Njatha v Waterfront Gardens Management Ltd (Civil Appeal E940 of 2023) [2025] KEHC 15118 (KLR) (Civ) (22 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15118 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E940 OF 2023

JM OMIDO, J

OCTOBER 22, 2025

BETWEEN

SAMUEL MWANGI NJATHA ..... APPELLANT

AND

WATERFRONT GARDENS MANAGEMENT LTD ..... RESPONDENT

(Being an appeal from the judgement and decree of Hon. G. Simatwo Resident Magistrate/Adjudicator delivered on 11th August, 2023 in Milimani SCCOMM No. E1310 of 2023 Waterfront Gardens Management Limited v Samuel Mwangi Njatha)

JUDGMENT

1. The Appellant herein, Waterfront Gardens Management Limited has brought this appeal against the Respondent Samuel Mwangi Njatha, being aggrieved by the judgement and decree of Hon. G. Simatwo, Resident Magistrate/Adjudicator, delivered on 11th August, 2023 in Milimani SCCOMM No. E1310 of 2023 Waterfront Gardens Management Limited v Samuel Mwangi Njatha.
2. The Appellant has presented thirteen [13] grounds of appeal vide the memorandum of appeal dated 19th February, 2024 which may be summarized as follows:
    a. That the learned Adjudicator erred in law and in fact in failing to properly consider the evidence before her.
    b. That the learned Adjudicator erred in law and in fact in failing to find that the evidence of the Respondent was adduced by an incompetent witness and was therefore inadmissible.
    c. That the learned Adjudicator erred in law and in fact in failing to find that the contract between the Appellant and the Respondent was unenforceable.

d. That the learned Adjudicator erred in law and in fact in failing to find that the court had no jurisdiction in view of an existing arbitration clause in the agreement between the Appellant and the Respondent.

3. The Appellant proposes that the instant appeal be allowed and that the trial court's judgement be set aside and the claim before the trial court be dismissed with costs to the Appellant. The Appellant also seeks the costs of the instant appeal.

4. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123 to re-assess, re-analyse and re-evaluate the evidence adduced in the trial court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

5. In Selle, Sir Clement De Lestang observed that:

> " This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
>
> However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

6. The record of the trial court bears it that the Respondent [the Claimant before the trial court] commenced the proceedings before the trial court vide a statement of claim dated 21st February, 2023 seeking judgement against the Appellant [the Respondent in the trial court] in the sum of Ksh.501,829/- being the value of services rendered to the Appellant from the year 2019 to 2023 under an agreement dated 27th May, 2008, compensation by way of general damages and costs of the claim.

7. The Respondent pleaded that the Appellant was a lessee at Waterfront Gardens Estate where the Respondent was the management company and that the former failed to pay to the latter service charges amounting to Ksh.501,829/-, necessitating the suit before the trial court.

8. The Appellant resisted the Respondent's claim before the trial court and to that end filed a response to the statement of claim dated 22nd March, 2023. The Appellant admitted in his response that he was required to remit to the Respondent service charge at a monthly rate of Ksh.6,300/- but added that he had dutifully paid the same to the Respondent.

9. The Appellant pleaded that sometime in the year 2017, the Respondent introduced new and/or additional charges in the form of a sinking fund and carpex, expenses that had not been included in the original agreement, without consulting and/or notifying the Appellant and proceeded to demand for a year's payment of the said additional charges from the Appellant.

10. The Appellant pleaded that he was unable to pay the additional demanded amount and as a result, the Respondent withdrew all the services that it was providing under the agreement in September, 2018, leaving Respondent without essential services such as electricity and water.

11. The Appellant pleaded that it was an absurdity and unjust for the Respondent to bring the claim to recover payment of service charge for services that were withdrawn in September, 2018. He sought that the claim before the trial court be dismissed with costs.

12. The Respondent called its property manager Zachariah Wasike Nalukesi as its witness. The witness testified and adopted the contents of his witness statement dated 21st February, 2023 as his evidence in chief.

13. In his statement, the Respondent's witness stated that the Appellant was a house unit owner within Waterfront Gardens Estate from June, 2016 and that the latter was in arrears in payment of service charges and utility bills, amounting to Ksh.501,829/-.

14. The witness produced the following documents in support of the Respondent's case:Demand letter dated 23rd January, 2023.Company resolution to recover the arrears from the Appellant by way of filing a suit.Debit statement issued to the Appellant dated 23rd January, 2023.Certificate of incorporation of the Respondent company.Lease agreement dated 27th May, 2008.Letter dated 6th June, 2016 on proposed/agreed increase of service charges.

