

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. E027 OF 2025

JAMES ANTHONY LUSWETI

MUNIALO:.....1ST PLAINTIFF/RESPONDENT

ABEDNEGO KIVUNGA MULWA:.....2ND PLAINTIFF/RESPONDENT

VERSUS

EVEREST LIMITED:.....1ST DEFENDANT/APPLICANT

THE COMPANY FOR HABITAT AND HOUSING

IN AFRICA (SHELTER AFRIQUE):.....2ND DEFENDANT

EVEREST PARK MANAGEMENT LIMITED:.....3RD DEFENDANT

RULING

The application is dated 21st March 2025 and is brought under Section 6 of the Arbitration Act 1995, Rule 2 of the Arbitration Rules, 1997; Section 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Article 159 of the Constitution of Kenya seeking the following orders;

1. THAT there be a stay of all proceedings herein pending arbitration.
2. THAT the dispute between the parties be referred to arbitration.
3. THAT the 1st Defendant/Applicant be at liberty to apply for such further or other orders and/or directions as this Honourable Court may deem fit and just to grant in the circumstances.

4. THAT the costs of this application be awarded to the Defendants/Applicants against the Plaintiff/Respondent.

It is based on the grounds that the parties hereto on various dates entered into individual, personal and separate Sale Agreements and Leases whereby each of the Plaintiffs purchased an Apartment Unit/Flat at the property known as Everest Park situate in Mavoko area, Athi River. Clause/s of the Sale Agreements and/or Lease Agreements stipulated that any disputes or differences arising therefrom shall be referred to arbitration. This suit has been instituted by the Plaintiffs/Respondents in violation of the Agreements, Leases and/or prematurely without the dispute being referred to arbitration as stipulated in the Sale Agreement or in the Lease agreements. By virtue of the Agreement the parties hereto had agreed and are bound to proceed to arbitration on matters in dispute or differences arising therefrom. The Lease document/s and Agreement attached to the Plaintiffs' Statement of Claim or Complaint at various Clauses require that all disputes and questions whatsoever which shall arise between the parties shall be referred to arbitration.

This court has considered the application and the submissions therein. Stay of proceedings for whatever reason is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is very strict. In the case

of Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000 the court stated that;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

Stay of proceedings has been discussed in the following passages in Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, that;

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

The provisions of Article 159(2)(a)(b)(c) and (d) of the Constitution of Kenya as read with Sections 1A and 1B of the Civil Procedure Act, Cap 21 enjoin this court to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties.

Section 6 of the Arbitration Act 1995 (hereinafter called “the Act”) empowers the Court before which proceedings are brought in a matter which is subject to an arbitration agreement, to stay the proceedings and refer the parties to arbitration. Section 6(1) of the Act further provides that the Court shall grant a stay of legal proceedings subject to the exceptions set out therein. None of those exceptions apply to this suit. The 1st Defendant/Applicant is ready, willing and able to proceed to Arbitration on any dispute arising from the parties as stipulated in the Agreement and/or Leases. That this application ought to be granted in the interests of equity and justice.

In determining this issue, Section 6(1) of the Arbitration Act No. 4 of 1995 is key. It 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 files any pleadings or

takes any other step in the proceedings, 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.”

The provision is mandatory but has a limitation. It is expressly provided that if the arbitration agreement is “*null and void, in operative or incapable of being performed,*” and where there is no dispute between the parties with regard to matters agreed to be referred to arbitration. Where a party alleges these matters and they are proved, the court will not stay the proceedings and refer the matter to arbitration.

The intentions of the parties to a contract with an arbitration clause was that if any dispute arises they oust the jurisdiction of the court and have preference to have the dispute settled through arbitration. This is in line with Judicial Authority, under Article 159(2)(c) of the Constitution which states.

“In exercising Judicial authority courts and Tribunals shall be guided by the following principles –

“alternative forms of dispute resolution including reconciliation, mediation, arbitration ----- shall be promoted.”

