



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL CASE NO. 10 OF 2020

EVANSON KARIUKI KAMAU.....1ST PLAINTIFF/RESPONDENT

STANLEY MUGAISO MBEHERO.....2ND PLAINTIFF/RESPONDENT

MARK EDDY KARUNGO.....3RD PLAINTIFF/RESPONDENT

JULIANNA OGGEMA.....4TH PLAINTIFF/RESPONDENT

HAGEN BERNARD FRANCIS MUTAMBI.....5TH PLAINTIFF/RESPONDENT

JANE OMWAMI.....6TH PLAINTIFF/RESPONDENT

ERICK KANG'ETHE.....7TH PLAINTIFF/RESPONDENT

MARTIN KIMATHI WERU

(Suing on behalf of and as Donee of a power of attorney from

Josephine Kambura Weru.....8TH PLAINTIFF/RESPONDENT

LUCY WANJIRU LAU-BIGHAM.....9TH PLAINTIFF/RESPONDENT

CECILIA MWIKALI LAU.....10TH PLAINTIFF/RESPONDENT

JOHN BOSCO WAINAINA LAU.....11TH PLAINTIFF/RESPONDENT

ROBERT GITUMBO GATERU.....12TH PLAINTIFF/RESPONDENT

FAITH WATIRI KAHONGE.....13TH PLAINTIFF/RESPONDENT

CAROLINE WAIRIMU KIHARA.....14TH PLAINTIFF/RESPONDENT

ALICE AUMA AGORO-MAJANI.....15TH PLAINTIFF/RESPONDENT

-VERSUS-

TAMARIND MEADOWS LTD.....1ST DEFENDANT/APPLICANT

TAMARIND PROPERTIES LTD.....2ND DEFENDANT/APPLICANT

RULING

1. The defendants/applicants approached the court vide notice of motion dated 7.7.2020 that was brought under Article 48 and 50 of the

Constitution, sections 1A and 3A of Civil Procedure Act, Order 40 Rule 4 and 7 and Order 51 Rules 1-3 and 15 of the Civil Procedure Rules and section 6 of the Arbitration Act.

2. The application sought the following primary orders

a) **Spent**

b) **Spent**

c) **THAT** this court be pleased to stay/suspend, until further orders, the orders made herein on 17.6.2020.

d) **THAT** this court be pleased to discharge the orders made herein on 17.6.2020.

e) **THAT** this court be pleased to stay further proceedings in this suit pending the reference of the dispute to arbitration under clause 22 of each of the sale agreements.

f) **THAT** as an alternative to (e) above, the court be pleased to strike out this suit and the application or to stay further proceedings in the same pending first, the determination of the 1st defendant's application in the **Court of Appeal at Nairobi, Civil Application NAI 128 of 2020: Tamarind Meadows Ltd v Wibeso Ltd & Others** and Secondly the 1st defendant's intended appeal against the judgement delivered in **Machakos ELC court, Civil Case No 226 of 2017: Wibeso Investment Ltd & Anor v Tamarind Meadows Ltd & Others.**

g) **THAT** as an alternative to (f) above, this court be pleased to transfer this suit to the ELC Court at Machakos.

h) **THAT** the costs of this Application be provided for.

3. The grounds upon which the application is based are that:

a) A civil court has no jurisdiction to adjudicate on matters concerning title to land.

b) Under section 6 of the Arbitration Act, this court has power to stay further proceedings in the suit and refer the matter to arbitration in view of the arbitration clause in each of the agreements;

c) This suit and the application dated 26.5.2020 are barred by the doctrine of res judicata and sub judice in view of the **Court of Appeal at Nairobi, Civil Application NAI 128 of 2020: Tamarind Meadows Ltd v Wibeso Ltd & Others** and the judgement delivered in **Machakos ELC court, Civil Case No 226 of 2017: Wibeso Investment Ltd & Anor v Tamarind Meadows Ltd & Others ;**

d) That the order to deposit in court Kshs 67,121,796/- was against the rules of natural justice;

e) That the plaintiffs/applicants obtained ex parte illegal orders on 17.6.2020 and did not disclose material facts to the court hence the same was obtained upon deception.

