



REPUBLIC OF KENYA



**Patel & another v Ngirici (Environment & Land Case 101 of 2022)
[2023] KEELC 16152 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16152 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 101 OF 2022**

**JA MOGENI, J
MARCH 16, 2023**

BETWEEN

PRAVINKUMAR RAMANLAL PATEL 1ST PLAINTIFF

VINABEN PRAVIN KUMAR PATEL 2ND PLAINTIFF

AND

ANDREW PETER NGIRICI DEFENDANT

RULING

1. The application is a Chamber Summons dated 8/04/2022, expressed to be brought under Article 159(2) (c) of the *Constitution*, Section 1A and 3A of the *Civil Procedure Act*, Section 6 & 10 The *Arbitration Act* and Rule 2 of the *Arbitration Rules* and all other enabling provisions of the law. The Defendant, who is the Applicant in this application seeks the following orders:
 - a. That the Honourable court be pleased to issue an order for stay of all proceedings herein pending arbitration.
 - b. That the Honorable Court be pleased to direct that the dispute between the Plaintiffs and the Defendant herein be referred to arbitration as per Clause 15 of the Sale Agreement dated April 24, 2018.
 - c. That the costs of this application be awarded to the Defendant/Applicant against the Plaintiffs/Respondents.
2. The application is premised on the following grounds:
 - i. That on April 24, 2018 the parties herein entered into a sale agreement for the sale and purchase of that property known and described as Land Reference Number 9104/137



- ii. That clause 15 of the Sale Agreement was specific that in case of any dispute and where negotiations have failed then the same shall be referred to Arbitration.
 - iii. That indeed a dispute has arisen between the parties herein as to their respective rights and obligations under the Agreement and the unfair terms of the undated Addendum, which dispute should be determined by way of arbitration pursuant to the express terms of Agreement.
 - iv. That despite the clear provision of Clause 15 the plaintiff has filed the suit herein before this honorable court for hearing and determination
 - v. That this court lacks the requisite jurisdiction under section 6 and 10 of the Arbitration Act.
 - vi. That the defendant is desirous of invoking the dispute resolution mechanism enshrined under Clause 15 of the Agreement
 - vii. That Article 159(2) (c) of the Constitution of Kenya encourages this Honorable Court to promote arbitration as an alternative form of dispute resolution especially where parties have expressly incorporated the arbitration agreement in their contract
 - viii. That it is in the interest justice to stay the legal proceedings instituted by the plaintiff herein and the dispute between the parties be referred to Arbitration as contemplated in the Agreement and in the light of the provisions of section 6 of the Arbitration Act.
 - ix. That the plaintiff will not suffer any prejudice in the event that the suit is stayed and referred for arbitration.
3. The application is supported by an Affidavit sworn by the defendant Andrew Peter Ngirici dated 8/04/2022. There is a further affidavit sworn by Andrew Peter Ngirici dated November 21, 2022 in answer to the replying affidavit by the plaintiff.
 4. The application has been opposed. Pravin Bowry SC, a senior partner at Bowry & Company Advocates the firm representing the plaintiff has sworn a replying affidavit dated April 27, 2022.
 5. I have considered the application, the affidavits by both parties and the submissions made by the counsels, Mr. Ramadhan M. Abubakar for the Defendant/Applicant and Mr. A.I Onyango for the Plaintiff/Respondent.
 6. This application has been brought by the Defendant and it seeks a stay of the proceedings and a reference of the matter to an arbitrator. It is the Applicant's contention that the contractual relationship governing the two parties to this suit was governed by an Agreement Contract Document annexed to the application.
 7. The defendant contends that under clause 15 of the sale agreement dated April 24, 2018 it provided that where there will be a dispute under the Agreement, both parties were to endeavor to resolve the matter amicably, and that where the parties were unable to settle amicably, the matter must be referred to arbitration without any exemption whatsoever.
 8. The plaintiff who is the respondent through Pravin Bowry SC a senior partner at Bowry and Company Advocates the Firm representing the plaintiffs, opposed the application and filed a replying affidavit dated April 27, 2022 and grounds of Opposition on even date. The first ground is that the application is frivolous, vexatious and an abuse of the court process.



