



**Registered Trustees of the Agricultural Society of Kenya v County Government of Kisumu
(Environment & Land Case E003 of 2025) [2025] KEELC 769 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 769 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E003 OF 2025**

E ASATI, J

FEBRUARY 21, 2025

BETWEEN

**THE REGISTERED TRUSTEES OF THE AGRICULTURAL SOCIETY OF
KENYA PLAINTIFF**

AND

COUNTY GOVERNMENT OF KISUMU DEFENDANT

RULING

1. The application before court for determination is the Notice of Motion dated 31st January, 2025 brought by the Defendant pursuant to the provisions of Section 6 of the *Arbitration Act*, Order 51 Rule 1 Civil Procedure Rules, 2010 and sections 1A, 1B and 3A of the *Civil Procedure Act*.
2. The application seeks for an order that proceedings in this suit be stayed and the matter referred to Arbitration in terms of the parties' Memorandum of Understanding dated 16th day of September, 2020. The Applicant's case is that the parties to the suit entered into a Memorandum of Understanding (also referred to herein as MOU) dated 16th September, 2020 which is still active. That the suit revolves around the Memorandum of Understanding. That the Memorandum of Understanding has both termination clause and dispute resolution clause. That the Memorandum of Understanding is categorical on how disputes are to be resolved; first by use of best efforts using consultation and negotiation with each other in good faith to reach a just and equitable solution and secondly, if not settled as contemplated within 30 days, the dispute be referred to a single arbitrator.
3. That the land in dispute is public land held in trust for the people of Kenya.
4. That the parties should be allowed to exhaust their out of court settlement agreement and remedies as to dispute resolution as agreed before the same is brought to court. The application was supported by the averments in the Supporting Affidavit of Abala M. Wanga sworn on 31st January, 2024.



5. The application was opposed vide the grounds of opposition contained in the Replying Affidavit of Thadeus Fita sworn on 5th February, 2025. It was the Respondent's case that the Plaintiff/ Respondent is the registered owner of all that portion of land known as L.R. NO.18042 measuring approximately 34.95Ha within Kisumu Municipality (Mamboleo Showground). That parties entered into a Memorandum of Understanding dated 16th September, 2020 for the purpose of collaborating in the development and implementation of various projects for their mutual benefit without attracting any liability to either party.
6. That the substratum of the suit revolves around property rights and the violation of the same by trespass thus is outside the scope of the Memorandum of Understanding. That the dispute herein does not fall within the scope contemplated under the arbitration clause.
7. That the Memorandum of Understanding has a termination clause which was properly activated by the Respondent by giving a 3 months' notice of termination in writing to the Applicant in accordance to the provisions of article 11(iii) of the Memorandum of Understanding hence it stood terminated on 28th November, 2024. That the termination has never been challenged.
8. That the present application is made in bad faith in a bid to circumvent the law and defeat the course of justice.
9. The application was canvassed by way of oral submissions made on 6th February, 2025. It was submitted on behalf of the Applicant that the Memorandum of Understanding is to expire on 16th September, 2025. That the facilities in dispute were built by both the national and county governments. That grounds of termination of the Memorandum of Understanding were provided for.
10. That in article 10, the Memorandum of Understanding provided for a Dispute Resolution Mechanism. That if the Memorandum of Understanding is still subsisting, the issue of trespass does not arise.
11. It was submitted on behalf of the Plaintiff/Respondent that the subject of the dispute does not come under the scope of the Arbitration clause.
12. That under paragraph 15 of the Complaint, it is clear that the cause of action is trespass, whose particulars are itemized as (a) to (i) thereunder. That the particulars of trespass do not relate to the collaborative efforts between the parties herein. That the suit property is not public land but that property held by the A.S.K. Society is vested in the Trustees of the Society as shown by the title deed annexed to the Replying Affidavit.
13. Counsel relied on the case of *UAP Provincial Insurance Co. Ltd. -vs- Michael John Beckett* and submitted that if the dispute is not within the scope of the Memorandum of Understanding, then the appropriate forum is the court.
14. Counsel also relied on the case of *National Bank of Kenya Limited -vs- Pipeplastic (K) Ltd & Another* where it was held that a court should not rewrite agreement to give a different meaning than the one intended by the parties.
16. That the County Government has not challenged the notice of termination of the Memorandum of Understanding which was delivered to the County government in August, 2024 and took effect on 27th November, 2024.
17. That article 11(iii) of the Memorandum of Understanding required that any party wishing to terminate the Memorandum of Understanding shall give the other party at least 3 months' notice.



