



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL SUIT. NO. E806 OF 2020

IN THE MATTER OF THE ARBITRATION ACT NO. 4 OF 1995

BETWEEN

CHRISTOPHER THIONGO WAWERU.....1ST APPLICANT

JAMES MWANGI KABUGI2ND APPLICANT

AND

WAIYAKI WAY DEVELOPERS LIMITED 1ST RESPONDENT

VIRJI MEGHJI PATEL 2ND RESPONDENT

MUIGAI PHARES THUMBI3RD RESPONDENT

WAIYAKI RIDGE GARDENS LIMITED 4TH RESPONDENT

N. K. MUGO & COMPANY ADVOCATES 5TH RESPONDENT

RULING

Introduction

1. The application for consideration is the Notice of Motion dated 30th June 2020 made, inter alia, under **Order 40 rule 1** of the **Civil Procedure Rules** and **section 7(1)** of the **Arbitration Act, 1995** ("the Act") and it seeks the following main reliefs:

[1] Spent

[2] Spent

[3] THAT a conservatory order do issue restraining the Respondents whether by themselves, through their servants agents or otherwise from committing breach of the shareholders agreement dated 30th December 2015 and more specifically from transferring, alienating or in any way or manner disposing any interest in the Waiyaki Way Developers Ltd and Waiyaki Ridge Garden Limited pending the reference and determination of the Arbitration proceedings between the parties.

[4] THAT this Honourable Court be pleased to appoint either of the following nominees as sole Arbitrator to determine the dispute between the Shareholders under the provisions of clause 5.3.4 of the Shareholder Agreement dated 30th September 2015.

1. John Morris Ohaga FCI Arb

2. Allen Waiyaki Gichuhi FCI Arb

3. Dr Kariuki Muigua FCI Arb

[5] THAT the Court do make a finding that the Firm of N. K. Mugo & Co. Advocates or any advocates therein representing the said firm cannot be appointed arbitrators due to their partisan conduct and involvement in the breach of the provisions of the Shareholders Agreement dated 30th December 2015.

[6] THAT the cost of this proceedings be paid by the Respondent.

2. The application is supported by the joint supporting affidavit sworn by the Applicants on 30th June 2020 and their supplementary affidavit filed 20th August 2020 respectively. The 2nd Respondent, who is the Managing Director of the 1st Respondent, has sworn a replying and further affidavit dated 7th August 2020 and 4th September 2020 respectively in opposition to the application. The 5th Respondent has opposed the application through Grounds of opposition dated 13th August 2020. In addition to the depositions, counsel for the applicants and counsel for the 1st and 2nd respondents filed written submissions in support of their respective positions for consideration by the court.

Background of the Dispute

3. The dispute between the parties revolves around the Shareholders Agreement dated 30th December 2015 and a brief background of the matter is as follows. The 1st Respondent, Waiyaki Way Developers Limited (“the Company”), was incorporated in 2015 as a Special Purpose Vehicle for the purpose of developing apartment units with ancillary facilities (“the Project”) on three parcels of land; Dagoretti/Kangemi/1861, 1862 and 1326 owned by Muigai Phares Thumbi, James Mwangi Kabugi and Nicholas Kamanu Waweru respectively. The three proprietors together with Christopher Thiongo Waweru and Peter Maina Kanamba Karienyé incorporated the Company.

4. In due course they entered into a Shareholders Agreement dated 30th December 2015 under which some of the shareholders would surrender their land to the Company as their capital contribution while the others would avail or source or finance in order to complete the project. The Applicants ceded their right to participate in the project and were to await profit distribution according to a formula set out in the Agreement as follows:

§ Christopher Thiongo Waweru would be allocated 21 units.

§ James Mwangi Kabugi would be allocated 15 units.

§ Nicholas Kamanu would be allocated 34 units.

§ In the event the construction of units went beyond 84 units, Christopher Waweru and James Mwangi would be allocated 30% of the additional units.

§ The remainder of the units would be shared between Muigai Phares Thumbi and Peter Maina Kanamba Karienyé in accordance with their shareholding in the Company.

§ Upon allocation of the units to Christopher Thiongo Waweru, James Mwangi Kabugi and Nicholas Kamanu Waweru, they would transfer their shares in the Company to Muigai Phares Thumbi and Peter Maina Kanamba Karienyé.

5. The Shareholders Agreement provided that disputes would be resolved in accordance with Clause 26 as follows:

26. SETTLEMENT OF DISPUTES

26.1 In the event of any dispute between the Shareholders arising in connection with this Agreement or any associated agreement entered into pursuant to this Agreement, the disputing parties shall use all reasonable endeavours to resolve the matter on an amicable basis. If one party serves formal written notice on the other that a material dispute of such description has arisen and the parties are unable to resolve the dispute within a period of thirty (30) days from the date of service of such notice, then the dispute shall be referred to arbitration in accordance with Clause 26.2 herein below.

26.2 Any dispute arising out of or in connection with this Agreement shall be referred to and finally settled by arbitration under Arbitration Act 1995 and the rules made thereunder by one arbitrator appointed in accordance with the agreement of the parties failing which the parties hereby agree that the Law firm of N. K. Mugo & Co. Advocates shall appoint one of its Advocates to be the sole arbitrator and its decision shall be final and binding. The place of arbitration shall be Nairobi in the Republic aforesaid. The language of arbitration shall be in English.

