



**Njenga v Micasa Investments Limited (Civil Appeal E115 of 2024)
[2024] KEHC 16795 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 16795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E115 OF 2024
NIO ADAGI, J
OCTOBER 30, 2024**

BETWEEN

BEATRICE NJENGA APPLICANT

AND

MICASA INVESTMENTS LIMITED RESPONDENT

RULING

Chamber Summons dated 26/04/2024

1. The Applicant filed the instant Chamber Summons application dated 26/04/2024 Under Section 7 of the *Arbitration Act*, Rule 2 of the *Rules* thereof and all other enabling provisions of the Law seeking Orders that;
 1. Spent.
 2. That an order be and is hereby issued preserving the subject property being House No.94,102 Southpark Estate situate on Land Reference Number 20521 (I.R NO.74204) Mavoko Machakos), which is the subject of the intended arbitration proceedings, by restraining any dealings involving the House and maintaining its status quo.
 3. That an order of temporary injunction be and is hereby issued restraining the Respondent and/or its Agents from alienating, dealing in, dissipating, offering for sale, advertising negotiating, or in any other way interfering House No. 94, 102 Southpark Estate situate on Land Reference Number 20521(I.R NO.74204) Mavoko Machakos) which is the subject of the arbitration proceedings.
 4. That the Respondent and/or its agents be and are hereby restrained from dealing in any manner prejudicial to the Applicant's interest in respect of House No.94,102 Southpark Estate situate on Land Reference Number 20521 (I.R NO.74204) Mavoko Machakos), which



is the subject of the arbitration proceedings pending the hearing and determination of the Arbitration proceedings.

5. Spent.
6. That the arbitral proceedings to be commenced in terms of the Agreement of Sale dated the 22nd April, 2021 within a period of 180 days from the date of the Ruling.
7. That costs of this application be provided for.

Applicant's Case

2. The application is based on the grounds thereto that are reiterated in the Supporting Affidavit of even date of Beatrice Njenga, the Applicant.
3. In support of the application, she avows that on or about 22nd April 2021, the Respondent and her, entered into an agreement for sale of House No.94, 102 South Park Estate situate on Land Reference Number 20521 (I.R NO. 74204) Mavoko- Machakos.
4. That she complied with the terms of the said Agreement and paid the entire deposit to the tune of Kenya Shillings Three Million and One Hundred (Ksh.3,100,000.00) in accordance with clause 2.1 of the said Agreement.
5. Clause 1.1(g) of the Agreement for Sale further provides that the completion date of the project was June 2022.
6. Notwithstanding Clause 1.1(g) on the completion of the project, the Respondent blatantly failed, ignored and or refused to finalize and hand over the project to her.
7. Vide a letter dated 17th April 2024, the Respondent ambushed her with a completion Notice demanding payment of the balance of the Purchase price within 22 days. That was at a time when she was scheduled for an emergency life threatening medial procedure effective immediately and unable to comply with the demand.
8. She further avers that the Respondent invited her for a meeting on 23d September 2023at the Signature Mall where the Respondent sought her indulgence in terms on time extension and she allowed in good faith.
9. The Applicant further avers that she made further payments amounting to Kshs.465,440.00/- which she purports was an addition to the initial deposit of KShs.3,100,000.00/-.
10. She asserts that the delay in completion of the subject house made it difficult for her to make necessary arrangements to clear the outstanding balance of the purchase price.
11. The Applicant asserts that there is a dispute as to the impromptu payment of the balance of the purchase price and damages which ought to be referred to arbitration in line with the provisions of Clause 19 of the aforementioned Agreement for Sale.
12. She states that she wishes to declare a dispute for reference to arbitration by having her advocates on record issue a notice to the Respondent.
13. The Applicant is apprehensive that unless her application is heard and interim orders granted, she risks illegal forfeiture of the deposit as well as loss of the house, despite being no fault on her part.
14. The Applicant avers that a dispute has arisen as to the impromptu payment of the balance of the purchase price and damages which dispute ought to be referred to arbitration as per the terms of Clause



19 of the Agreement. The Applicant now wishes to declare a dispute for reference to arbitration by having her Advocates on record issue a notice to the Respondents.

