



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT
NAIROBI
ELCLC NO. E558 OF 2025

MAUREEN MUENI.....
PLAINTIFF

=VERSUS=

LENANA GARDENS
LIMITED.....DEFENDANT

RULING

1. The Defendant, through a Replying Affidavit sworn on 24th November 2025, raised a preliminary objection challenging this Court's jurisdiction to hear and determine this suit. The Defendant argued that the suit offends the doctrine of exhaustion, as the agreement between the parties contains an arbitration clause.
2. The Defendant argued that the dispute is governed by an arbitration clause in the parties' agreement, which designates arbitration as the agreed forum for resolving disputes. Accordingly, the Defendant contends that the Plaintiff has approached the Court prematurely, without first

exhausting the agreed dispute-resolution mechanism, thereby depriving the Court of jurisdiction.

3. It was further argued that under the Arbitration Act, the Court's intervention is limited to specific circumstances, including the issuance of interim measures of protection, which require proof of, among other things, a valid arbitration agreement, an imminent threat to the subject matter, and the appropriateness of the relief sought. It was maintained that the Plaintiff has failed to meet these conditions, particularly by not demonstrating any imminent threat or formally declaring a dispute capable of arbitration.
4. The Defendant contends that the application essentially seeks to invite the Court to determine issues that are within the jurisdiction of an arbitral tribunal, thereby usurping the parties' preferred method of dispute resolution.
5. Based on the foregoing, the Defendant maintained that both the application and the suit are incompetent, premature, and legally untenable. In conclusion, the Defendant urged the Court to decline jurisdiction, strike out the proceedings, and direct the Applicant to adhere to the agreed arbitral process.
6. The preliminary objection was canvassed by way of written submissions.

THE RESPONDENTS SUBMISSION

7. The Respondent filed its submissions dated 1st December 2025.

8. On behalf of the Defendant, Counsel submitted that the Preliminary Objection is valid as it raises a pure point of law regarding jurisdiction based on the doctrine of exhaustion arising from an arbitration agreement between the parties. Counsel cited the definition of a preliminary objection outlined in **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696**. Counsel also cited **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** to emphasize that jurisdiction is fundamental and, once it is lacking, the Court must down its tools.
9. Counsel argued that the parties herein are bound by their agreement, which explicitly states that any dispute should be resolved through arbitration. It was submitted that the use of the term "shall" signifies a binding obligation. Counsel submitted that the Applicant has neither declared a dispute nor commenced arbitral proceedings, but has instead improperly invoked the Court's jurisdiction, including seeking summary judgment, thereby attempting to bypass the role of an arbitral tribunal. To support this argument, reliance was placed on ***Alison Jean Louis v Rama Homes Limited [2020] KEHC 637***, where the Court declined jurisdiction due to the existence of a valid arbitration clause and referred the dispute to arbitration. Counsel further cited ***Speaker of the National Assembly v James Njenga Karume [1992] eKLR*** and ***Dickson Mukwe Lukeine v Attorney General & 4***

- others [2012] eKLR**, to submit that where a dispute resolution mechanism is prescribed, it must be strictly followed.
10. Counsel relied **on Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR** to emphasise the principle of party autonomy in arbitration. Counsel cited **Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR**, to submit that Courts are last resort forums and that litigants must first exhaust alternative dispute resolution mechanisms.
 11. Counsel further submitted that the application and suit are premature and incompetent, having been filed before exhausting the agreed arbitral process. Counsel urged the Court to uphold the Preliminary Objection and strike out the proceedings with costs.
 12. Counsel urged the Court to adopt a similar approach as in comparable decisions and to uphold the sanctity of contractual dispute resolution mechanisms by declining jurisdiction and referring the parties to arbitration.

THE PLAINTIFF'S SUBMISSIONS

13. The Plaintiff filed her submissions dated 3rd December 2025.
14. On behalf of the Plaintiff, Counsel submitted that the Preliminary Objection is misconceived as it fails to appreciate the scope of this Court's jurisdiction under the Arbitration Act. Counsel further submitted that the Court's

jurisdiction is expressly conferred by Section 7(1) of the Arbitration Act, which empowers the Court to issue interim measures of protection before or during arbitral proceedings. To support this argument, reliance was placed on **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others Civil Application No. 2 of 2011**, where the Court held that jurisdiction flows from statute or the Constitution.

15. Counsel argued that Section 7(1) of the Arbitration Act does not require the prior initiation of arbitration, but instead permits Court intervention after a dispute arises and before an arbitral tribunal is established. To reinforce this point, reliance was placed on **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR**, where the Court of Appeal held that interim measures aim to preserve the subject matter pending arbitration and are not a substitute for the arbitral process.
16. Counsel further submitted that the doctrine of exhaustion is inapplicable, as the Plaintiff is not seeking a determination of the substantive dispute but merely interim protective relief to preserve the subject matter pending arbitration. Counsel maintained that requiring exhaustion of the arbitral process prior to granting such relief would undermine the purpose of Section 7(1), given that the subject matter could be dissipated before the tribunal is constituted.

17. Counsel relied on **Jr Miles Construction Ltd v Bomi Engineering and Construction Limited & another [2025] KEHC 3286 (KLR)**, where it was held that the existence of an arbitration clause does not bar the court from issuing interim orders. Further reliance was placed on **CMC Holdings Ltd & another v Jaguar Land Rover Exports Limited [2013] eKLR**, where the Court emphasized that interim measures are intended to maintain the status quo pending arbitration.
18. Counsel submitted that the Plaintiff would face imminent prejudice, including threats of eviction and possible alienation of the subject property, which would render any eventual arbitral proceedings nugatory. In the circumstances, seeking interim protection was both necessary and justified, and it cannot be considered an abuse of process.
19. In conclusion, Counsel urged the Court to dismiss the Preliminary Objection with costs and allow the Plaintiff's application to proceed to hearing on its merits.

