Miathu & 3 others v Stuart & 2 others (Land Case E057 of 2024)
[2025] KEELC 5814 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5814 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

LAND CASE E057 OF 2024

LL NAIKUNI, J

JULY 17, 2025

BETWEEN

KARIUKI MIATHU ..... 1ST PLAINTIFF

NJERI MATHU ..... 2ND PLAINTIFF

NGUGI MATHU ..... 3RD PLAINTIFF

NJANJA MATHU ..... 4TH PLAINTIFF

AND

COLIN STUART ..... 1ST DEFENDANT

STACY OLUOCH OJUANG ..... 2ND DEFENDANT

LAND REGISTRAR KWALE LAND REGISTRY ..... 3RD DEFENDANT

RULING

I. Introduction

1. Before this Honourable Court for its determination is the Notice of Preliminary objection by Colin Stuart, the 1st Defendant herein dated 5th December, 2024.

2. Upon service of the Notice of Preliminary objection, directions were taken to have it be disposed off by way of written submissions.

II. The Notice of Preliminary objection by the 1st Defendant

3. The 1st Defendant brought an objection challenging the originating summons by the Plaintiffs' on the following grounds: -

a. That the Honourable Court lacks jurisdiction to hear and determine this suit on account ofthe mandatory provision in the sale agreement[s] dated 7th August, 2023 and in particular Clause 16.2, thereof which provides for arbitral processes in resolving any dispute regarding the transaction or contract.

b. That for the above said reason, the Plaintiffs' suit should be struck out with costs

III. Submissions

4. On 11th March, 2025 while the Parties were present in Court, they were directed to have the Notice of Preliminary Objection dated 5th December, 2024 be canvassed by way of written submissions. Unfortunately, by the time of penning down this ruling, the Honourable Court had only been able to access the written submissions by the 1st Defendant. Pursuant, on 17th July, 2025, the Honourable Court proceeded to reserved and indeed delivered its Ruling on its own merit accordingly.

A. The Written Submissions by the 1st Defendant

5. The 1st Defendant through the Law firm of Messrs. Kenga & Company Advocates filed their written submissions dated 10th March, 2025. Mr. Kenga Advocate commenced the submissions by asserting that the Notice of Preliminary Objection was on a point of law filed by the 1st Defendant dated 5th December, 2024. It was meritorious and thus should be allowed with costs.

6. Further to that, the Counsel recounted to Court a brief background of the matter herein. He informed the Court that the Plaintiffs filed this suit vide their joint Plaint dated 13th September, 2024, seeking to enforce contractual obligations regarding the suit premises, being parcels of land described as Plot No. Kwale/Michingirini/379, Plot No. Kwale/ Michingirini/ 380 and Plot No. Kwale/ Michingirini/ 381. The transaction was made on 7th August, 2023 vide a sale agreement[s] dated 7th December, 2023 where the 1st Defendant sold the said suit premises to the Plaintiffs.

7. Further, the Learned Counsel submitted that the Plaintiffs were relying on the aforementioned sale agreement[s] for the reliefs sought. The said agreement was attached to their injunctive application dated 13th September, 2024 and marked as "KM – 2". According to the Learned Counsel, under Clause 16.2 of the said sale agreement thereof, it provided in mandatory terms that any dispute arising out of breach and/or termination and/or invalidity of the agreement shall be referred to arbitration. The said clause read as follows: -

> "Any dispute, controversy or claim out of or relating to this agreement or the breach, termination or invalidity thereof, shall be referred to arbitration under the rules of the Chartered Institute of Arbitrators [Kenya branch]. Both parties shall nominate and agree on an arbitrator failure of which the matter shall be forwarded to the Chairman of the Chartered Institute of Arbitrator, whose appointee shall be final. The determination of the arbitrator shall be final and binding on all parties and so far as the law permits not subject to appeal"

8. Based on the above, the Honourable Court had no jurisdiction to hear and determine this suit and should therefore be struck out with costs as prayed for in the Notice of Preliminary objection according to the Learned Counsel. The Learned Counsel relied on various authorities where the courts have made findings to the effect that any transaction with arbitral forums on resolution of disputes should be handled through arbitration as that is what parties intended to resolve their disputes. One of the said case laws is the case of: "James & Catherine Holdings Limited v Thika Greens Ltd & another, being

