



Troy Medicare Pharmacy Limited & 10 others v Nishapa Investments Limited & 3 others; Magic Business Centre Sub -Tenants & 2 others (Interested Parties) (Environment & Land Case E236, E033 & E035 of 2023 (Consolidated)) [2024] KEELC 4401 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4401 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E236, E033 & E035 OF 2023 (CONSOLIDATED)**

**MD MWANGI, J
MAY 23, 2024**

BETWEEN

TROY MEDICARE PHARMACY LIMITED PLAINTIFF

AND

NISHAPA INVESTMENTS LIMITED 1ST DEFENDANT

FASHION PLAZA LIMITED 2ND DEFENDANT

AND

MAGIC BUSINESS CENTRE SUB -TENANTS INTERESTED PARTY

ROYAL PALMS MUSTARD LIMITED INTERESTED PARTY

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE E033 OF 2023**

BETWEEN

ROYAL PALMS MUSTARD LIMITED PLAINTIFF

AND

TROY MEDICARE PHARMACY LIMITED 1ST DEFENDANT

NISHAPA INVESTMENTS LIMITED 2ND DEFENDANT

FASHION PLAZA LIMITED 3RD DEFENDANT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE E035 OF 2023**



BETWEEN

PAUL MBURU NJUMA 1ST PLAINTIFF
MOHAMED IBRAHIM GEED 2ND PLAINTIFF
JUDY WAMARWA NYAMU 3RD PLAINTIFF
ABDIRIZAK SAHEL ABDULLAHI 4TH PLAINTIFF
ONESMUS MUIRU MUSYOKA 5TH PLAINTIFF
JOYCE WANJIKU GICHURU 6TH PLAINTIFF
JOSEPH WACHIRA GITHINJI 7TH PLAINTIFF
BENSON WAWERU 8TH PLAINTIFF
PETER MWANGI WANJIRU 9TH PLAINTIFF

AND

ROYAL PALMS MUSTARD LIMITED DEFENDANT

AND

TROY MEDICARE PHARMACY LIMITED INTERESTED PARTY

RULING

(In respect to the Plaintiff's application dated 18th December 2023, brought under the provisions of Article 50 (1) of *the Constitution*, Section 6(1)(a) of the *Arbitration Act*, 1995, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 11 Rule 3 (1) (d), Order 40 rules 1 and 2 of the Civil procedure Rules).

Background

1. The application under consideration is the Plaintiff's Notice of Motion dated 18th December 2023. The application prays that the court be pleased to lift and or discharge its orders of 13th December 2023 staying these proceedings and referring this matter to arbitration and in substitution thereof proceed to issue directions on the hearing of this matter. Further that upon granting the above order, the court be pleased to issue an order of injunction restraining the Defendants/Respondents from selling, disposing, transferring and or in any manner whatsoever altering the current ownership of all that parcel of land known as L.R No. 209/1829 pending hearing and determination of this suit.
2. It is also the Plaintiff's prayer that pending the hearing and determination of this suit, the court be pleased to appoint an independent estate agent to manage and collect rent over that parcel of land known as L.R No. 209/1829 and the rent so collected be utilized to pay the head lessor (the Defendants) as well as the daily running expenses and the balance thereof be deposited in a joint interest earning account in the names of the Plaintiff and the Defendants or be deposited with the court.
3. Finally, the Plaintiff prays that this suit be consolidated with ELCC/E235/2023 and all other related files for hearing and determination.



