



Safaricom Investment Co-operative Limited v Francis Mbugua Kinyanjui & Leonard Njogu Njau t/a Kinyanjui & Njau Advocates; Irura (Interested Party) (Civil Miscellaneous Application E100 of 2022) [2023] KEHC 21741 (KLR) (Civ) (25 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL MISCELLANEOUS APPLICATION E100 OF 2022

AN ONGERI, J

AUGUST 25, 2023

BETWEEN

SAFARICOM INVESTMENT CO-OPERATIVE LIMITED PLAINTIFF

AND

**FRANCIS MBUGUA KINYANJUI & LEONARD NJOGU NJAU T/A
KINYANJUI & NJAU ADVOCATES DEFENDANT**

AND

MARTHA NJERI IRURA INTERESTED PARTY

RULING

1. The application coming for consideration in this ruling is the one dated 24/6/2022 seeking stay of proceedings herein pending referral of this dispute to arbitration.
2. It is supported by the affidavit of Leonard Njogu Njau sworn on 24/6/2022. He has deposed that Applicants legal Services were enlisted by the Respondent for various conveyancing transactions between the years 2015-2021 and in particular the contract made on 30th July 2015. It is the Respondent's case that the Applicant has not executed its work as per the contracts and has refused to give back the documents passed over to it by the Respondent.
3. He averred that the respondent is aware that its documents are being held in lieu of the applicant's fees as quantum of the same. That it is clear from the contract made on 30th July, 2015 that any disputes arising out of the said contract would be resolved in accordance with clauses 7, 8, 9 and 10. The Respondent has deliberately refused to invoke the dispute resolutions procedure provided for by the contract and agreed by both parties.



4. The legal office of the plaintiff filed a replying affidavit sworn on 3/5/2023 opposing the application in which she deposed that agreement dated 10th July 2018 having been terminated with full knowledge and consent of the parties, partially in writing and partially by conduct does not exist and therefore the arbitration clause referred thereto does not apply herein. That after entering into the agreement dated 10th July 2018 in respect of Title Number Kekonyokie/Iikisumet/60 the defendant committed egregious acts of fraud and forgery, rendering the arbitration clause referred thereto null and void, inoperative or incapable of being performed.
5. She averred that the fraud was relayed to the plaintiff by the directorate of criminal investigations Kajiado County who were investigating the plaintiff's dealings with Title Number Kekonyokie/Iikisumet/60. Investigations revealed that there was no subdivisions of the land and registration of transfers in favour of the plaintiff's members and customers, that from the said green card it was clear that the title was not closed on subdivision and the registrar confirmed that the parcel of land was and is still owned by Vijaylaxmi Hassanally Mohamedally Rattansi, therefore the title that the defendant presented to the plaintiff was a forgery.
6. She contended that in light of the fraud perpetrated by the defendants is complex in nature and the decision on these issues demand extensive evidence for which civil court is more appropriate than arbitration. She indicated that the suit herein straddles multiple transactions and may involve many third parties who may claim an interest in the documents held by the defendant illegally and that finally the orders that the plaintiff seeks orders against the defendant can only be granted by this court in exercise of its supervisory jurisdiction over advocates who are its officers.
7. The parties filed written submissions as follows; the defendant submitted that the Agreement contracts that had been filed by the plaintiff clearly had an Arbitration clause agreed upon by the parties when the Applicant filed the chamber summons under consideration, the plaintiff promptly withdrew the documents. That the dispute herein emanates from the contract agreement and the same touches on the payments made and the work done under contract agreements.
8. The defendant submitted that they filed a memorandum of appearance and objected to the jurisdiction of this court hearing the originating summons in view of the Arbitration clauses in the contract agreements and by doing so they showed that they are willing to adhere to the arbitration clause.
9. The interested party submitted that she is not party to the advocate client contract between the plaintiff and defendant and cannot therefore be subjected to a process in which it had no duties or obligations. she was represented in that sale agreement by her own advocate and upon the completion of the sale transaction the defendant retained the title deed unjustly. that whereas the defendant was supposed to transfer only 10 acres to the plaintiff he transferred the whole parcel of land measuring 25 acres to the plaintiff irregularly. The defendant now hold title in which the interested party has 15 acres and cannot hold the title as she was not his client and does not owe him legal fees.
10. The plaintiff submitted that section 6(1) of the *Arbitration Act*, sets out a statutory time bar for when a party wishing to enforce an arbitration agreement must file their application to stay the proceedings in favor of arbitration. This bar is not later than the time when that party enters appearance or takes the appropriate procedural step to acknowledge the legal proceedings against that party. It was their argument that the defendant failed to comply with the aforementioned section by filing the preliminary objection dated 4th April 2022 and further filling the memorandum of appearance dated 14th March 2022.
11. The plaintiff submitted further that the contract dated October 2015, the Plaintiff had engaged the Defendants to survey and subdivide LR No. 10823/1427- Juja S.W of Thika into 150 plots and transfer