ELC No. E003 of 2024, KEELC 1690 [KLR]", where the learned judge stated as follows at paragraphs 47 and 48, thereof: -

> "47. Given that the sale agreement binding the parties herein contains an arbitration clause, and given that parties are bound by their agreement, this court finds that the Plaintiff/ Applicant brought the suit to court prematurely without exhausting the available mechanism for dispute resolution as provided in the existing binding sale agreement.
>
> 48. In view of the foregoing, the Court finds and holds that a valid Arbitration Agreement exists between the parties herein precluding the intervention of this Court in the dispute between the parties, save for grant of interim measures pending arbitration as provided under Section 7 of the *Arbitration Act*."

9. According to the Learned Counsel, in the said authority, various case laws were cited and relied on by the court and therefore we shall not overburden the court through production of other authorities on the matter.

10. In conclusion, the Learned Counsel averred that the upshot was that the 1st Defendant's notice of Preliminary Objection was merited and should be allowed with costs.

IV. Analysis and Determination

11. I have considered the Notice of Preliminary Objection dated 5th December, 2024 by the 1st Defendant, the written submissions, assorted authorities, the relevant provision of *the Constitution* of Kenya, 2010 and statures.

12. In order to arrive at an informed, reasonable and fair decision herein, the Honourable Court has framed three [3] issues which fall for its determination in the Notice of Preliminary Objection. These are: -

    a. Whether the Preliminary objection meets the threshold of objections based on Law and Precedents?

    b. Whether the Notice of Preliminary objection dated 5th December, 2024 is merited?

    c. Who bears the Costs of the Notice of Preliminary objection dated 5th December, 2024.

ISSUE No. a). Whether the Preliminary objection meets the threshold of objections based on Law and Precedents?

13. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter is whether the objection meets the threshold for raising such an objection. In determining this instant Notice of Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.

14. According to the Black Law Dictionary 11th Edition, 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....."

15. The Courts have various defined Preliminary objection as one that consists of a point which has been pleaded or which arises by clear implication out of pleadings and which if argued as a Preliminary point my dispose of the suit.

16. The above legal preposition has been made graphically clear in the now famous case of "Mukisa Biscuits v Westend Distributor Ltd [1969] EA 696", the court observed 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 had 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue."

17. This statement of the law has been echoed time and again by the courts: see for example, "Oraro v Mbaja [2007] KLR 141".

18. The same position was held in the case of "Nitin Properties Ltd v Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257" where the Court held that;

> " A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion."

19. Similarly in the case of "United Insurance Company LTD v Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005[2005] LLR 7396", the Court held that;

> " A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed ."

20. Therefore from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of "In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003" where the Court held that;

> " A Preliminary Objection cannot be raised if any facts has to be ascertained."

21. I have further relied on the decision of "Attorney General & Another v Andrew Mwaura Githinji & another [2016] eKLR" as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

    [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.

22. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the 1st Defendant herein. These are the Honourable Court lacked jurisdiction to hear and determine this suit on account of the Mandatory provisions in the sale agreement dated 7th August, 2023 and in particular Clause 16.2, thereof which provides for arbitral processes in resolving any dispute regarding the transaction or

contract. In this case, I am satisfied that the objection raises pure points of law in that the preliminary objection. Since an issue going to the jurisdiction of this Court has been raised that issue must be dealt with in limine.

ISSUE No. b). Whether the Notice of Preliminary objection dated 5th December, 2024 is merited?

23. Under this Sub - title the Court shall examine whether the Notice of Preliminary objection is merited. An objection to the jurisdiction of the court has been cited as one of the preliminary objections that consists a point of law.The 1st Defendant raised a Preliminary Objection citing that the court lacks jurisdiction to entertain the suit herein and pray that the matter be referred to Arbitration.