4. In support of the application was an affidavit of **ROBERT DARBY** on 7.7.2020 where he reiterated the grounds indicated in the application and annexed inter alia a copy of the notice of appeal and application in **Court of Appeal at Nairobi, Civil Application NAI 128 of 2020: Tamarind Meadows Ltd v Wibeso Ltd & Others** that was duly marked **RD1**; a copy of a certificate for the suit property known as LR 18469 (LR 71611) in the names of the 1st defendant that was duly **marked RD4**.

5. In reply to the application was an affidavit deposed by Stanley Mugaisi Mbehero the 2nd plaintiff on behalf of the rest of the plaintiffs sworn on 6th August, 2020 who averred that the deponent and 14 other plaintiffs made an off-plan purchase for the town houses located on LR 18469 which properties cannot be sold because the same are encumbered by a suit filed against the defendants. It was averred that the Court of Appeal did not issue specific orders as to payment of license fees vide its ruling in **Civil Application NAI 128 of 2020: Tamarind Meadows Ltd v Wibeso Ltd & Others** and it would be unjust enrichment to pay license fees to the defendant. The deponent averred that the order that was issued by this court on 17.6.2020 was just as the 1st defendant has shareholders who are not Kenyan and that there was imminent risk that the defendants/applicants would transfer and dispose of their assets meaning that the respondents would not be able to recover the relief likely to be awarded by the court. According to the deponent, Tamarind Meadows Ltd is a special purpose vehicle that was set up to undertake construction and sale of the town houses in Tamarind Meadows Estate on LR 18469. It was pointed out by the deponent that the suit is a claim for breach of contract and not a claim to title of the suit property hence it fell within the jurisdiction of the court. According to the deponent, the dependants waived their right to arbitrate as they failed to enter appearance and file an application on time. It was deposed that there are currently two titles to LR 18469 that was the grant IR 71611 (RD4) held by the 1st defendant and the grant IR 72481 held by Novicome Ltd; that the dispute is subject to an appeal arising from Machakos ELC 226 of 2017 where it was held that the grant IR 71611 held by the 1st defendant was void. The deponent averred that the 1st defendant through undue influence imposed arbitrary license agreements on the 2nd and 7th to 15th plaintiffs. The court was urged to dismiss the application with costs.

6. Vide further affidavit filed on 20.8.2020 Robert Darby in rejoinder deposed upon advice from his counsel on record that the defendants are Kenyan Registered Companies hence the issue of security for costs that was raised by the applicants is a non-starter. It was reiterated that the plaintiff's claim related to the use and occupation of houses located on the suit premises hence this court lacked the requisite jurisdiction.

The deponent averred upon advise from his advocate that the application dated 7.7.2020 was filed online on 8.7.2020 that was well within 14 days' period within which to file a defence.

7. The application was canvassed vide written submissions that the parties filed and exchanged.

8. In support of the application, counsel for the applicants in placing reliance on the decision in the case of **Republic v Karisa Chengo & 2 others [2017] eKLR** submitted that because the dispute related to a land matter, then the court had no jurisdiction to hear and determine the same.

9. Learned counsel cited the provisions of section 6 of the Arbitration Act 1995 that in material part provides that: -

“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.”

10. Counsel cited the case of **Directline Assurance Co. Ltd & 4 Others v Suninvest & 15 Others (2019) eKLR**.

11. According to counsel's interpretation of the above section and cited case, there is no dispute on the validity of the arbitration clause contained in the sale agreements hence this court has no jurisdiction to hear the dispute; rather it ought to down its tools and refer the matter to arbitration as agreed by the parties.