4. The Plaintiff's application is premised on the grounds on the face of it and the supporting affidavit of ROSEMARY MUTHEU MWATHE.
5. The Plaintiff avers that it has a substantial stake in the suit property having constructed stalls which have been leased out to over 500 sub-tenants who are currently paying rent to the 2nd interested party herein. The Plaintiff states that the 2nd interested party has no capacity to compensate it for its investment as well as for the loss of investment income in case that the Plaintiff succeeds in this matter. This explains the Plaintiff's prayer that the court appoints an estate agent to receive the rent thereof pending the determination of this matter.
6. The Plaintiff asserts that the gravamen of its claim is based on its illegal and unlawful eviction from the suit premises which was carried out in an oppressive, high-handed manner and with impunity by the Defendants and the 2nd interested party. As such, the Plaintiff insists that the reference of this matter to arbitration is not tenable for the reasons enumerated on the face of the application, namely that;
 - a. There is no arbitrable dispute between the Plaintiff and the Defendants.
 - b. The subject matter of this case centres on the unlawfulness of the eviction of the Plaintiff from the suit premises which falls outside the scope of the arbitration agreement. Therefore, only this court can determine the issue under the provisions of section 152F of the Land Act. The appointment of an arbitral tribunal would be moot and academic.
 - c. By reason of the unlawful eviction of the Plaintiff, the arbitration agreement has been rendered inoperative hence there would be no basis for proceeding with any intended arbitration.
 - d. The eviction of the Plaintiff was carried out illegally and in breach of established public policy and it would thereof be against the spirit of Section 35(2)(b)(ii) of the Arbitration Act to make an award which is contrary to each public policy.
 - e. The dispute in this matter involves 3rd parties, the interested parties, who are not parties to the lease agreement dated 14th June 2021 hence any determination the arbitrator would give would have a ripple effect on their rights and interests which transcend the relationship between the Plaintiff and the Defendants.
7. The Plaintiff further argues that its interests in the suit property is exposed and should the Defendants proceed with any action of selling it to a third party, the Plaintiff stands to suffer irreparable loss as this would not only change the character and form of this dispute to the detriment of the Plaintiff but would convolute the matter and further impair the ability of the Applicant to recover damages against the Defendants.
8. The Plaintiff points out that the other suit ELCC/E235/2023 is related to this matter as both premises share the same management offices and the issues arising are diametrically similar. It would therefore serve the interests of justice if the two files are consolidated and heard together.
9. The supporting affidavit affirms the grounds on the face of the application.

Responses by the Defendants and Interested Parties

10. The application was opposed by the Defendants and one of the Interested Parties; Royal Palms Mustard Limited, who filed a replying affidavit sworn by Antony Maina Mutahi, one of its directors. He termed the Plaintiffs application as an abuse of the process of court and an afterthought, which ought to be dismissed with costs.



11. The deponent asserts that if the Plaintiff was dissatisfied with the ruling of this court, then the only option available to it was to either seek a review or appeal against it to the Court of Appeal. The present application is therefore a non-starter.
12. The deponent further reiterates that the essence of this dispute is the Plaintiff's apprehension that the Defendants may sell the suit property without compensating it (the Plaintiff) for goodwill and investments made which apprehension was already addressed by the court in its ruling of 13th December 2023, when it ruled that any loss suffered or anticipated was compensable.
13. The deponent too denied that the dispute in this matter regards eviction; rather it is the termination of the lease between the Plaintiff and the Defendants.
14. The Defendants response to the Plaintiff's application was by way of a preliminary objection dated 25th February 2024.
15. In the preliminary objection, the Defendants stated that the Plaintiff's application was fatally and incurably defective for failure to invoke the court's jurisdiction properly and for being contrary to the doctrine of 'functus officio'. The court's ruling of 13.12.2023 had finally determined this matter by referring it to arbitration and issuing appropriate interim measures of protection under section 7(1) of the *Arbitration Act*.
16. The Defendants further stated that the Plaintiffs application violated the provisions of section 10 of the *Arbitration Act*.

Court's Directions

17. The court's directions were that the application be canvassed by way of written submissions. The Plaintiff, the Defendants and Royal Palms Mustard Ltd filed their respective submissions. The court has had the opportunity to read and consider the said submissions.

