



REPUBLIC OF KENYA



**Maina v Maina & another (Environment & Land Case
10 of 2022) [2024] KEELC 6691 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 6691 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 10 OF 2022**

MD MWANGI, J

JULY 23, 2024

BETWEEN

JOHN MUKUHA MAINA PLAINTIFF

AND

PENINAH NYAMBURA MAINA 1ST DEFENDANT

PETSUN LIMITED 2ND DEFENDANT

RULING

1. This ruling is in respect of the 1st Defendant's application dated 27th March, 2024 expressed to be brought under Sections 1A, 1B, 3, 3A, 16 and 59 of the [Civil Procedure Act](#), Cap. 21 Laws of Kenya. The applicant seeks for orders;
 - a. That this Honourable Court be pleased to strike-out the instant suit for want of jurisdiction.
 - b. That in the alternative, this Honourable Court be pleased to refer the instant suit for arbitration and/or mediation.
 - c. That costs of this application be borne by the Plaintiff/Respondent.
2. The application is premised on the grounds that the Honourable Court lacks the jurisdiction to try the instant suit. The suit is therefore frivolous and an abuse of the court process.
3. The application is further supported by the Affidavit of Peninah Nyambura Maina, the Applicant, deponed on the 27th March, 2024. The Applicant avers that the suit property, L.R No. 209/9738 constitutes part of the Estate of their deceased father, the late Evans Maina Mwangi. As such, the matter should be determined in the Succession Cause No. 778/1990. She avers that the Plaintiff accuses her of the suit property through the family owned company, Vumira Enterprises Limited, which was one the beneficiaries.



4. She further argues that the Sale Agreement listed in the Plaintiff's List of Documents clearly indicates that any dispute in the sale ought to be referred to arbitration. Therefore, owing to the twin issues raised herein, this court lacks the jurisdiction as a court of 1st instance.

Grounds of opposition by the 2nd Defendant

5. In response to the application, the 2nd Defendant filed Grounds of Opposition dated 29th April, 2024 arguing that the question of jurisdiction of the Court was already determined by Majanja J who transferred the file to this Court.
6. The 2nd Defendant avers that there is no issue of succession between the parties in the matter and the suit by the Plaintiff is a claim on ownership and use of the land in accordance with Article 162 (2) (b) of *the Constitution*.
7. Further, that the parties having filed pleadings in this suit including a Defense and a Counter-claim, this matter cannot be referred to Arbitration as sought by the 1st Defendant. The Arbitration is not a remedy available to the parties and the Application is only bent on causing unreasonable delay in the determination and conclusion of this suit contrary to the overriding objective.
8. The Application is unmerited, misconceived, misplaced, scandalous, vexatious and therefore an abuse of the Court process. It should therefore be dismissed with costs accordingly.

Court's directions

9. The court directed parties to file their respective submissions which they did. The 1st Defendant/Applicant's submissions are dated 3rd May, 2024. The 2nd Defendant's submissions are dated 31st May, 2024. The court has had occasion to read the submissions which now form part of its record.

Issues for Determination

10. Having considered the application and the affidavit in support, the grounds of opposition filed in response thereto as well as the rival submissions, the issues for determination in my view are;
 - A. Whether this Court has jurisdiction hear and determine the dispute herein
 - B. Whether the Court should refer this matter to arbitration.

Analysis and Determination

A. Whether this Court has jurisdiction hear and determine the dispute herein

11. In determining this issue, the court has to consider the interplay between the jurisdiction of the Environment and Land Court and that of the High Court under the *Law of Succession Act* (Cap. 160). The Court of Appeal while dealing with a similar issue in the case of *Diasproperty Limited & 5 others - vs- Githae & 10 others (Civil Appeal E155 & E157 of 2023* (Consolidated)) [2024] KECA 318 (KLR), stated at Paragraph 36 and 37 that;

“Under Article 165(5)(b) of *the Constitution*, the High Court shall not have any jurisdiction in respect of matters within the jurisdiction of the Environment and Land Court. Under Article 162(2) of *the Constitution* and section 13 of the *Environment and Land Court Act*, 2012, all matters relating to land, its ownership, use, tenure, boundaries, and so on, are reserved for the Environment and Land Court.