9. The plaintiff/respondent contends that there is no dispute between the parties and that the instant suit is brought due to the non-compliance of the applicant to an agreement which the plaintiff/respondent seeks enforcement of. Counsel for the plaintiff/respondent deposed that the application does not disclose any dispute within the meaning of the arbitration clause for arbitration and that it should be dismissed and the suit allowed to proceed.
10. The plaintiff/respondent has admitted that the defendant has paid Ksh 51,000,000 towards fulfilment of the purchase of property known as LR 9104/137 as per the sale agreement dated April 24, 2018. These funds have however not been received by the vendor who is the plaintiff/respondent on a stakeholder basis.
11. The plaintiff/respondent has submitted that despite the applicant/defendant not having paid the outstanding amount for purchase of LR 91604/137 he has been allowed onto the suit premises and he is in occupation and has continued to default in payment of the outstanding amount.
12. On his part the applicant contends that the plaintiff/respondent despite the clear provisions of clause 15 of the Agreement has filed a suit before the court.
Further it is the applicant's contention that Article 159(2)(c) of the *Constitution* encourages the court to encourage arbitration as form of dispute resolution especially where the parties have incorporated this in their contract.
13. The application was canvassed through written submissions. The applicant filed its submissions dated 1 November 22, 2022 submitting that the suit should be referred to arbitration. According to the applicant, the suit was filed in violation of clause 5.1.4 of the lease which requires that a dispute between the parties over the lease be referred to arbitration.
14. According to the respondent, there is a dispute relating to the Sale Agreement which needs to be referred to arbitration. The applicant also identified three issues for determination. In his submission he relied to the case of *Kenneth Chesinya Kiptoon v Sasam Limited & Another* [2016] eKLR, *Blasovilla Holdings Kenya Ltd versus Foton East Africa Ltd* [2014] Eklr, *Mustafa Tobiko Ole Tampul versus Hassan Ole Naado & 17 Others* [2021] eKLR, among other cases.
15. Apart from the Grounds of Opposition and the Replying Affidavit I perused the CTS and never found any submissions made by the plaintiff/respondent. I note that there is no dispute on the existence of the sale agreement for property known as LR 9104/137. There is also no dispute that the said agreement contains an arbitral clause, viz, Clause 15 thereof. The question is whether the suit should be referred to arbitration in accordance with the agreement between the parties or not.
16. It is trite that where a dispute resolution mechanism exists outside the court, the mechanism should be exhausted before the court's jurisdiction is to be invoked. See *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* [2015] eKLR. This principle is consistent with Article 159 of the *Constitution* which enjoins the court to promote alternative dispute resolution mechanisms and where possible the court ought to give it full effect. This includes arbitration. Indeed, section 10 of the *Arbitration Act* ("the Act") expressly bars the court from dealing with matters arbitral except as expressly provided for in the law.
17. Section 6(1) of the *Act* provides: -

"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”.

18. The above provision is clear in its terms, where a matter is a subject of an arbitration agreement, the court is to stay the proceedings and refer the dispute to arbitration save in the case of the exceptions set out in the provision. In the law of evidence, the general rule is that he who alleges must prove. The applicant must demonstrate that the subject matter of the suit or dispute is subject to an arbitration agreement and not subject to the exceptions.

19. The general rule in section 6 of the Act is however, subject to two exceptions. These are; where the arbitration agreement is found to be null and void, inoperative or incapable of being performed, and where the court finds that there is no dispute between the parties with regard to the matters to be referred to arbitration.

20. In Adcock Ingram East Africa Ltd v Surgilinks Ltd [2012] eKLR, the court held: -

“I would agree with the defendant that it is an abuse of the process for parties to refer their disputes to court if the agreement that gives rise to the proceedings contains an arbitration clause. However, if a certain portion of a claim is not in dispute it is improper to refer the entire claim to arbitration. Before a court can order parties to go to arbitration it has to be satisfied that there is indeed a dispute over the claim in issue”.

21. In Nanchang Foreign Engineering Co Ltd vs Easy Properties Kenya Ltd [2014] Eklr, the court observed:

“... Referral of a matter to Arbitration or other alternative method of alternative dispute resolution is not intended to cause delays or deny a party who is rightly entitled to payment. Such a party ought not to await determination or resolution of the matter by an arbitral tribunal or a tribunal established with a view to reach an amicable settlement just because there is a clause for referral of a dispute to such fora unless there is indeed a dispute.

If there is no dispute which can be referred to such fora, the court automatically assumes jurisdiction once a suit is filed in court for its determination. Indeed, Article 50 of the Constitution of Kenya, 2010 provides that every person has a right to have any dispute decided in a fair and public hearing before a court”.

22. From the foregoing, it is clear that the existence of an arbitration agreement in a contract does not per se lead to a stay of proceedings. It must be demonstrated that the claim presented in court is disputed and is subject to the arbitral agreement. Where it can be demonstrated that part of the claim is not in dispute, it will be a waste of time and against the spirit of Article 159 (2)(b) of the Constitution to refer such a matter to arbitration. Any application made in such circumstances for stay and reference to arbitration is meant to delay the wheels of justice and should be rejected by the court.

23. In the present case, I have had the advantage of seeing the plaint which commenced these proceedings. I have also seen the addendum which has precipitated the instant application. The applicant is disputing the claim by the plaintiff which was raised vide a letter dated July 14, 2021 from the advocate of the



vendor to the purchaser's advocate seeking to have him pay Kesh 1,000,000 being monthly payment for delayed completion of the agreement.