12. Learned counsel in placing reliance on Order 40 Rule 4(3) of the Civil Procedure Rules and the case of **Auni Bhaiji & 4 Others v Chief Magistrate, Milimani Law Courts & 2 Others [2017] eKLR** submitted that there were no valid orders served on the defendants on 9.6.2020 as alleged by the plaintiffs. Counsel challenged the failure to serve the exparte orders on the defendants within 3 days and cited the case of **Esther Wambia Mungai v Fredrick Mwai Mwhia (2017) eKLR** as well as the court of Appeal decision in **Omega Enterprises (Kenya) Ltd v Kenya Tourist Development Corporation & 2 Others (1998) eKLR**.

13. It was posited by counsel that the orders made and or extended on 17.6.2020 were made without jurisdiction and could be incapable of any effect. Reliance was placed on the case of **Macfoy v United Africa Co Ltd (1961) 3 All ER 1169**.

14. Learned counsel in addressing the issue of non-disclosure submitted that the plaintiffs are not entitled to the reliefs granted on 3.6.2020 and 17.6.2020 on the basis of non-disclosure of material facts. Reliance was placed on the case of **Uhuru Highway Development Limited & 3 Others v Central Bank of Kenya & 2 Others, Nairobi Civil Appeal 126 of 1995**.

15. Learned counsel took issue with what he termed as a colossal amount of money that the defendants were ordered to deposit. Counsel placed reliance on the case of **Reliance Bank Ltd v Norlake Investments Ltd (2002) 1 EA 227**. The court was urged to allow the application dated 7.7.2020.

16. Vide submissions dated 28.8.2020, counsel for the plaintiff/respondents framed five issues for determination in opposition to the application, being : Firstly whether the high court has jurisdiction to hear this matter; Secondly whether the defendants have met the requirements provided for in section 6 (1) of the Arbitration Act 1995; Thirdly whether the plaintiffs/respondents are parties to the appeal in **Civil App Nai 128 of 2020 Tamarind Meadows Ltd v Wibeso Ltd & Others**; Fourthly whether the interim orders are valid and duly served upon the defendants/applicants and finally whether the proceedings conducted on the 17.7.2020 legal.

17. In respect of the 1st issue, counsel submitted that the claim was in respect of contractual breaches. Counsel stated the predominant purpose test as was indicated in the case of **Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Ltd & Another (2016) eKLR** and submitted that the contractual issue was a dispute that this court has jurisdiction to entertain.

18. On the 2nd issue, it was submitted in placing reliance on the case of **Lofty v Bedouin Enterprises Ltd EALR (2005) 2 EA** that there were conditions set out in section 6(1)(a) and (b) of the Arbitration Act to be met in order for a grant of an order of stay of proceedings. It was counsel's argument that the application ought to have been filed within 15 days from the date of service of summons that was effected on 9.6.2020 and because the same was not done then the applicants did not meet the requirements set out in section 6(1) of the Arbitration Act 1995.

19. In respect of the 3rd issue, it was submitted that the plaintiffs had not laid any claim to LR 18469 nor had they filed any documents in **Court of Appeal Nairobi Civil Application 128 of 2020, Tamarind Meadows Ltd v Wibesco Ltd & 6 Others**. Counsel cited the case of **Republic v Registrar of Societies- Kenya & 2 Others ex parte Moses Kirima & 2 Others (2017) eKLR** and submitted that the instant suit is not barred by the doctrine of res judicata.

20. On the 4th issue, counsel submitted that the orders given by the court on 17.6.2020 were legal and valid; that they were served within 3 days pursuant to Order 40 Rule 4 of the Civil Procedure Rules. Counsel cited the case of **Liu Ching Liang v Webwave Electric Manufacturing (K) Co Ltd & 2 Others (2016) eKLR** where it was observed that *“The purposes of any order that should be issued under Order 39 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him.”* Counsel pointed out to court that the 1st defendant is

not a trading company and has no sources of income; that it is a Special Purpose Vehicle and innocent purchasers ought to be protected. Counsel cited the case of **Xtranet Communications Limited v Westlands Skye Development Limited [2019] eKLR** where the court noted that:

“30. At this interlocutory stage, this court has been called upon to determine if the plaintiff has made out a case for the preservation of the sum of Kshs 81,579,238 that is held in the defendant’s bank account pending the hearing and determination of the suit.