Issues for Determination

18. Before framing the issues of determination in this matter, it is appropriate to point out that the orders that the Plaintiff seeks to lift or discharge arose from the ruling delivered by this court on 13th December 2023. The ruling was in respect of the Plaintiff's own applications and the ones by the Defendants as well as the Interested Parties. One of the applications by the Plaintiff, dated 14th July 2023, sought for an injunction against the Defendants and their assigns pending the hearing and determination of the application and arbitration.
19. The circumstances at the time of the ruling of 13th December 2023 were as they are at the time of filing this current application. As noted in the ruling of 13th December 2023, the Plaintiff's relationship with that of the Defendants is premised on a lease agreement between them over the suit property – L.R No. 209/1829. The 2nd Interested Party – Royal Palms Mustard Ltd was in possession of the suit property as it still is. That was the reasons why the Plaintiff was seeking for an order directing the Interested Party to vacate the suit premises.
20. The Plaintiff then was still advancing the argument that the 2nd Interested Party gained possession unlawfully, through collusion and connivance. The court ruled that it was upon the arbitral tribunal to decide whether the termination of the lease and the subsequent removal/eviction of the Plaintiff from the suit property from was unlawful or not, that is to say, whether the lease between the Plaintiff the Defendants was lawfully terminated. The Plaintiff in the current application is advancing the same



grounds and arguments. The Plaintiff reasons that the consequence of this alleged unlawful removal from the suit premises renders the arbitration agreement inoperative and untenable.

21. Royal Palms Mustard Ltd terms the Plaintiff's application an abuse of the process of court. The Defendants on their part assert that the application violates the principle of *functus officio* and contradicts section 10 of the *Arbitration Act*.
22. Considering the Plaintiff's application, the responses thereto and the submissions filed, the issues for determination are; -
 - a. Whether the Plaintiff's application violates the principle of *functus officio*.
 - b. Whether the arbitration agreement between the Plaintiff and the Defendants is inoperative.
 - c. Whether the Plaintiff is entitled to any of the orders sought in its application.
 - d. What orders should issue in respect to the costs of the application.

Analysis and Determination

23. A reading of the lease agreement between the Plaintiff and the Defendants leaves no doubt about their intentions at the time of making the lease in regard to the resolution of any disputes arising between them. I would say as Lord Hoffman said in the case of *Nafta products Ltd & others –vs- Fili Shipping Company Ltd & Others* [2007] UK HL 40, that,

“In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.”

24. In the case of the *County Government of Kirinyaga –vs- African Banking Corporation Ltd* [2019] EKLK, the court while interpreting an arbitration clause held that,

“the clear intention of parties was that if any dispute arises, they oust the jurisdiction of the court and have preference to have the dispute settled through arbitration.”

25. To that extent I agree with the submissions by the Defendants that this court already pronounced itself and referred the matter to arbitration. The Plaintiff's application though framed as an application for review does not seek that the court reviews its earlier ruling. The application is indeed an invitation to the court to sit on appeal against its own ruling.

26. The principle of *functus officio* as explained by the Supreme Court of Kenya in the case of *Raila Odinga –vs- IEBC & 3 Others, KESC & (KLR) (CIV) (24th October 2013) (Ruling)*,

“... is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision – making powers may as a general rule, exercise those powers only once in relation to the same matter...”



The principle is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) be final and conclusive. Such a decision cannot be revoked or varied by the decision maker.”

27. On that basis alone, I would disallow the Plaintiff’s application. I will however proceed to determine the other issues identified, as good practice demands.

28. Mativo J, (as he then was) in the case of Technoservice Ltd –vs- Nokia Corporation & 3 Others [2021] EKLK, rightly observed that under our law, court’s intervention in arbitration proceedings is limited only to the circumstances expressly permitted by the Arbitration Act. He held that;

“In this regard, section 10 of the Act provides that except as provided in the Act, no court shall intervene in matters governed by the Act. In absolute terms, the section limits the jurisdiction of the court to only such matters as provided for by the Act. The section typifies the recognition of the policy of party’s autonomy which underlie the arbitration generally and in particular the Act.”