The court will therefore promote other forms of dispute resolution where the circumstances of the case so allows and the parties have agreed to an alternative mode of dispute resolution other than the court.

In *Blue Limited vs Jaribu Credit Traders Limited Nairobi (Milimani)* HCCS No. 157 of 2008 where Kimaru, J stated *inter alia* as follows;

“It is now settled law that where parties have agreed to resolve any issue arising out of a commercial agreement, the courts are obliged to give effect to the said agreement of the parties by staying proceedings and referring the dispute for resolution by arbitration. Before staying proceedings, the court has to be satisfied that there is a valid arbitration clause in the agreement capable of performance. At the stage of the application for stay of proceedings, the court is not called upon to determine the merits or otherwise of the plaintiff’s suit nor the counterclaim filed by the defendant. The court is further not required at this stage of proceedings to consider the validity, legality or otherwise of the agreement that was entered between the plaintiff and the defendant.

The court is only required to consider whether there was a valid arbitration clause in the agreement capable of being enforced by the court...That principle recognises the fact that where there is an arbitration clause in an agreement, such clause is considered as a separate and severable agreement between the parties who have agreed to resolve any dispute arising from the agreement by arbitration. A party

to an agreement cannot raise issues relating to the validity or otherwise of the agreement to defeat the arbitration clause in the agreement. The issue as to whether the agreement which was entered between the plaintiff and the defendant is valid or not is an issue which can only be determined during the hearing of the dispute on arbitration. The court's concern is whether the arbitration clause in the agreement is valid and therefore capable of being performed as envisaged by section 6(1)(a) of the Arbitration Act, 1995. Having considered the agreement, the court holds that the arbitration clause is valid and is capable of being performed...Section 7(1) of the Arbitration Act, 1995 grants to the court jurisdiction to grant interim measure of protection where it is established that there exists a valid and enforceable arbitration agreement.”

The rationale for respecting the parties' agreement was explained in the case of Eunice Soko Mlagui vs Suresh Parmar & 4 Others (2017) eKLR, where it was held that;

“Section 6 of the Arbitration Act is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitrating where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution.”

Be that as it may, the tenor and import of Article 159(2) (c) of the Constitution as read together with Section 6(1) of the Arbitration Act is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement. Secondly, where a party elects to come to court and the other party to the arbitration agreement seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance.

I have perused the court file and find that the 3rd Defendant raised a preliminary objection dated 6th March 2025 that this court had no jurisdiction to hear the suit as against the 2nd Defendant as they enjoy immunity under the Privileges and Diplomatic Immunities Act Cap 179 Laws of Kenya. Consequently, the Plaintiff filed a notice of withdrawal of the suit as against the 2nd Defendant dated 30th June 2025. What is left for this court to determine is the present application. The 1st Defendant stated that this court lacks jurisdiction to entertain this matter and the same should be referred to arbitration and the 3rd Defendant is in support of the same. I have perused the agreement for sale dated 23rd September 2021 between the 2nd Plaintiff Abednego Kivunga Mulwa and the 1st Defendant and find that it does provide for Arbitration in clause 13.15 on page 18 and 19 of the same and this is not disputed. By a lease dated 28th January 2014 between the 1st Plaintiff James Anthony Lusweti Munialo and the 1st and 3rd Defendant clause 4.2 on page 12 similarly refers disputes to Arbitration. The Plaintiffs maintain

that the agreements provide for the courts as the appropriate forum and the arbitration clause 13.15 creates an ambiguity. I do not see any ambiguity. The presence of the arbitration clause in both the agreements does not oust the jurisdiction of this court but allows the court to enforce the agreement and guided Article 159(2)(c) of the Constitution by referring this matter to Arbitration as contemplated by the parties and staying the proceedings. I find that the application is merited and grant it as prayed. Costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY
OF DECEMBER 2025.**

N.A. MATHEKA

JUDGE