



**Maina v Swivel Marketing Limited (Commercial Case E087 of 2023)  
[2024] KEHC 14014 (KLR) (Commercial and Tax) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14014 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E087 OF 2023  
MN MWANGI, J  
NOVEMBER 8, 2024**

**BETWEEN**

**SHIRLEY MAINA ..... APPELLANT**

**AND**

**SWIVEL MARKETING LIMITED ..... RESPONDENT**

*(Being an Appeal from the ruling of the Small Claims Court of Kenya at Nairobi delivered by Honourable J.P. Omollo (Ms), Adjudicator, on 28th April 2023)*

**JUDGMENT**

1. The appellant filed a claim in the Small Claims Court vide a statement of claim dated 10<sup>th</sup> March 2023, seeking judgment against the respondent for Kshs.710,000/= and costs of the suit. She claimed that she got into a Sale Agreement with the respondent on or about 8<sup>th</sup> October 2018 (sic) for an apartment BH34 that was to be built on all that parcel of land known as Dagoretti/Kinoo/2150, at Kshs.6,800,000/=. The appellant on various dates paid a total of Kshs.2,110,000/= in deposit. She contended that the respondent failed to commence construction of the apartments and opted to build townhouses instead. As a result, she sought a full refund of her deposit. She averred that whereas the respondent refunded her Kshs.1,400,000/=, a balance of Kshs.710,000/= remains due and owing to her from the respondent.
2. The respondent filed a Chamber Summons application dated 22<sup>nd</sup> March 2023, in the Small Claims Courts seeking orders that the proceedings in the said Court be stayed and for the dispute therein to be referred to arbitration. In the affidavit filed in support of the said application, the respondent averred that the parties therein entered into an Agreement for Sale dated 5<sup>th</sup> June 2020 where the appellant was to purchase an apartment from its construction project. It further averred that in as much as the



appellant's claim is heavily grounded on that Agreement, Clause J of the said Agreement provides that any dispute or difference arising therefrom shall be referred to arbitration.

3. In opposition to the said application, the appellant filed a replying affidavit sworn on 31<sup>st</sup> March 2023 by Shirley Maina, the appellant herein. She averred that the respondent has never denied that it breached the Agreement dated 5<sup>th</sup> June 2020 by constructing town houses instead of apartments, thus forcing her to request for a refund of the deposit she had paid. Further, the amount sought in the statement of claim is an outstanding balance of the refund which the respondent has on numerous occasions admitted and agreed to reimburse. She asserted that there is no dispute between them to warrant reference to arbitration.
4. In a ruling delivered by the Small Claims Court on 28<sup>th</sup> April 2023, the Hon. Adjudicator found that the respondent's application was merited, and proceeded to strike out the appellant's claim citing Section 36 of the *Arbitration Act*, on the ground that the Small Claims Court has no jurisdiction to enforce Arbitral Awards. Aggrieved by the aforesaid decision, the appellant filed a Memorandum of Appeal dated 3<sup>rd</sup> May 2023 raising the following grounds of appeal -
  - i. That the learned Trial Adjudicator erred in law by failing to take into account considerations that she should have taken into account before entering a Ruling against the appellant;
  - ii. That the learned Adjudicator erred in law by failing to apply the applicable laws of evidence on the facts before her;
  - iii. That the learned Adjudicator erred in law by failing to take into account the provisions of Section 6(1)(b) of the *Arbitration Act* 1995;
  - iv. That the learned Adjudicator erred in law by relying on Section 36 (1) of the *Arbitration Act* 1995 in rendering her final ruling;
  - v. That the learned Adjudicator erred in law by declining one of the prayers in the application before her and then subsequently allowing the entire application as a whole;
  - vi. That the learned Adjudicator erred in law by failing to evaluate and assign appropriate weight to the legal arguments and evidence before her; and
  - vii. That the learned Adjudicator erred in law by failing to appreciate and apply the law of evidence on admission.
5. The appellant's prayer is for the appeal to be allowed with costs, for the ruling of the Small Claims Court at Nairobi delivered by Honourable Omollo (Ms.) Adjudicator, on 28<sup>th</sup> April 2023 in Claim No. E1836 of 2023 to be set aside, and that the said claim be reinstated in the Small Claims Court at Nairobi.
6. The respondent filed a Notice of Preliminary Objection dated 26<sup>th</sup> February 2024 raising the following grounds -
  - i. That this Honorable Court lacks the Jurisdiction to hear and determine this Appeal by virtue of Section 13(2)(d) of the *Environment and Land Court Act* No.19 of 2011, Laws of Kenya;
  - ii. That this case belongs to the Environment and Land Court as provided for under Article 162(2)(b) of *the Constitution* of Kenya, 2010; and
  - iii. That this Honourable Court should forthwith down its tools as far as this case is concerned.