it to its members, and the contract dated September 2016, where the Plaintiff engaged the Defendants to offer conveyancing services in subdividing Title No. IR. 156797 situated in South West of Thika measuring 6.07 Ha. into 107 plots but however terminated since there was no performance on the part of the defendants.

12. The plaintiff argued that the performance under this contract was varied when the parties agreed to transfer the property Kekomyokie/Ilkisumet/60 to the Plaintiff, and then sub-divide the property. In the initial contract, the parties had agreed that the sub-division would be undertaken while the property was still under the name of the Vendor, Nicholas Sankok.
13. The plaintiff contended further that even though there was performance, the defendant committed egregious acts of fraud, that would render any dispute under this contract un-arbitrable.
14. It was the plaintiff submission that the suit herein is brought under Section 47(1) of the *Advocates Act* and Order 52, rule 4(1) of the *Civil Procedure Rules*, 2010. The Plaintiff submits that this suit calls upon the court to exercise its special jurisdiction to supervise the conduct of advocates. That this case, it is only this Honorable Court that can order the Defendants to deliver the documents in their possession which belong to the Plaintiff and render an account of the monies held by them in trust of the Plaintiff.
15. Further that this is special jurisdiction of the court that cannot be abrogated to an Arbitrator. That it faces a risk of grave injustice should its relationship with the Defendant by interpreted by a Tribunal which lacks the requisite jurisdiction to discipline Advocates and regulate their conduct.
16. The sole issue for determination is whether this case should be referred to arbitration.
17. I find that it has not been disputed that the parties entered into a contract on 30/7/2015 which provides that any disputes arising out of the said contract would be resolved in accordance with Clause 7, 8, 9 and 10 which states that the matters be referred to the arbitration tribunal.
18. The law provides that where parties have agreed on arbitration clause they oust the jurisdiction of the court.
19. Section six (6) of the *Arbitration Act* states as follows;

“Section Stay of legal proceedings

- 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 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.”



20. In *Soko Mlagui v Suresh Parmar & 4 others* [2017] eKLR, it was held as follows;

“Section 6 of the *Arbitration Act* is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitrating where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution. We do not therefore find anything in the provision that can be described as derogating or subverting the constitutional edict as regards alternative dispute resolution.”

21. Justice Mativo, (as he then was), said in the case of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) as follows;

“Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes by an arbitral tribunal, as an alternative to adjudication by the courts or a public forum established by law. Parties by mutual agreement forgo their right in law to have their disputes adjudicated in the courts/public forum. Arbitration agreement gives contractual authority to the arbitral tribunal to adjudicate the disputes and bind the parties. The arbitration agreement being the product of a consensual contract, I refuse the invitation to “rectify the arbitration clause.” The applicant is inviting the court to venture into the forbidden sphere of re-writing contracts willfully signed by consenting parties”.

22. I find that in the current case, it has not been shown that the arbitration agreement is null and void, inoperative or incapable of being performed; or that there is no dispute between the parties with regard to the matters agreed to be referred to arbitration.

23. I accordingly refer this suit to the arbitration tribunal in accordance with the agreement between the parties.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF AUGUST, 2023.

A. N. ONGERI

JUDGE

