Tesfaighiorgis & 2 others v Rosslyn Suites Limited (Environment and Land Petition E042 of 2025) [2026] KEELC 149 (KLR) (26 January 2026) (Ruling)

Neutral citation: [2026] KEELC 149 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND PETITION E042 OF 2025

CG MBOGO, J

JANUARY 26, 2026

BETWEEN

MICHEALIN WOLDU TESFAIGHIORGIS .... 1ST PETITIONER

HAGOS TADESSE GEBREMESKEL .... 2ND PETITIONER

RAHEL GHEZAI WOLDESLASSE .... 3RD PETITIONER

AND

ROSSLYN SUITES LIMITED .... RESPONDENT

RULING

1. Before this court for determination is the chamber summons dated 3rd July, 2025 filed by the respondent, and it is expressed to be brought under Article 159 (2) (c) of *the Constitution* of Kenya, Section 6 of the *Arbitration Act* and Sections 1A, 1B and 3A of the *Civil Procedure Act* seeking the following orders: -

    1. That this honourable court be pleased to stay all proceedings in this suit pending arbitration of this dispute in compliance with the terms of the respective agreements for lease entered into by and between the petitioners and the respondent.

    2. That this honourable court be pleased to refer the dispute to arbitration in accordance with the terms of the respective agreements for lease entered into by and between the petitioners and the respondent.

    3. That this honourable court be pleased to issue any such and/or further orders as it may deem fit in the interests of justice.

    4. That the costs of this application be provided for.

2. The application is premised on the grounds on its face. It is supported by the affidavit of the Farhana Hassanali, a director of the respondent sworn on even date. The respondent deposed that on or about 15th March, 2021, the 1st petitioner as the purchaser and the respondent as the vendor entered into an agreement for lease with respect to apartment no. B601 on the 6th floor of Block B on the development known as Enaki Town, constructed on Land Parcel 10688/219.

3. On or about 27th January, 2021 the 2nd petitioner as the purchaser and the respondent as the vendor entered into an agreement for lease with respect to apartment no. G402 on Block G of the 4th floor of the same development. Further, that on or about 12th March, 2020 the 3rd petitioner entered a similar agreement with respect to apartment no. G502 on Block G of the 5th floor of the same development.

4. The respondent deposed the said agreements for lease stipulate that all disputes that arise shall be resolved by way of good faith consultation, and if that fails, it shall be referred to arbitration. Further, that it is trite law, that the parties entered into a binding contract, and the chosen forum being arbitration, the court should give effect to such intention.

5. The respondent further deposed that the petitioners filing of this suit is mala fides and an attempt to circumvent the binding dispute resolution mechanism chosen by the parties as they prayed that the matter be referred to arbitration.

6. The petitioners filed their grounds of opposition dated 4th August, 2025 challenging the instant application on the following grounds:-

    1. That, the petition is premised on violation of the petitioners' constitutional right to equal protection of the law, right to property and breach of statutory obligations on the part of the respondent. The petition before the court is outside the scope of the arbitration clause and cannot be referred to an arbitrator for adjudication.

    2. That, an arbitral tribunal lacks the jurisdiction to hear and determine issues involving the violation and infringement of constitutional fundamental rights and freedoms under Articles 27(1), 28 and 40, which matters fall within the jurisdiction of this honourable court. See Bia Tosha Distributors Limited vs. Kenya Breweries Limited & 6 Others [2023] KESC 14 (KLR).

    3. That, the constitutional reliefs sought are within the exclusive jurisdiction of this honourable court as a superior court in accordance with Article 162(2) of *the Constitution* and Section 13(5) of the *Environment and Land Court Act*.

    4. That the interpretation and application of various statutory provisions, including the *Sectional Properties Act*, 2020, the Sectional Properties Regulations 2021, the *Land Act* 2012 and the *Land Registration Act* 2012 do not fall within the scope of the arbitration clause relied upon by the respondent.

7. In addition to the grounds of opposition, the 1st petitioner filed the replying affidavit sworn on the 20th of August, 2025 on his own behalf and on behalf of the other petitioners. The 1st petitioner deposed that the respondent has misrepresented that there exists a contractual dispute between the parties, and that under the respective terms of sale, they had fulfilled all terms and conditions including purchase price, closing costs, registration of certificate for lease and stamp duty.