31. I find that the answer to the above question is to the positive. The plaintiff has not only demonstrated that it paid the sum of Kshs 45 million to the defendant but that the defendant had not delivered on its part of the bargain as at the time of the institution of this suit in 2018, 4 years after their agreement was executed. The plaintiff also expressed its apprehension on the ability of the defendant, as Special Purpose Vehicle, to satisfy the decree that may be entered against it should the suit be determined in the plaintiffs favour.”

21. The court was urged to dismiss the application dated 7.7.2020 with costs.

22. Having considered the application and the evidence rendered vide the respective affidavits as well as the submissions and authorities cited, I find the issues for determination are as follows:

a) Whether clause 21 of the agreement between the respective

plaintiffs and the 1st defendant made arbitration obligatory.

b) Whether the matter ought to be referred to arbitration.

c) What orders may the court make?

23. In this case section 6(1) of the Arbitration Act states as follows;

“A Court before which proceedings are brought in a matter which is subject of an Arbitration agreement shall, if a party so applies not later than the time when the party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to the 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

24. It is trite law that this court cannot entertain a matter yet the same ought to be referred to arbitration. In **Cott UK Ltd v Barber Ltd [1997] 3 All E.R. 540**, Hegarty, J., said:

“The courts have increasingly recognized that where the parties have agreed that a dispute should go to arbitration, the court should be slow to interfere with that choice, and should normally grant a stay, unless there are strong grounds for permitting the matter to proceed in the ordinary courts. That is part and parcel of the increasing recognition by the courts in this country of the benefits of alternative forms of dispute resolution, of which arbitration is the classic and historic example. Thus there is today a more restricted approach to arbitration applications or appeals from an arbitrator’s ward; and, perhaps significantly in the Commercial Court, whose principles are applied in this list also, there is a requirement on the parties to consider the merits of alternative forms of dispute resolution.”

25. Halsbury’s Laws of England, 4th edition, Vol. 1, paras 561 to 565 lays down the five preconditions for the court’s consideration as to whether to refer a matter to arbitration. These are that (i) there must be a valid arbitration agreement covering the question in dispute, (ii) the applicant must be entitled to rely on the agreement, (iii) the applicant must have taken no steps after entering an appearance otherwise they will be taken to have submitted to the court’s jurisdiction; (iv) the applicant must be ready and willing to arbitrate, and (v) the court must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement.

26. In the case of **Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] eKLR**, where it was observed that *“all an applicant is obliged to do is to bring his application promptly. The Court will then be obliged to consider three basic aspects. First, whether the applicant has taken any step in the proceeding other than the steps allowed by the said section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred.”*

27. Counsel for the applicant was of the view that since there was an arbitration clause, then a dispute ought not to find its way in the court. The respondent on the other had submitted that the application was brought late.

28. In the case of **Diocese of Marsabit Registered Trustees v Technotrade Pavilion Ltd (2014) eKLR** it was observed that *“I should add that, the requirement in section 6(1) of the Arbitration Act is not a mere technicality which can be diminished by Article 159(2) (d) of the Constitution as claimed by the Applicant. It is a substantial legal matter which aims at promoting and attaining efficacious resolution of disputes through arbitration by providing for stay of proceedings but only where a party desirous of taking advantage of an arbitration clause in a contract has applied promptly for stay of proceedings and made a request to have the matter referred to arbitration. Needless to*

state that arbitration falls in the alternative forms of dispute resolutions which under Article 159(2) (c) of the Constitution should be promoted by courts except in so far as they are not inconsistent with any written law”

29. The evidence in this case is in the nature of affidavits in support of the application and opposition thereto as well as the annexures thereto. The Defendants/applicants have exhibited the contract between the parties in which clause 21 on Arbitration reads:

“21 Should any dispute arise ...with regard to the interpretation, rights, obligations and/ or implementation of any one or more of the provisions of this Agreement, the parties shall in the first instance attempt to resolve such dispute by amicable negotiation

*Should such negotiations fail to achieve a resolution within 15 days either party **may declare** a dispute by written notification to the other, whereupon such dispute shall be referred to arbitration....”*

30. With respect to clause 21 of the agreements as referred to above, a dispute ought to be referred to arbitration.

31. According to the Plaintiffs in their plaint, the defendants are responsible for the failure of consideration. The defendants on the other hand indicated that they had appealed against the finding of the Environment and Land Court. This means that this case does not involve a dispute as to the use of the suit land but on failure of consideration; that the plaintiffs and the 1st defendant are parties to the agreement and as such there would be no bar to refer the dispute to arbitration.

