



**Gathuku v Kings Pride Constructors Limited & 2 others (Environment & Land Case 256 of 2022) [2023] KEELC 21440 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21440 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 256 OF 2022  
J OMANGE, J  
NOVEMBER 9, 2023**

**BETWEEN**

**SUSAN MUTHONI GATHUKU ..... PLAINTIFF**

**AND**

**KINGS PRIDE CONSTRUCTORS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JUNCTION PARK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion application dated the 27<sup>th</sup> July 2022 the Applicants sought the following orders:
  - a. Spent.
  - b. That honourable court does issue an order restraining the defendants, their servants, agents, representatives, assigns, relatives or associates from in any way transferring, transacting, occupying, entering and/ erecting structures on the suit property Dagoretti/Riruta/5973 pending the determination of this suit.
  - c. Costs of the application.
2. The Application was supported by an Affidavit sworn by the Plaintiff who deponed that she entered into a joint venture agreement on or about 4<sup>th</sup> October 2013 with the 1<sup>st</sup> Defendant company in which it was agreed that the 1<sup>st</sup> Defendant would construct (80) apartments unit on suit property Dagoretti / Riruta/5973 herein referred as the suit property.
3. She deponed that they subsequently incorporated a development company the 2<sup>nd</sup> Defendant, to which she transferred her title to the suit property as her contribution to the project. She states that in spite



of necessary approvals to construct having been obtained, the development has not commenced. She has held several meetings with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to resolve the issue but no action has been forthcoming. This has necessitated the filing of this application on grounds of breach of the joint venture agreement.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents raised a preliminary objection dated 31<sup>st</sup> January 2023 on grounds that the court lacks jurisdiction to entertain the application as the joint venture agreement had an arbitration clause that provided for a dispute resolution mechanism. The Respondents contend that the Plaintiff is in violation of Section 6 and 7 of the *Arbitration Act* as she failed to adhere to the Arbitration clause.
5. The Respondents submitted on the provisions of the Arbitration clause in the Joint Venture Agreement. Counsel cited the provisions of section 10 of the *Arbitration Act* that bars courts from intervening in a matter governed by the Act and placed reliance in the determination given in the case of *Union Technology Kenya Limited v City county Government of Nakuru* [2017] eKLR.
6. Counsel referred the court to the provisions of Article 159(2)(c) of *the Constitution* as read together with the above-mentioned sections of the *Arbitration Act*. Counsel urged the court to give effect to the agreement.
7. Counsel submitted that the issue of jurisdiction had been raised at the earliest opportunity as was held in the case of *Mukisa Biscuit Manufacturing Co Ltd versus West End Distributors Ltd* (1969) EA 696.
8. Even after being given several opportunities to do so, the Plaintiff did not file any submissions. The law with regards to Preliminary objection was settled by the case of *Mukisa Biscuit Manufacturing Co. ltd v West End Distributors ltd*. [1969] EA 696, at the Court of Appeal for East Africa, where Law J.A. and Newbold P. held as follows respectively

“So far as I am aware, a Preliminary Objection consists of a pure 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 on 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.”

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that 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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.

9. From the foregoing, it is evident that a Preliminary objection raises a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. A preliminary objection cannot lie if additional facts have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. The Court has to be satisfied that there is no proper contest as to the facts. The facts ought to be agreed on as they are prima facie presented in the pleadings before the court.
10. The undisputed facts in this case are that the parties did enter into a joint venture agreement which agreement has an arbitration clause that gives effect to arbitration as a mode of resolving disputes. The venture agreement was attached to the plaintiff's affidavit.
11. The only issue for determination is therefore



**Whether this court has jurisdiction to deal with the dispute in question.**

12. The issue of jurisdiction is well settled in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, where Nyarangi J. of the Court of Appeal held that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

13. In this case clause 12 of the Joint venture agreement, which is before this court provides that any dispute, difference or question arising at any time between the parties touching on the interpretation of the agreement or on rights of the parties shall be referred to arbitration. The intention of the clause was expressly stated and is clear to be in mandatory terms that parties should abide to. The basis of this application is the alleged breach by the 1<sup>st</sup> and 2<sup>nd</sup> defendants of terms of the joint venture agreement and therefore, falls under the realm of Clause 12 on Arbitration of the said Agreement.

14. The parties herein clearly intended that if there was any dispute it would be resolved by way of Arbitration. The Constitution of Kenya 2010 mandated the Judiciary to promote Alternative Dispute Resolution Mechanisms. This provision no doubt was introduced into the Constitution to enhance efficiency of courts which were struggling under ever increasing caseloads. Courts must breathe life into this Constitutional provision by promoting where possible Alternative Dispute Resolution.

15. Jurisdiction has been defined in Halsbury’s Laws of England (4<sup>th</sup> Ed.) Vol. 9 at page 350 as “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.”

16. I hold the same view that the court held in County Government of Kirinyaga v African Banking Corporation Ltd [2020] eKLR wherein it was stated;

“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.

17. In the end I find that the notice of preliminary objection has merit. The application and suit are struck out with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 9TH DAY OF NOVEMBER 2023.**

**JUDY OMANGE**

**JUDGE**

In the presence of: -

No appearance by the parties

Steve - Court Assistant

