Lilande v Heri Development Limited & 2 others (Land Case E147 of 2024) [2024] KEELC 13261 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13261 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

LAND CASE E147 OF 2024

MD MWANGI, J

NOVEMBER 14, 2024

BETWEEN

ANNE LILANDE ..... PLAINTIFF

AND

HERI DEVELOPMENT LIMITED ..... 1ST DEFENDANT

HERI PARADISE MANAGEMENT LIMITED ..... 2ND DEFENDANT

CHURCH OF GOD ESAT AFRICA (K) REGISTERED TRUSTEES ..... 3RD DEFENDANT

(In respect of the Defendant's Preliminary Objection dated 7th June, 2024 challenging the jurisdiction of the court to hear and determine this suit for the reason that the entire suit offends the doctrine of exhaustion as the agreement between the parties contains an arbitration clause)

RULING

Background

1. This ruling is in respect of the Defendants' Preliminary Objection dated 7th June, 2024. The Defendants object to the Plaintiff's suit on the grounds that;

    a. This Honourable Court lacks jurisdiction to hear and determine this suit for the reason that the entire suit offends the doctrine of exhaustion as the agreement between parties contains an arbitration clause and which offence deprives the Court of the necessary Jurisdiction to entertain the suit.

    b. It is therefore just expedient and in the interest of justice that the suit be struckout forthwith with Costs to the Defendants.

2. The Court directed that the preliminary objection be canvassed by way of written submissions. Both sides have complied and the court has had occasion to peruse the submissions and the precedents relied on in support of the submissions which now form a part of the record of this court.

Defendants' submissions

3. The Defendants' submissions are dated 13th August, 2024. The Defendants submit that the Plaintiff's suit offends the Doctrine of exhaustion. They assert that the Plaintiff has not exhausted the agreed dispute resolution mechanism before approaching this Court. They further submit that this is a pure point of law which they are pleading. They contend that the issue of jurisdiction being central in judicial proceedings is a well settled principle in law. That a Court acting without jurisdiction is acting in vain.

4. They refer to Clause L of the Agreement for Sale of the three bed-roomed apartment number A10 on L.R No. 1/38, the subject matter of this suit which states that:

> "All claims and disputes whatsoever arising under this Agreement shall be referred to Arbitration in accordance with the *Arbitration Act* of Kenya...."

5. The Defendants further submit that time and again it has been stated that where there exists other sufficient and adequate avenues or fora to resolve a dispute, a party ought to first pursue that avenue or forum before resorting to the court process. They cite the Court of Appeal decision in Speaker of the National Assembly –vs- James Njenga Karume (1992] eKLR, where the Court of Appeal held that:-

> "... In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."

6. The Defendants also cite the case of Dickson Mukwe Lukeine v Attorney General & 4 Others [2012] eKLR, where Justice Majanja held that parties should use the applicable procedures to resolve disputes as provided by the statute before going to court.

7. Further the Defendants argue that parties having voluntarily chosen to be subjected to Arbitration, they are bound by it. They rely on the Court of Appeal decision in the case of Nyutu Agrovet Limited –vs- Airtel Networks Limited [2015] eKLR, to drive the point home.

8. Consequently, the Defendants pray that the Preliminary Objection be upheld and the Plaintiff's suit be dismissed with costs.

Respondent's Submissions

9. In her submissions dated 22nd August, 2024, the Plaintiff argues that the instant Preliminary objection does not qualify to be determined as a Preliminary Objection since it raises matters that requires ascertaining of facts and probing of evidence. The Plaintiff submits that the basis of the preliminary objection is the lack of an Arbitration Clause which would require minute interrogation of the Parties' prior engagement with respect to the issues raised and whether such engagement yielded results to justify reference to an Arbitration forum. The Plaintiff faults the Defendants for failing to resolve the matter amicably over the years.

10. The Plaintiff submits that the mere existence of an Arbitration Clause does not automatically oust the jurisdiction of this Court. She asserts that a Party who wishes to refer a matter filed in Court to Arbitration must first comply with the conditions set out under Section 6 of the *Arbitration Act*. The

Plaintiff submits that a Party who objects to jurisdiction on account of an Arbitration Clause has to file an application for stay of proceedings pending reference to Arbitration. A Preliminary Objection is neither the legal procedure of seeking stay nor the means to contest jurisdiction under the *Arbitration Act*.