24. The applicant contend that they entered appearance on 8/04/2022 upon being served with the plaintiff/respondent's pleadings and they proceeded to file the instant application dated 8/04/2022 where he sought to stay the proceedings and have the same referred to arbitration as per section 6(1) of the Arbitration Act.
25. I have carefully considered the depositions. It would seem that after the plaintiff demanded payment of the outstanding sale agreement balances and the penalty of Kesh 1,000,000 from the defendant, the latter did disputed the same. The applicant went ahead to file the instant application. There was contention about the payment of the Kesh 1,000,000 contained in the addendum.
26. When a debt arises in the normal course of business between parties which is not disputed, notwithstanding the parties being in a relationship that is governed by an arbitral agreement, such a claim cannot be referred to arbitration. Those are the claims which the proviso to section 6 of the Act sought to exempt.
27. In the present case however, the applicant did dispute the claim when the demand was made and also pointed out that the agreement made provision for arbitration.
28. The court cannot re-write contracts that have been entered into by the parties. They must therefore be bound by the terms therein. The intervention by the court is limited as can be seen in the provisions of Section 10 of the Arbitration Act which provides as follows: -

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

29. While rendering its determination with regard to the issue of reference of matters to arbitration under Section 6 of the Arbitration Act, in the case of Mali Developers Ltd v Postal Corporation of Kenya (2014) eKLR, this court stated as follows:-

“The Arbitration Act is a complete code for resolution and determination of disputes and the provisions of the Civil Procedure Act are limited in so far as they are appropriate as envisaged in Rule 11 of the Arbitration Rules 1997...Article 165 of the Constitution of Kenya, 2010 gives the High Court supervisory jurisdiction over any person, body or authority exercising a judicial or quasi-judicial function to ensure the administration of justice and it would therefore be in order for this court to interrogate the whole proceedings and evidence to ensure that justice was done. However, the court recognizes that it can only intervene in arbitral proceedings within the parameters envisaged by Section 10 of the Arbitration Act.”

30. Section 6 (1) of the Arbitration Act provides:

“6

- (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 –
 - E. that the arbitration agreement is null and void, inoperative and incapable of being performed; or



- f. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
- (2) Notwithstanding that an application has been brought under subsection (1) and the matter is pending before the court, arbitral proceedings may be commenced or continued and an arbitral award may be made.”
31. Under that section, a Defendant is permitted to apply for reference of the proceedings to arbitration either at the time of entering appearance or at any time before filing any pleadings, or at any time before taking any step in the proceedings. The Court of Appeal put it very clearly in the Corporate Insurance Company Limited case, supra, where it stated:
- “In the present case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to rely on the clause.”
32. The Applicant in this case entered appearance and then subsequently before taking any further step in the proceedings filed the instant application seeking to have the matter referred to arbitration. I am satisfied that the application is not incompetent, that the Applicant has not waived its right to invoke the arbitration clause and have the matter referred to arbitration, and that therefore this application should be considered.
33. The Counsel for the plaintiff/respondent has argued that there is no dispute to be referred to arbitration. Mr Bowry SC argued that the Defendant had already admitted liability for the sale agreement dated April 24, 2018 and the addendum dated April 30, 2019 with the latter providing for payment of the monthly penalty. Counsel Pravin Bowry SC argued that in those circumstances, there is no dispute as the plaintiff approached this court to exercise their rights under the sale agreement.
34. From my reading of the contract I do not agree with the Plaintiff/Respondent that there is no dispute between the parties and that the case is plain and obvious. That the Plaintiff’s claim against the Defendant is for exercise of their rights under the sale agreement under and therefore there is no dispute to refer to arbitration. I do find that there is in fact a dispute. The first dispute is whether there has been any breach between the parties and in line with that issue, whether any money is payable.
35. Clause 15 of the contract between the two parties provides that all disputes without exemption should be referred to arbitration. I am satisfied that under Clause 15, the dispute in this matter should be referred to arbitration.
36. The court would not wish to keep the parties in court for a minute longer when in fact they are supposed to be in another forum that they voluntarily and freely agreed to for the resolution of their dispute.

Disposition

37. Given the foregoing, I find merit in the application dated April 8, 20122 and issue the following orders:
- a. That a stay of further proceedings in this matter be and is hereby issued and the matter herein referred to arbitration.
 - b. Costs to the Defendant.



It is so Ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 16TH DAY OF MARCH 2023

MOGENI J

JUDGE

Judgment read in virtual court in the presence of:

Ms. Kariuki holding brief for Senior Counsel Bowry for Plaintiff/Respondent

Ms. Kiuluku holding brief for Mr. Abubakar for Applicant/Defendant

Ms. Caroline Sagina: Court Assistant

