

KENYA / JUDGMENT

Ublagger v Nduta & 2 others

[2026] KEELC 5388 (KLR)

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Environment and Land Court

BEFORE

CG Mbogo

CASE / FILE NUMBER

Environment and Land Case E587 of 2025

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Ublagger v Nduta & 2 others (Environment and Land Case E587 of 2025) [2026] KEELC 5388 (KLR)
(3 September 2026) (Ruling) Neutral citation:

[2026] KEELC 5388 (KLR) Republic of Kenya In the Environment and Land Court at Nairobi
Environment and Land Case E587 of 2025 CG Mbogo, J September 3, 2026 Between Gert
Ublagger Plaintiff and Immanuela Nduta 1 st Defendant Company Advocates 2 nd
Defendant Teresa Nyambura 3 rd Defendant

Ruling

1. Before this court for determination are two applications respectively. The notice of motion dated 2 nd October, 2025 is filed by the plaintiff/applicant and it is expressed to be brought under Articles 22, 23, 40, and 162 (2)(b) of the Constitution , Sections 1A, 1B, 3A 13 and 26 of the Environment and Land Court Act , Sections 3A and 63 (e) of the Civil Procedure Act , Order 40 rule 1 and 51 rule 1 of the Civil Procedure Rules seeking the following orders:- 1. Spent. 2. Pending the inter partes hearing and determination of this application, temporary conservatory and preservative orders do issue in the form of an injunction restraining the defendants whether by themselves, their agents, servants, assigns, or any person acting under their authority, from selling, transferring, charging, leasing, renting out anew, encumbering, wasting, damaging, alienating, or in any way dealing with or disposing of Apartment no. B1006, Elina residences (erected on LR. no. 209/22088) Nairobi or any part thereof. 3. Pending the hearing and determination of the suit, the defendants be directed to forthwith deposit all rental income accrued from apartment no. B1006, Elina residences (erected on LR. no. 209/22088) from May 2022 to date into an interest-bearing escrow account in the joint names of the parties' advocates. 4. Pending the hearing and determination of this suit, temporary conservatory and preservative orders do issue in the form of an injunction restraining the defendants whether by themselves, their agents, servants, assigns, or any person acting under their authority, from selling, transferring,

charging, leasing, renting out anew, encumbering, wasting, damaging, alienating, or in any way dealing with or disposing of Apartment no. B1006, Elina residences (erected on LR. no. 209/22088) Nairobi or any part thereof. 5. Pending the hearing and determination of the suit, an order be and is hereby issued compelling the defendants to render and file a true, full and accurate account, within 14 days of: a. All rental payments received since October 2022; b. All tenancy agreements or arrangements entered into since acquisition; c. All deposits, service charges, utilities payments, management fees or other sums received, held or expended relating to the apartment; and d. All dealings, receipts, disbursements or profits derived from the suit property. 6. Pending the hearing and determination of the suit, an order be and is hereby issued compelling the defendants to produce and furnish to the plaintiff within 7 days, complete and unredacted copies of all documents and records relating to the acquisition, management, occupation and rental of Elina apartments no. B1006. 7. Pending the hearing and determination of the suit, the plaintiff be granted access to apartment no. B1006, through a mutually agreed or court-appointed independent property manager or valuer, for purposes of inspection, inventory of contents, verification of occupation and valuation of rental and market value within 7 days. 8. The costs of this application be in the cause. 2. The application is premised on the grounds inter alia that the plaintiff/applicant is the true beneficial owner of apartment no. B1006 Elina residences, the suit property erected on LR. no. 209/22088 having provided 100% of the purchase funds. The application is further supported by the affidavit of the plaintiff/applicant sworn on 7th October, 2025. The plaintiff/applicant deposed that while looking to invest in Kenya, he executed an offer letter for the purchase of the suit property at Kshs.22,451,000/- as an investment and not a gift. He deposed that as a non-resident, he retained the 2nd defendant/respondent to protect his interests, and they signed a trust deed dated 16th March, 2022 where the 1st defendant/respondent agreed to hold the property in trust for him. He deposed that he remitted Kshs.25,611,940/- on diverse dates in 2022, and on 31st March 2022, he terminated the volaire engagement after discussions with the 1st defendant/respondent. 3. The plaintiff/applicant deposed that he was showed the suit property as a replacement investment and in the offices of the 2nd defendant/respondent, he signed a misrepresented trust instrument and a sale agreement not knowing that the 1st defendant/respondent had already executed an agreement for sale for the same property as a sole purchaser. He deposed that despite assurances, no trust deed or executed sale agreements were ever delivered to him. He also spent additional sums on furnishings, and the 3rd defendant/respondent who presented herself as the suit property's manager gave false rental benefits. 4. The plaintiff/applicant deposed that he learnt that the suit property has been rented to four other tenants and the rent unlawfully retained by the defendants/respondents. That unless this court intervenes, he risks suffering irreparable harm. 5. The 1st defendant/respondent filed the replying affidavit sworn on 19th February, 2026. She deposed that together with the plaintiff/applicant, they were in a romantic relationship until February 2022 when they got engaged. She deposed that the plaintiff/applicant had expressed interest in purchasing a volaire project which failed. Instead, the plaintiff/applicant cancelled the purchase and issued instructions for the purchase of the suit