11. The Plaintiff further submits that the orders sought in the Plaint are outside the scope of Arbitration. An arbitrator would not have the powers to determine such issues. The Plaintiff submits that the Preliminary Objection as it stands lacks merit.

12. On whether the Court lacks jurisdiction and/or barred by the doctrine of exhaustion, the Plaintiff contends that this Court has jurisdiction to entertain the suit as enshrined under Article 50(1) and 162(1) of *the Constitution* and that the existence of the Arbitration Clause in the Agreement for Sale does not oust Court's jurisdiction over the matter. The Defendant/Objectors have not complied with the procedural requirements of Section 6 and 7 of the *Arbitration Act* and cannot therefore preclude this Honourable Court from exercising jurisdiction over the instant suit. Further, that the Defendants/Objectors raising a question of law as to whether or not the Plaintiff suit offends the doctrine of exhaustion subjected the issue to the determination of the Court, thus this Honourable Court is seized of jurisdiction to determine such issue and not an Arbitrator.

13. The Plaintiff further contends the entire preliminary objection based on grounds that the doctrine of exhaustion is not applicable to the instant suit falls within the exceptions of the Rule pursuant to Section 9(4) of the Fair Administrative Actions Act. The section according to the Plaintiff is couched in mandatory terms and empowers the Court to exempt such obligation, if the Court considers such exemption to be in the interest of fairness and justice.

14. The Plaintiff refers to the decision in the case of Republic v Independent Electoral and Boundaries Commission [IEBC] Ex-Parte National Super Alliance (NASA) Kenya & 6 Others [2017]. The court stated that in exceptional circumstances, where the court finds that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law it may permit the suit to proceed before it. The Plaintiff urges the court to find that the objection has been raised to frustrate the wheels of justice and/or twist the Court's arms to the detriment of an aggrieved Party.

15. The Plaintiff's Counsel argues that striking out a suit should only be resorted to as a last resort where there is defect in the pleadings incapable of cure by amendment. The suit filed herewith is by no means defective. The striking out of the suit would deprive the Plaintiff the unlimited right to access justice. The Defendants' Preliminary Objection does not meet the requisite threshold, has no merit and is a waste of judicial time and ought to be dismissed with costs to the Plaintiff.

Issues for Determination

16. Having considered the Preliminary Objection, the parties' respective submissions and the pleadings filed herein, the issues arising for the determination are follows: -

    a. Whether the Preliminary Objection is a proper preliminary objection that raises pure points of law.

    b. Whether the Plaintiff's suit offends the doctrine of exhaustion.

Analysis and Determination

A. Whether the Preliminary Objection is a proper preliminary objection that raises pure points of law.

17. A Preliminary Objection was defined in the case of Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, in the following words:-

> "So far as I am aware, 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." (emphasis added).

18. In the case of Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No. 22 of 1999, the Court held that:-

> "When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings."

19. Further a Preliminary Objection must stem from the pleadings and should raise pure point of law. See the case of Avtar Singh Bhamra & Another...Vs....Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, where the court held that:-

> "A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."

20. In the case of Oraro...vs...Mbaja (2005) 1KLR 141, the Court held that:-

> "Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence."

21. In the instant case, the preliminary objection is a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. This was one of the examples given in the Mukisa Biscuits case as to what a preliminary objection should be.

22. The Court finds and holds that the Notice of Preliminary Objection as raised by the Defendants/ Objectors meets the test of what amounts to a Preliminary Objection. It raises pure points of law and can be determined without ascertainment of facts from elsewhere other than the material placed before the court. The agreement that the objection is based on is one of the documents that the Plaintiff has attached to her plaint.

B. Whether the Plaintiff's suit offends the doctrine of exhaustion.

23. The Objection hinges on the fact that the sale agreement giving rise to the suit has an arbitration clause. The Court has gone through the said sale agreement and confirms that it contains an Arbitration clause that provides that;

> "All claims and disputes whatsoever arising under this Agreement shall be referred to arbitration in accordance with the provisions of *Arbitration Act* of Kenya....."

24. Section 6(1) of *Arbitration Act* states as follows:

> "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....."

25. In the instant suit, Clause L of the Sale Agreement is on Arbitration. According to the said clause, parties clearly agreed that all claims and disputes that were to arise under the agreement were to be referred to be a single arbitrator to be appointed by the parties. Parties are bound by their terms of Contract and the Court cannot rewrite the said Contract. The said agreement between the parties provided for the Arbitration of disputes and the same ought to be guided by the provisions of *Arbitration Act*.