ANALYSIS AND DETERMINATION

20. Having considered the preliminary objection and the rival submissions, the only issue for determination is whether the preliminary objection is merited. The law regarding preliminary objections is well settled. A preliminary objection must be based on a pure point of law. In **Mukisa Biscuits Manufacturing Company Ltd v West End**

Distributors Ltd [1969] EA 696, Law JA stated as follows:

“So far as I’m 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

21. In the same decision, **Sir Charles Newbold JA** stated:

“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 demurrer. It raises a 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. 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.”

22. The principle was restated in **Oraro v Mbaja (2005) eKLR**, where Ojwang J (as he then was) described it as follows:

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and, in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

23. The objection on jurisdiction is based on a pure point of law. A plea that parties are bound by a contractual arbitration clause is a classic example of a proper

preliminary objection identified in **Mukisa Biscuit**. The objection is therefore properly taken as a point of law.

24. The Defendant's objection is based on an arbitration clause in the agreement between the parties. The Defendant contends that the Plaintiff prematurely invoked the jurisdiction of this Court without first referring the dispute to arbitration. It was further argued that the application seeks for the Court to determine issues within the scope of the arbitral tribunal.

25. The Plaintiff asserted that she does not seek a final determination of the substantive dispute. According to the Plaintiff, the Court has only been approached for interim protective measures pending arbitration, a jurisdiction expressly granted by Section 7 of the Arbitration Act.

26. It is trite that jurisdiction is everything, and without it, the court cannot take one step. In **Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Limited (1989) eKLR**, the Court held that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”

27. Similarly, in **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR** the Supreme Court held that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

28. A Court derives its jurisdiction from the Constitution, legislation or both. This Court derives its jurisdiction from Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act. Section 13(2) grants the Court jurisdiction to hear and determine disputes relating to environmental planning and protection, land use planning, title, tenure, boundaries, and any other dispute relating to the environment and land. However, that jurisdiction must be exercised in accordance with the law, including the Arbitration Act, where parties have agreed to submit their disputes to arbitration.

29.. **Section 10 of the Arbitration Act** limits court intervention in arbitration matters. It provides that:

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

30. The effect of Section 10 is that, when parties have agreed to refer any dispute to arbitration, the Court must

respect that choice and refrain from determining the merits of the dispute except as expressly permitted by the Arbitration Act.

31. Clause 12.9 of the agreement between the parties states that any disputes arising from or related to the agreement must be referred to arbitration. The clause is expressed in mandatory terms. However, it also allows a party to seek preliminary injunctive relief or interim conservatory measures from a Court of competent jurisdiction while awaiting the arbitrator's final decision.

32. **Section 3** of the **Arbitration Act** defines an arbitration agreement as:

“an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”

33. It is not disputed that the parties entered into an agreement containing an arbitration clause. No material has been presented to suggest that the arbitration clause is null and void, inoperative, incapable of being performed, or otherwise invalid. The substantive dispute between the parties, therefore, falls within the scope of the arbitration agreement.

34. Section 6 of the Arbitration Act outlines the statutory process for enforcing an arbitration agreement during ongoing court proceedings 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

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(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.”

35. The Defendant has raised the objection at the earliest opportunity. It has not been demonstrated to have taken any step in the proceedings that constitutes a waiver of the arbitration agreement. Accordingly, the Defendant is entitled to insist that the substantive dispute be referred to arbitration.

36. However, the Plaintiff has not requested this Court to definitively resolve the contractual dispute. A review of the Plaint and the Chamber Summons filed simultaneously with it indicates that the Plaintiff is seeking interim protective orders pending the arbitration. The Plaintiff explicitly admits that the dispute is subject to arbitration and that arbitral proceedings have not yet been initiated.

37. **Section 7(1)** of the **Arbitration Act** provides as follows:

“(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”

38. The purpose of Section 7 is to preserve the subject matter pending arbitration and ensure the arbitral process is not rendered nugatory.

39.. In **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR**, the Court of Appeal held that interim protective measures under Section 7 of the Arbitration Act serve as “holding” orders, pending the outcome of the arbitral proceedings.

40. Section 7(1) expressly permits a party to approach the Court either before or during arbitral proceedings. The fact that the Plaintiff has not yet initiated arbitration does not

bar the Court's jurisdiction. Requiring the Plaintiff to first commence arbitration before seeking interim measures would defeat the purpose of Section 7, especially when the subject matter may need to be preserved before the arbitral tribunal is established.

41. Consequently, the Court finds that although the substantive dispute between the parties is governed by the arbitration clause, the existence of that clause does not bar this Court from considering an application for interim measures of protection under section 7 of the Arbitration Act.

42. In the end, I find that the Defendant's Preliminary Objection is without merit and is hereby dismissed with costs.

RULING SIGNED, DATED, AND DELIVERED VIA MICROSOFT TEAMS THIS 8TH DAY OF MAY 2026.

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HON. T. MURIGI
JUDGE

IN THE PRESENCE OF:

NYAMAGWA FOR THE DEFENDANT/RESPONDENT

AHMED -COURT ASSISTANT