property which she was to own as a sole proprietor. 6. The 1 st defendant/respondent deposed that the issue of trust did not arise, and that when he visited the country, he witnessed the execution of the sale agreement and the transfer documents which showed that he was aware that the suit property was to be transferred to her. She deposed that she resides in the suit property and has never leased or rented it. 7. In further response, the 2 nd defendant/respondent filed his replying affidavit sworn on 19 th February, 2026. He deposed that both the plaintiff/applicant and the 1 st defendant/respondent visited his office for the execution of the sale agreement and the transfer in April 2022. According to him, they were in a romantic relationship and abandoned the issue of the trust deed since there were no instructions for the suit property to be held in trust for anybody. The 2 nd defendant/respondent deposed that the plaintiff/ applicant is well educated, and that he cannot allege misrepresentation when he issued instructions for the suit property to be held by the 1 st defendant/respondent. He deposed that he cannot be faulted for diligently carrying out his client's instructions, and he has no interest whatsoever in the suit property. 8. The plaintiff/applicant filed an undated further affidavit. He reiterated the averments in his supporting affidavit and further deposed that the trust deed contradicts the gift narrative since there is evidence through whatsapp on diverse dates that indeed the suit property was rented to tenants. He deposed that the 2 nd defendant/respondent failed in his fiduciary duty and committed professional negligence. He noted the silence on the 3 rd defendant/respondent's part whom he deposed that she has misappropriated the funds from the rental income yet admits the investments with no returns. 9. The notice of motion dated 30 th January, 2026 is filed by the 1 st defendant/respondent and it is expressed to be brought under Article 159 (2) (c) of the Constitution , Section 6 of the Arbitration Act and Section 20(2) of the Environment and Land Court Act seeking the following orders:- 1. Spent. 2. That the instant suit be and is hereby struck out for want of jurisdiction due to the existence of arbitration clause at Section 12 of the trust deed dated 16 th March 2022. 3. That the costs of this application be provided for. 10. The application is premised on the grounds on its face. It is further supported by the affidavit of the 1 st defendant/respondent sworn on even date. She deposed that the trust deed dated 16 th March, 2022 which forms part of the pleadings in this suit is a principal document that goes to the root of the instant case. Further, that clause 12 of the trust deed provides that any dispute arising between the parties should be referred to arbitration. She deposed that for this reason, it is in the interest of justice that this suit is struck out to allow the plaintiff/applicant to invoke the right platform for resolution of the dispute. 11. The plaintiff/applicant filed his replying affidavit sworn on 3 rd March, 2026. He deposed that Section 6 of the Arbitration Act bars the application since the 1 st defendant/respondent entered appearance and took substantive steps in these proceedings thus forfeiting the right to arbitration. He deposed that the 2 nd and 3 rd defendants/respondents are not parties to the trust deed and cannot be compelled to arbitrate. The plaintiff/applicant deposed that the 1 st defendant/respondent took clear and unequivocal steps in these proceedings and engaging the court before invoking arbitration. Further, that an arbitration clause does not oust the jurisdiction of this court to hear and determine this suit, and that claims rooted in fraud, tortious conspiracy, and professional misconduct are beyond the

