



REPUBLIC OF KENYA



KENYA LAW

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Dima v Nasuulu Community Wildlife Conservancy Organisation (Sued through its official) John Eule - Chairman Andrew Phitisa Secretary & another (Civil Case E001 of 2024) [2025] KEHC 4000 (KLR) (Civ) (27 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4000 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CIVIL
CIVIL CASE E001 OF 2024
SC CHIRCHIR, J
MARCH 27, 2025**

BETWEEN

NURIA HASSAN DIMA PLAINTIFF

AND

**NASUULU COMMUNITY WILDLIFE CONSERVANCY ORGANISATION
(SUED THROUGH ITS OFFICIAL) JOHN EULE - CHAIRMAN ANDREW
PHITISA SECRETARY 1ST DEFENDANT**

ASHA SORA GUYO 2ND DEFENDANT

RULING

1. The Plaintiff/ Applicant herein file suit against the Respondents seeking for a declaration that the 1st Respondent's election to its Board contravened its own constitution.
2. At the same time, she filed a Notice of Motion dated 11/11/2024 under Certificate of Urgency seeking orders as follows;
 - a. Spent
 - b. Spent
 - c. That the Honourable Court be pleased to issue an order of temporary injunction barring the 1st Respondent from admitting and confirming the 2nd Respondent as a committee and/or board member representative of the Borana Community residing in Olla Bolte and Odha location Kambi – Garba sub-location pending the hearing and determination of the Main Suit.
 - d. Any other relief that the Honourable Court deem fit to grant.



- e. The costs of this Application to be provided for.
3. On 16/12/2024 the 1st Respondent filed a Replying Affidavit, while the 2nd Respondent filed it on unknown date. The 2nd Respondent further filed a defence dated 6th December 2024.
4. On 16/12/2024 the 2nd defendant filed a preliminary objection.(The objection) The Objection is to the following effect:
- “That the Honourable Court lacks Jurisdiction to hear and determine the Plaintiff’s Suit, Plaint and Application dated 11th November, 2024) in the light of the Arbitrating clause No. 14 of the 1st Defendant’s Constitution as read together with the provisions of Article 159(2)© of *the constitution* of Kenya , 2010 and the provisions of sections 7 and 18 of the *Arbitration Act*, cap 49 Laws of Kenya”
5. The objection was canvassed by way of written submissions, which the parties duly filed, which I have duly considered the same alongside the Authorities cited.

Analysis and determination

6. The issues for consideration is whether the objection herein meets the threshold of a preliminary objection, and whether the objection should be upheld.
7. In Mukhisa Biscuit Manufacturing Company Limited Vs West End Distribution (1968) EA 696 cited by both respondents a preliminary objection was defined as follows; “A preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit..... preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.
8. The objection in this case is one of jurisdiction. There is no gainsaying that jurisdiction is an issue of law. The objection therefore meets the threshold of a preliminary objection.
9. When the issue of a court’s jurisdiction arise in a matter, the court must, of necessity address it as a preliminary issue since its determination determines whether the litigation ends or proceeds. In the case of Samuel Machira & Anor Vs Kenya Commercial Bank & 2 Others (2012) eKLR, the supreme court held “A court’s Jurisdiction flows either from *the constitution* or legislation or both. This a court of law can only exercise jurisdiction as contained by *the constitution* or other written law. It cannot arrogate to itself Jurisdiction exceeding that which is contained upon it by law. We agree with counsel for the first and second respondent in his submission that the issue as to where a court of law has jurisdiction to entertain a matter, is not one of mere Procedural technicality it goes to the very heart of the matter for without jurisdiction court cannot entertain any proceedings “(Emphasis added).
10. The 2nd Defendant states that this court lacks jurisdiction to entertain this suit in the light of the Arbitration Clause provided for under clause 14 of the 1st Defendant’s constitution, Article 159(2) (b) of *the constitution* and sections 7 and 18 of the *Arbitration Act*. Clause 4 of the said constitution provides as follows: “Any dispute arising out of this constitution or concerning the business of the group, which cannot be resolved or settled by the committee or the general meeting, shall be referred for Arbitration in accordance with the laws of Kenya”. Section 7 of the *Arbitration Act* is on interim orders that a court may issue and Section 18 of the same Act empowers an Arbitral tribunal to certain orders incidental to the proceedings before it.