15. Upon being cross examined, the Respondent's witness told the trial court that the Appellant stopped paying the monthly Ksh.6,300/- service charge on 31st October, 2018 and several demands and notices to the Appellant went unheeded.

16. The witness further told the trial court that vide a letter dated 6th June, 2016, the Respondent notified the residents at Waterfront Garden Estate of new service charges and introduction of carpex.

17. The witness admitted that the dispute between the two parties was not submitted to arbitration despite there being an arbitration clause in the agreement.

18. The Appellant testified before the trial court and adopted the contents of his witness statement dated 15th June, 2023 as his testimony in chief.

19. The Appellant stated that under the agreement, he was required to pay a monthly service charge of Ksh.6,300/- which covered cleaning, security, electricity for the common areas, water consumption for the common areas and other services, which he stated that he had continued paying without fail.

20. The Appellant further stated that in July, 2016, the Respondent introduced new expenses in the form of a sinking fund and carpex, which were not included in the original agreement, without notifying and/or consulting the estate's residents. That the Respondent subsequently wrote to the Appellant on 8th December, 2017 demanding payment of the arrears of the new expenses and that when the Appellant failed to pay the same, the Respondent disconnected the Appellants water supply and withdrew other essential services, which the Appellant did not specify in his statement.

21. The Appellant stated that the statements that the Respondent relied on before the trial court were "fake and untrue". He prayed that the suit before the trial court be dismissed.

22. The Appellant produced the following documents in support of his case:Minutes of an extraordinary general meeting held on 19th September, 2009.Photographs depicting a disconnected water meter.Receipts of previous payments of service charge by the Appellant, from 2018.

23. Upon being cross examined, the Appellant told the trial court that the amount of Ksh.6,300/- remained constant and that he continued paying the said amount. Challenged further, the Appellant stated that the last time that he paid service charge was in 2018 and he admitted that he had defaulted in paying the same for a period of about four years. He further admitted that he was in default in paying for carpex and sinking fund charges.

24. The Appellant further admitted that he received demands from the Respondent but did not make good the payment of the arrears.

25. On being further cross examined, the Appellant stated that the Respondent did not disconnect electricity supply to his house and did not discontinue providing any other services and that only the water meter was disconnected. He stated that he was aware that he was required to pay sinking fund of Ksh.28,000/-, having been notified formally by the Respondent.

26. On being reexamined, the Appellant stated that he failed to pay the sinking fund and carpex charges because the same were not in the initial agreement and were only subsequently introduced without him being consulted. He complained that the dispute was never referred to arbitration.

27. Upon considering the record and the evidence before her, although the learned Adjudicator/Resident Magistrate Hon. Simatwo did not succinctly set out the issues for determination in her judgement as she was required to, she proceeded, as discernible from the judgement, to render herself as to whether it was lawful and/or within the agreement that was signed by the parties, to introduce further charges under service charge, other than the monthly amount of Ksh.6,300/- that the agreement provided for.

28. In her resolve, Hon. Simatwo was persuaded that the increment of service charge by introduction of further charges was not anchored in law as the Respondent did not demonstrate that it involved and/or consulted the Appellant and the other residents before making the increments.

29. The learned Adjudicator considered the contention by the Appellant that the Respondent was not entitled to recover the service charge from the Appellant since the services that were being provided had been withdrawn by the Respondent. In dismissing that contention, the learned Adjudicator observed as follows:

> "25. The Respondent has also not demonstrated to this court whether the Claimant has failed to provide common area services as envisaged in the lease agreement. The Respondent has not complained about security issues or impassable paths. It is therefore evident that the Claimant is honouring their obligation under the lease agreement.
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> 26. The Respondent is categorical that he stopped paying the stipulated service charge after the Claimant unilaterally disconnected his water supply. However, according to the lease agreement, there are different array of services not limited to water supply. Five different arrays of services are listed such as insuring the buildings and the common paths of the estate against loss of damage by fore, the costs of lighting, cleaning and maintaining common areas among others. I will not regurgitate the same here. Te Respondent has not demonstrated to this court whether he was denied access to the other services."

30. From the above, the trial court reached the finding that as the Appellant had admitted that he stopped paying the agreed monthly service charge of Ksh.6,300/-, the Respondent was entitled to recover the unpaid arrears from the date of default as the Appellant did not demonstrate that the Respondent failed to provide or discontinued the other services under the agreement, other than water supply.

