



**Morarji & another v Royal Beach Apartments Limited (Environmental and Land Originating Summons E003 of 2024) [2025] KEELC 1340 (KLR) (19 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1340 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIROMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2024**  
**SM KIBUNJA, J**  
**MARCH 19, 2025**

**BETWEEN**

**SHOBHA CHANDRASEY MULJI MORARJI ..... 1<sup>ST</sup> PLAINTIFF**

**SHAUKATALI MOHAMED HUSSEIN KHAN ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ROYAL BEACH APARTMENTS LIMITED ..... DEFENDANT**

**RULING**

[Defendant's Chamber Summons Dated 24th June 2024]

1. The defendant moved the court through the application dated the 24<sup>th</sup> June 2024 seeking for orders that the matter be referred to arbitration; stay of proceeding herein pending the hearing and determination of the arbitration proceedings, and costs to be in the cause. The application is based on the five (5) grounds marked (i) to (v) on its face and supported by the affidavit of Mohamed S. Farid Fahamy, one of the defendant's directors, sworn on the 24<sup>th</sup> June 2024. It is the defendant's case that the parties herein entered into a sale agreement on the 25<sup>th</sup> October 2014, that at clause "L" provided for disputes like the instant one to be referred to arbitration, and it is only fair and just that the court grants its application.
2. The application is opposed by the plaintiffs through the replying affidavit of Shobha Chandrasey Mulji Morarji, the 1<sup>st</sup> plaintiff, sworn on the 31<sup>st</sup> July 2024, *inter alia* deposing that this suit is to ensure the defendant complies with the mandatory requirements of the Sectional Properties Act, chapter 286 of Laws of Kenya that came into force on 28<sup>th</sup> December 2020, and is no pegged on the sale agreement; that as the arbitration clause on the sale agreement cannot suffice in the present dispute, the defendant's application should be dismissed with costs.



3. The record confirms that when the matter was mentioned on the 6<sup>th</sup> February 2025, the learned counsel for the plaintiff informed the court that they had filed submissions dated the 5<sup>th</sup> February 2025 on the defendant's application and sought for a ruling date. The learned counsel for the defendant requested for and was granted seven days to file and serve their submissions, which they filed dated 6<sup>th</sup> February 2025. The court has considered both submissions.
4. The issues for the court's determinations in the chamber summons are as follows:
  - a. Whether the dispute herein is one of the disputes covered under arbitration clause in the parties' sale agreement, and whether the matter herein should be referred to arbitration.
  - b. Whether the defendant has met the threshold for stay of proceedings.
  - c. Who should pay the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence by the parties, submissions by the learned counsel, superior courts decisions thereon and come to the following conclusions:
  - a. That there is no dispute that the parties herein entered into the sale agreement dated the 25<sup>th</sup> October 2014 for sale of the suit property. I have perused the annexed copy of the said sale agreement and clause "L" provide as follows:

"L. Arbitration

All claims and disputes {except as provided in the Special Conditions Clause F(a)v} whatsoever arising under this Agreement shall be referred to arbitration in accordance with the provisions of the Arbitration Act of Kenya (Act Number 4 of 1995) by a single arbitrator to be appointed by agreement between the parties or, failing agreement within fourteen (14) days of the notification by either party to the other of the existence of a dispute or claim, to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators, Mombasa Branch, on the application of either party. Arbitration shall take place in Mombasa."

The Special Conditions Clause "F(a)v" provides as follows:

"F. Apartments – Inspection State And Condition

- a. Construction and Plans
  - (v) Notwithstanding the provisions for arbitration contained in this agreement, any dispute arising in connection with the matter referred to in this clause shall be submitted for arbitration to an Architect appointed by the Kenya Association of Building and Civil Engineering Contractors (KABCEC)."
- b. That from the plaintiffs' pleadings, filed through the originating summons dated the 13<sup>th</sup> May 2024, the prayers sought are inter alia that:
  - i. Defendant be compelled to transfer the reversionary interest to the management company and register/



