REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

COMMERCIAL CASE NO. E370 OF 2020

BETWEEN

GREENVIEW DEVELOPERS LIMITED ....PLAINTIFF

AND

SURESH MOHANLAL FATNIA..DEFENDANT

R U L I N G

1. This is a ruling on the defendant's Preliminary Objection dated 28th September 2020. The same was canvassed by way of written submissions which are on record.

2. The background to this matter is that plaintiff ("the Company") is the registered owner of the property known as title **No.IR 204926** also known as **L.R No. 1870/VIII/268**, *Peponi View Villas* ("the suit property") situated in the City of Nairobi. The plaintiff has constructed thereon 11 houses. The defendant is a director of the Company and is occupying House No.1 ("the premises") on the basis that he has purchased the same. The company denies the defendant's claim and has brought the present proceedings to evict him therefrom.

3. The thrust of the defendant's Preliminary Objection dated 28/9/2020 is that this court lacks jurisdiction to deal with this matter as there exists an Arbitration clause in the Sale Agreement between the defendant and the Company as well as in the Memorandum and Articles of Association of the Company.

4. Counsel for the defendant submitted that this court lacks jurisdiction as this is purely a Land matter. That the Sale Agreement dated 23/5/2018 between the parties and as well as Company's Memorandum of Association have an arbitral clause. That in the premises, the parties were supposed to go for arbitration before coming to court.

5. On his part, Counsel for the Company submitted that the agreement dated 23/5/2018 was invalid as the defendant had not paid the purchase price. That there having been no consideration to the sale, the agreement was a nullity and cannot be relied on. That there is no enforceable contract between the parties and the arbitral clause cannot therefore be enforced.

6. On the arbitral clause in the Company's Memorandum of Association, Counsel for the plaintiff submitted that the same only applied to disputes between the Company and its members. That the same was only applicable in respect of the terms provided for in the Articles of Association. He urged the application be dismissed.

7. I have considered the record and the submissions of Learned Counsel. In **Hassan Ali Joho & Another vs. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013,** the Supreme Court of Kenya reiterated the principle in **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors [1969] EA 696** to the effect that: -

> "*To restate the relevant principle from the precedent-setting case,* ***Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors (1969) EA 696****:*
>
> ***'a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration … a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion'.***

8. The exhaustion doctrine posits that where a dispute resolution mechanism exists outside the court, that mechanism should be exhausted before the court's jurisdiction is invoked. (See the Court of Appeal decision in ***Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* [2015] Eklr**). This is consistent with the provisions of ***Article 159 of the Constitution*** which enjoins the court to promote alternative dispute resolution mechanisms and where possible, the court to give it full effect.

9. I have seen the agreement dated 23/5/2018 between the parties. Clause (O) thereof provided that: -

> ***"Unless otherwise provided in this Agreement, any dispute, difference or question whatsoever which may arise between the parties including the interpretation of rights and liabilities of either party shall be referred to an arbitrator under the rules of the Arbitration Act 1995 of Kenya or any statutory modifications or re-enactment for the time being in force, such arbitrator to be appointed by agreement of both parties and in the absence of agreement within fourteen (14) days of the notification of the dispute by either party to the other then on the application of any one party by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) and the decision of such arbitrator shall be final and binding on the parties hereto".***

10. ***Section 6(1) of the Arbitration Act, 1995*** ("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 the 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 matters agreed to be referred to arbitration".***

11. It is the plaintiff's contention that the agreement relied on by the defendant is a nullity as there was no consideration that was paid for the sale of the subject house. That in the premises, this Court has jurisdiction to entertain the matter before it.

12. I have already shown that the Sale Agreement between the parties had an arbitral clause. The said clause required any dispute arising from the Sale Agreement be referred to arbitration. A perusal of the Sale Agreement shows that, it contains the names of the parties, the description of the property, the purchase price and the conditions thereto. The same was properly executed by the parties.

13. The recitals in the said agreement indicate that the Company offered to sell and the defendant agreed to purchase the premises for a specified sum. That the offer and acceptance was evidenced in the execution clause of the agreement where both parties executed and the same was attested to.

14. In my view, upon execution of the agreement, the same had the effect of validating the agreement. It made the parties thereto to be bond by the provisions thereof. It constituted a valid agreement. Whether there was consideration or not, that does not bring that agreement within the ambit of ***section 6(1) of the Act.*** (See ***Nelson Kivuvani Vs Yuda Komora & Another, Nairobi HCCC No.956 of 1991).***

15. Indeed, the issue of whether there was consideration is a matter which should be determined by the arbitral tribunal. In this regard, I reject the plaintiff's contention that the Sale Agreement remained a promise or offer on the basis that the defendant had allegedly not paid the consideration indicated therein. That agreement is valid and binding. All that is left is to ascertain whether the parties thereto did undertake and or fulfil their respective obligations thereon or not.

16. As regards the Memorandum and Articles of Association of the Company, the submissions of Learned Counsel for the plaintiff are correct. The disputes referred to therein, are those that are in respect of the running of the Company and the application of those Articles. The same would not apply in this case. The dispute herein is purely a commercial transaction that seems to have gone awry.

17. On the other hand however, assuming the arbitration clause was non-existent or incapable of enforcement, it is my view that this is a matter for the Environment and Land Court ("ELC") and not this court. I hold that view because, ***Article 162(2) of the Constitution as read with Section 13 of Environment and Land Court Act,*** provide that the ELC has jurisdiction to determine disputes relating to the environment and use and occupation of, and title to land.

18. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, courts utilize the pre-dominant Purpose Test. (See **Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another [2016] eKLR).** In the present case, the predominant dispute is about the occupation and/or ownership of the premises in the suit property.

19. In view of the foregoing, I find that the matter is wrongly before this Court. The parties should have gone to arbitration. Accordingly, I stay these proceedings and refer the parties to arbitration in accordance with the terms of the Sale Agreement between themselves. The said arbitration be kick started within 30 days of the date of this ruling. In default, there will be liberty to apply.

20. Under ***section 6 of the Act,*** the defendant was supposed to apply for stay of proceedings instead of raising a preliminary objection as he did herein. In this regard, I will order that each party do bear own costs.

It is so ordered.

DATED and DELIVERED at Nairobi this 25th day of February, 2021.

A. MABEYA FCI Arb

JUDGE