24. Jurisdiction has been defined in Halsbury's Laws of England [4th Ed.] Vol. 9 at page 350 as

> " ...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

25. Primarily, the issue of jurisdiction is well settled in "Owners of the Motor Vessel "Lillian S" v Caltex Oil [Kenya] Ltd [1989] KLR 1", where Nyarangi J. of the Court of Appeal 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 pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

26. The 1st Defendant/Objector urged the Court to give effect to the intentions of the parties herein expressed in their agreement. According to the 1st Defendant, the clear intentions of the parties was that in case of any dispute arising they would submit it for arbitration in accordance with the Clause 16.2 of the agreement dated 7th August, 2023 of the sale agreement which mandates parties to the agreement to resolve their dispute through arbitration.

27. Kenya ratified the United Nations Commission on International Trade Law [UNCITRAL Model Law] which obligates courts to uphold the principle of party autonomy in resolving commercial disputes. The essence of the principle of party autonomy is that, where parties to a contract have consensually and in unequivocal terms provided for the forum through which to resolve their disputes, the courts are obligated to give effect to that choice of dispute resolution forum. The Court of Appeal in the case of "Nyutu Agrovet Limited – Versus Airtel Networks Limited [2015] eKLR" reaffirmed the supremacy of the principle of party autonomy in the resolution of commercial disputes in the following words:-

> " Our Section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to recognize this autonomy, we would become a pariah state and would be isolated internationally."

28. The exhaustion doctrine posits that where a dispute resolution mechanism exists outside the court, that mechanism should be exhausted before the court's jurisdiction is invoked. [See the Court of Appeal decision in "Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR". This is consistent with the provisions of Article 159 of *the Constitution* which enjoins the

court to promote alternative dispute resolution mechanisms and where possible, the court to give it full effect.

29. In the case of "Nyutu Agrovet Ltd [Supra]", the Court of Appeal was emphatic that Courts should uphold the party autonomy concept where parties have incorporated an arbitration clause in their contract. The court stated that where parties incorporate the arbitration clause in the contract between them, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails.

30. The 1st Defendant contends that the Court lacks the jurisdiction to handle this mater at this stage as it was instituted before exhaustion of the alternative dispute resolution mechanism being arbitration. They urge the court to lay down its tools and not to make one more step in this matter. The legal position is 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. I agree with the court's holding in the case "Eunice Soko Mlagui v Suresh Parmar and 4 others [2017] eKLR". The court stated that section 6 of the *Arbitration Act* is a specific statutory provision on stay of proceedings and referral of a dispute to arbitration where parties had entered into an agreement with an arbitration clause. The provision of the law prescribes the conditions under which a Court can stay proceedings and refer a dispute to arbitration. Its intention is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution. The Court stated that there was nothing in that provision that could be said to be derogating or subverting the constitutional edicts as regards alternative dispute resoluti

31. Additionally, in the case of "Raila Odiga v IEBC & 3 Others", the Supreme Court observed that Article 159 [2], [d] of *the Constitution* simply means that a court of law should not apply undue attention to procedural requirements at the expense of substantive justice. The provision of Article 159 [1] and [2] of *the Constitution* of Kenya, 2010 was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Courts.

32. The objective of arbitration is to attain fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense. The second objective should be the promotion of party autonomy [arbitration being a consensual process in that the primary source of the arbitrator's jurisdiction is the arbitration agreement between the parties]. The third objective should be balanced powers for the courts: court support for the arbitral process is essential, the price thereof being supervisory powers for the court to ensure due process. True to the principle of party autonomy the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal's statutory duty to conduct the proceedings in a fair and impartial manner.

33. The principal purpose of an arbitration clause is to provide a specialized tribunal to hear the dispute falling within the ambit of the matters governed by the agreement. Parties are at liberty to contract and to vest arbitrability determinations in the arbitrator, but only if the agreement contains clear language to that effect. A reading of the above clauses and the above tests leave no doubt that the parties chose arbitration as the preferred mode of dispute resolution, they not only agreed on the place of arbitration, but they also elected the applicable law and rules.

34. The provision of Section 6 of the *Arbitration Act*, No. 4 of 1996 which is couched in mandatory terms lays down the applicable tests in applications of this nature. The grounds in support of or against the application will stand or fall on the grounds laid down in the above section which 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."