26. Section 6 of the said Act requires the Court, where an application is made by a party, to stay the proceedings and refer the matter for Arbitration. In this case, no such application has been made. What the Defendants instead have done is to raise an objection premised on the doctrine of exhaustion. The court then has to decide whether the objection is merited.

27. As eloquently explained in the case of Speaker of the National Assembly -vs- Njenga Karume [1992] eKLR, where there is a clear procedure for redress of any particular grievance, prescribed under *the Constitution* or Statute, that procedure must be strictly followed.

28. The Court of Appeal in the case of Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR, reiterated on the doctrine of exhaustion and held as follows;

> "We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.
>
> "We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs' disputes had they filed them within the church set up. And there was always the right, acknowledged by the learned Judge, of approaching the courts after exhaustion of the church mechanisms. By failing to do so, and

quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely."

29. In the case of Yes Housing Co-operative Society Limited -vs- Kenneth Onsare Maina [2020] eKLR, the Court held that;

> " Before concluding this issue Article 159(2)(c) of *the Constitution* provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.
>
> 37. It follows that this Court is not just under a duty to enforce a contractual clause binding the parties to refer their disputes to arbitration but is under a Constitutional obligation to promote that mode of dispute resolution. In my view it would amount to an abdication of its judicial duty if the court were to shirk that duty and decline to refer a matter to arbitration simply because a party believes that the applicant's case is unmerited and is bound to fail. Whether or not the case is unmerited is for the arbitrator to determine. In this case, it was an express term of the said agreement that if the Vendor fails to comply with the obligations under the Agreement, the Purchaser shall without prejudice to its rights and remedies rescind the said Agreement and the Vendor shall forthwith refund the Deposit to the Purchaser with interest. In this case it is clear that the Vendor has failed, as a result, of the decision in Machakos Succession Cause No. 54 of 2010, to fulfil his obligations under the Sale Agreement. It is that failure or inability on the part of the Defendant that gave rise to the dispute and provoked this suit.
>
> 38. Under section 12(4) of the *Arbitration Act*, where parties fail to reach an agreement as provided for in the arbitration clause mandating that the dispute be referred to arbitration, the High Court is given jurisdiction, upon application by any party, to give effect to the agreement referring the dispute to arbitration. In the present application I hold that the defendant is entitled to have the dispute with the plaintiff determined by arbitration pursuant to the said clause 15 of the Agreement and I therefore direct that all further proceedings in this case are hereby stayed and the dispute herein is hereby referred to Arbitration. The parties do agree on a single arbitrator to determine the dispute between themselves within thirty (30) days or where they fail the arbitrator be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators Kenya Chapter upon the application of either party. The dispute shall be determined by arbitration within sixty (60) days from the date of appointment of the said arbitrator."

30. Further in the case of County Government of Kirinyaga –vs- African Banking Corporation Ltd [2020] eKLR, the Court held that;

> " The clear 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 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"

31. The Parties in this case by their agreement chose to have all their disputes and differences resolved through arbitration. I must remind the parties that they are bound by the terms of their contract. The Court of Appeal in the case of He*samuddin Gulamhussein Pothiwalla Admin, Trustee and Executor of the Estate of Gulamhussein & Ebrahim Pothiwalla -vs- Kidogo Basi Housing Co-operative Society Ltd & 31 others (Civil Appeal No. 330 of 2003*) held that:-

> " A Court of Law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

32. The Parties choice of forum in their contract denies the court the jurisdiction to entertain this matter. The Court has no other option, but to comply with the law. This Court is not just under a duty to enforce the contractual clause binding the parties to refer their disputes to arbitration but is under a Constitutional obligation to promote that mode of dispute resolution. The Plaintiff came to this court before exhausting the dispute resolution mechanism agreed in the agreement of sale. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked.

33. The upshot from the foregoing is that the Notice of Preliminary Objection dated 7th June 2024 by the Defendants/Objectors is merited. The said Preliminary Objection is upheld. The Plaintiff's suit is herby struck out with costs to the Defendants/Objectors.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Avedi for the Plaintiff

Mr. Nyamagwa for the Defendants

Court Assistant: Yvette