



**Morris t/a Levana Hotel v Kamunzyu & 3 others (Environment and Land  
Case E094 of 2024) [2025] KEELC 8577 (KLR) (4 December 2025) (Ruling)**

Neutral citation: [2025] KEELC 8577 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND CASE E094 OF 2024  
MD MWANGI, J  
DECEMBER 4, 2025**

**BETWEEN**

**ALFRED NJOROGE MORRIS T/A LEVANA HOTEL ..... PLAINTIFF**

**AND**

**FREDRICK NZIOKI KAMUNZYU ..... 1<sup>ST</sup> DEFENDANT**

**LYDIA WANJIRU WARUGURU ..... 2<sup>ND</sup> DEFENDANT**

**SUNDLAND REAL ESTATE ..... 3<sup>RD</sup> DEFENDANT**

**ADAN W NGETHE T/A GARAM INVESTMENT AUCTIONEERS .... 4<sup>TH</sup>  
DEFENDANT**

*(In respect of the Preliminary Objection raised by the 1st and 2nd Defendants  
contesting the court's jurisdiction to hear and determine this matter on  
the basis of an arbitration clause in an agreement between the parties)*

**RULING**

**Introduction**

1. Before this Court for determination is a Notice of Preliminary Objection dated 9th September 2025 brought by the 1st and 2nd Defendants herein. The objection challenges the competency of the suit as instituted by the Plaintiff, contending that the Court lacks jurisdiction to entertain the dispute between the parties.
2. The 1st and 2nd Defendants assert that the lease agreement executed between themselves and the Plaintiff contains a binding arbitration clause under Clause 11 thereof, which expressly provides that any dispute arising from or relating to the said lease shall be referred to arbitration. It is therefore their position that the jurisdiction of this Court is ousted by virtue of that clause in the parties' lease agreement.



3. Further, the Defendants argue that the filing of this suit contravenes Sections 6 and 17 of the *Arbitration Act*, Cap. 49 Laws of Kenya, which mandate reference of such disputes to arbitration upon the request of a party to an arbitration agreement. They contend that the suit is premature, incompetent and an abuse of the Court process. Consequently, they pray that the Plaintiff's suit be dismissed with costs.
4. The Preliminary Objection is opposed by the Plaintiff through a Replying Affidavit sworn on 16th September 2025. The Plaintiff contends that the objection is a frivolous and a misguided attempt to defeat the suit at its inception and urges the Court to disregard it in its entirety.
5. The Plaintiff avers that at the time the cause of action arose, he had not received a duly executed copy of the Lease Agreement from the 1st and 2nd Defendants, who were his landlords. He states that this prompted him to file Reference No. E210 of 2023 before the Business Premises Tribunal in Nairobi, claiming protection as a controlled tenant.
6. The Plaintiff further asserts that during the proceedings before the Tribunal, the 1st and 2nd Defendants never challenged the Tribunal's jurisdiction nor tendered any executed lease establishing that the Plaintiff was not a protected tenant. As a result, the Tribunal proceeded on the basis that the Plaintiff was indeed a protected tenant, and it is only after the Plaintiff's alleged unlawful eviction that the current suit was instituted.
7. The Plaintiff expresses surprise that nearly one year after the filing of this suit, the 1st and 2nd Defendants have now produced a purportedly executed lease agreement, attaching it to their Statement of Defence, and contemporaneously lodging the present Preliminary Objection. It is argued that the said lease is an afterthought introduced merely to derail the suit and mislead the Court.
8. Additionally, the Plaintiff contends that the Defendants' delay in invoking the arbitration clause is unreasonable and malicious. It is also stated that there is in fact no validly executed lease agreement.
9. Finally, the Plaintiff argues that having filed a Statement of Defence and Counterclaim, the 1st and 2nd Defendants have already submitted to the jurisdiction of this Court, thereby precluding reliance on Section 6 of the *Arbitration Act*. The Plaintiff thus urges that the Preliminary Objection is untenable, misconceived and ought to be dismissed with costs.

### **Directions**

10. The court directed that the Preliminary objection be canvassed by way of written submissions, the submissions of which have been duly considered in the writing of this ruling.

### **Analysis and Determination**

11. I have considered the Preliminary Objection dated 9th September 2025, the Replying Affidavit sworn by the Plaintiff on 16th September 2025, and the rival positions taken by the parties. Only one substantive issue arises for determination; i.e. whether the suit should be stayed and referred to arbitration pursuant to the provisions of the *Arbitration Act*.
12. A Preliminary Objection, as defined in the locus classicus, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, was described by Law JA as follows:

“So far as I am aware, 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.”



Sir Charles Newbold, P in the same decision stated that:

“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.”

13. The 1st and 2nd Defendants placed reliance on an alleged arbitration clause in a lease agreement and Sections 6 and 17 of the *Arbitration Act*. The aforementioned sections provide as follows:

Section 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 matter 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 the proceedings, any provision of the arbitration agreement to the effect that the dispute shall not be brought before the court shall be null and void.”

Section 17 — Competence of arbitral tribunal to rule on its jurisdiction

“(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. (2) For that purpose— (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and (b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause. (3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.”

14. The statutory language is precise. A party seeking to rely on an arbitration clause must approach the court no later than the time of entering appearance or otherwise acknowledging the claim. Once a party files a Statement of Defence, and even more so a Counterclaim, they place themselves squarely within the Court’s jurisdiction and cannot thereafter seek refuge in arbitration.
15. This position has been reinforced in judicial precedent. This court in *Shaffie A Weru v Ganza Ltd & Another* (2022) eKLR, the held that:

“...a party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration... Section 6 of the *Arbitration Act* is a specific statutory provision... Its intention is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution.”



16. Similarly, in *Diocese of Marsabit Registered Trustees v Techno Trade Pavilion Ltd* (2014) eKLR, the Court stated emphatically that:

“The requirement in Section 6(1) of the *Arbitration Act* is not a mere technicality... It is a substantial legal matter... providing for stay of proceedings only where a party desirous of taking advantage of an arbitration clause... has applied promptly... and made a request to have the matter referred to arbitration.”

17. The foregoing decisions leave no room for creative interpretation or procedural misconduct.

18. Here, the 1st and 2nd Defendants have already filed a Statement of Defence and Counterclaim. They voluntarily invoked and submitted to the jurisdiction of this Court. They now seek to retreat from the same after one year of litigation. The law does not tolerate such opportunistic forum shopping. Any alleged arbitration clause — even assuming its existence and validity — cannot be invoked so late in the proceedings to suit a party's ‘tactical desires’.

19. In view of the foregoing analysis, this Court finds that the Preliminary Objection dated 9th September 2025 is devoid of merit, misconceived, and a gross abuse of the court process.

20. Accordingly, the Preliminary Objection is hereby dismissed with costs to the Plaintiff.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 4<sup>TH</sup> DAY OF DECEMBER 2025.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Were h/b for Mr. Musungu for the Plaintiff

Ms. M'ruaki for the 1<sup>st</sup> & 2<sup>nd</sup> Defendant

N/A for the 3<sup>rd</sup> & 4<sup>th</sup> Defendants

Court Assistant: Mpoye