8. The 1st petitioner deposed that the respondent has refused to comply with the legal framework governing their leases that changed when the *Sectional Properties Act* was enacted. Further, that following the said enactment, the government through a public notice issued on 9th May, 2021

informed members of the public that they would no longer register long-term leases supported by architectural drawings with effect from 10th May, 2021.

9. It was further deposed that by a letter dated 22nd April, 2024 their advocates on record wrote to the respondent's advocates on record, demanding the respondent's compliance with the governing legal framework i.e. the *Sectional Properties Act* 2020 and the Sectional Properties Regulations 2021, by transferring ownership of their respective units to the petitioners through the registration of sectional titles and the subsequent formation of a management corporation to manage the common areas of the development, to which the respondent's advocates responded via an email dated 25th April 2024, stating that they would proceed with the registration of long-term leases instead of sectional titles as the chief land registrar had told them they had the freedom to choose between sectional titles and long-term leases.

10. The 1st petitioner highlighted that the respondent herein has since converted the property from L.R. No. 10666/219 to Nairobi/Block229/384 to bring it under the unified registration system of the *Land Registration Act*, which register does not allow for the registration of multiple leases granting ownership to the proprietor section. He deposed that it is clear that the petition seeks to enforce the petitioners' constitutional and statutory rights to obtain vacant possession of their properties and sectional titles issued based on a proper interpretation of the *Sectional Properties Act*, the Sectional Properties Regulations 2021, the *Land Act*, and the *Land Registration Act*.

11. The 1st petitioner deposed that the interpretation of statutory provisions is a reserve of this honourable court and such mandate cannot be ousted by an arbitration clause as claimed by the respondent. That as a result of the respondent's conduct, the petitioners are unable to utilize and enjoy their respective units in violation of their rights under Article 40 of *the Constitution* despite paying the full consideration in terms of purchase price as well as all ancillary costs.

12. It was further deposed that the respondent has not demonstrated that there is a dispute capable of being referred to arbitration as they had complied with the terms of the agreement for sale, and that the petition cannot be referred to arbitration as compliance with the *Sectional Properties Act* as read together with the Sectional Properties Regulations 2021 did not form part of the agreements for sale. They urged the court to dismiss the application with costs.

13. The respondent filed its supplementary affidavit sworn on 3rd September, 2025. The respondent reiterated its position that the petitioners deliberately and maliciously concealed the fact that the agreements for lease had an arbitration clause. Further, that the principle of constitutional avoidance applies to this matter, as the petitioners should utilise all lawful remedies available to them in the present context.

14. Regarding the petitioners' contention that there is no dispute capable of being referred to arbitration, the respondent deposed that the question whether there is a dispute capable of being referred to arbitration is a matter which should be determined by the arbitrator since, by delving into the facts of this case, this honourable court will have delved into the realm of the arbitrator. Further, that it is aware their advocates shared the engrossed leases with each of the petitioners for their execution, but they all refused or neglected to execute them, and that the petitioners have deliberately impeded and stalled the process that would allow them to acquire vacant possession of the apartments.

15. The respondent deposed that by virtue of the aforementioned registration, the other purchasers have registered proprietary rights in their various apartments in the form of long-term leases, and which proprietary rights have manifested in the possession of their apartments along with other rights and entitlements recognized by *the Constitution* and in the said leases on similar terms as the petitioners' leases.

16. The respondent's position thus is that the petitioners have elevated a contractual dispute to a constitutional question unnecessarily so as to defeat the purpose of the unchallenged arbitration clause, which agreement they need to honour.

17. The application was canvassed by way of written submissions. The respondent filed its written submissions dated 3rd September, 2025. The petitioners filed their written submissions dated 20th August, 2025.

18. I have considered the application, the replies thereof and the written submissions filed by both parties. The issue for determination is whether the dispute between the parties ought to be referred to arbitration.

19. The instant application seeks for this matter to be referred to arbitration, as the agreements for lease entered into by the parties stipulate. On the other hand, the petitioners herein contend that there is no dispute capable of being referred to arbitration and that their constitutional rights have been violated by the respondent.

20. Section 6 (1) and (2) of the *Arbitration Act* CAP 49 provides as follows:

> " 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 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.
>
> (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined."

21. Thus, the court is obliged to stay the matter until arbitration is done by the parties pursuant to the arbitration clause unless the court determines that the above listed exceptions exist.