35. 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. The Defendant raised the issue of Arbitration promptly. Since the Defendant filed the application promptly as set out in "Section 6[1] of the *Arbitration Act*".

36. Indeed, it is instructive to note that for such a protracted duration now, the provision of Section 6[1] of the *Arbitration Act* has been a subject of interpretation by Kenyan courts and the prevailing jurisprudence is that a party who does not comply with the timelines set out in Section 6[1] of the *Arbitration Act* loses the right to seek stay and referral orders. The cases where this interpretation has been affirmed include: "Charles Njogu Lofty v Bedouim Enterprises Limited CA No 253 of 2003"; "Niaxons [K] Ltd v China Road & Bridges Corporation Kenya [2001] KLR 12" and "Eunice Soka Mlagui v Suresh Parmer & 4 others [2017] eKLR".

37. The Plaintiffs instituted this suit in violation of both the provision of Section 6 of the *Arbitration Act* [Act improperly before the Court. Clearly, this Honourable Court lacks jurisdiction to hear and determine the Plaintiffs' suit as the parties have their choice of forum as arbitration. The issues herein touch on a contract for sale of interest in land. The intention of the contracting parties in the Sale Agreements are to pursue Arbitration even if it is not spelt in mandatory terms. This court will not rewrite the terms of the parties' Sale Agreements. Be that as it may, we are all required to adhere to Article 159[2][c] of *the Constitution*:-

> " [2] In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> [c] alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted."

38. The upshot is that the 1st Defendant's preliminary objection dated 5th December, 2024 is merited. Section 6 [1] of the *Arbitration Act* provided that a court before which proceedings were brought in a matter which was the subject of an arbitration agreement was to, if a party so applied not later than the time when that party entered an appearance or otherwise acknowledged the claim against which the stay of proceedings was sought, stay the proceedings and refer the parties to arbitration unless it found that the arbitration agreement was null and void, inoperative or incapable of being performed;

or that there was not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

ISSUE No. c). Who bears the Costs of the Notice of Preliminary objection dated 5th December, 2024

39. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 [1] of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri v Nairobi City County Government [2018] eKLR" and "Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another [2015] eKLR", the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR", the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

40. In the present case, the 1st Defendant shall have the costs of the Notice of Preliminary objection dated 5th December, 2024 and that of the struck Plaint dated 13th September, 2024.

V. Conclusion and Disposition.

41. Ultimately in view of the foregoing detailed and expansive analysis to the objection, the Honourable Court arrives at the following decision and make below orders:-

    a. That the Notice of Preliminary objection by the Defendant dated 5th December, 2024 be and is hereby found to have merit and the same is allowed entirely.

    b. That the Honourable Court finds that as between the Plaintiffs and Defendants, they have their choice of forum as arbitration and there is a dispute to be determined through arbitration.

    c. That the import of the above is that this Court lacks jurisdiction to hear and determine the dispute as canvassed in the underlying the Plaintiffs suit herein dated 13th September, 2024, seeking to enforce contractual obligations regarding the suit premises, being parcels of land described as Plot No. Kwale/Michingirini/379,Plot No. Kwale/Michingirini/380 and Plot No. Kwale/Michingirini/381 made on 7th August,2023 vide a sale agreement [s] dated 7th December, 2023 where the 1st Defendant sold the said suit premises to the Plaintiffs and the same is struck out.

    d. That the instant proceedings are stayed and the dispute is referred to Arbitration under Clause 16.2 of the Sale Agreement by the Parties under Section 6 of *Arbitration Act*.

    e. That the 1st Defendant shall have the costs of the Struck out Plaint dated 13th September, 2024 and the Notice of Preliminary objection dated 5th December, 2024.

42. It Is So Ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 17TH DAY OF JULY 2025.

HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT

Ruling delivered in the presence of:

a. Mr. Daniel Disii, the Court Assistant;

b. No appearance for the Plaintiffs & 3rd Defendant.

c. Mr. Kenga Advocate for the 1st Defendant.

d. Mr. Willy Advocates for the 2nd Defendant.