7. The appeal herein and the Preliminary Objection were canvassed concurrently by way of written submissions. The appellant's submissions were filed by the law firm of W & M and Company Advocates on 27<sup>th</sup> August 2023 and 18<sup>th</sup> March 2024, whereas the respondent's submissions were filed on 4<sup>th</sup> March 2024 by the law firm of Adoli & Company Advocates
8. Ms. Nekesa, learned Counsel for the appellant cited the provisions of Section 6(1) of the Arbitration Act, No. 4 of 1995 and acknowledged that the Agreement between the parties herein includes an arbitration clause. She however argued that that the said Section limits arbitration if inter alia, there is no dispute between the parties, as is the case herein. She submitted that the appellant is merely seeking the balance of a refund already partially paid by the respondent, with no dispute regarding the amount owed. She relied on the Court of Appeal case of UAP Provincial Insurance Company Ltd v Michael John Beckett [2013] eKLR, and contended that since the respondent does not dispute the debt owed to the appellant, there is no actual dispute between the parties to be referred to arbitration.
9. Mr. Adoli, learned Counsel for the respondent submitted that this Court lacks jurisdiction to hear the instant appeal. He stated that since the appeal involves a Sale Agreement dated 5<sup>th</sup> June 2020 for the purchase of a three-bedroom apartment, the matter falls under the jurisdiction of the Environment and Land Court as per Section 13(2)(d) of the Environment and Land Court Act. He further contended that the Small Claims Court's ruling of 28<sup>th</sup> April 2023 was legally sound, given that the appellant acknowledged the arbitration clause in the Agreement.
10. Counsel cited the case of Technoservice Limited v Nokia Corporation & 3 others [2021] eKLR, and argued that the nature of the dispute between the parties herein falls within Clause J of the Agreement, as the appellant alleges that she paid amounts towards purchase of an apartment but never received the apartment since the project did not take off, whereas the respondent avers that the project stalled due to the Covid – 19 Pandemic, but it is now on course and therefore there has been no default. In submitting that allowing the appeal herein will be tantamount to rewriting the contract between the parties herein, Counsel referred to the case of South Nyanza Sugar Co. Ltd v Leonard O. Arera [2020] eKLR.
11. In a rejoinder, Ms. Nekesa cited the provisions of Section 38(1) of the Small Claims Act and Article 165(3)(e) of the Constitution of Kenya, 2010 and submitted that this appeal falls within the jurisdiction of this Court. The appellant argued that the appeal and the claim before the Small Claims Court do not relate to land or property, but is purely a financial matter concerning the balance of the deposit paid by the appellant.

#### **ANALYSIS AND DETERMINATION.**

12. I have re-examined the entire Record of Appeal and given due consideration to the written submissions by the parties' respective Counsel. The issues that arise for determination are –
  - i. Whether this Court has jurisdiction to hear and determine this Appeal; and
  - ii. Whether the instant appeal is merited.

#### **Whether this Court has the jurisdiction to hear and determine this Appeal.**

13. On the issue of jurisdiction, in the case of the Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, Nyarangi, JA., held as follows -

...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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

14. The respondent's challenge to this Court's jurisdiction is based on the provisions of Article 162(2)(b) of *the Constitution* of Kenya, 2010, which provides for the jurisdiction of the Environment and Land Court to hear and determine disputes in respect to the environment, use, occupation of, and title to land. The respondent also relied on the provisions of Section 13(2)(d) of the *Environment and Land Court Act*, which states that –

In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes -

...relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land

15. Upon perusal of the pleadings filed in the Small Claims Court by the appellant herein, it is evident that the dispute revolves around the refund of the sums of money paid by the appellant to the respondent and not the environment, use, occupation of, and title to land so as to invoke the jurisdiction of the *Environment and Land Court Act*.

16. Further, the appeal herein emanates from the decision of the Small Claims Court delivered on 28<sup>th</sup> April 2023. Appeals from decisions of the Small Claims Court are provided for under Section 38(1) of the *Small Claims Court Act* which states as follows –

A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law. (Emphasis added).

17. In the premise, this Court agrees with Counsel for the appellant that this appeal falls within the jurisdiction of this Court and does not fall in the ambit of matters within the jurisdiction of the Environment and Land Court. As such, the Notice of Preliminary Objection fails with costs to the appellant.