The Respondent's Case

15. In opposing the application, the Respondent has filed a Replying Affidavit dated 21st May 2024.
16. The Respondent admitted to the existence of an Agreement for Sale between it and the Applicant for the subject house.
17. The Respondent however averred that the present application was misconceived, unmeritorious and an abuse of the court process as the same is generalized and grounds relied upon vague and confounded.
18. The Respondent asserted that the Applicant was merely seeking extension of completion period through the courts by attempting to indefinitely stop it from dealing with the subject house pending her life-threatening medical procedure and recovery.
19. The Respondent further asserted that no dispute had been declared officially by the Applicant as at the time of its response to the Application which was merely a delay tactic.
20. The Respondent conceded to the payment of the deposit of Kshs.3,100,000.00/- by the Applicant in 3 instalments between May 2021 and October 2021.
21. The Respondent in response to the Applicant's averment that completion date was June 2022, asserted that the said completion date was an estimate and the same was applicable to some 5 other units within the same project.
22. It was the Respondent's case that it successfully completed the other 5 unit within the estimated completion date and handed over to the respective owners upon receipt of the full purchase price.
23. The Respondent contended that the Applicant requested for several changes to her unit which occasioned untoward delay in completion of her unit and additional costs over and above the purchase price.
24. The Respondent asserted that the additional payment of Kshs.465,440.00/- by the Applicant was made towards defraying costs attendant to the changes requested by the Applicant and some of the payments were actually made directly to the suppliers as indicated in paragraph 8 of the Application.
25. The Respondent further intimated that installation of some of the Applicant's bespoke fittings were done by suppliers who were sourced by the Applicant and the same were total strangers to the Respondent.
26. The Respondent averred that it was sceptical to complete the subject house prior to the Applicant furnishing it with proof of payments, offer letter and/or approval of a bank facility for the balance of the purchase price.
27. The Respondent further contents that it completed the subject house on 28th February 2024 after which it made several concerted efforts to reach the Applicant for a meeting to discuss the way forward but its attempts were futile necessitating the Completion Notice.
28. The Respondent further avers that despite the lapse of time between the estimated and actual completion date, the Applicant never served it with a completion notice and/or terminate the Agreement as provided by the Agreement for Sale entered into between the parties.



29. The Respondent asserts that it later learnt of the purchase of another house number 80 within the larger estate, by virtue of the Respondent's director being a director of the head lessor and management company of the estate.
30. The Respondent further asserts that the Applicant has not disputed owing the balance of the purchase price and as such does not have a prima facie case to warrant granting of the orders sought in her application.
31. The Respondent is apprehensive that if the orders sought by the Applicant are granted, its daily operations will be prejudiced as it had to borrow a loan facility to deliver on its obligation to the Applicant.
32. The Respondent invites the court to dismiss the Application but should it be inclined to allow the same, it be please to order the Applicant who has not disputed owing the balance to the Respondent, to deposit security for the same in an interest earning account in the joint names of the Parties pending commencement, hearing and determination of the Arbitration.
33. The respondent prays that the application be dismissed.

Analysis & Determination:

34. I have considered the application, the Replying Affidavit, the Respective Agreement for Sale between the Parties and the rival submissions by the Parties' Counsel. The major issue which arise for determination is:-

Whether the proceedings herein should be stayed and the matter be referred to arbitration.

In determining this issues, Section 6(1) of the Arbitration Act No. 4 of 1995 is key. It provides:-

- “(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 files any pleadings or takes any other step in the proceedings, 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.”

35. There is no dispute as to the existence of an Agreement for Sale between the Parties over sale of a house No.94 in 102 South Park Estate situate on Land Reference Number 20521 (I.R NO. 74204) within Mavoko Sub-County, Machakos County. On the first limb under Section 6(1)(a) of the Arbitration Act, I have had the opportunity to read through the entire Agreement and I must say, save for the copy in the court file being undated, I have not come across anything revealing that the Agreement is null and void, inoperative or incapable of being performed. The Parties have been acting on the said Agreement until when this matter was instituted before this court.
36. On the second limb under Section 6(1)(b) of the Arbitration Act, the Applicant asserts that there is a dispute as to the impromptu payment of the balance of the purchase price and damages which ought to be referred to arbitration in line with the provisions of Clause 19 of the aforementioned Agreement for Sale.
37. Clause 19 of the Agreement reads “Applicable Law and Arbitration”