It is notable that under Rule 43(1) of the Probate and Administration Rules, made under the *Law of Succession Act*, where, in succession proceedings, a party claiming that he was beneficially entitled to a parcel of land that the deceased left in his name, or there is a general dispute relating to the ownership of a parcel of land registered in the name of the deceased, such dispute has to be adjourned and be determined in originating summons in a separate court. It is when such a determination is made that the succession court can confirm the grant, bearing in mind the determination. Of course, with *the Constitution* and the *Environment and Land Court Act*, such a dispute has to be referred to the Environment and Land Court for resolution.”

12. The 2nd Defendant submits that the Plaintiff’s contention with the Defendants does not involve the distribution of the Estate of Evans Maina Mwangi but a purported fraudulent sale and transfer of the suit property to the 2nd Defendant.
13. I agree with the 2nd Defendant’s submissions. The Plaintiff’s suit is on the alleged fraudulent sale of Vumira House. It is not on the distribution of the estate of the deceased Evans Maina Mwangi.
14. Guided by the provisions of law, the cited authorities as well as the earlier Ruling by the Learned Judge David Majanja (as he then was), I am convinced that this court has the requisite jurisdiction to entertain this matter.

B. Whether the Court should refer this matter to arbitration

18. Section 6 of *Arbitration Act* states as follows:
 6. (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 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.
 - (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
 - (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.
15. The 1st Defendant/Applicant argues that the Sale Agreement listed in the Plaintiff’s List of Documents clearly indicate that any dispute in the sale ought to be referred to arbitration. The 2nd Defendant of the other hand contends that the application has been brought too late in the day as the 1st Defendant has actively participated in the proceedings herein. The law requires that no other steps be taken by an applicant other than entry of appearance and filing of the application for stay of proceedings and to refer the matter to arbitration.
16. In the case of Adrec Ltd –vs- Nation Media Group Ltd (2017) eKLR, the Court of Appeal restated and re-affirmed the position that in a suit founded on a contract containing an arbitration clause,



a defendant ought to contemporaneously with his notice of appointment or appearance file an application for stay of proceedings and to refer the matter to arbitration.

17. From the record, it is evident that the 1st Defendant filed its statement of Defence way back on 28th October, 2010 alongside its Memorandum of Appearance.

18. In the case of Diocese of Marsabit registered Trustees Vs Techno Trade Pavilion Ltd (2014) eKLR where the court unequivocally expressed itself in the following words;

“I should add that the requirement in section 6(1) of the *Arbitration Act* is not a mere technicality which can be diminished by Article 159)2) (d) of *the Constitution* as claimed by the Applicant. It is a substantial legal matter that aims at promoting and attaining efficacious resolution of disputes through arbitration by providing for stay of proceedings but only where a party desirous of taking advantage of an arbitration clause in a contract has applied promptly for stay of proceedings and made a request to have the matter referred to arbitration.”

19. In the case of Mt Kenya University -vs- Step Up Holding (K) Limited [2010] eKLR the Court of Appeal considered Section 6(1) of the *Arbitration Act* and held that even if the conditions set out in paragraphs (a) and (b) are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application is not made prior to or at the time of entering appearance or if the application is made after filing of the defence.

20. The 1st Defendant/Applicant’s application is too little too late. Having filed its statement of Defence, the 1st Defendant subjected itself to the jurisdiction of this court and wasted the opportunity to have this matter referred to arbitration. She ought to have made the application, not later than the time when she entered appearance or otherwise acknowledged the claim by the Plaintiff which the stay of proceedings is sought.

21. In conclusion therefore, I find that the 1st Defendant’s application dated 27th March, 2024 has no merit and it is hereby dismissed with costs to the 2nd Defendant.

It is so ordered.

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

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Gitonga for the 2nd Defendant/Respondent

N/A for the 1st Defendant/Applicant & the Plaintiff

Court Assistant: Yvette

M.D. MWANGI

JUDGE

