



REPUBLIC OF KENYA



KENYA LAW
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**Duchess Park Development Company Limited & 2 others v
Achila A10 & 13 others (Miscellaneous Cause E342 of 2024)
[2024] KEHC 13191 (KLR) (Commercial and Tax) (28 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13191 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CAUSE E342 OF 2024
JWW MONG'ARE, J
OCTOBER 28, 2024**

BETWEEN

**DUCHESS PARK DEVELOPMENT COMPANY LIMITED 1ST PLAINTIFF
DUCHESS PARK MANAGEMENT LIMITED 2ND PLAINTIFF
VILLA CARE MANAGEMENT LIMITED 3RD PLAINTIFF**

AND

**NICHOLAS OTIENO ACHILA A10 1ST DEFENDANT
STEPHEN KARANGIZI B9 2ND DEFENDANT
ALICE OWUOR A8 3RD DEFENDANT
JULIET KARANJA C3 4TH DEFENDANT
NANCY MIGARE NYABERA B13 5TH DEFENDANT
JONATHAN MURAGURI KARIUKI B14 6TH DEFENDANT
JACKSON OWINO B18 7TH DEFENDANT
HUSNA HASSAN C9 8TH DEFENDANT
JACKLINE OTIENO ODERO C11 9TH DEFENDANT
STEPHEN RADIDO A4 10TH DEFENDANT
MEIJIDE BEATRIZE C18 11TH DEFENDANT
PAUL OGWAYO OREM D6 12TH DEFENDANT
EDNA ADHIAMBO 13TH DEFENDANT**



RULING

1. The Plaintiffs instituted this miscellaneous cause through a Notice of Motion Application dated 18/4/2024 seeking a temporary injunction, pending determination of arbitration proceedings, to restrain the Respondents and/or their agents from taking over the interim management of all the property known as Land Reference Number 209/5990/13 registered in the Central Lands Registry at Nairobi as I.R. 87215/1(the suit property) and an order to have the 3rd applicant and the Respondents herein to open a joint account to hold any and all monies collected as service charge to allow the 3rd applicant to pay for service provided in the premises.
2. In the alternative the Applicants prayed for an order to stay the implementation of any of the resolutions made in the AGM of 20/4/2024 awaiting hearing and determination of the arbitration.
3. The basis of the application was that the Respondents herein ceased and/or refused to pay the service charge as set out in the sublease agreements entered between the parties and consequently the Applicants have had to incur all the service charge expenses.
4. The Applicants' case is that the Respondents breached the sale agreement and the terms of the sublease and have proceeded to set their own terms as to the amount due as service charge and whether it is payable to the 3rd Applicant.
5. In opposition, the 1st-9th Respondent and the 11th-13th Respondent jointly filed a preliminary objection dated 24/4/2024 while the 10th Respondent also filed a preliminary objection dated 24/4/2024.
6. In both P.O.s, the Respondents state that this court lacks jurisdiction to hear and determine the matter and prayers sought in the application as it raises issues that ought to be determined in the Environment and Land Court.
7. The Respondents argued that this matter is a dispute on leases and as such it is reserved constitutionally for the established Environment and Land Court. On this basis, the Respondents stated that this court lacks the jurisdiction to entertain this application and therefore it ought to be dismissed with costs in limine.

Analysis and Determination:

8. The parties filed written submissions on the preliminary objections; the Applicants' is dated 24/7/2024, the 10th Respondent's dated 18/6/2024 while the other Respondents jointly filed submissions dated 24/7/2024 which I have carefully considered.
9. The 1st Plaintiff is the holder of the title over the suit property in which it developed 70 residential apartments. The 1st-13th Defendants entered into separate sale agreements for the purchase of the said apartments contained in the suit property. The parties also entered into sub-lease agreements. Both of the agreements provided that disputes would be solved through consultations and if that failed, the parties would resort to arbitration. The Applicants contend that the Respondents have reneged on their obligations under the sublease in terms of remittance of service charge as set out therein. The sole issue for determination is whether the court has the jurisdiction to hear this miscellaneous application/ cause.