- 19.1 This, Agreement and its performance shall be governed by and construed in all respects in accordance with the laws of Kenya;
- 19.2 Any dispute arising out of or in connection with this Agreement shall be referred to arbitration by a single arbitrator to be appointed by Agreement between the parties or in default of such Agreement within Thirty (30) days of the notification of a dispute, upon the application of either party, by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitration of the United Kingdom:
- 19.3 Such arbitration shall be conducted in Nairobi in accordance with the Rules of Arbitration of the said Institute and subject to and in accordance with the provisions of the Arbitration Act 1995 as amended by the Arbitration (Amendment) Act No. 11 of 2009 or any statutory modification or re-enactment for the time being in force, or its successor legislation;
- 19.4 To the extent permissible by law, the determination of the Arbitrator shall be final, conclusive and binding upon the parties hereto.
- 19.5 Notwithstanding the provision of this clause, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from any court of competent jurisdiction pending the final decision or award of the arbitrator.
38. From the above clause, it is clear that the Applicant has approached this court under Sub-clause 19.5 of the Agreement seeking interim and conservatory measures, in particular seeking to preserve the subject property being House No.94,102 Southpark Estate situate on Land Reference Number 20521 (I.R NO.74204) Mavoko Machakos), which is the subject of the intended arbitration proceedings, by restraining any dealings involving the House and maintaining its status quo.
39. Section 7 of the Arbitration Act No. 4 of 1995 on interim measures by court states:-
- “7(1) It is not incompatible with an arbitration agreement for a party, to request from the High Court, before or during arbitral proceedings, an interim measure of protection for the high court to grant that measure.
40. According to the Applicant, there is a dispute as to the impromptu payment of the balance of the purchase price and damages which ought to be referred to arbitration in line with the provisions of Clause 19 of the aforementioned Agreement for Sale.
41. I respectively agree with the Applicant that a dispute exists between the parties herein. The Applicant has complied with Section 7 of the Arbitration Act, Cap 49 of the Laws of Kenya by requesting from the High Court, before arbitral proceedings, an interim measure of protection for the high court to grant that measure. Article 159(2), (c) of the constitution of Kenya 2010 provides and promotes alternative resolution mechanism, which includes reconciliation, mediation Arbitration and traditional dispute resolution mechanism and this court will only enforce the parties agreement to use this alternative justice system to resolve their dispute.
42. Sub-clause 19.2 of the Agreement provides that any dispute arising out of or in connection with the Agreement shall be referred to arbitration by a single arbitrator to be appointed by Agreement between the parties or in default of such Agreement within Thirty (30) days of the notification of a dispute, upon the application of either party, by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitration



43. Concerning the extent of any court's jurisdiction to intervene with matters governed by the Arbitration Act, Section 10 of the Arbitration Act provides:-

“Except as provided in this Act no court shall intervene in matters governed by this Act.”

44. From the above provisions one of the permitted interventions under the Section 7. The power of intervention is clearly vested in the High Court.

Arbitration Act by the High Court is an intervention by the court to give an interim measure of protection under

45. I equally agree with the Applicant that there exists a valid and enforceable arbitration clause ousting this court's jurisdiction from hearing and determining the dispute between the Parties herein, which obligates this court to stay the current proceedings in favour of Arbitration. The Supreme Court in the case of Samuel Kamau Macharia & another versus Kenya Commercial Bank & 2 others [2012] eKLR stated thus: -

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.....”

46. In the result, in order to give recognition to arbitration as an alternative to litigation and in exercise of this Court's inherent jurisdiction, I hereby make the following orders:-

- a. I allow an interim measure of protection in terms of prayer 2, 3 and 4 of the application dated 26th April 2024.
- b. An interim measure of protection in respect of the subject property being House No.94,102 Southpark Estate situate on Land Reference Number 20521 (I.R NO.74204) Mavoko Machakos) is granted for a period of Thirty (30) days only to enable the Parties to institute the necessary arbitral proceedings failing which the order shall automatically cease to operate.
- c. The proceeding herein will be stayed until conclusion of the said arbitral proceedings.
- d. Costs in the intended arbitration.

47. I would so order.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 30TH OCTOBER 2024

NOEL I. ADAGI

JUDGE