29. The Supreme Court of Kenya in the case of Nyutu Agrovet Ltd –vs- Airtel Networks Ltd [2015] eKLR, affirmed the rights of parties to refer their disputes to arbitration. It stated that;

“Sections 10 and 35 of the arbitration Act had to be interpreted within the context of the concept of finality as internationally recognized in arbitral proceedings conducted under the UNICTRAL model. They were not unconstitutional at all. Arbitration as a dispute resolution mechanism was not imposed on parties, they choose it freely when they incorporate the arbitration agreement into their contract, and at times even include finality clause as was the instant case. When they do so, they send the message that they do not wish to be subjected the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entailed. That was what party autonomy, a concept the courts treated with deference was all about.

When parties expressly exclude court intervention in their arbitration agreement, then they should honour it and embrace the consequences. They could not turn around and claim the very law they had freely chosen to govern their business was unconstitutional. That is what the Respondent was trying to do.”

30. Now, I did state earlier that the Plaintiff’s argument is that the alleged unlawful takeover of the suit premises by the Defendants renders the arbitration agreement between them inoperative. Kaplan J, in the case of Lucky-Goldstar International (HK) Ltd –vs- NG Moo Kee Engineering Ltd as cited by Mativo J in the case of Techno service Ltd –vs- Nokia Corporation and 3 Others (supra), noted that the term, ‘inoperative or incapable of being performed’, had been taken from the New York convention of 1958. The judge held that;

“The word ‘inoperative’ can be deemed to cover those cases where the arbitration agreement has ceased to have effect. The ceasing of effect to the arbitration agreement may occur for a variety of reasons. One reason may be that the parties have implicitly or explicitly revoked the agreement to arbitrate. Another may be that the same dispute between same parties has already been decided in arbitration or court proceedings (principles of res judicata...)

.... [A]s for instance where the award has been set aside or there is a stalemate in the voting of the arbitrators or the award has not been rendered within the prescribed time limit. Further he suggests that a settlement reached before the commencement of arbitration may have the



effect of rendering the arbitration agreement inoperative although he notes an American decision which left the issue to arbitrators.”

31. Having carefully considered the Plaintiff’s application, I find nothing in it to demonstrate that the arbitration clause in their lease agreement has been rendered inoperative. All that one Plaintiff has done is, through the art & craft of drafting pleadings, interchanged the phrase ‘unlawful eviction’ with the phrase, ‘unlawful termination of the lease agreement’ to try and fit the dispute in this matter under part XI of the *Land Act*. The truth of the matter however is that this dispute is simply about termination of a lease agreement. The removal/eviction of the Plaintiff from the suit premises was incidental to the termination of the lease. It will be upon the arbitral tribunal then to determine if the termination was lawful or not. The arbitral tribunal has the jurisdiction to determine the issue. Under the doctrine of Kompetenz/Kompetenz a tribunal can rule on both the validity of the arbitral clause and the underlying contract.
 32. The issue whether the Defendants actions were lawful or not is to be decided on the basis of the provisions of the lease agreement which is the premise of the relationship between the Plaintiff and the Defendants.
 33. The Kenya *Arbitration Act* as has been variously noted, is modelled on the UNCITRAL Model Law. It encompasses the UNICITRAL Model Law’s principles including finality of arbitral awards, limited court intervention, non-interference and the principles of severability and Kompetenz/Kompetenz.
 34. Section 17 of the *Arbitration Act* gives the Arbitral Tribunal the jurisdiction to rule on its own jurisdiction and also on any objections with respect to the existence or validity of the arbitration agreement. The Plaintiff must therefore raise the issues at that appropriate forum.
 35. Accordingly, and having considered the Plaintiff’s application, I see no basis whatsoever; legal or factual, for lifting and or discharging the orders of 13th December 2024. The Plaintiff’s application lacks merit. It is hereby dismissed with costs to the Defendants and the 2nd interested party.
 36. Since this court has nothing more to do with this file, it will be marked as closed.
- It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF MAY, 2024.

M.D. MWANGI

JUDGE.

In the virtual presence of:

Mr. Mutunga for the Plaintiff/Applicant

Mr. Gisemba for the Defendants/Respondents

Mr. Miano for the 2nd Interested Party

Yvette: Court Assistant.

M.D. MWANGI

JUDGE.