#### **Whether the instant appeal is merited.**

18. Section 6 of the *Arbitration Act*, No. 4 of 1995 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.



19. The appellant herein does not dispute that the Sale Agreement dated 5<sup>th</sup> June 2020 which is the subject of the claim and/or proceedings before the Small Claims Court, has a provision for arbitration at Clause J. She however contends that there is no dispute between the parties herein as the appellant's claim in the Small Claims Court is for the refund of the balance of the deposit paid by her, to the respondent. Further, she contends that since the said debt is not disputed by the respondent, her claim is purely for the enforcement of the undisputed debt.
20. The appellant's case is that she paid a deposit of Kshs.2,100,000/= to the respondent for the purchase of an apartment to be built by the respondent, a fact which is not disputed. She stated that the respondent failed to commence construction of the apartments and opted to build townhouses instead, which forced her to seek a full refund of her deposit. The appellant also stated that so far, the respondent has refunded her a total of Kshs.1,400,000/=, leaving a balance of Kshs.710,000/= which remains due and owing. From the Record of Appeal, I note that annexed to the appellant's affidavit in response to the Chamber Summons dated 22<sup>nd</sup> March 2023, there are various correspondence between the parties herein in regard to the said debt.
21. Vide a demand letter dated 17<sup>th</sup> February 2023, the plaintiff demanded the refund of the balance of Kshs.710,000/= from the respondent. In response thereto, the respondent's Advocates in a letter dated 22<sup>nd</sup> February 2023 addressed to the appellant's Advocates did not deny the said debt, instead in its response of even date, it proposed to settle the aforesaid balance in three instalments as per the sums of money stipulated in the said letter. The said proposal was however not acceptable to the appellant who filed the suit in the Small Claims Court. After the suit was filed, the respondent filed the Chamber Summons dated 22<sup>nd</sup> March 2023, and invoked the arbitral clause in the Sale Agreement and prayed for stay of proceedings in the said Court, and for the dispute to be referred to Arbitration.
22. In so far as the provisions of Section 6(1) of the *Arbitration Act* are concerned, the Court of Appeal in the case of Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] eKLR, addressed the import of the said provisions and held that –

All that an applicant for a stay of proceedings under section 6(1) of the *Arbitration Act* of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things -

  - a. Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;
  - b. Whether there are any legal impediments on the validity, operation or performance of the arbitration Agreement; and
  - c. Whether the suit intended concerned a matter agreed to be referred to arbitration.
23. Similarly, in the case of Charles Njogu Lefty v Bedouin Enterprises Ltd. [2005] eKLR, the Court of Appeal in discussing Section 6(1) of the *Arbitration Act* held that -

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 pleading or at the time of taking any step in the proceedings. The dispute between Charles Njogu Lefty, the appellant herein, and Bedouin Enterprises Ltd, the respondent



herein, basically concerns the interpretation given by G.B.M. Kariuki, J. to section 6 (1) of the 1995 Act, “the Act” hereinafter, in light of the circumstances surrounding the dispute. (Emphasis added).

24. Vide the arbitral clause in the Sale Agreement between the parties herein, they agreed to submit themselves to arbitration if a dispute arose between the two of them. In my considered view, a dispute exists between the parties herein due to the non-payment of the balance being claimed by the appellant, and that is the reason why she filed a suit in the Small Claims Court. Although her position is that the debt has been partly paid, and the appellant stated that the debt is not disputed, the appellant could only have moved the Trial Court to enter judgment on admission, if the respondent had taken steps to bring itself within the jurisdiction of the Small Claims Court by entering appearance and filing pleadings in response to the suit, which it did not. In light of the above factors, the Hon. Adjudicator was correct in holding that she had no jurisdiction to hear the suit that was filed by the appellant in the Small Claims Court. The Hon. Adjudicator however misapprehended the provisions of the law which the respondent had relied on in its application, which was Section 6 of the Arbitration Act and not Section 36 of the said Act. I say so because none of the parties herein had prayed for an order for enforcement of an Arbitral Award before her.
23. The above notwithstanding, this Court finds that the instant appeal is not merited. That being the case, I uphold the finding of the Hon. Adjudicator/Magistrate in striking out the suit before her. The appeal is therefore dismissed with costs to the respondent. The dispute between the parties herein is referred to Arbitration.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF NOVEMBER 2024.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

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**NJOKI MWANGI**

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**JUDGE**

In the presence of:

Ms Nekesa h/b for Ms Maina for the appellant

Mr. Rogers Alinyo h/b for Mr. Adoli for the respondent

Ms. B. Wokabi – Court Assistant.

Page 3 of 3 NJOKI MWANGI. J

