



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NAIROBI

ELCL CASE NO. E202 OF 2024

SAMUEL OWINGA.....OKOTH
F.....PLAINTIF

VERSUS

LENANA GARDENS LIMITED.....
DEFENDANT

RULING

(In respect of the Defendant's Preliminary Objection dated 17th July, 2025 challenging the jurisdiction of the Court to hear and determine this suit for the reason that the entire suit offends the doctrine of exhaustion as the agreement between the parties contains an arbitration clause)

Background

1. This ruling is in respect of the Defendant's Preliminary Objection dated **17th July, 2025**. The Defendant objects to the Plaintiff's suit on the grounds that:
 - a) This Honourable Court lacks jurisdiction to hear and determine this suit for the reason that the entire suit offends the doctrine of exhaustion as the agreement between the parties contains an arbitration clause under

Clause 12 of the Special Conditions, which offence deprives the Court of the necessary jurisdiction to entertain the suit.

b) It is therefore just, expedient, and in the interest of justice that the suit be struck out forthwith with costs to the Defendant.

2. The Court directed that the Preliminary Objection be canvassed by way of written submissions. The parties duly complied, and the Court has considered the submissions and authorities filed, which now form part of the record.

Defendants Submission

3. The Defendant submitted that the Preliminary Objection dated 17th July 2025 raises a pure point of law on jurisdiction. It was argued that the Plaintiff's suit offends the doctrine of exhaustion as the Agreement for Sale between the parties contains a **mandatory arbitration clause under Clause 12 of the Special Conditions**. Relying on **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, the Defendant contended that the objection meets the threshold of a **valid preliminary objection** capable of disposing of the suit at the outset.

4. On the issue of jurisdiction, the Defendant submitted that this Court lacks jurisdiction to entertain the suit in light of the agreed dispute resolution mechanism. Reliance was placed on *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1* for the proposition that jurisdiction is fundamental and that proceedings conducted without it are **a nullity**. The Defendant further argued that where parties have freely chosen arbitration, courts ought to defer to that choice, citing **Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR** in support of the principle of **party autonomy**.

5. The Defendant identified two issues for determination, namely: whether a valid preliminary objection had been raised, and whether the suit ought to be dismissed with costs. It was submitted that the Plaintiff prematurely invoked the Court's jurisdiction without first exhausting the agreed arbitral process, contrary to established jurisprudence on exhaustion. In support of this position, the Defendant relied on **Speaker of the National Assembly v James Njenga Karume [1992] eKLR, Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR**, and the decision in **Anne Lilande v Heri Development Limited & 2 others (ELC No. E147 of 2024)**, urging the Court to uphold the Preliminary Objection and strike out the suit with costs.

The Plaintiff's Submissions

6. The Plaintiff opposed the Preliminary Objection dated 17th July 2025, submitting that it does not meet the threshold of a valid preliminary objection as it is founded on contested matters of fact. Relying on **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, the Plaintiff argued that a preliminary objection must raise a pure point of law capable of determination without the need to ascertain facts or exercise judicial discretion. It was contended that the Defendant had invited the Court to interrogate the Agreement for Sale dated 16th August 2016, particularly **Clause 12**, which would require examination of evidence and interpretation of contractual terms, thereby taking the matter outside the realm of a proper preliminary objection.

7. The Plaintiff further submitted that even where an agreement contains an arbitration clause, such a clause does not automatically oust the Court's jurisdiction. Reference was made to **Section 6 of the Arbitration Act**, which provides that a party seeking to rely on an arbitration agreement must

apply for a stay of proceedings and referral to arbitration. It was argued that the Defendant had not made such an application and that the proper course, if at all, would be a stay of proceedings rather than striking out the suit. In support of this position, the Plaintiff relied on **Article 159(2)(c) of the Constitution**, which encourages alternative dispute resolution while preserving the supervisory role of the Court.

8. On the issue of striking out, the Plaintiff urged the Court to exercise caution, noting the drastic nature of striking out pleadings. Reliance was placed on **D.T. Dobie & Company (Kenya) Ltd v Joseph Mbaria Muchina & another [1980] eKLR**, where the Court warned that the power to strike out should be exercised sparingly. The Plaintiff also cited **Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others [2018] eKLR** to emphasize the need to prioritize substantive justice over procedural technicalities. Consequently, the Plaintiff urged the Court to dismiss the Preliminary Objection with costs, or in the alternative, to order a stay of proceedings rather than striking out the suit.

Issues for Determination

9. **Having considered the Preliminary Objection, the parties' respective submissions, and the pleadings filed herein, the Court is of the view that the following issues arise for determination:**
 - a) **Whether the Preliminary Objection constitutes a proper preliminary objection raising pure points of law.**
 - b) **Whether the Plaintiff's suit offends the doctrine of exhaustion by reason of the arbitration clause contained in the agreement between the parties.**

Analysis and Determination

A. Whether the Preliminary Objection constitutes a proper preliminary objection raising pure points of law

10. A preliminary objection was authoritatively defined in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, where Law JA stated 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. 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.”* (emphasis added).
11. The courts have consistently held that for a preliminary objection to be sustained, it must be capable of determination **without recourse to evidence** beyond the pleadings. In **Quick Enterprises Ltd v Kenya Railways Corporation (Kisumu HCCC No. 22 of 1999)**, the Court held that: *“When preliminary points are raised, they should be capable of disposing of the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere other than the pleadings.”*
12. Similarly, in **Avtar Singh Bhamra & Another v Oriental Commercial Bank (Kisumu HCCC No. 53 of 2004)**, the Court emphasized that: *“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”*