arbitration scope. 12. Both applications were canvassed through written submissions. The plaintiff/ applicant filed written submissions dated 20 th April, 2026. The defendants/ respondents did not file their written submissions. Be that as it may, I have considered both applications, the replies thereof and the written submissions filed by the plaintiff/applicant. In my view, the issues for determination are two:- a. Whether the suit should be struck out for want of jurisdiction owing to the arbitration clause in the trust deed. b. Whether the plaintiff/applicant is entitled to the orders sought in his application. 13. I will begin with the first issue since the jurisdiction of this court has been challenged on the basis of the arbitration clause in the trust deed. The legal document binding the plaintiff/applicant and the 1 st defendant/respondent in the dispute before this court is the trust deed dated 16 th March, 2022. This document presumably governed the acquisition and ownership of the suit property which is the subject matter in this suit. Jurisdiction is everything and without it, the court cannot proceed any further except to down its tools. This was stated in the famous case of Owners of the Motor Vessel Lillian “S” v. Caltex Oil Kenya Limited [1989] KECA 48 (KLR). 14. As I have understood the 1 st defendant/respondent, she contends that clause 12 of the trust deed ousts the jurisdiction of this court to hear and determine the suit. This in my view means that she acknowledges that the terms in this agreement were binding including clause 12 which states: “ Any dispute and questions whatsoever which shall arise between the parties hereto touching on this declaration or relating to the rights and liabilities of either party hereto shall be referred to an arbitrator to be appointed by agreement of both parties and in absence of agreement to be appointed by the chairperson for the time being the Chartered Institute of arbitrators and the decision of such an Arbitrator shall be final and binding on the parties hereto.” 15. Section 6 (1) and (2) of the Arbitration Act provides 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 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 any dispute between the parties with regard to the matters agreed to be referred to arbitration. (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.” 16. Thus, the court is obliged to stay the matter until arbitration is done by the parties pursuant to the arbitration clause unless the court determines that the above listed exceptions exist. On the other hand, the plaintiff/applicant argued that the 1 st defendant/respondent forfeited her right to arbitration since she has taken substantive steps in these proceedings. Secondly, there are claims of fraud, civil conspiracy and professional negligence as well as individuals who are not signatories to the agreement that are parties in this suit hence the matter cannot be heard and determined through arbitration. 17. On the right to pursue arbitration, I disagree with the plaintiff/ applicant on this issue. The suit was filed in October 2025. The defendants/respondents filed their notice of appointment dated 11 th December, 2025 on 15 th December, 2025 when the matter was before court for the inter-partes hearing of the plaintiff/applicant’s application.

Thereafter, the matter was in court on 19 th February 2026 during which time the 1 st defendant/respondent had filed the application for striking out. It should also be noted that the 1 st defendant/respondent has not filed her statement of defence. It is clear that the 1 st defendant/respondent has not forfeited her right to seek arbitration as a mode of dispute resolution. 18. As earlier stated, the subject matter in this case arises from the trust deed dated 16 th May, 2022 between the plaintiff/applicant and the 1 st defendant/ respondent, which they entered into willingly. Therefore, the court is not allowed to intervene in disputes of arbitration as stipulated by Section 10 of the Arbitration Act , which orders that:- “ Except as provided in this Act, no court shall intervene in matters governed by this Act.”

19. In the case of Technoservice Limited v Nokia Corporation & 3 others [2021] KEHC 13349 (KLR), the court made the following observation:- “ Under our law, court intervention in arbitration proceedings is limited only to circumstances expressly permitted by the Arbitration Act . In this regard, section 10 of the Act provides that except as provided in the Act, no court shall intervene in matters governed by the Act. In absolute terms, the section limits the jurisdiction of the court to only such matters as are provided for by the Act. The section typifies the recognition of the policy of party’s autonomy, which underlie the arbitration generally and in particular the Act.....Section 10 permits two possibilities where the court can intrude in arbitration. First, is where the Act expressly provides for or permits the intervention of the court. Second, in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act.” 20. While I note that the dispute between the primary parties ought to be referred to arbitration, the plaintiff/ applicant argued that issues of fraud and conspiracy as well as professional negligence can only be determined by this court. Clause 12 of the trust deed is clear that ‘any dispute or question...’ is to be referred to arbitration. It is my belief that the alleged claims of fraud can well be heard and determined by the arbitrator. With regard to claims against the 2 nd and 3 rd defendants/respondents, a unique situation presents itself where parties who are not bound by the trust deed are sued. 21. Even with the suit having been filed against other parties not parties to the trust deed, the arbitration proceedings are not ousted on this ground. This bring to fore the appropriate remedy which is to stay proceedings in this suit to await the determination of the arbitration proceedings. Once this is done, the proceedings before this court against the 2 nd and 3 rd defendants/respondents can proceed. 22. Having said the above and noting that the arbitration clause in the trust deed restrains this court from dealing any further with this suit, the court cannot determine at this stage the notice of motion dated 2 nd October, 2025. Therefore, the proceedings in this suit are hereby stayed, and the matter between the plaintiff/applicant and the 1 st defendant/respondent is hereby referred to arbitration for hearing and determination. It is so ordered. DATED, SIGNED & DELIVERED VIRTUALLY THIS 3 RD DAY OF SEPTEMBER, 2026. HON. MBOGO C.G. JUDGE 03/09/2026. In the presence of:- Mr. Benson Agunga – Court assistant Mr. Kitila for the Defendants/Respondents Mr. Odhiambo for the Plaintiff/Applicant

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