



REPUBLIC OF KENYA



Kwa Shamba Limited & another v Rissah (Environment and Land Case E058 of 2025) [2025] KEELC 5766 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5766 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE E058 OF 2025**

MD MWANGI, J

JULY 31, 2025

BETWEEN

KWA SHAMBA LIMITED 1ST PLAINTIFF

EMRO KAJIADO PLC 2ND PLAINTIFF

AND

SARAH FRANCIS RISSAH DEFENDANT

(In respect of the Defendant's Notice of Preliminary Objection dated 4th June, 2025 challenging the jurisdiction of this court to entertain the Plaintiffs suit)

RULING

Background

1. The Defendant's Notice of Preliminary Objection dated 4th June, 2025 asserts that this court lacks the jurisdiction to entertain the matter pursuant to Sections 3[1], 4, and 10 of the Arbitration Act No.4 of 1995 and Clauses 8 on Special Conditions of the Agreements dated 23rd October, 2018 and 18th November, 2019 respectively.

Rejoinder by the Plaintiff

2. The Preliminary Objection was opposed by the Plaintiffs through a Replying Affidavit sworn on 10th July, 2025. The deponent implores the court to dismiss it with costs terming it frivolous, vexatious and abuse of court process as it seeks to circumvent legal, valid and enforceable terms and conditions of the Agreements which the Defendant has failed to perform to the Plaintiff's detriment.
3. According to the Deponent, this court has the jurisdiction to hear and determine the Plaintiffs' suit under Section 13 of the Environment and Land Court Act and Article 162[2][b] of the Constitution because the Defendant failed to trigger the provisions Section 6[1], [2] and [3] of the Arbitration Act.



Further, frustration of previously initiated arbitration process between the parties by the Defendant has led to its unfortunate collapse.

4. The Deponent alleges that the Defendant and administrators of the estate of Francis Mutaiyan Risa refused to acknowledge and accept service of letter dated 22nd February, 2024 from the Plaintiff's Counsel proposing to commence arbitration proceedings on the enforceability of terms and conditions of the Agreements dated 18th November, 2019 and 23rd October, 2018. It is further asserted that the Defendant failed to acknowledge and accept the Plaintiffs' counsel's letter dated 5th March, 2024 seeking the appointment of an arbitrator by the Chartered Institute of Arbitrators in respect of the disputes between the 2nd Plaintiff and the Defendant.
5. The Deponent states that according to the Chartered Institute of Arbitrators' reply dated 5th March, 2024, the appointment of the arbitrator was on the satisfaction of the prerequisite conditions that all subsequent correspondences with the Institute must be served upon all disputing parties. It is averred that physical service upon the Defendant has failed because she cannot be traced neither has she acknowledged service through WhatsApp. The Plaintiff hence maintains that this court has the jurisdiction to enforce clause 8[v] of the agreement.

Court's directions

6. Pursuant to court's directions, the preliminary objection was disposed of through written submissions which the court has had occasion to consider in writing this ruling.

Issues for determination

7. The singular issue for determination after careful consideration of the Preliminary Objection, Plaintiff's response as well as the parties submission is whether the preliminary objection is merited.

Analysis and determination

8. The Preliminary objection by the Defendant was filed on 4th June, 2025. The Defendant has invoked Section 3[1], 4, and 10 of the *Arbitration Act* No. 4 of 1995 to oust the jurisdiction of this court to hear and determine the Plaintiffs' suit. In addition, the Defendant has referred to Clause 8 on the Special Conditions in the agreements to demonstrate the existence of an arbitration clause.
9. Clause 8 of the Agreements stipulates the mode of dispute resolution mechanism in the following terms;

“Should any dispute arise between the parties hereto with regard to the interpretation, rights, obligations and or implementation of any one or more of the provisions of this Agreement, the parties shall in the first instance attempt to resolve such dispute by amicable negotiation. Should such negotiations fail to achieve a resolution within fifteen [15] days, either Party may declare a dispute by written notification to the other, whereupon such disputes shall be referred to arbitration.”
10. Through the Plaint dated 13th July, 2025, the Plaintiff is seeking judgment to be entered against the Defendant for an Order of Specific Performance of the two Sale Agreements.
11. The Plaintiff maintains that the appropriate forum for determining their suit is this court because it has the jurisdiction to hear the matter since the Defendant has frustrated efforts to have the matter determined by an Arbitrator. The Plaintiffs further accuses the Defendant of failing to trigger the provisions of Section Section 6[1], [2] and [3] of the *Arbitration Act*.



12. Section 6 [1], [2] and [3] of the *Arbitration Act* provides as follows;

“6. Stay of legal proceedings

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.”

13. The provisions also stipulate that if a party wish to have a matter referred to Arbitration, they must lodge an Application for stay upon entering appearance.

14. The Court of Appeal in *Niazsons [K] Ltd v China Road & Bridge Corporation Kenya* [2001] KECA 376 [KLR] stated as follows;

“Whether or not an arbitration clause or agreement is valid is a matter the Court seized of a suit in which a stay is sought is duty bound to decide. The afore quoted section does not expressly state at what stage it should do so. However, a careful reading of the section leaves no doubt that the Court must hear that application to come to a decision one way or the other. It appears to me that all an applicant is obliged to do is to bring his application promptly. The Court will then be obliged to consider three basic aspects. First, whether the applicant has taken any step in the proceeding other than the steps allowed by the said section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred.”

15. This position was recently restated by the Court of Appeal recently in *Pumwani Riyadha Mosque Committee & another v Gikomba Business Centre Limited* [Civil Appeal E965 of 2024] [2025] KECA 1257 [KLR] [11 July 2025] [Judgment] where the court stated as follows

“A party desirous of activating an arbitration clause where a suit has been filed in court is duty- bound to activate section 6[1] of the *Arbitration Act*. That is the only way the court can know about the existence of the arbitration clause.”



16. A party may bring to the attention of the court the existence of an arbitration clause in an agreement either by way of an application or a preliminary objection as the Defendant has done in this case.
17. Article 159[2] [c] of *the Constitution* obligates Courts while exercising judicial authority to promote Alternative Dispute Resolution {ADR} Mechanism amongst them arbitration as one of the means of determining disputes. The implication of this constitutional imperative is that besides courts, disputing parties can resolve their difference through ADR. Further, litigation of disputes by courts ought to be embraced as the last resort if parties upon the parties exhausting the available ADR mechanisms.
18. In *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] KECA 304 [KLR], the Court of Appeal reaffirmed this principle by stating that;

“We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

19. According to Clause 8 of the agreements between the parties, any disputes arising out of the agreements must be resolved firstly through amicable negotiation and afterwards through arbitration should negotiation fail. Going by the wordings of the Agreements, it is clear that the parties never envisioned to have any dispute arising out of the Agreements solved by courts at the first instance. Taking into account these circumstances, the court finds merits in the Defendant’s preliminary objection and upholds it. Consequently, the Plaintiffs’ suit is struck out but with no orders as to costs considering the stage at which it has been struck out and further in a bid to promote reconciliation and allow the parties pursue appropriate channels of dispute resolution.
20. It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 31ST DAY OF JULY 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Kibet Korir for the Defendant

Mr. Kadima for the Plaintiffs

Court Assistant: Edwin

