



**Kamau v Joyrom Heights Limited & 2 others (Environment & Land Case E245 of 2023) [2024] KEELC 7184 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7184 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E245 OF 2023  
JA MOGENI, J  
OCTOBER 30, 2024**

**BETWEEN**

**NJERI LAUREEN VIRGINIA KAMAU ..... PLAINTIFF**

**AND**

**JOYROM HEIGHTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**TEVODY HEIGHTS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**LUCY RINGERA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application before court is the notice of motion dated 4/03/2024 brought by the plaintiff/applicant under Sections 1A, 1B, 3A and Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 and Order 51 Rule 1, and other enabling provisions of the law. The applicant is asking the court for the following orders:
  1. Spent
  2. That the Honourable court be pleased to review the ruling of the court delivered on 31<sup>st</sup> January 2024 and to review and or vacate the orders made pursuant thereto and dismiss the 2<sup>nd</sup>/3<sup>rd</sup> defendant's preliminary objection dated 15<sup>th</sup> August 2023.
  3. That in the alternative the court do set aside its orders striking out the suit and instead order the suit be stayed pending arbitration.
    1. That the cost of the application be provided for.
2. The application is based on the grounds on the face of it and on the supporting affidavit of Njeri Lauren Virginia Kamau the plaintiff herein sworn on 4/04/2024. The applicant contend the court made an error apparent on the face of the record pursuant to it's ruling delivered on 31/01/2024 which



- upheld the preliminary objection dated 15/08/2023 by the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants. That the court failed to recognize that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are not parties to the arbitration agreement which is provided for in the Project Development Agreement (herein agreement) and a copy was annexed as NK2.
3. That therefore the 2<sup>nd</sup> and 3<sup>rd</sup> defendants cannot be compelled into arbitration. Further that the court failed to recognize that the plaintiff and the 1<sup>st</sup> defendant opposed the referral to arbitration due to the presence of non-parties who are therefore not bound by the arbitration agreement. That despite the 3<sup>rd</sup> defendant executing the Agreement she had no authority as was stated in the defence.
  4. The applicant contends that Section 6 (1) of the Arbitration provides for staying of disputes pending arbitration yet according to the applicant, the fact that the court failed to recognize that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are not parties to the arbitration will deny the parties from seeking any remedies against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are non-parties in the Project Development Agreement.
  5. The applicant avers that the consequence of striking out the suit instead of staying it is that the parties will be stopped from seeking redress from the court. That if the court was aware of these apparent errors it would have disallowed the preliminary objection.
  6. The 1<sup>st</sup> defendant filed a replying affidavit sworn on 22/04/2024 supporting the application of the plaintiff/applicant and averred that the 1<sup>st</sup> defendant has no recourse against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants since they are not parties to the Project Development Agreement. That the court needed to have considered the submissions of the 1<sup>st</sup> defendant averring that section 6(1) of the Arbitration Act allowed the court not to refer the matter to arbitration,
  7. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not file any response to the Notice of Motion and therefore it means that the application is unopposed since it was supported by the 1<sup>st</sup> defendant.
  8. On 19/06/2024, directions were taken to canvass the application by way of written submissions. The Applicant filed hers dated 23/07/2024 whereas the 1<sup>st</sup> respondent filed theirs dated 6/08/2024 and 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not file any.
  9. Briefly, the Preliminary Objection that the plaintiff seeks to have set aside was filed by the firm of Were & Oonge Advocates on behalf of all the defendants seeking referral of the dispute to arbitration. Later on 13/09/2023 the firm of Musyoka Murambi & Associates filed a separate memorandum of appearance on behalf of the 1<sup>st</sup> defendant.
  10. On her part, the applicant submitted that the right to review is well anchored in Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. That the court made a mistake by referring the suit for arbitration yet the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who filed the preliminary objection were not parties to the Project Development Agreement. Thus this is an error apparent and a mistake.
  11. The plaintiff has also argued that despite lodging a notice of appeal they can still seek review since the notice of appeal is not an appeal and she has relied on the Court of Appeal case of Multichoice (Kenya) Ltd vs Wananchi Group (Kenya) Ltd & 2 Others [2020]eKLR. On the issue of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants being non-parties to the agreement the plaintiff has placed reliance on Martin Njuguna Ngugi v Ahmed Noor Sheikh and Another [2018] eKLR and the case of Damaris Wanjiru Nganga v Loise Naisaie Leiyen and Another [2015] eKLR, where the court declined to refer the matter to arbitration because the performance of the agreement between the parties was tied to the third party.
  12. The plaintiff reiterates her position that the court should review its decision for the sufficient reason that the signatories to the Project Development Agreement, the Plaintiff, and the 1<sup>st</sup> Defendant



opposed the application for referral of the dispute to arbitration. Which is the basis for the preliminary objection and which indeed the court considered in delivering its ruling on 31/01/2024. The court considered the Plaintiff's Grounds of Opposition dated 22/9/2023 and its submission dated 25/10/2023 where the plaintiff opposed referral of the dispute to arbitration. Similarly, the court also considered in its ruling the submissions of the 1<sup>st</sup> defendant dated 19/10/2023.

