



Rosslyn House Limited v Saveet Resorts Ltd & 2 others (Miscellaneous Application E564 of 2021) [2021] KEHC 148 (KLR) (Commercial and Tax) (22 October 2021) (Ruling)

Neutral citation: [2021] KEHC 148 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E564 OF 2021
A MABEYA, J
OCTOBER 22, 2021
IN THE MATTER OF AN ARBITRATION ACT 1995
AND
IN THE MATTER OF AN APPLICATION TO THE HIGH COURT**

BETWEEN

ROSSLYN HOUSE LIMITED APPLICANT

AND

SAVEET RESORTS LTD 1ST RESPONDENT

MARA HILL LTD 2ND RESPONDENT

PARAMAMBA LIMITED 3RD RESPONDENT

RULING

1. The dispute between the parties revolves around the completion of a development in which the respondents had purchased three units. The parties had entered into three separate Sale Agreements dated 7/10/2015 with similar terms for the purchase of three apartments known as unit 306, 308 and 3018. The agreement provided for a completion date of 24 months from 31/5/2015, hence completion ought to have been on or before 31/5/2017.
2. The applicant failed to complete as envisaged in the agreement causing the parties to sign three Deeds of Variation dated 27/6/2018 which were similar for each apartment. The deeds provided, inter alia, that the new completion date was 30/4/2019, the vendor would pay 5% above CBK base rate if completion delayed beyond 31/5/2019.



3. It also stipulated that if the certificate of practical completion would not have been issued by 30/11/2019, the purchaser had three choices. The purchaser could either extend completion time, sue for specific performance or rescind the agreement and demand repayment after issuing a 14 day notice.
4. The applicant defaulted causing the respondent's to rescind the sale agreement and demanded a full refund. The applicant failed to refund causing the respondents to refer the matter to arbitration. The parties agreed on Hon. Rtd Justice Havelock, as the arbitrator.
5. However, on the onset, the applicant raised an objection challenging the arbitrator's jurisdiction on the ground that the sale agreements were not properly rescinded by the respondents. Vide a ruling dated 1/7/2021, the arbitrator found that he had jurisdiction to hear and determine the dispute based on the arbitration clause. He also found that the matters raised in the objection were not preliminary as they were matters of evidence as opposed to matters of law.
6. By an Originating Summons dated 30/7/2021, the applicant appealed against the said decision and sought the determination of questions relating to the jurisdiction of the Honourable Arbitrator superintending over the said dispute and the arbitrability of the dispute between the parties.
7. Contemporaneous with the Originating Summons, the applicant lodged a Chamber Summons dated 30/7/2021 under Section 17(6) of the *Arbitration Act* seeking a stay of the arbitral proceedings pending the determination of the Originating Summons.
8. The Summons was supported by the affidavit of Elizabeth Waiyaki sworn on 30/7/2021. She contended that the completion and rescission notices were defective, that the matter was not subject to arbitration as the only available remedies were a suit for specific performance or extension of time as per the Sale Agreements. That in the premises, the arbitral proceedings should be stayed until the Originating Summons was determined.
9. The application was opposed vide the respondent's affidavit of Kunal Kamlesh Shah sworn on 13/8/2021. He deposed that the application was a delaying tactic on the applicant's part. That the construction stalled and there was no indication that the apartments would ever be completed hence the respondents were well within their right to rescind the agreements as per the Deeds of Variations. That the sale agreements entered between the parties had an arbitral clause which gave the arbitrator jurisdiction to determine the dispute between the parties.
10. The Court has considered the parties' contestations. The main issue for determination is whether the arbitral proceedings should be stayed pending the determination of the Originating Summons that seek to challenge the jurisdiction of the Arbitral Tribunal. It is clear that the applicant had raised the objection at the earliest opportunity.
11. I have looked at the agreements. Clause 28.2 thereof provides that: -

“Any dispute, controversy or claim arising out of or relating to this agreement, or breach, termination or invalidity thereof, shall be referred to arbitration under the Rules of the Chartered Institute of Arbitrators of the United Kingdom, Kenya Branch”.
12. That shows that there is prima facie evidence that there was an arbitral clause in the agreements between the parties. On a prima facie basis, that process was contemplated by the parties.
13. Further, there is prima facie evidence that the applicant did concur with the respondent in the reference of the matter to arbitration and that it had even concurred in the appointment of the arbitrator.



14. The foregoing brought the parties squarely within the general jurisdiction of the arbitral law, that the court should as much as possible not interfere with the arbitral process unless the continued proceedings of the arbitral process would cause untold suffering, burden, prejudice or loss to the party seeking the stay thereof.
15. This Court is aware that a party is not precluded from challenging the jurisdiction of an arbitrator on the ground that he appointed or participated in the appointment of an arbitrator. (See section 17(2) of the *Arbitration Act*). However, by dint of section 17(8) of that Act, the unnecessary staying of arbitral proceedings is discouraged. That subsection provides: -
 - “(8) While an application under sub-section (6) is pending before the High Court the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided and such award shall be void if the application is successful”.
16. In view of the foregoing, nothing was set out in the supporting affidavit to show that if the arbitral proceedings are not stayed as sought, the applicant will suffer irreparable loss and damage. There are no special circumstances for the Court to depart from the general rule set out in the aforesaid section 17(8) of the Act.
17. Consequently, I find the Chamber Summons dated 30/7/2021 to be unmerited and dismiss the same with costs to the respondents.
18. However, the parties are directed to take steps and expeditiously prosecute the Originating Summons accordingly. In the meantime, the Arbitral Tribunal may proceed with its proceedings but is hereby directed not to publish its award if it concludes the proceedings well before the Originating Summons is determined.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

A. MABEYA, FCI Arb

JUDGE