18. That article 11(iii) is a standalone provision on the mode of termination of the Memorandum of Understanding which allows either party to unilaterally terminate the Memorandum of Understanding by giving notice. That there would be no need to give notice under article 11(ii) of the Memorandum of Understanding.
19. I have considered the application, the Replying Affidavit and the submissions made.
20. It is not denied that the parties herein entered into a Memorandum of Understanding dated 16th September, 2020 to remain in force for a term of five (5) years with the option to renew.
21. It is also not in dispute that the Memorandum of Understanding provides inter alia for termination thereof and Dispute Resolution Mechanism for disputes, questions and disagreements arising between the parties.
22. It is clear that there is a dispute or difference between the parties and that is why this suit is in court.
23. Currently, the suit is pending compliance of directions given by the court on disposal of an application by the plaintiff for an order of temporary injunction. The Defendant in the pendency of the said application brought the present application seeking to stay the proceedings pending compliance with the terms of the Memorandum of Understanding on dispute resolution.
24. The issues that arise for determination in the application are;
 - a. whether or not the Memorandum of Understanding had been terminated as at the time of filing this suit.
 - b. whether the dispute between the parties is within the scope of the Memorandum of Understanding and therefore subject to the dispute resolution mechanism provided for in the MOU.
 - c. whether the proceedings in the suit herein should be stayed pending reference of the dispute to arbitration.
26. On whether the Memorandum of Understanding had been terminated as at the time of filing suit, the Plaintiff's case was that it served the Defendant with notice of termination of Memorandum of Understanding in accordance with article 11(iii) of the Memorandum of Understanding and that the same took effect on 27th November, 2024 hence by the time of filing suit, the Memorandum of Understanding was not active.
27. The Plaintiff referred the court to annexure GO3 annexed to the Replying Affidavit of Thadeus Fita. Annexure GO3 was a letter on the Plaintiff's letterhead dated 28th August, 2024 addressed to the County Secretary, Kisumu County Government, signed by one Batram Muthoka, EBS. Its stated in part that;
28. As part of the restructuring process, the society is constrained to terminate the Memorandum of Understanding dated 16th September, 2020 between A.S. K and Kisumu County Government. This letter therefore serves as a three months' notice of termination pursuant to Article 11(iii) of the Memorandum of Understanding which notice shall lapse on 28th November, 2024."



29. The Defendant denied receipt of the letter. The mode of delivery of the letter to the Defendant was not disclosed. In the Memorandum of Understanding the address of service for the County Government had been given as;

His Excellency the Governor of P.O. Box 2783 – 40100 County Government of Kisumu
Website: www.kisumu.go.ke ”

30. There was no reason given why the letter was not sent to the address given in the Memorandum of Understanding. No evidence was exhibited that the letter was delivered to or reached the Defendant.

31. I find that in the absence of such evidence, it cannot be deduced that the Defendant was served with Notice of termination of the Memorandum of Understanding or that the Memorandum of Understanding had been terminated as at the time of filing suit or at all. It follows therefore that as at the time of filing suit, the Memorandum of Understanding was still active.

32. On whether the dispute between the parties is within the scope of the Memorandum of Understanding and therefore subject to the dispute resolution mechanism provided for in the MOU.

33. The Memorandum of Understanding provided for a mode of resolution of disputes between the parties.

34. Article 10 of the Memorandum of Understanding provided that;

(i) In the event of any dispute, questions or disagreement arising from or relating to the Memorandum of Understanding, the parties hereto shall use their best efforts to settle the dispute, question or disagreement. To this end, they shall consult and negotiate with each other in good faith and recognizing their mutual interests, attempt to reach a just and equitable solution, satisfactory to both parties.”

36. The rest of the article provide for the manner of handling disputes that are not settled amicably.

37. From this article, it is clear that the dispute, question or disagreement must be one arising from or related to or within the scope of the Memorandum of Understanding.

38. Article 12 of the Memorandum of Understanding provided for the scope of the Memorandum of Understanding as follows;

(i) the Memorandum of Understanding governs the broad objectives and conditions of the collaboration.

(ii) detailed specific agreement of each collaborative activity between the parties shall be developed within the provisions of the Memorandum of Understanding and after execution by both parties, shall become annexes to the Memorandum of Understanding.

(iii) such specific documents may include: an agreement that defines in details the specific project being undertaken and a Financial Memorandum (FM) that defines in details all the financial matter/undertakings/involvement, liabilities and rights of the collaborating parties and/or partner(s), third parties prior to, during and after particular project shall be expressly stated in the particular project agreement which agreement terms shall in the event of any inconsistency take precedence over the provisions of the Memorandum of Understanding”

39. The Plaintiff's claim as contained in the plaint is based on the tort of trespass. The particulars of trespass as itemized under paragraph 15 of the plaint are: -destruction and vandalization of the Plaintiff's property.demolition of partition walls, removing doors and causing significant damage rendering the



offices unusable, defacing and removing the Plaintiff's logos and trade marks from the main entrance of the Mamboleo Showground, welding or causing to be welded the gates to the Plaintiff's premises, shut, effectively preventing the Plaintiff, its employees and agents from accessing the property, maintaining unlawful control over the property.

40. The matters placed before this court as contained in the plaint are acts of trespass unrelated to the scope of the Memorandum of Understanding. It was submitted on behalf of the applicant that if the MOU has not been terminated, then the issue of trespass does not arise. It is however clear that the plaintiff's complaint relates to activities by the applicant which according to the plaintiff are outside the scope of the MOU and which are injurious to its property rights. Existence of Memorandum of Understanding is not a licence or a cover for a party thereto to engage in unlawful acts which violate the rights of the other party.
41. In *UAP Provincial Insurance Company Ltd versus Michael John Beckett CA No. 26 of 2007* relied upon by the Respondent, the court held as follows:
16. In our view, the issue with which Mutungi, J was concerned when dealing with the application under section 6 of the *Arbitration Act* was whether or not the arbitration clause would be enforced and whether the matter was one for reference to arbitration. Section 6 of the Arbitration provides an enforcement mechanism to a party who wishes to compel an initiator of legal proceedings with respect to a matter that is the subject of an arbitration agreement to refer the dispute to arbitration. Section 6 of the *Arbitration Act* under which UAP's application for stay of proceedings was presented provides in the relevant part:
17. It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6(1)(b) of the *Arbitration Act* is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry, the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, and then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.
42. In the present suit as already indicated there is a dispute between the parties but the same is not within the scope of the Memorandum of Understanding. The appropriate forum for resolution is the court.
43. I find that the application lacks merit. The same is hereby dismissed. Costs to abide the main suit.
- Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 21ST FEBRUARY, 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Ligami for the Plaintiff/Respondent

Qeu for the Defendant/Applicant.