31. The learned Adjudicator thus entered judgement in favour of the Respondent and issued the following reliefs:

    a. The Respondent shall pay the Claimant the outstanding service charge from November, 2018 at the rate subsisting before 1st July, 2016 of Ksh.6,300/-.

    b. If the above sum remains unpaid after thirty days of today's date, it will attract interest at court rates until full payment.

c. The Respondent to bear the costs of this claim.

d. 30 days stay of execution granted.

32. I have perused and considered the memorandum of appeal, the submissions by the parties and the record of the trial court. The parties present three substantive issues for determination, which once resolved by this court, will then determine whether or not the appeal herein should be allowed. The issues are as follows:

1. Whether the firm of Kiragu & Mwangi, whose representative was the sole witness of the Respondent, had authority to enforce the agreement between the Appellant and the Respondent, not being a party to the agreement and having failed to produce a certificate of registration as an estate agent.

2. Whether the trial court had jurisdiction to determine the claim/suit in light of the subsisting arbitration clause in the agreement.

3. Whether the Appellant was entitled to recover from the Respondent the amount in service charge as awarded by the trial court.

33. I will proceed to deal with the issues, seriatim.

34. In the first issue, the Appellant presents two-pronged arguments, first, that the firm of Kiragu & Mwangi, whose representative was the sole witness of the Respondent, had no authority to enforce the agreement between the Appellant and the Respondent, not being a party to the agreement and second, having failed to produce a certificate of registration as an estate agent, the said firm failed to comply with Section 18 of the *Estate Agents Act* and could not therefore enforce the agreement between the Appellant and the Respondent.

35. On the first point, it is instructive from the record of the trial court that the party that filed the claim was the Respondent and not the firm of Kiragu & Mwangi. Much as the Respondent's witness was from the said firm, that did not make him or the firm the Claimant. He remained to be a witness for the Appellant. The argument that Kiragu & Mwangi are the ones who were seeking to enforce the agreement between the Appellant and the Respondent is therefore misplaced. It is the Respondent that sued to enforce the agreement and called as a witness, the person from the said firm. It therefore does not matter that that the witness was not an employee of the Respondent, especially in light of the fact that the terms of the agreement were not challenged and that there was an admission by the Appellant that he signed the agreement.

36. On the second point, the Appellant argued that having failed to produce a certificate of registration as an estate agent, the firm of Kiragu & Mwangi could not enforce the agreement as no evidence was presented to prove that it was registered under the *Estate Agents Act*.

37. In the case of Peter Gathungu Gikonyo t/a Afriland Agencies v Keithian Investment Limited & 2 others [2025] eKLR, while addressing a similar challenge, I stated as follows:

> "35. The first issue for me to address is whether there was a valid agreement between the Appellant and the Respondents. The issue concerns the validity of the property management agreement that the Respondents pleaded in the plaint before the trial court was entered into between the Appellant and the Respondents. The position taken by the Respondents was that both the Appellant and the Respondents signed the said agreement. The Appellant contested the validity of the agreement on the first ground that he was not a

registered estate agent under the *Estate Agents Act*, Cap 533, Laws of Kenya and on the second ground that the agreement was prepared and explained to the parties by a law firm that was owned by an Advocate who was the 1st and 2nd Respondents' director, resulting in a conflict of interest.

36. The questions raised are whether the agreement was rendered invalid on the basis that the Appellant was not a registered estate agent under the *Estate Agents Act* and on the ground that there was a possible conflict of interest.

37. Regarding the Appellant's non-registration as an estate agent, the *Estate Agents Act* prohibits unregistered persons from practicing or holding themselves out as estate agents. Section 18[1] of the Act provides:

> " No person shall, unless he is a registered estate agent, practice as an estate agent or hold himself out as so practising, whether or not for gain."

38. However, the law is equally clear that the penalty for acting as an unregistered estate agent is criminal in nature and does not necessarily render void all agreements entered into by such persons.

39. The illegality operates to bar persons who are not registered as agents from enforcing contractual rights, particularly in claiming commission or remuneration, but not to invalidate the agreement itself unless it was wholly dependent on the illegality. This position was affirmed in the case of Patel v Singh [1987] KLR 585, where the court held that:

> " A contract made by an unregistered estate agent was not necessarily void but was unenforceable by the agent in seeking commission, due to statutory illegality."

40. Similarly, in the case of Alfred Munene v Barclays Bank of Kenya & Another [2002] eKLR, the court emphasized that the purpose of the Act is to regulate the profession and protect the public from unqualified persons, not to invalidate every transaction involving an unregistered agent.

