



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. E045 OF 2019

ZULFIQAR QAMAR DIN.....1ST PLAINTIFF/APPLICANT

SHAMSHAD BEGUM MOHD RAFIQUE.....2ND PLAINTIFF/APPLICANT

VERSUS

BROOKSIDE PEARL LIMITED.....DEFENDANT/RESPONDENT

RULING

(1) Before this Court is the Notice of Preliminary Objection dated **18th April 2019**. The Defendant **BROOKSIDE PEARL LIMITED** objects to this Court hearing and determining the Notice of Motion dated **26th March 2019** filed by the Plaintiff/Applicants **ZULFIQAR QAMAR D.N** (the 1st Plaintiff/Applicant) and **SHAMSHAD BEGUM MOHO RAFIQUE** (the 2nd Plaintiff/Applicant). The Preliminary Notice is premised on the grounds: -

“1. THAT this Honourable Court does not have any jurisdiction to entertain and/or grant any prayers for this matter for reasons:

1.1.1 The contract (Agreement for Sale dated 7th November 2017) between the parties clearly stipulates that should any dispute arise between the parties. Arbitration shall be the tool used to resolve such dispute.

1.1.2 Pursuant to Article 159 of the Constitution of Kenya, 2010:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles, among them is “alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

1.1.3 Pursuant Section 6 of the Arbitration Act, CAP 49, Laws of Kenya, it is stipulated by law that a stay be issued for legal proceedings which are subject to arbitration.

2. THAT as a consequence the prayers sought in the Complaint cannot issue.

(2) The Preliminary Objection which was opposed by the Plaintiff/Applicants was argued orally in court on **15th November 2019**.

(3) In issue between the parties is Agreement dated **7th November 2017** (hereinafter “**the Agreement**”) by which the Plaintiff/Applicants (as Purchasers) agreed to purchase from the Defendant/Respondent (the Vendor/Developer) **Apartment No.5** in **Block D** of the Development constructed by the Defendant/ Respondent on **LR NO.1870/11/578** in the Westlands Area of Nairobi.

(4) The Plaintiff/Applicants aver that despite having entered into an agreement to purchase **Apartment No.5D**, they later discovered that the Defendant had sold the said Apartment to a third party at a higher price. The Defendants/Respondents offered to the Plaintiff a choice of any alternative apartment on the same development. However, the Plaintiff/Applicants are adamant that their choice remains **Apartment 5D**. To this end the Plaintiff/Applicant filed in court the Notice of Motion dated **26th March 2019** seeking various reliefs. The Defendant/Respondent’s position is that the dispute ought to be referred to Arbitration as provided for in their written Agreement.

ANALYSIS AND DETERMINATION

(5) I have carefully considered the submissions made by both parties in respect of the Notice of Preliminary Objection. Two main issues arise for determination:-

- (i) Does there exist a dispute for determination between the parties?
- (ii) Should the matter be referred to Arbitration?

(i) Existence of a Dispute

(6) Before any court can refer a matter to Arbitration, that court must be satisfied that there indeed exists a dispute to be so referred. In **ADDOCK INGRAM EAST AFRIA LTD –VS- SURGILINKS LTD, Hon Justice Daniel Musinga** (as he then was) held as follows:-

“Before a court can order parties to go to arbitration, it must be satisfied that there is indeed a dispute over the claim in issue.”

(7) In this regard, **Section 6(1)(b)** of the **Arbitration Act** provides that: -

“(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:

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”

Therefore, a matter will not automatically be referred to Arbitration upon request, until the question of whether or not a dispute actually exists is determined.

(8) In **UAP PROVINCIAL INSURANCE COMPANY LTD –VS- MICHAEL JOHN BECKETT CA NO.26 OF 2007**, the Court stated as follows:-

“It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6(1)(b) of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry, the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, and then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. 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.”

(9) Clause Q under the Heading **ARBITRATION** in the Agreement between the parties dated **7th November 2017** provides as follows:-

“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 modification 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.”[own emphasis]

(10) In the instant case the Agreement between the parties was specifically in relation to the purchase of **Apartment 5D** and the Defendant offer to sell the said Apartment to the Plaintiffs. The Defendant later sold that Apartment to a third party. The Defendant now seeks to alter the Agreement through a Deed of Variation to include an offer to sell to the Plaintiffs instead. **Apartment 6C**. However, the Plaintiffs not being desirous of purchasing **Apartment 6C** declined to sign that Deed of Variation. The Plaintiffs then proceeded to sue the Defendants alleging Breach of Contract and Fraud.

(11) In objecting to this Notice of Preliminary Objection the Plaintiff/Applicants argue that the Defendant failed to file a Memorandum of Appearance together with the Notice of Preliminary Objection. They cited **ADREC LIMITED –VS- NATIONA MEDIA GROUP LIMITED [2017] eKLR**, where it was held that:-

“Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.

(12) A look at the file reveals that the Defendant herein filed a Memorandum of Appearance on **3rd April 2019**. The Defendant did not file any defence but filed the Notice of Preliminary Objection on **18th April 2018**. I therefore find that said Preliminary Objection is properly before the court.

(13) Accordingly, I find and hold that the dispute between the parties does amount to a dispute which falls within the scope of the Arbitration clause of the Agreement dated **7th November 2017** which dispute ought to be referred to Arbitration.

(ii) **Should the Dispute be referred to Arbitration**

(14) **Section 3** of the **Arbitration Act** defines an arbitration agreement as:-

“an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship whether contractual or not.”

(15) Where parties voluntarily enter into an Agreement they will often make a choice on the mode of dispute resolution. **Clause 6(j)** of the Agreement of **7th November 2017** reads as follows:-

“The Lease and performance shall be governed by and construed in all respects in accordance with the laws of the Republic of Kenya. Any dispute arising out of or in connection with this lease shall be referred:

a. To the main management company for mediation by the Board of Directors. If such process should fail, then

b. To arbitration by a single arbitrator to be appointed by agreement between the parties or in default of such agreement within fourteen (14) days of the notification of a dispute, upon the application of either party, by the Chairman for the time being of the Kenya Branch of Chartered Institute of Arbitrators. Such Arbitration shall be conducted in Nairobi in accordance with the Rules of Arbitration of the said institute and subject to and in accordance with the Provisions of the Arbitration Act 1995 or any modifications or substitutes thereof. To the extent permissible by law, the determination of the Arbitrator shall be final and binding upon the parties.”

(16) There was therefore a clear and express intention by the parties that all disputes between them be referred to Arbitration for settlement. This was their choice of forum for dispute resolution. **Section 10** of the **Arbitration Act** provides for minimal and very specific areas in which courts can intervene.

(17) I am cognizant of **Article 159** of the **Constitution of Kenya 2010** which encourages alternative forms of dispute resolution including Arbitration. In **KENYA OIL CO. LTD –VS- KENYA PIPELINE [2010] eKLR**, it was held thus:-

“The principle of party autonomy underpinning arbitration is premised on the platform that provided it does not offend structures imposed by law, parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts or by limiting the circumstances under which recourse to the courts may be heard.”

If the parties choose to exclude the court in their agreement then they should honour it.”

(18) Based on the foregoing, I find and hold that the dispute between the Plaintiffs and the Defendant ought to be referred to Arbitration in line with the terms of the Agreement dated **7th November 2017**. Costs for this Preliminary Objection to be met by the Plaintiff/Applicants.

Dated in **Nairobi** this...**27th**day of **May 2020**.

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Justice Maureen A. Odera