Gikomba Business Center Limited v Puwani Riyadha Mosque Committee & another (Commercial Case E610 of 2024) [2024] KEHC 15815 (KLR) (Commercial and Tax) (5 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15815 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E610 OF 2024

A MABEYA, J

DECEMBER 5, 2024

BETWEEN

GIKOMBA BUSINESS CENTER LIMITED ..... PLAINTIFF

AND

PUWANI RIYADHA MOSQUE COMMITTEE ..... 1ST DEFENDANT

PUMWANI RIYADAH MOSQUE REGISTERED TRUSTEES ... 2ND DEFENDANT

RULING

1. Before Court is the defendants' application dated 17/10/2024. It was brought under Article 162(2)(b) and (3) of *the Constitution* of Kenya, sections 5 and 63(e) of the *Civil Procedure Act* CAP 21 laws of Kenya, Order 2 rule 15(d), Order 40 rule 7 and Order 51 rule 15 of the Civil Procedure Rules 2010.

2. The application sought that the plaint dated 8/10/2024 be struck out and the plaintiff's suit be dismissed.

3. The application was premised on the grounds set out on the face of it and the supporting affidavit of AHMED SHEIKH OMAR sworn on 17/10/2024. It was contended that the defendant was the registered owner of the property known as LR NO 209/19680 which was leased to the plaintiff on 9/9/2015. That the Lease contained an arbitral clause which provided that disputes arising from the Lease be resolved through that forum.

4. That vide an order dated 10/9/2024, the 2nd defendant was allowed to evict the plaintiff from the suit property as the Lease had been terminated and possession taken by the 2nd defendant. That the Court lacked jurisdiction to hear the matter pursuant to the arbitral clause and that if there was a court with

jurisdiction, it is the Environment and Land Court. That the plaint was an abuse of the court process and should be struck out.

5. The plaintiff opposed the application vide a replying affidavit of BAKAL MAALIM KULMIA sworn on 28/10/2024. It was contended that the plaintiff was an investor responsible for the construction of GIKOMBA BUSINESS CENTER erected on the suit property. That the investment was made pursuant to the parties' agreement that the defendants would honour the 35year Lease in favour of the plaintiff.

6. The plaintiff further contended that the Lease was still valid and as such it held proprietary rights in the business premises. That the orders in BPRT/E922/2024 had been stayed by Hon Wahome Ndegwa of the Business Rent Tribunal. That the Court had the jurisdiction to hear and determine the matter since the dispute concerns a commercial transaction involving its investment venture.

7. The application was canvassed by way of written submissions which were ably hi-lighted by Learned Counsel and which I have carefully considered. The defendants submitted that the plaint sought to enforce the plaintiff's rights under the lease agreement and therefore it was a matter under the jurisdiction of the Environment and Land Court.

8. That the plaintiff was guilty of material nondisclosure since it deliberately concealed the determination in BPRT/E922/2024 and its withdrawal of MCELC NO E369 of 2024. Further, that the Lease had an arbitral clause which ousts the jurisdiction of the Court.

9. It was submitted that the dispute before Court was commercial in nature since the plaintiff, as an investor, had injected Kshs 300,000,000/- into the venture with an agreement that the term of the Lease would be in effect for 35years. That Article 162(2) (b) of *the Constitution* of Kenya was not applicable in this case. That the issue before Court was premised on Article 40 of *the Constitution* on the right to own property.

10. On the issue of material non-disclosure, it was submitted that the orders in BPRT/922/2024 were stayed on 1/10/2024. That the arbitral clause was not applicable.

11. I have carefully considered the pleadings and the submissions on record. I have also considered the various authorities cited by Learned Counsel. The main issue for determination is whether the plaint dated 8/10/2024 should be struck out on the grounds propounded.

12. The application was brought, inter-alia, Order 2 Rule 15 of the Civil Procedure Rules deals with striking out of pleadings and which in the relevant parts provides as follows: -

> " 15(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
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> a. ...
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> ...
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> d. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

13. In DT Dobie and Company (K) Ltd vs Joseph Mbaria Muchina& Another (1982) KLR 1, it was stated that: -

> " The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial

judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case."

14. In the present case, the defendants sought to have the plaint struck out on grounds; that the Court has no jurisdiction which lies with the Environment and Land Court and, that the Lease the subject of the suit has an arbitral clause which ousts the jurisdiction of the Court.

15. In Owners of the Motor Vessel 'Lillian "(S) versus Caltex Oil (Kenya) Ltd [1989] KLR 1, the Court of Appeal delivered itself as follows: -

> "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court had 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.
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> ...
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> "By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court had cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristic. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

16. Article 162 of *the Constitution* as read with section 13 of the *Environment and Land Court Act* expounds on the jurisdiction of the Environment and Land Court 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.
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> 2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
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> (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
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> (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."

17. In Suzanne Butler & 4 Others vs. Redhill Investments & Another (2017) eKLR, the Court held that: -

> " When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue."

18. In the present case, I have perused the plaint dated 8/10/2024 and on a careful review thereof, it is clear that the plaintiffs' gravamen concerns a breach of contract. Specifically, from paragraphs 3 to 11 of the plaint sets out the cause of action, which is breach of contract and not otherwise. In any event, the prayers themselves are apt as to what the suit is all about.

19. The suit before Court concerns the Lease by the defendants given to the plaintiff for the construction of Gikomba Business Center, which is a commercial venture. It is alleged that the defendants are in breach of that Lease and this suit is all about that. In applying the predominant test, the matter involves commercial interests and therefore, it is within the purview of the High Court jurisdiction. Accordingly, the matter is in the correct forum.

20. The second issue is whether the arbitral clause in the subject Lease ousts the jurisdiction of the Court. In view of Article 159(2)(c) of *the Constitution*, courts are encouraged to give effect to agreements of the parties where there exists an alternative dispute resolution mechanism.

21. In the present case, it is not in dispute that the Lease herein had an arbitral clause. However, the plaintiff contended that the dispute does not concern the operation of the Lease but rather its investment.

22. Section of section 6 of the *Arbitration Act* provides that: -

> " 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—
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> 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.

23. In Adrec Limited vs. Nation Media Group Limited [2017] eKLR, the court stated that: -

> " Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration"

24. In Charles Njogu Lofty vs. Bedouin Enterprises Ltd [2005] eKLR, the Court of Appeal 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 Lofty, 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.

25. In the present case, the defendants seek to invoke the arbitration clause in an effort to oust the jurisdiction of this Court. From the reading of section 6 of the *Arbitration Act* and the aforesaid authorities, where an arbitration agreement exists, a defendant is required to apply to court for a stay of proceedings and reference to arbitration before filing any response to the suit. This application is made at the time of entering appearance in the case and before delivering any pleading.

26. In the present case however, the defendants did not file any application under section 6 of the *Arbitration Act* to stay the proceedings and for reference. Instead, they have made the present application, which indicates an acceptance of the jurisdiction of this Court. By participating in these proceedings and seeking reliefs that are not for stay and reference, the defendants have effectively acceded to the jurisdiction of the Court.

27. The failure to seek a stay of proceedings and for reference at the appropriate time, coupled with the defendants' active participation in the current proceedings, means that the defendants have waived their right to insist on arbitration at this stage. The contention that the Court lacks jurisdiction therefore fails.

28. The issue of material nondisclosure was raised with respect to BPRT/E922/2024. The plaintiff however, claimed that the same was stayed by the tribunal on 1/10/2024. This contention was neither refuted nor challenged by the defendants. It therefore remains that the order in BPRT/E922/2024 remains stayed.

29. Accordingly, I find no merit in the application and the same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE