



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 516 OF 2016**

HUSSEIN VIRANI.....1<sup>ST</sup> PLAINTIFF/RESPONDENT  
JANICE KEMOLI.....2<sup>ND</sup> PLAINTIFF/RESPONDENT  
JOEL WEAVER.....3<sup>RD</sup> PLAINTIFF/RESPONDENT  
PAUL WEAVER.....4<sup>TH</sup> PLAINTIFF/RESPONDENT  
PRATIK ROY.....5<sup>TH</sup> PLAINTIFF/RESPONDENT  
RIZWANA SHEIKH.....6<sup>TH</sup> PLAINTIFF/RESPONDENT  
SALIM FAIZAL.....7<sup>TH</sup> PLAINTIFF/RESPONDENT  
KARIM MOHAMEDALI HADI.....8<sup>TH</sup> PLAINTIFF/RESPONDENT  
SAPNA HADI.....9<sup>TH</sup> PLAINTIFF/RESPONDENT

*(suing as Residents of One Redhil Estate)*

=VERSUS=

**TWENTY REDHIL LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1. This is the Notice of Motion dated 20<sup>th</sup> June 2016. It is brought under Section 6 and 7 of the Arbitration Act 1995, Section 59, 59C and 63 (e) of the Civil Procedure Act, Chapter 21 Laws of Kenya, Order 46 Rules 1, 2 and 5 of the Civil Procedure Rules, 2010, the inherent enabling provisions of the law.

2. It seeks order:-

- (1) *Spent*
- (2) *Spent*
- (3) *That the dispute between the parties herein be referred to arbitration.*
- (4) *That the dispute herein be referred to arbitration before either:-*
  - (a) *Mr. Mwaniki Gachoka*
  - (b) *Mr. John Ohaga, or*

(c) *Dr. Kariuki Muigua*

(5) *In the alternative, the suit be struck out with costs to be paid to the defendant.*

(6) *The costs of this application be borne by the plaintiff.*

3. The grounds are on the face of the application and are listed as in paragraph 1 to 6.

4. The application is supported by the affidavit of Farhan Pervez Qureshi, the Accountant with the defendant/applicant sworn on the 20<sup>th</sup> June 2016.

5. On the 17<sup>th</sup> July 2018, Mr. Odhiambo appearing for the plaintiff told the court that what was coming up is the ruling on two applications. I have gone through the court file and find that on 20<sup>th</sup> July 2016 the court directed that the Notice of Motion dated 20<sup>th</sup> June 2016 be heard and determined in priority to the Notice of Motion dated 13/5/2016 and directed that it be canvassed by way of written submissions.

6. The Notice of Motion dated 20<sup>th</sup> July 2016 is opposed. There is a replying affidavit sworn by Hussein Virani the 1<sup>st</sup> plaintiff/respondent on the 14<sup>th</sup> July 2016.

7. I have considered the Notice of Motion, the affidavit in support and the annexures, the replying affidavit and the annexures, the written submissions of counsel and the authorities cited.

The issues for determination are:-

(i) *Whether the dispute between the parties should be referred to arbitration.*

(ii) *If so, who should be appointed as the Honourable Arbitrator*

8. I have gone through the lease agreements clause 8 provides that:-

***“any disputes or claim ....shall be referred to arbitrator”***

The plaintiffs/respondents do not dispute the fact that the agreements between the parties herein expressly provided for arbitration.

9. Section 6(1) of the Arbitration Act, 1995 provides as follows:-

***“A court before which proceedings are brought in a matter which is subject to arbitration agreement shall, if a party 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) the arbitration agreement is null and void, in operative 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”.***

10. In the case of **Haki Shipping Corporation –vs- Sopex Oils Ltd [1997] 3 All. ER.833** as cited with authority in the case of **Alliance Media Kenya Ltd vs Monier 2000 Limited [2005] eKLR** it was held that:-

***“Where the parties to a contract agreed to refer any dispute arising there from or in connection therewith to arbitration, any subsequent claim made by one of the parties in relation to the contract, which the other party refused to admit or did not pay, was relevant dispute which the claimant was both entitled and bound to refer to arbitration, notwithstanding the fact that the respondent did not have a sustainable defence to it. In the instant case, the plaintiff claimed damages from the defendant for breach of charter party and since the defendant did not admit liability, however indisputable the plaintiff’s claim there remained a dispute between the parties which by clause 9 of their agreement, they had agreed to refer to arbitration.”***

The defendant/applicant also relied on the case of:- **Julius Macharia Mwangi vs Githambo Tea Factory & Another (2015) eKLR** where it was held that:

***“I find that the parties entered into an agreement, which contained the arbitration clause. According to the arbitration clause in the agreement for sale of land, the parties clearly agreed that all claims and disputes that were to arise under the agreement were to be referred to a single arbitrator.....in light of the foregoing matter....the proceedings in this suit shall be stayed.....”***

I am guided by the above authorities.

11. The plaintiffs/respondents in filing this suit rely in clause 8.4 of the lease agreement which provides that:

***“Notwithstanding the foregoing, a party is entitled to seek preliminary injunctive relief or interim conservatory measures, from any court of competent jurisdiction pending the final decision or award of the arbitration.”***

I am of humble view that this clause envisages a situation where the parties first submit themselves to arbitration as stipulated in the agreement.

12. In the case of **Niazsons (K) Limited vs China Road & Bridge Corporation Kenya [2001] eKLR** the Court of Appeal in giving guidance on Section 6(1) of the Arbitration Act stated that:-

***“Whether or not an arbitration clause or agreement is valid is a matter the court seized of a suit in which a stay is sought is duty bound to decide. The aforesaid section does not expressly state at what stage it should do so. However, a careful reading of the section leaves no doubt that the court must hear that application to come to a decision one way or the other. It appears to me that all an applicant is obligated to do is bring his application promptly. The court will then be obliged to consider three basic aspects. First, whether the applicant has taken any step in the proceeding other than the steps allowed by the said section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred.”***

I am guided by the above interpretation in finding that this application is proper before this court. It was also observed in the above authority that Section 6(2) of the Arbitration Act, 1995 does not permit parallel proceedings to be handled simultaneously.

13. Article 159 (2) (c) of the Constitution recognizes arbitration as an alternative form of dispute resolution and encourages courts to refer matters to arbitration.

14. In conclusion I find merit in this application and grant the orders sought namely:-

- (a) That the dispute between the parties herein be referred to arbitration.***
- (b) That the dispute herein be and is hereby referred to arbitration before Mr. John Ohaga.***
- (c) That in the meantime the proceedings in this suit be stayed.***
- (d) That costs of this application do abide the outcome of the suit herein.***

It is so ordered.

**Dated, signed and delivered in Nairobi on this 14<sup>TH</sup> day of NOVEMBER 2018**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiffs/Respondents

.....Advocate Defendant/Applicant

.....Court Assistant