41. Accordingly, the agreement remains valid and binding as between the parties. However, to the extent that the Appellant may have been acting in the capacity of an estate agent, a claim for his commission would be unenforceable. The court therefore holds that the agreement cannot be invalidated on the basis of the Appellant's own non-compliance with statutory registration requirements."

38. I am still of the above persuasion, with the result that the Appellant's argument fails, there being no dispute that both the Appellant and the Respondent freely entered into the agreement and having found above that it was the Respondent, and not the firm of Kiragu & Mwangi, that sought to enforce the agreement.

39. The second issue for me to determine is whether the trial court had jurisdiction to determine the claim/ suit in light of the subsisting arbitration clause in the agreement.

40. In the case of Ventra Locomotives v Kenya Railways Corporation [Civil Suit E009 of 2022] [2025] KEHC 10836 [KLR] [3 July 2025] [Ruling], I had the opportunity of addressing the same issue and the decision that I reached on the same was as follows:

> " 45. Section 6[1] of the *Arbitration Act* provides that:
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> 6. Stay of legal proceedings
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> [1] A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, I fa 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
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> [b] that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
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> [2] Proceedings before the court shall not be continued after an application under subsection [1] has been made and the matter remains undetermined.
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> [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.

46. My understanding of the provision above is that where a suit has been filed and a party wishes to invoke an arbitration clause, the application for stay of proceedings must be filed not later than the time of filing the memorandum of appearance. That then means that an application that seeks stay of proceedings and reference to arbitration that is filed after the entry of appearance is incompetent.

47. The Court of Appeal considered the above position in Section 6[1] of the *Arbitration Act* in the case of Eunice Soko Mlagui v Suresh Parmar & 4 others [2017] eKLR and stated that:

> " After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our mind, filing a defence constitutes acknowledgement of a claim within the

> meaning of the provision. Be that as it may, to the extent that after amendment, Section 6[1] still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance, the pre-2009 decisions of our courts on the application of Section 6[1] are still good law to that extent.
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> In Charles Njogu Lofty v Bedouin Enterprises Ltd, CA No 253 of 2003, this court considered Section 6[1] and held that even if the conditions set out in paragraphs [a] and [b] 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 appearance or is made after filing of the defence."

41. Under Section 6[1] of the *Arbitration Act*, a party who has been sued and who desires to invoke an arbitration clause should not file a defence but should without delay file an application for stay of proceedings and for the dispute to be referred to arbitration.

42. A party that enters an appearance and files a defence before filing an application for stay of proceedings and for the matter to be referred to arbitration waives his right to invoke an arbitration clause in an agreement. The Appellant herein filed a response to the Respondents claim and therefore waived his right to raise the issue of an arbitration clause in the agreement. The trial court therefore had jurisdiction to proceed and determine the suit before it.

43. The third issue for determination is whether the Appellant was entitled to recover from the Respondent the amount in service charge as awarded by the trial court.

44. From the agreement that the parties executed, service charge was payable at the monthly rate of Ksh.6,300/-. The services for which the amount was paid included cleaning of the common areas, electricity supply and lighting of the common areas, common area water consumption, maintenance expenses of the common areas, labour charges for the common areas, the use of the main entrances driveways car parks and paths and the boundary walls and fences of the property, the cost of insuring the building and the common areas against loss or damage by fire, security costs, etc.

45. As rightly pointed out by the learned Adjudicator, apart from the water supply to the Appellant's house which was disconnected, the Appellant did not complain that the Respondent stopped offering and/or supplying the other services. As a matter of fact, when the Appellant was cross examined, he admitted that the only service that was discontinued was the water supply.

46. The foregoing being the position, it would not be possible for the learned Adjudicator to severe the cost of water from the other services that the Appellant continued receiving. My view then is that the learned Adjudicator reached the right findings that the Respondent was entitled to recover from the Appellant service charge at the monthly rate of Ksh.6,300/- from November, 2018.

47. Being of the foregoing findings, I reach the result that the appeal herein is devoid of merit and I proceed to dismiss it with costs to the Respondent.

48. This file is hereby closed.

DELIVERED [VIRTUALLY], DATED AND SIGNED THIS 22ND DAY OF OCTOBER, 2025.

JOE M. OMIDO

JUDGE

For The Appellant: Mr. Rukwaro.

For The Respondent: Mr. Mwendwa.

Court Assistants: Mr. Ngoge & Mr. Juma.