### **Analysis and Determination**

13. Having read and considered the application, the grounds upon which it was anchored, the rival affidavits, the written submissions and the totality of the record, the key issue for determination is whether a review and or setting aside of the ruling dated 31/01/2024 can be granted?
14. The rules for review are clear. Section 80 of the *Civil Procedure Act* give power of review while Order 45 sets out the rules. The rules restrict the grounds for review and lays down the jurisdiction and scope of review limiting it to the following grounds:
  - a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made; or,
  - b. On account of some mistake or error apparent on the face of the record; or
  - c. For any other sufficient reason and whatever the ground, there is a requirement that the application has to be made without unreasonable delay.
15. In the case of *National Bank of Kenya Ltd-v- Ndungu Njau (1997) eKLR*, the Court of Appeal held that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of law cannot be a ground for review.”
16. In the instant case, the applicant alleges that there is an error apparent on the face of the record that the court made a mistake. Now I have looked at the documents filed including the two agreements. The first sale agreement dated 07/08/2015 is signed between the 2<sup>nd</sup> defendant and the applicant herein for sale of an apartment situated on Hatheru Road known as Tevody Heights Limited. The Agreement at Clause 7 provides as follows:

“7. That if there be any difference or dispute between the parties on any matter arising hereunder or claimed so to rise, the same shall be referred to the Court of Arbitration in Kenya whose award thereon shall be final and binding on the parties.” [Emphasis added]
17. Vide a letter dated 31/01/2017 the plaintiff/applicant requested Tofina Rom Builders Ltd who are not parties to this suit to transfer the signed agreement to the Makueni Road project. Subsequently the applicant signed a Project Development Agreement between the 1<sup>st</sup> defendant and herself and executed the Agreement in the presence of Advocate Apedu Edward. The agreement was drawn by Were Oonge the counsel for all the defendants. Clause 9 of the said agreement prefers that, for dispute resolution



- that the parties go for arbitration. That an affected party is directed to give written notice of no less than twenty one (21) days to the other party indicating the intention to refer the matter to arbitration.
18. Both of these documents were reviewed by the court before making its decision on 31/01/2024. I am not persuaded that there is any mistake made by this honorable court in referring the dispute to arbitration. The 2<sup>nd</sup> defendant is a party to the 1<sup>st</sup> agreement which was transferred to the 2<sup>nd</sup> Project Development Agreement. The 3<sup>rd</sup> defendant is a director of the 2<sup>nd</sup> defendant Tevody Heights which initially initiated the contract that was subsequently transferred to the 1<sup>st</sup> defendant. It therefore beats logic for the plaintiff to claim that the two are not parties to the arbitration yet both agreements refer to the arbitration as the first intervention of resolving any arising dispute. The plaintiff wrote a letter to Tofina Rom Builders Limited who are not parties to this suit was a letter to the 3<sup>rd</sup> defendant who is a director of Tofina Rom Builders Limited.
19. In the *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR the court had held that;
- Order 45 rule 1(a) and (b) in addition to setting out the conditions that an Applicant in an application for review must satisfy in order to get the application granted, reiterates the proviso of Section 80(a) and (b) which in my view makes it plainly clear that the options of a review and an appeal are not simultaneously available to an aggrieved party. Once a party has opted for a review the option of an appeal cannot at the same time be available to the party....
- In my view a proper reading of Section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order.
20. At the same time, I note that the applicant also lodged a Notice of Appeal. Now incase the applicant wanted to lodge a review then they should have withdrawn the Notice of Appeal altogether or forfeited her right to seek for review. She cannot have both processes going on simultaneously. In my opinion this is tantamount to an abuse of the process of the court and the same must surely fail.
21. Litigation somehow must come to an end and for the Applicant, the end came when she filed her Notice of Appeal and somewhere along the line she either abandoned the Appeal and thereafter resurfaced with the present Application seeking to review the order of 31/01/2024. Litigation cannot be conducted on the basis of trial and error and that is why there are provisions of the law and the procedure to be adhered to.
22. It is my opinion that the Applicant's averment and submissions on the error apparent on the face of the record that the Court made a mistake on referring this matter to arbitration yet the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were not party to the Project Development Agreement is not correct since the documents presented show that the defendants are parties to the agreement by virtue of their legal identity and by the position of the 3<sup>rd</sup> defendant being a director of the 2<sup>nd</sup> defendant and having executed the Agreement of the 1<sup>st</sup> defendant. The decision of the court had to uphold the arbitration clause in the Agreement.
23. By the said arbitration clauses provided in both the agreement of 07/08/2015 and that of 15/08/2018 I find that there was no error in the court referring the parties to arbitration because it is the parties who contracted to do so in the event of a dispute and therefore I cannot rewrite the contract for the parties they are bound by what they signed.



24. In the decided case of Ajit Kumar Rath -vs- The State of Orisa & Others, 9 Supreme Court Case 596: the Supreme Court of India had this to say:-

‘the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule”

25. In conclusion, I find that this Application did not meet the threshold set out under Order 45 Rule 1 of the Civil Procedure Rules and thus this is not a proper case for the court to exercise its discretion in favour of the Applicant. Accordingly, I proceed to dismiss the application dated 4/03/2024 in its entirety with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF OCTOBER 2024**

.....

**MOGENI J  
JUDGE**

- In the Virtual presence of:
- Mr. Githiri holding brief for Mr. Kinoti for Plaintiff/Applicant
- Ms. Omuya for 1<sup>st</sup> Defendant
- Ms. Kache holding brief for Mr. Oonge for 3<sup>rd</sup> Defendant
- No appearance for 2<sup>nd</sup> defendant
- Caroline Sagina - Court Assistant

.....

**MOGENI J  
JUDGE**