- convert the company into a corporation under the *Sectional Properties Act*.
- ii. Defendant be compelled to undertake conversion of the long term listed leases into the *Sectional Properties Act* regime.
  - iii. Land Registrar be ordered to register restrictions against the listed titles should the preceding orders not be complied with.
  - iv. Costs.
- c. Both counsel have in their respective submissions referred the court to the provisions of section 6 of the *Arbitration Act*, 1995 that obligates the court dealing with a matter subject to an arbitration agreement to refer the parties to arbitration upon application. The exemptions in the provision are listed and includes where the court finds the arbitration agreement is null and void, inoperative or incapable of being performed; or there is not in fact any dispute between the parties with regard to matters agreed to be referred to arbitration. It is the plaintiffs’ submission that sale agreement that contains the arbitration clause “L”, does not provide for conversion of their long term leases to sectional properties titles, and arbitration would not be a suitable option. They also submitted that the mere existence of arbitration clause does not abrogate the court’s jurisdiction and relied on the case of UAP Provincial Insurance Company Limited versus Michael John Beckett (2018) eKLR, where the Court of Appeal found inter alia that where the court after enquiry finds the dispute before it is indeed covered under the arbitration agreement, then it should refer it to arbitration but “If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.”
- d. The learned counsel for defendant inter alia cited Article 159(2) (c) of the *Constitution* that obligates the courts to be guided by and promote the principle of alternative forms of dispute resolution including “... reconciliation, mediation, arbitration and traditional dispute resolution mechanisms...” and submitted that it is clear from the arbitration clause in the parties’ sale agreement that they preferred arbitration in settlement of their disputes and therefore ousted the court’s jurisdiction. The counsel referred to the decision in the case of *Yes Housing Co-operative Society Limited versus Kenneth Onsare Maina* [2020] eKLR, where the court observed that it is “... not just under a duty to enforce a contractual clause binding the parties to refer their disputes to arbitration but is under a Constitutional obligation to promote that mode of dispute resolution...” That the contention by the plaintiffs that their claim being of conversion under the *Sectional Properties Act*, do not fall under those disputes to be



referred to arbitration is not correct as the arbitration clause “L”, covers all claims except those under clause “F(a)(v)”.

- e. Having considered the pleadings, facts presented so far, case law cited by both learned counsel and upon perusing the sale agreement of 25<sup>th</sup> October 2014 and noting that clauses “E” and “H” thereof, among others have made reference to sublease and reversionary interest respectively, that are part of the issues raised for determinations in the originating summons, then the court agrees with the defendant that the disputes herein are amenable to be resolved through arbitration. I agree with the decision cited by the defendant in their submissions of the case of *Pius Kimaiyo Langat versus Co-operative Bank of Kenya Limited* [2017] eKLR, where the Court of Appeal stated that:

“We are alive to the hallowed legal maxim that it is not the business of the courts to rewrite contracts between parties. They are bound by the terms of their contract unless, fraud, coercion or undue influence are pleaded and proved.

In the instant proceeding and application, no party has pleaded fraud, coercion or undue influence in the entering into the sale agreement of 25<sup>th</sup> October 2014 that contains the parties’ clear manifestation for all disputes to be referred to arbitration. The statutory duty, and indeed the Constitutional obligation of the court is to abide by the parties’ preferred mode of dispute resolution, which the plaintiffs appear to have forgotten when they came to court by referring the dispute herein, to arbitration in terms of Clause “L”. Having found the application for the disputes herein to be referred to arbitration meritorious, it follows that it is only fair and just that the proceedings herein should be stayed pending the hearing and determination of the arbitration.

- f. Under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where for reasonable cause the court directs differently. That so as to cultivate good will between the parties, I find it fair and just for the costs of the application to abide the outcome of the arbitration.

6 That in view of the foregoing determinations on the chamber summons dated 24<sup>th</sup> June 2024, the court finds and orders as follows:

- a. That the defendant’s application has merit and is allowed as prayed in terms of prayers (1) and (2).
- b. That the costs to abide the outcome of the arbitration.
- c. That this matter be placed for mention to await the determination of the arbitration proceedings.

It is so ordered.



**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 19<sup>TH</sup> DAY OF MARCH 2025.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

In The Presence Of:

Plaintiffs : Mrs. Kandie For Gekonde

Defendant : Mr Rotich For Maulidi

Shitemi – Court Assistant.