32. In the case of **Yes Housing Co-operative Society Limited v Kenneth Onsare Maina [2020] eKLR**, Justice Odunga stated that;

“37. It follows that this Court 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. In my view it would amount to an abdication of its judicial duty if the court were to shirk that duty and decline to refer a matter to arbitration simply because a party believes that the applicant’s case is unmerited and is bound to fail. Whether or not the case is unmerited is for the arbitrator to determine. In this case, it was an express term of the said agreement that if the Vendor fails to comply with the obligations under the Agreement, the Purchaser shall without prejudice to its rights and remedies rescind the said Agreement and the Vendor shall forthwith refund the Deposit to the Purchaser with interest. In this case it is clear that the Vendor has failed, as a result, of the decision in Machakos Succession Cause No. 54 of 2010, to fulfil his obligations under the Sale Agreement. It is that failure or inability on the part of the Defendant that gave rise to the dispute and provoked this suit.”

33. In terms of the said clause 21 of the agreement, and by dint of Article 159(2) of the Constitution, the dispute between the plaintiffs and the defendants ought to be determined by arbitration because that is what they agreed to do vide the various sale agreements in the event of a dispute. It is only after the arbitration recourse has been utilized can the parties approach the courts. Further, it is noted that the ELC matter did not involve the plaintiffs and thus their principal concern at the moment is about the refund of their purchase consideration. It is noted that the defendants’ present application which alludes to the existence of an agreement to refer any dispute to arbitration was presented to court rather late. The defendants were expected to seek to refer the dispute to arbitration in good time pursuant to the provisions of section 6 of the Arbitration Act 1995. However, in the interest of justice and fair play and in line with the dictates of Article 159(2) of the constitution, and in order to give effect to their intentions under the purchase agreements i will excuse the defendants and grant their request for referral of the dispute to arbitration since it had been agreed by the parties in the various purchase agreements. In any case the plaintiffs had not disclosed to the court at the ex-parte stage the fact that there was a clause in the agreements to refer any dispute between them to arbitration. It was thus improper for the plaintiffs not to disclose such an important fact. Now that the same has been disclosed then the parties must be called upon to go by the terms of their agreement which require that they refer the dispute to arbitration. There will be no prejudice suffered by the plaintiffs as their rival issues will be placed before the arbitrator for determination.

34. I note that the defendants have sought for an alternative prayer that this matter be referred to the ELC courts for trial. However, the pleadings clearly indicate that the plaintiff’s claim relates to a breach of contract and are seeking for refund of the purchase consideration plus costs thereby leaving no doubt that it is a commercial dispute which is outside the purview of the Environment and Land Court by dint of Articles 162(2)(b) of the constitution.

35. In the result, it is my finding that the defendants’ application dated 7.7.2020 has merit. The same is allowed in the following terms:

a) All further proceedings and orders in this suit are hereby stayed and the dispute herein is hereby referred to Arbitration as provided under Clause 21 of the sale/purchase agreements entered into by the parties.

b) The parties shall agree on a single arbitrator to determine the dispute between themselves within thirty (30) days or where they fail the arbitrator be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators Kenya Chapter upon the application of either party.

c) The dispute shall be determined by arbitration within sixty (60) days from the date of appointment of the said arbitrator.

d) The costs of the application are awarded to the defendant/applicants.

It is so ordered.

Dated and delivered at Machakos this 29th day of September, 2020.

D.K. Kemei

Judge