REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELCEPCC CASE NO. E006 OF 2025

GHANIMA LIMITED

NEO WESTEND LIMITED::PLAINTIFFS

VERSUS

DENNIS KIOKO NGULI

CONSOLATA NZULA MAINGI

ERASTUS RIOBA *(Sued as chairman, Secretary and treasurer of CASAMIA LUKENYA RESIDENTS ASSOCIATION)*::**DEFENDANTS**

RULING

The Defendants hereby raise a preliminary objection in this matter on the grounds that;

1. 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 which dictates that any dispute, referred to an arbitrator and the decision of such arbitrator shall be final and binding to the parties hence the same deprives the Court of the necessary jurisdiction to entertain the suit.
2. It is therefore just expedient and in the interest of justice that the suit be struck out forthwith with costs to the Defendants.

The Defendants argue that this court lacks jurisdiction as the entire suit offends the doctrine of exhaustion. That the agreement between the parties contains an arbitration clause which dictates that any dispute is to be referred to an arbitrator and the decision would be final.

The Plaintiff submitted that the Defendants filed a statement of defence dated 4th March 2026 thereby submitting to the jurisdiction of this court. That Section 6 of the Arbitration Act and Rule 2 of the Arbitration Rules provide that any application for reference of a dispute to Arbitration must be made by summons in the suit and this has not been done.

This court has considered the Preliminary Objection, submissions and authorities cited therein. According to the Black Law Dictionary a Preliminary Objection is defined as being;

> *"In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary……"*

The above legal preposition has been made in the case of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) E.A. 696 where the court held that;

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

In the case of Attorney General & Another vs Andrew Mwaura Githinji & another (2016) eKLR the court outlined the scope and nature of preliminarily objection as;

(i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

(ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

(iii) *The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.*

It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. I find that the filed preliminary objection by the Defendants herein was properly brought before the court.

Section 6 of the Arbitration Act 1995 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.

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 the case of 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 is 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 Defendants raised a preliminary objection dated 3rd March 2026 that this court lacks jurisdiction to entertain this matter and the same should be referred to arbitration. I have perused the court record and find that the Defendants filed a notice of appointment and preliminary objection dated 3rd March 2026. A notice of motion is dated 4th March 2026. I note that the preliminary objection was raise at the time of entering appearance. I have perused the sample standard registered sub leases of one of the courts and find that

it does provide for Arbitration in clause 6.10 and this is not disputed as the Plaintiff attached the same in their pleadings on page 33 to 46 of the Plaintiffs list of documents. The 2nd Defendants replying affidavit dated 4th March 2026 annexed and marked CNM1 is a copy of a sample agreement with an arbitration clause at special condition X. between the 1st Applicant and one Hillary Musumba Wadundwe for Villa number 17 dated 30th June 2015. I find that there is a valid arbitration clause between the parties which ought to be enforced. The presence of the arbitration clause in 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 preliminary objection is merited and I hereby stay these proceedings and refer the parties to arbitration. For the avoidance of doubt no interime orders have been issued. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF MARCH 2026.

N.A. MATHEKA

JUDGE