13. Applying the foregoing principles to the present case, the Defendant's Preliminary Objection is premised on the assertion that the parties are bound by an arbitration clause contained in the Agreement for Sale and that, as a result, this Court lacks jurisdiction to entertain the suit. The existence of the said agreement and the arbitration clause therein is not contested and forms part of the Plaintiff's pleadings.
14. The Court is satisfied that the issue raised whether the dispute ought to be referred to arbitration pursuant to the parties' agreement is a question of law touching on jurisdiction, and one that can be determined by reference to the pleadings and documents already before the Court, without the need to ascertain contested facts or take oral evidence.
15. In the circumstances, the Court finds that the Defendant's Preliminary Objection meets the legal threshold of a proper preliminary objection, as it raises pure points of law capable of determination at this stage.

B. Whether the Plaintiff's suit offends the doctrine of exhaustion

16. The Preliminary Objection herein hinges on the fact that the Sale Agreement dated 16th August 2016, which gave rise to this suit, contains an arbitration clause. The Court has carefully perused the said agreement and confirms that it provides as follows:

"If any dispute, difference or questions shall arise whether during the continuance of this Agreement or upon or after its determination between the parties hereto touching or concerning this Agreement or as to any other matter of this Agreement such dispute, difference or question whatsoever shall be referred to an arbitrator under the

rules of the Arbitration Act No. 4 of 1995 of Kenya or any statutory modification or re-enactment for the time being in force, such arbitrator to be appointed by agreement of both parties and in the absence of agreement within fourteen (14) days of the notification of the dispute by either party to the other on the application of any party by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) and the decision of such arbitrator shall be final and binding on the parties hereto.”

17. **The clause is couched in mandatory terms, and clearly demonstrates the parties’ intention that all disputes arising from the agreement be resolved through arbitration. Parties are bound by the terms of their contract, and the Court cannot rewrite the same. In Hesamuddin Gulamhussein Pothiwalla v Kidogo Basi Housing Co-operative Society Ltd & 31 others (Civil Appeal No. 330 of 2003), the Court of Appeal held that: “A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”**
18. The Plaintiff contended that the Court ought to stay the proceedings instead of striking out the suit. However, the Court takes note that no application for stay has been made under Section 6 of the Arbitration Act. The objection before Court is grounded on the doctrine of exhaustion, and the Court must determine whether the suit was prematurely filed. As explained by the Court of Appeal in Speaker of the National Assembly v James Njenga Karume [1992] eKLR, where there exists a clear procedure for redress of a grievance, that procedure must be strictly followed.
19. The doctrine of exhaustion was further elaborated by the Court of Appeal in Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others

[2015] eKLR, where the Court held: *“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 fora of last resort and not the first port of call... The exhaustion doctrine is a sound one and serves the purpose of postponing judicial consideration of matters until a party has first been diligent in pursuing the mechanisms provided.”*

20. In the present case, the parties expressly chose arbitration as their forum for dispute resolution. That choice is not merely contractual but is also supported by **Article 159(2)(c) of the Constitution**, which commands courts to promote alternative dispute resolution mechanisms, including arbitration. In ***Yes Housing Co-operative Society Ltd v Kenneth Onsare Maina [2020] eKLR***, the Court held that: *“The Court is not just under a duty to enforce a contractual clause binding the parties to arbitration but is under a constitutional obligation to promote that mode of dispute resolution.”*
21. The Court is further guided by the statutory framework governing recourse to the High Court against arbitral awards, as set out under **Section 35 of the Arbitration Act**, which provides as follows:

“35. Application for setting aside arbitral award

1. Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).
2. An arbitral award may be set aside by the High Court only if—
 - a) the party making the application furnishes proof—

- I. that a party to the arbitration agreement was under some incapacity; or
- II. that the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or
- III. that the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- IV. that the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or
- V. that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or
- VI. that the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

b) the High Court finds that

- I. the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
 - II. the award is in conflict with the public policy of Kenya.
3. An application for setting aside the arbitral award may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34, from the date on which that request had been disposed of by the arbitral award.
 4. The High Court, when required to set aside an arbitral award, may, where appropriate and if so, requested by a party, suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”
22. The foregoing provision demonstrates that the Arbitration Act deliberately restricts court intervention and confines the role of the High Court to post-award supervision on narrowly defined grounds. It follows that permitting the present suit to remain pending by way of a stay would undermine the statutory scheme and the finality of arbitral proceedings, contrary to both the parties’ agreement and the intent of the law.
 23. The Court therefore finds that the Plaintiff approached this Court before exhausting the dispute resolution mechanism agreed upon in the Sale Agreement dated 16th August 2016. Consequently, the suit offends the doctrine of exhaustion, and this Court lacks jurisdiction to entertain it at this

stage.

24. The upshot is that **the** Preliminary Objection is merited. the Plaintiff's suit is hereby struck out with costs to the Defendant.

It is so ordered!

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **19th day** of **December, 2025.**

MOHAMMED N. KULLOW
JUDGE

Ruling delivered in the presence of: -

Mr. Aboge for the Plaintiff

Mr. Nyamaswa for the Defendant

Philomena W..... Court Assistant