11. There is no dispute that the parties' constitution has an Arbitration clause. From the respective party's submissions, it is also evident that they are cognizant of the fact that the presence of an Arbitration clause in a constitution or agreement, bars a party from seeking to resolve disputes through other mechanisms.
12. The 2nd Respondent's has argued that this court can not be the port of first call; that based on the principle of exhaustion the plaintiff must first exhaust the available remedies, which in this case is the Arbitration. It is further argued that this court is bound by Article 159(2)(c) to embrace and encourage alternative dispute resolution mechanisms.
13. The internal mechanism in this case is Arbitration and there are rules governing it. Indeed the 2nd Respondent has cited Section 6 and 7 of the Arbitration as a basis of her objection. Section 6 provides as follows.
 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 are dispute between the parties with regard to the matter agreed to be referred to Arbitration.
 2.
 3.
14. Section 6 (1) of the *Arbitration Act* is simply stating that once parties resort to Arbitration as dispute resolution mechanism, this is the procedure to follow.....
15. The 1st Respondent has argued that the main contention is that the court is being made the port of first all. I disagree. The issue is not the exhaustion principle. The issue rather is the respondents' failure to adhere to the procedure imperative when invoking Arbitration as the 1st port of call .In other words, the respondents failed to comply with the prerequisite requirements of section 6 of the *Arbitration Act*.
16. According to Section 6 of the *Arbitration Act* ,upon being served with the summons or Application, they were required to file an application staying the proceedings at the same time they are filing a memorandum of appearance or other acknowledgment of service .
17. In this case the 2nd respondent filed a statement of defence on the 10/12/2024 and filed the preliminary objection on 16 / 12/ 2024. The 1st respondent filed a replying Affidavit and a Notice of Appointment not Memorandum of appearance . Even if this court was to treat the Notice of appointment as serving the same purpose as a memorandum of appearance , the replying Affidavit addresses the claims made in the Application. Thus by filing the defence and the replying Affidavit respectively the defendants had forgone their right to have the matter referred to Arbitration.
18. In interpreting Section 6, the court of Appeal in the case of Mt. Kenya University v Step Up Holding (K) Ltd [2018] KECA 125 (KLR) stated: "We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter. The appellant herein entered appearance, and then responded to the respondent's application for injunction before filing



the application seeking an order for reference to arbitration. Critically the appellant's response to the respondent's application for injunction amounted to the taking of a procedural step in the matter before the initiation of the reference "

19. Thus invoking the exhaustion principle in the circumstances of this case is misplaced as the issue is about failing to comply with a set procedure in the alternative system of dispute resolution called Arbitration.
20. Further when a party wants a matter to go for Arbitration, that party should file for stay of proceedings (Section 6 of the *Arbitration Act*). A preliminary objection does not stay the proceedings. Indeed the respondents have not applied for stay proceedings at all.
21. The rationale for an Application for stay as opposed to a preliminary objection is not heard to see; because apart from determining whether an Arbitration clause does exist, the court also has to determine if there is any dispute warranting Arbitration. Thus, the respondent's mode of approaching the court was defective in any event.
22. The preliminary objection is misconceived . It is hereby dismissed .
23. The costs of the preliminary objection goes to the plaintiff as against the 2nd respondent.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 27TH DAY OF MARCH, 2025.

S. CHIRCHIR

JUDGE.

In the presence of:

Roba Katelo- Court Assistant

Mr. Galgalo for the 1st Respondent

Lesaigor for the 2nd Respondent.

