Green House Limited v Muhuni (Environment and Land Appeal E014 of 2024) [2025] KEELC 807 (KLR) (26 February 2025) (Judgment)

Neutral citation: [2025] KEELC 807 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL E014 OF 2024

NA MATHEKA, J

FEBRUARY 26, 2025

BETWEEN

GREEN HOUSE LIMITED ..... APPELLANT

AND

PURITY WARUGURU MUHUNI ..... RESPONDENT

(Being an Appeal from the Ruling delivered by Hon. Daffline Nyaboke Sure- PM) on 26th March, 2024 in Kangundo MCELC/E006/2021 (As consolidated with MCELC/E002/2023)

JUDGMENT

1. The Appellant herein, Green House Limited, being dissatisfied with the Ruling and Orders of the HON. DAFFLINE NYABOKE SURE (PM) in Kangundo MCELC/E006 of 2021 as consolidated with Kangundo MCELC/E002 of 2023, as delivered on the 26th of March, 2024 Appealed to this Honourable Court against the said Ruling and Orders on grounds that;
    a. The Honourable Magistrate erred in law and fact in failing to consider the provisions of Clause 16 of the Sale Agreement dated 16th July, 2016 which ousted jurisdiction of the court, hence arriving at a wrong decision by dismissing the Preliminary Objection dated 18th September, 2023.
    b. The Honourable Magistrate erred in law when she dismissed the Preliminary Objection dated 18th September, 2023 and proceeded to arrogate herself jurisdiction contrary to the express provision of Section 10 of the *Arbitration Act* as well as available precedents on court's intervention on disputes reserved for arbitration.
2. The Appellant therefore prays that:
    a. This appeal be allowed.

b. This Honorable Court be pleased to set aside the Ruling and Orders of the HON. DAFFLINE NYABOKE SURE (PM) in Kangundo MCELC/E006/2021 as consolidated with Kangundo MCELC/E002 of 2023 as delivered on the 26th of March, 2024 and substitute it with an order allowing the Preliminary Objection dated 18th September, 2023 by staying Kangundo MCELC/E006/2021 as consolidated with Kangundo MCELC/E002 of 2023 and refer the dispute to arbitration.

c. The costs of this Appeal and the Preliminary Objection before the lower court be awarded to the Appellant.

3. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in Mbogo and another vs Shah (1968) EA 93 where it was held that;

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do."

4. A notice of preliminary objection was discussed by the Supreme Court in Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others cited the leading decision on Preliminary Objections, Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) EA 696, where the Court held as follows:

> " 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... 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 has to be ascertained or if what is sought is the exercise of judicial discretion".

5. Similarly, the Supreme Court in Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others (2015) eKLR made the following observation as relates to Preliminary Objections:

> " ... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."

6. The point of law the appellant argues is that this court does not have jurisdiction to entertain the application and suit since clause 16 of the impunged agreement dated 16th July 2016 provides for negotiation and arbitration in the event of a dispute and not court proceedings.

7. 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."

8. 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.

9. The arbitration clause in the said agreement dated 16th July 2016 reads inter alia as follows;

> ARBITRATION
>
> 16.1 Should any dispute arise between the Parties hereto with regard to the interpretation, rights and/or implementation of any one or more of the provisions of this Agreement, the Parties to such dispute shall in the first instance attempt to resolve such dispute by amicable negotiation.
>
> 16.2 Should such negotiation fail to achieve a resolution within Fifteen (15) days, either party may declare a dispute by written notification to the other, whereupon such dispute shall be referred to arbitration under the following terms:-

10. The intentions of the parties 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."

11. 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.

12. *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."

13. 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."

14. 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.

15. The plaintiff/respondent made an application dated 10th August 2023 to consolidate MCELC/E006 of 2021 with Kangundo MCELC/E002 of 2023, thereafter the 1st defendant/ appellant raised the preliminary objection dated 18th September 2023 seeking to stay the proceeding pending Arbitration. I find that, the 1st defendant did not file an application within the time frame set out in Section 6(1) of the Act. Secondly, the 2nd respondent in the consolidated suit one Muia Mungali is not a party to the said sale agreement dated 16th July 2016 between the respondent Purity Waruguru Muhuni and the appellant Green House Limited. Guided by the law, facts and the authorities cited above, I find this appeal lacks merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26TH DAY OF FEBRUARY 2025.

N.A. MATHEKA

JUDGE