



**Moretti & 5 others v Dream Geast Limited & 2 others (Environment & Land
Case E53 of 2022) [2024] KEELC 57 (KLR) (22 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 57 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E53 OF 2022
FM NJOROGE, J
JANUARY 22, 2024**

BETWEEN

ANDREA MORETTI & 5 OTHERS PLAINTIFF

AND

DREAM GEAST LIMITED & 2 OTHERS DEFENDANT

RULING

1. This ruling is in respect of the 1st Defendant's Preliminary objection dated 24th October 2022 which is raised on the following grounds: -
 - 1) That this honourable court does not have jurisdiction to determine this matter in the first instance as the issue at hand is governed by an arbitral clause that necessitates disputes arising herein be first dealt and determined by an arbitrator.
 - 2) That the suit and the application contains inadmissible and legally impermissible annexures in a language not of the court contrary to the provisions of Section 86 of the *Civil Procedure Act*.
2. The Preliminary Objection was disposed of by way of written submissions.

Defendants' submissions.

3. The 1st Defendant submitted that Clause 5.4 of all the leases entered between the Plaintiffs and the 1st Defendant provided that all disputes in relation to the obligations of the lease be handled by an arbitrator appointed under that clause and thus this court lacks express and original jurisdiction of the first instance. In support of its position, the 1st Defendant relied on the authorities of *Judges and Magistrate's Vetting Board & 2 Others v Centre for Human Rights and Democracy & 11 Others* S.C Petitions 13A of 2012 as Consolidated with Petition 15 of 2013 [2014] eKLR, *Hon M.M Galgalo & 3 Others V Musikari Kombo & Another* HCC No. 382 of 2006 [2006] eKLR and *Areva T & D India Limited v Priority Electrical Engineers Ltd* [2012] eKLR.



4. It was submitted by counsel for the 2nd and 3rd Defendants that the Plaintiff willingly and without duress agreed to subject to arbitration all disputes and questions arising between the parties as regards the lease. It was also submitted that the plaintiffs' suit is premature for failing to consider the arbitration clause as outlined in the lease agreements. Counsel cited the authority of *Owners of the Motor Vessel Lillian S v Caltex Oil* (Kenya) Ltd [1989] KLR 1.

Plaintiff's Submissions.

5. Counsel for the Plaintiffs submitted that an objection to the jurisdiction of the court on account of arbitration should be filed at the time of entering appearance and not thereafter. Counsel stated that the 1st Defendant entered appearance on 24th October 2022 and filed the preliminary objection on 25th October 2022 which runs afoul of Section 6 (1) of the *Arbitration Act*. Counsel relied on the authorities of *Bedouin Enterprises Ltd v Charles Njogu Lofty and Joseph Mungai Gikonyo T/A Garam Investments* and *Rene Industries Limited v County Government of Kitui* [2019] eKLR.
6. Counsel further submitted that the arbitral clause provided for disputes arising between the parties, disputes touching on construction of any clause in the lease and disputes touching on the rights and liabilities of the parties. Counsel argued that the arbitral clause is not applicable in the present case since the 2nd and 3rd Defendants are not a party to the lease between the Plaintiff and the 1st Defendant as such they cannot purport to enforce a clause in an agreement they are not a party to. The case of *Damaris Wanjiru Nganga v Loise Naisiae Leiyen & KCB Bank* [2015] eKLR was relied upon.

Disposition

7. The essence of a preliminary objection was addressed in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* (1969) EA 696 where the court stated that:

“The first matter relates to the increasing practice of raising points which should in normal manner, quite improperly be by way of preliminary objection. A preliminary Objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on assumption that all 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.

... 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 a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

8. I have considered the pleadings and submissions by the parties herein as well as the authorities relied upon. The 1st Defendant raised a preliminary objection citing that the court lacks jurisdiction to entertain the suit herein for reason that there exists an arbitral clause. Order 2 Rule 9 *Civil Procedure Rules* 2010 prescribes that: -

“A party may by his pleading raise any point of law.”



9. The issue for determination is whether this court has jurisdiction to deal with the dispute in question. 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.”

10. The power of a court to stay proceedings and refer matters to arbitration is provided for under Section 6 of the *Arbitration Act* Cap 4 of 1995. It provides that:

“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.”

11. 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. 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 find reliance by the plaintiffs on the presence of other parties to the present proceedings to be of no succour to them. If they had filed no suit there would be no third parties involved. Secondly, regardless of their presence, the dictates of the contractual terms between the 1st defendant and the plaintiffs hold priority, and the relations between the defendants and the plaintiffs respectively and others take a back seat and will be interpreted based on the outcome of the arbitration.

12. The 1st Defendant herein entered appearance on 24th October 2022 and filed the preliminary objection on 25th October 2022. In my view, the time difference is negligible as anticipated by Section 6 (1) of the *Arbitration Act* which I should think is not meant to be punitive. The spirit of the *Act* is to give effect to contractual arbitration clauses.

13. Besides, it is significant that no defence to the matter has been filed and this is indicative of desire on the part of the objector that the arbitration process be exhausted before this court assumes jurisdiction and hears the suit, though he has wrongly filed a preliminary objection instead of a motion to stay proceedings. I am of the opinion that even though the preliminary objection was not filed at the time the 1st Defendant entered appearance, the 1st Defendant raised the issue of Arbitration promptly. I am therefore of the view that the present suit ought not be dismissed before any arbitration proceedings have been conducted.

14. Owing to the foregoing considerations, I find that there exists the option of arbitration between the Plaintiffs and the 1st Defendant and thus rather than dismiss it, this court hereby stays this suit till the determination of the arbitration proceedings. The plaintiff shall initiate action that will lead to the arbitration in accordance with the agreement between the parties within 45 days of this order.



15. There shall be no orders as to costs.

DATED, SIGNED AND ISSUED AT MALINDI ON THIS 22ND DAY OF JANUARY 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI

