



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CIVIL SUIT NO. E002 OF 2024

UNIVERSAL DOUBLE TREE HOTEL LIMITED.....
PLAINTIFF

VERSUS

WILLSTONE HOMES LIMITED.....
DEFENDANT

RULING

1. This ruling considers the notice of preliminary objection (PO) filed by the defendant dated 5/02/2025, which raises the following points of law: -

a. THAT this honourable court lacks jurisdiction to hear and determine the suit upon the grounds that the agreement of sale dated 14/10/2022, which forms the subject of the dispute between the parties, contained an arbitration clause.

b. THAT the suit is defective and incompetent as it is in contravention of the arbitration clause and should be dismissed with costs to the defendant.

2. The PO is canvassed by written submissions. This court sincerely appreciates the submissions from **Ms Odanga & Partners**, the defendant's advocates, dated 11/11/2024, and those from **Ms Orioki Kenyeru & Co.**, representing the plaintiff, dated 17/02/2025. After identifying and examining the issues for resolution, this ruling will analyse and decide on the arguments presented in the respective submissions concerning specific issues, while also considering relevant laws and judicial precedents. Accordingly, having reviewed the PO and the opposing submissions, the issue that arises for determination is **whether the PO has met the legal threshold and is merited.**

3. Regarding the law and jurisprudence, the law is settled. As submitted by the plaintiff's counsel, in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] KESC 54 (KLR), the Supreme Court of Kenya endorsed the precedent-setting case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors (1969) EA 696**, which has long settled the principles of POs and what constitutes it in the following manner:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

4. As stated in **paragraph 21** of the Supreme Court of Kenya's decision in **Independent Electoral & Boundaries Commission v Cheperenger & 2 others [2015] KESC 2 (KLR)**, a PO serves two primary purposes: first, to protect the party making the objection from wasting excessive time and resources; second, to save valuable judicial time by ensuring it is reserved for cases that genuinely merit resolution. Therefore, using POs as a strategy to win a case, rather than resolving disputes based on their merits through proper judicial processes, is inappropriate.

5. Three tests are to be applied: first, whether the PO raises a pure point of law; second, whether there is evidence that all the facts alleged by the opposing side are correct; and third, whether the facts need not be ascertained.

6. Now, in questioning this court's jurisdiction, the defendant has pointed out to this court an alleged *clause M* of an agreement for sale, which ostensibly states that any disputes regarding defects shall be referred to arbitration by the vendor's architect, whose decision shall be final and binding. In response to the issue of *clause M*, the plaintiff has directed the court to *clause 9 (G)* of an alleged sale agreement, which allegedly states that the parties should endeavour first to attempt to resolve any dispute, claim, or controversy arising or relating to the agreement through an alternative dispute mechanism. *Prima facie*, this is a factual issue to be established by the adduction of evidence from both parties. Consequently, this court finds that the PO does not raise a pure point of law and is therefore rejected.

7. As this court concludes and having considered the record, it is not lost to this court that the defendant, for reasons known to it, is hell bent on ensuring that this matter is not heard and determined on the merits. It is worth noting that the existence of an arbitration clause in an agreement does not preclude the court's jurisdiction.

8. Furthermore, **Section 6(1)** of the **Arbitration Act** states that a court in which proceedings are initiated regarding a matter covered by an arbitration agreement shall, if a party applies no later than when they enter an appearance or otherwise acknowledge the claim, stay the proceedings and refer the parties to arbitration unless it finds that -(a) that the arbitration agreement is null and void, inoperative, or incapable of being performed; or (b) that there is in fact no dispute between the parties concerning the matters to be referred to arbitration.
9. In this case, it is noted that no such application has been filed, and the matter has been in court for nearly two years, with the defendant having already submitted a defence dated 7/10/2023. Having sat on its laurels, it cannot raise the issue of arbitration at this late stage. Accordingly, the final orders that the court finds appropriate are as follows: -

a) The preliminary objection is dismissed with costs being in the cause.

b) There shall be no further filings of applications in this matter unless with leave of the court.

c) This matter shall be mentioned for purposes of pretrial directions.

It is so ordered.

**Delivered and Dated at Machakos this 11th day of
November, 2025.**

**HON. A. Y. KOROSS
JUDGE
11.11.2025**

**Ruling delivered virtually through Microsoft Teams Video
Conferencing Platform**

In the presence of;

Ms Kanja Court Assistant.

Mr. Orioki for plaintiffs.

Miss Wambui holding brief for Mr. Odanga for defendant.