22. In the agreement for lease between the 1st petitioner and the respondent clauses 8.10 and 8.11 stipulate as follows:--

> " 8. 10. Any dispute, controversy or claim arising out of or relating to this agreement or a termination hereof (including without prejudice to the generality of the foregoing, whether as to its interpretation, application or implementation), shall be resolved by way of consultation held in good faith between the parties. Such consultation shall begin immediately after one party has delivered to the other written request for such consultation. If within fifteen (15) business days following the date on which such notice is given the dispute cannot be resolved amicably, the dispute, controversy or claim shall be submitted to arbitration in accordance with clause 8.11.
>
> 8. 1I. Should any dispute, controversy or claim as is referred to in clause 8.10 arise between the parties and the consultation process referred to in clause 8.10 shaII have not resolved such dispute, the dispute shall upon application by any party be referred to arbitration by a single arbitrator to be appointed by the chairman

> for the time being of the Chartered Institute of Arbitrators, Kenya Branch upon the written request of either party. The arbitration shall be conducted in accordance with the rules or procedures for arbitration under the arbitration rules, December, 2012 published by the Chartered Institute of Arbitrators, Kenya Branch. The decision of the arbitrator shall be final and binding on the parties and may be made an order of a court of competent jurisdiction."

23. The same terms quoted above are repeated in clauses 2.23 and 2.38 in the lease agreement between the 2nd petitioner and the respondent herein and clauses 8.10 and 8.11 of the lease agreement between the 3rd petitioner and the respondent herein.

24. It is thus evident that parties had agreed to first consult and discuss any dispute in good faith to arrive at a resolution, which appears to have failed in this case, then to refer the dispute to arbitration. The fact that the petitioners have filed this suit is evident that a dispute has arisen between the parties. The subject of the dispute is that the petitioners view is that their lesseeship should be governed by the now effective *Sectional Properties Act* instead of having them registered as long-term leases as the respondent intends to.

25. Therefore, the subject matter of this case arises from the lease agreement between the parties, which they entered into willingly. Therefore, the court is not allowed to intervene in disputes of arbitration as stipulated by Section 10 of the *Arbitration Act*, which orders that:-

> " Except as provided in this Act, no court shall intervene in matters governed by this Act."

26. In the case of Technoservice Limited v Nokia Corporation & 3 others [2021] KEHC 13349 (KLR) relied upon by the respondent, the court made the following observation:-

> "Under our law, court intervention in arbitration proceedings is limited only to circumstances expressly permitted by the *Arbitration Act*. In this regard, section 10 of the Act provides that except as provided in the Act, no court shall intervene in matters governed by the Act. In absolute terms, the section limits the jurisdiction of the court to only such matters as are provided for by the Act. The section typifies the recognition of the policy of party's autonomy, which underlie the arbitration generally and in particular the Act...... Section 10 permits two possibilities where the court can intrude in arbitration. First, is where the Act expressly provides for or permits the intervention of the court. Second, in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act."

27. In the court's view, there is no public interest matter that warrants the intervention of this court in the parties' agreement, as it is a private dispute between the parties. It is trite law that a court cannot rewrite a contract between parties as stated in the Court of Appeal case of: In National Bank of Kenya Limited vs. Pipe Plastic Samkolit (K) Ltd [2002] eKLR, in which the learned judges of the Court of Appeal held that:-

> " A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved."

28. It is also trite law that where a dispute resolution mechanism exists, the court should not interfere in the same. This is known as the doctrine of exhaustion. The learned judges of the Court of Appeal in

the case of Muthinja & another v Henry & 1756 others (Civil Appeal 10 of 2015) [2015] KECA 304 (KLR) held that:-

> "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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands courts to encourage alternative means of dispute resolution."

29. It therefore follows that the court must allow the dispute resolution mechanism that the parties chose to take effect, which is arbitration in the present case. Accordingly, the court hereby allows the chamber summons dated 3rd July, 2025 as follows:-

    i. The dispute between the parties is hereby referred to arbitration in accordance with the terms of the respective agreements for lease entered into by and between the petitioners and the respondent.

    ii. All the proceedings in this suit are hereby stayed pending arbitration in compliance with the terms of the respective agreements for lease entered into by and between the petitioners and the respondent.

    iii. The court makes no orders as to costs.

    It is so ordered.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 26TH DAY OF JANUARY, 2026.

HON. MBOGO C.G.

JUDGE

26/01/2026.

In the presence of:

Ms. Vena Aron - Court assistant

Mr. Mungai holding brief for Mr. Issa for the Petitioners/Respondents

Mr. Wachira for the Respondent