10. This is a ruling on the two P.Os filed by the Respondents. The Respondents submitted that any dispute in relation to a lease agreement and the issue of service charge as provided under the lease agreement should be within the purview of the Environment and Land Court and not this court.
11. On the other hand, the Applicants submitted that under the Arbitration Act, the court with appropriate jurisdiction to issue any temporary relief awaiting an arbitration is the High Court and that the Act has not been amended to state whether the special courts have this jurisdiction. The Respondents further submitted that service charge is a civil debt and the same is recoverable via civil proceedings and not through the special courts therefore the court is duly clothed with the jurisdiction to hear and determine the instant application.
12. It is not in dispute that each of the Respondents herein entered into sale agreements and sublease agreements with the 1st Applicant in relation to the purchase of apartments. Clauses 7.16 and 7.17 of the sale agreement states:
 - “7. Any dispute, controversy or claim arising out of or relating to this Agreement
7.16 or a termination hereof (including without prejudice to the generality of the foregoing, whether in its interpretation, application or implementation), shall be resolved by way of consultation held in good faith between the parties. Such consultation shall begin immediately after one party has delivered to the other written request for such consultation. If within fifteen (15) Business Days following the date on which such notice is given the dispute cannot be resolved, the dispute, controversy or claim shall be submitted to arbitration in accordance with clause 7.17.
 - 7.17 Should any dispute, controversy or claim as is referred to in clause 7.16 arise between the parties and the consultation process referred to in clause 7.16 shall have not resolved such dispute, the dispute shall upon application by any party, be referred for arbitration to a person acceptable to the parties or if the parties cannot agree on the appointment of such person within a period of thirty (30) days from the date of such application, then the dispute shall be referred to arbitration by a single arbitrator to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch upon the written request of either party. The appointment of the arbitrator shall be final and binding on the parties. The arbitration shall take place in Nairobi, Republic of Kenya and the language of arbitration shall be English. The arbitration shall be conducted in accordance with the Arbitration Act, 1995. The decision of the arbitrator shall be final and binding on the parties and may be made an order of a court of competent jurisdiction. Notwithstanding the foregoing, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from a court in Kenya of competent jurisdiction pending the final decision or award of the arbitrator.”
13. Clause 6.1 and 6.2 of the sub lease agreements state:
 - “6.6.1 Save as otherwise provided in this Sub-Lease, any dispute arising from or in connection with this Lease, its validity, the Parties’ rights and/or obligations thereunder or its termination shall, to all extent possible, be settled amicably by mutual agreement of the parties to such dispute and such agreement shall be confirmed in writing signed by both parties.



6.2 Any dispute arising from or in connection with this SubLease, its validity, the Parties' rights and/or obligations thereunder or its termination, and which is not settled in accordance with Clause 6.1 above shall be finally resolved in accordance with the rules of the Chartered Institute of Arbitrators, Kenya Chapter (hereinafter called "the Institute") and the *Arbitration Act*, 1995 (as amended from time to time) by an Arbitrator appointed by agreement of the Parties to the dispute and failing such agreement within fourteen (14) Days of a request therefore by either Party, by an Arbitrator appointed by the Chairman of the Institute, which shall have regard to the nature of the dispute in making such appointment."

14. Both of the agreements above provide that disputes would be solved through consultations and if that failed, the parties would resort to arbitration. It is clear therefore that the dispute between the parties, which is on the payment of service charge, ought to be referred to arbitration for resolution.

15. Section 7(1) of the *Arbitration Act* provides as follows:

"(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 and for the High Court to grant that measure."

16. A plain and ordinary interpretation of section 7 above is that where there is an arbitration clause in a contract, the parties to the contract may apply to the High Court for an interim measure of protection pending determination of the arbitration and the same may be granted by this court. Section 7 states that the application may be made to the High Court and does not specify that the court ought to be a specialized one.

17. It is crystal clear therefore that this court is clothed with the jurisdiction to issue the temporary relief sought by the Applicants in the subject application pending determination of the arbitration between the parties.

18. The upshot of the foregoing is that the preliminary objections filed herein lack merit and are dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 28TH DAY OF OCTOBER 2024

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Achieng holding brief for Mr. Onyony for the 10th Respondent.
2. Mr. Omwanza Nyamweya for the Applicants.
3. Ms. Addikah holding brief for Ms. Achayo for the 1-9th Respondents.
4. Godfrey - Court Assistant

