civil Procedure Rules 2010 which provides that suits shall be instituted by way of a plaint unless otherwise prescribed.
    - ii. The application is fatally defective hence ripe to be struck out with costs.
  7. The 2<sup>nd</sup> respondent submitted that the applicant ought to have filed a plaint and not a miscellaneous application. In any case, counsel submitted that the applicants improperly invoked the court's jurisdiction since the arbitration rules provide that applications under sections 6 and 7 of the Act shall be made by summons in the suit.
  8. In their submissions dated November 22, 2021, the applicants do not specifically deny that the application ought to have been brought by way of summons to the suit. They instead invite this court to consider the provisions of article 159 of the Constitution as well as section 1A and 1B of the Civil Procedure Act.

## Analysis

9. I have carefully considered the pleadings, rival submissions and authorities presented by the parties to advance their respective positions. The very nature of the preliminary objection means that it ought to take precedence over the determination of the application herein as it has the effect of disposing the matter if found to be sustainable.
10. The principles that the court should apply in determining the merits or otherwise of a preliminary objection were set out by the Court of Appeal in the often-cited case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated in part that:

“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.”



At page 701 Sir Charles Newbold, P added that:-

“... 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.”

11. This court is therefore required to consider whether there is merit in the preliminary objection as raised. Rule 2 of the arbitration rules provides that applications under sections 6 and 7 of the Act shall be made by summons in the suit. The respondents have pointed out and correctly so, that since the application before the court is premised on section 7 of the *Arbitration Act*, it was mandatory that the application for interim reliefs must be made in an existing suit.
12. It is common ground that the applicant approached the court by way of a miscellaneous application and that there is no suit backing the application. The Court of Appeal was faced with a similar issue as this in the case of *Scope Telematics International Sales Limited v Stoic Company Limited & another* [2017] eKLR.
13. This was an appeal from the High Court which had held that if an application under section 7 of the Act was not anchored on a suit, the same did not render it fatal so as to deny a party the right to seek interim relief. Very much akin to the current case, the 1<sup>st</sup> respondent therein did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on article 159 of the *Constitution* for the proposition that justice is to be administered without undue regard to technicalities.
14. The Court of Appeal while appreciating the need for judicial discretion took issue with the High Court for having exercised its discretion in favour of the 1<sup>st</sup> respondent by invoking the said article, the overriding objective under the *Civil Procedure Act*, and held that failure to anchor the application on a suit did not render the application fatal or incurably bad. The court, emphasizing the importance of rule 2 of the rules warned that:-

“The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. It was not about what prejudice the appellant or and 2<sup>nd</sup> respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision”.

#### **Determination And Orders**

15. In considering the application before me, I am bound by this finding of the Court of Appeal and I therefore must find that a miscellaneous application was not the correct procedure to approach the court and that the application was fatally and incurably defective.
16. The preliminary objection is merited and is hereby granted. This application is hereby struck out with costs to the respondent.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 7th DAY OF JULY 2023.**

**F. MUGAMBI**

**JUDGE**

**Court Assistant: Ms. Lucy Wandiri.**

