Arusi v Presbeta Investment Limited (Miscellaneous Application E036 of 2025) [2025] KEELC 6808 (KLR) (3 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6808 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

MISCELLANEOUS APPLICATION E036 OF 2025

MD MWANGI, J

OCTOBER 3, 2025

BETWEEN

YEHOSHUA ARUSI ..... APPLICANT

AND

PRESBETA INVESTMENT LIMITED ..... RESPONDENT

RULING

(In respect of the Notice of Motion application dated 13th June 2025 seeking the court's intervention in appointment of an Arbitrator on behalf of the parties herein)

- Introduction

1. Before this Court for determination is the Applicant's Notice of Motion dated 13th June 2025 brought pursuant to Section 12(8) and (9)(a) of the *Arbitration Act*, and Rule 5 of the Arbitration Rules. The Applicant seeks orders that this Court do direct the Chairman of the Chartered Institute of Arbitrators (Kenya) to appoint an arbitrator to hear and determine the dispute between the Applicant and the Respondent arising from the Sale Agreement dated 21st September 2015 between the Applicant and the Respondent. The Applicant further prays for such other directions as may be necessary to effect the appointment of an arbitrator, and for any other orders that this Court may deem fit in the circumstances.

2. The application is supported by the affidavit of Yehoshua Arusi, the Applicant herein, sworn on 13th June 2025. The grounds upon which the application is predicated are, inter alia, that the Applicant and the Respondent entered into a Sale Agreement for the sale of the property known as Kajiado/Lorngosua/1836 at a consideration of Kshs. 65,000,000/-, out of which a balance of Kshs. 10,000,000/- remains unpaid following the dishonour of ten post-dated cheques issued by the Respondent. It is contended that pursuant to Clause 10 of the Sale Agreement, disputes arising under the agreement are to be referred to arbitration. Attempts to agree on the appointment of an

arbitrator have, however, failed, and a request made to the Chairperson of the Chartered Institute of Arbitrators (Kenya) was met with the advice that the dispute resolution clause was silent on the appointing authority in the event of such a deadlock between the parties.

3. Despite being duly served with the application, the Respondent has not filed a response. Thus the matter proceeded unopposed.

Directions

4. The court directed that the Applicant to file written submissions which have been duly considered in the writing of this ruling.

Analysis and Determination

5. Having considered the application, this court finds that the sole issue that arises for determination is whether this Court should intervene under Section 12 of the *Arbitration Act* in the appointment of an arbitrator.

6. Arbitration is in its essence a consensual and party driven process. At the heart of arbitral proceedings is the principle of party autonomy. In the case of Peter Ouma Onyango v Mats Karlsson (Miscellaneous Application E1219 of 2020) [2021] KEHC 4155 (KLR), the court rightly opined that:

> "The general approach on the role and intervention of the court in arbitration in Kenya is provided for in section 10 of the Act which provides that except as provided in the Act, no court shall intervene in matters governed by the Act. In peremptory terms, the section restricts the jurisdiction of the court to only such matters as are provided for by the Act. The section epitomizes the recognition of the policy of party's 'Autonomy' which underlie the arbitration generally and in particular the Act."

7. That said, the starting point is the arbitration agreement between the parties herein embodied in Clause 10 of the Sale Agreement dated 21st September 2015, which provides as follows:

> "Any dispute with regard to any matter in connection with the sale and purchase of the said property shall be referred to an arbitrator to be appointed by the parties hereto and failing agreement as to the appointment of such arbitration then to two arbitrators, one to be nominated by each party in accordance with the provisions of the *Arbitration Act* ..."

8. The arbitration clause envisages two scenarios: reference to a sole arbitrator to be mutually appointed by the parties, and failing agreement, reference to two arbitrators, one to be nominated by each party. However, it is evident that the clause does not go further to stipulate what is to happen in the event the two parties fail to reach a consensus. Equally, it does not provide for the appointment of a third arbitrator nor does it identify an appointing authority to break the deadlock. Again, the arbitration clause does not specify what would happen in the event the two arbitrators (in case the parties agreed) failed to reach a consensus.

9. Section 12 of the *Arbitration Act* permits the Court to intervene in the appointment of arbitrators where the parties have agreed on a procedure which has failed, or where a party defaults in making the requisite appointment. In the present matter, the agreement does not disclose a complete procedure capable of enforcement. The law is clear that the Court cannot impose an arbitrator or an appointing mechanism where the agreement itself is deficient.

10. This position was clearly enunciated in Danki Ventures Ltd v Sinopec International Petroleum Services Ltd [2014] eKLR, where the Court held that:

> " The Court cannot impose on the parties either a particular arbitrator or a method for choosing the arbitrator."

11. Similarly, in In re Application for Appointment of an Arbitrator (Misc. Appl. E28 of 2022) [2022] KEHC 13294 (KLR), the Court underscored that:

> " The Court cannot impose an arbitrator on the respondent where there was no agreement between the parties as to the appointing authority or the number of arbitrators. To do so would be tantamount to re-writing the arbitral contract for the parties."

12. It follows, therefore, that where an arbitration clause is vague, incomplete or silent on fundamental matters such as the appointment mechanism, the Court cannot salvage the clause by introducing terms that the parties never agreed upon. In such circumstances, the clause is rendered inoperative or incapable of being performed within the meaning of section 6(1)(a) of the *Arbitration Act*.

13. Applying the foregoing principles, I am find that Clause 10 of the agreement herein is fatally deficient. It does not establish a workable procedure for the appointment of the arbitral tribunal. In the absence of such a mechanism, there is no basis upon which section 12 of the *Arbitration Act* can be invoked. To grant the orders sought would amount to rewriting the parties' agreement.

14. That said, the Applicant is at liberty to pursue the dispute before a court of law as an ordinary civil suit.

15. The Notice of Motion dated 13th June 2025 is hereby dismissed but with no orders as to costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 3RD DAY OF OCTOBER 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

N/A by Parties

Court Assistant: Mpoye

M.D. MWANGI

JUDGE