



**Githaiga v Mogo Auto Limited (Miscellaneous Application E052 of 2024)
[2024] KEHC 3253 (KLR) (Commercial and Tax) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3253 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E052 OF 2024
FG MUGAMBI, J
MARCH 20, 2024**

BETWEEN

ROBERT GITHAIGA APPLICANT

AND

MOGO AUTO LIMITED RESPONDENT

RULING

Background

1. This ruling determines the Motion application dated 22nd January 2024 brought under section 7(1) of the *Arbitration Act*, sections 1A, 1B, 3A, 63 (c) and (e) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, Order 32 Rule 1(1) and 5(1), Order 40 rule 1(a), 2 and 10 and Order 51 Rule 1 of the *Civil Procedure Rules*. The application seeks temporary injunctive relief against the respondent from interfering with vehicle registration KCQ xxxx, pending the appointment of an arbitrator.
2. The application is supported by the affidavit of Robert Githaiga, the applicant herein, dated 22nd January 2024. The application is opposed by way of a replying affidavit sworn by Erick Omondi, the Debt Collection Legal Officer of the respondent, on 22nd February 2024. Alongside this the respondent also filed a Notice of Preliminary Objection dated 20th February 2024.
3. The Preliminary Objection is premised on the grounds that Motion Application dated 22nd January 2024 is fatally and incurably defective in law as the application is not anchored on a suit as per the mandatory requirements of Rule 2 of the *Arbitration Rules, 1997*. The second ground is that this Honourable Court has no jurisdiction to entertain the application dated 22nd January 2024 as there is no enforceable arbitration agreement between the parties as contemplated under Section 4 of the *Arbitration Act, 1995*.



4. The application was canvassed by way of written submissions. Both parties filed their respective submissions, with the applicant's submissions dated 13th March 2024 and the respondent's submissions dated 13th March, 2024.
5. This Court notes that the applicant has not in any way responded to the first issue raised by the respondent, on the averment that the application breaches rule 2 of the Arbitration Act, 1995. For the avoidance of doubt, the said rule 2 provides as follows:

“Applications under sections 6 and 7 of the Act shall be made by summons in the suit.”
6. The essence of rule 2 is that an application like the one before this Court ought to have been brought by way of a Chamber Summons and not a Notice of Motion. While such transgression may be excusable, the Courts have held time and again that the requirements of rule 2 requiring that an application be premised on a suit are couched in mandatory terms. (See Scope Telematics International Sales Limited V Stoic Company Limited & Another, [2017] eKLR as well as Machiri Limited v Sogea-Satom Kenya Branch, [2020] eKLR.
7. The Court of Appeal further noted in Scope Telematics [*supra*] that this error cannot be wished away, since the manner of initiating a suit cannot be termed as a mere case of technicality where else it is the basis of jurisdiction.

Determination

8. For the foregoing reasons this Court upholds the preliminary objection. The application dated 22nd January 2024 is struck out for being fatally defective, with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF MARCH 2024.

F. MUGAMBI

JUDGE

