



Kinyanjui v Waiyaki Way Developers Limited & 3 others; Kenya Commercial Bank Ltd (Interested Party) (Environment & Land Case E216 of 2020) [2023] KEELC 16600 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16600 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E216 OF 2020
OA ANGOTE, J
MARCH 23, 2023**

BETWEEN

SAMUEL MICHAEL KINYANJUI PLAINTIFF

AND

WAIYAKI WAY DEVELOPERS LIMITED 1ST DEFENDANT

WAIYAKI RIDGE GARDENS MANAGEMENT COMPANY LIMITED 2ND DEFENDANT

CHRISTOPHER THIONGO WAWERU 3RD DEFENDANT

MUIGAI PHARES THUMBI 4TH DEFENDANT

AND

KENYA COMMERCIAL BANK LTD INTERESTED PARTY

RULING

1. In the Notice of Preliminary Objection dated 25th April, 2022, the 1st and 2nd Defendants have averred that this court lacks jurisdiction to hear the application and the suit.
2. The Notice of Preliminary Objection proceeded by way of written submissions. The 3rd Defendant's advocate submitted that there exists a Deed of Assignment dated 13th July, 2018 between the 3rd Respondent as the "Assignor," the Plaintiff as the "Assignee" and the 1st Defendant as the Lessor.
3. The 3rd Defendant's counsel submitted that at clause "D" of the said Deed of Assignment, there existed a Shareholder Agreement dated 30th December, 2015 between the Lessor and the Assignor, among other parties and that the Assignor was entitled to 34 units, including the property known as Apartment number A A4 situated on the 1st floor of Block AA (the suit property).



4. It was submitted that all the other disputes relating to the suit property are pending arbitration at different fora and an order was issued restraining any transfer of units to any party by the 1st Defendant. As it stands, it was submitted, the 3rd Defendant has no unit to transfer to the Plaintiff as none has been assigned to him.
5. Counsel submitted that the very fact that the Plaintiff is seeking to enforce an alleged sale Agreement by way of a mandatory injunction compelling the Defendants to give vacant possession and to transfer the suit property that was subject to the Deed of Assignment constitutes a dispute within clause 9 of special conditions warranting referral to Arbitration.
6. It was submitted that pursuant to Article 159 (2) (c) of *the Constitution*, courts are guided by the principles of alternative forms of dispute resolution including arbitration; that section 59 (c) of the *Civil Procedure Act* further buttresses that position; that the Plaintiff ought to have taken in consideration the clause on arbitration and that this court does not have jurisdiction to determine the dispute.
7. In his submissions, the Plaintiff's advocate submitted that the Arbitration Act does not apply herein; that not all the parties in the suit are parties to the contract and that it is only this court that can grant the nature of reliefs sought in this suit.
8. This suit was commenced by way of a Plaint dated 29th October, 2020. In the Plaint, the Plaintiff averred that at all material times, the Defendant had a joint venture agreement to develop and offer for sale apartments in respect of land premises known as Dagoretti (Kangemi) 2037 and whose registered owner is the 1st Defendant.
9. The Plaintiff averred that on 13th July, 2018, he entered into a specific agreement with the 1st Defendant as the Lessor and the 3rd Defendant as the Assignor for purchase of Apartment number A A4 situated on the 1st floor of Block A A erected on title number Dagoretti (Kagemi) 2037 together with one (1) share in Waiyaki Ridge Management Company Limited. According to the Plaintiff, the anticipated completion period was two (2) years.
10. It is the Plaintiff's case that he obtained a bank facility and paid the entire purchase price of Kshs. 6,000,000 on 14th July, 2018 to the 4th Defendant's accountant and legal fees and that pursuant to the said agreement, the Defendants were under contractual obligation to erect and complete the development project.
11. The Plaintiff averred that in blatant breach of the agreement, the Defendants failed to deliver to the Plaintiff the agreed Apartment number A A44 together with one (1) share in the management company.
12. In his prayers, the Plaintiff has sought for a permanent injunction restraining the Defendants from selling the suit premises; general damages and for a mandatory injunction compelling the defendants to give him vacant possession and to transfer the suit premises to him.
13. In their defence, the 1st and 2nd Defendants averred that the agreement between them and the Plaintiff, if at all, was subject to arbitration in accordance with clause 9 of the special conditions. In the circumstances, it was, averred, this court lacks jurisdiction.
14. As correctly submitted by the Defendants counsel, this court is obligated under Article 159 (2) (c) of *the Constitution* to be guided by the principles of alternative forms of dispute resolution including arbitration.



15. Section 20(2) of the *Environment and Land Court Act* provides that where alternative dispute resolution mechanism is a condition precedent to any proceedings before the court, the court shall stay proceedings until such condition is fulfilled.
16. The Plaintiff's suit is wholly dependent on the "Deed of Assignment Agreement" dated 13th July, 2018 between the 3rd Defendant as the "Assignor" the Plaintiff as the "Assignee" and the 1st Defendant as the "Lessor."
17. The said agreement, under special condition clause 9 provides that if any dispute, difference or questions shall arise whether during continuance of the agreement or upon or after its determination between the parties concerning the agreement, or any matter connected to the agreement, such dispute, difference or question shall be referred to one arbitrator under the rules of the Chartered Institute of Arbitrators of the United Kingdom Kenya Branch.
18. The agreement further provides that such arbitrator shall be appointed by agreement of both parties and in the absence of agreement within 14 days of the notification of the dispute by either party to the other, then on the application of anyone party by the Chairman of the Chartered Institute of Arbitration.
19. To the extent that the Plaintiff was a party to the agreement, and considering that the agreement has an arbitration clause, it is the finding of this court that it does not have jurisdiction to determine the dispute herein.
20. For those reasons, the court allows the Defendant's Notice of Preliminary Objection dated 25th April, 2022 in the following terms;
 - a. This suit be and is hereby struck out with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF MARCH, 2023.

O. A. ANGOTE

JUDGE

In the presence of:

No appearance for

M/s Wanja for 1st Defendant

Court Assistant - June