6. By a Contract of Transfer of Shares and Refund of Money dated 6th February 2017 (“Contract of Transfer of Shares”), one of the shareholders, Peter Maina Kanamba Karienyé sold his shares to the 2nd Respondent, Virji Meghji Patel on the understanding that he would be refunded the money he had invested in the Company. According to the Applicants, the 2nd Respondent therefore became party to the Shareholders Agreement as the Contract of Transfer of Shares made reference to and incorporated it.

7. In order to give effect to the Shareholders Agreement, the shareholders incorporated the 4th Respondent company with the following shareholding;

§ Waiyaki Way Developers Limited – 262 shares

§ Virji Meghji Patel – 1 share

§ Muigai Phares Thumbi – 1 share

The 5th respondent was appointed the Company Secretary of both the 1st and 4th Respondents.

8. The gravamen of the Applicants' case concerns the sharing of units in the Project which is almost complete with a total of 264 units. They stated that when they held a meeting on 4th February 2020 with the 2nd Respondent with a view to sharing out the units in accordance with the Shareholder's Agreement, he rebuffed them and insisted that they were entitled to 21 and 15 flats respectively yet they are entitled to 30% of the additional units in excess of 84 units.

9. The Applicants further deponed that they had another meeting with the 2nd Respondent on 12th June 2020 regarding the allocation of units but no agreement was reached. Instead the Applicants were given a draft Supplementary Agreement which dealt only with the 21 and 15 flats due to each Applicant and which, upon signing, would constitute a full and final settlement and also discharge the 1st Respondent and Developers from any liability.

10. The Applicants are apprehensive that unless an injunction is granted, their units would be sold as Block D and E have been sold as at 13th June 2020 leaving Block A, B and C. They pray that 21 units due to the 1st Applicant and 15 units due to the 2nd Applicant and 54 additional units be preserved pending reference to arbitration. The Applicants stated that they have attempted to have the matter resolved amicably since February 2020, a period of more than 20 days but the Respondents have refused to address their concerns hence the need to refer the matter to arbitration.

11. On his part, the 2nd Respondent confirmed that he entered into the Contract of Transfer of Shares in which he acquired 25 shares in the Company previously owned by Peter Maina Kanamba Karienyne. He deponed that at the time of entering the said Contract, he was furnished with the Memorandum of Objects and Articles of Association for the Company, the CR 12 and a Shareholder's Agreement dated 28th July 2015 signed by all the shareholders of the Company including the Applicants. He therefore stated that he was not aware of the Shareholders Agreement dated 30th December 2015 as it was not disclosed to him at the time, either before or after entering in the Contract and making financial commitments in the Project. That he only came to know of the Agreement during the meeting of 4th February 2020 and that the claim for additional units by the Applicants only arose when the Project was substantially complete.

12. The 1st and 2nd Respondents' case is that the Applicants have no basis for their claim for additional units on the basis of the Shareholders Agreement dated 30th December 2015, which was not disclosed to the 2nd Respondent. The 2nd Respondent accused the Applicants of having conspired with Peter Maina Kanamba Kareinye who has filed a suit namely; **HC COMM No. E011 of 2020 Peter Maina Kanamba Karienyne v Waiyaki Way Developers Limited and Virji Meghji Patel** to take advantage of him. In that suit, the Plaintiff claimed refund of Kshs. 43,108,227.84 and USD 15,225.43 on the basis that the Defendants had violated the Contract of Sale of Shares. He has also filed a counterclaim seeking Kshs. 739,500,000.00 from Peter Kanamba on the ground that he ought to have disclosed to him the Shareholders Agreement dated 30th December 2015.

13. The 2nd Respondent further deponed that the Shareholders Agreement referred to in the Contract of Transfer of Shares is the one dated 28th July 2015 and not 30th December 2015. He contends that he would not have signed that Transfer of Shares if he had known about the formula agreed on to share the units as it would not have made economic sense for him to incur substantial investments and in particular surrendering 30% of the additional units to the Applicants.

Issues for determination

14. From the facts I have outlined, it is evident that there is a dispute between the parties regarding the Shareholders Agreement dated 30th December 2015 and in particular whether the parties are bound by the Agreement and if so whether the units are to be distributed in accordance with the agreement.

15. From the prayers sought in the application, there are three issues for resolution as follows:

(a) Whether the court should appoint the proposed arbitrators to resolve the dispute between the parties.

(b) Whether the court should make a finding that the law firm of N. K. Mugo & Co. Advocates or any advocates therein representing the said firm cannot be appointed arbitrators due to their partisan conduct and involvement in the breach of the provisions of the Shareholders Agreement dated 30th December 2015.

(c) Whether the court should grant interim measures of protection pending reference of the dispute to arbitration.

Whether the court should appoint an arbitrator

16. The appointment of an arbitrator under the Shareholders Agreement is governed by Clause 2.8 which sets out the following three steps:

- (i) The parties to use reasonable endeavours to resolve the dispute within 30 days from the date of service of the notice giving the other party material description of the dispute.
- (ii) Failing amicable resolution of the dispute, the parties appoint one arbitrator agreed upon by the parties.
- (iii) If the parties fail to agree on a single arbitrator, the law firm of N. K. Mugo and Company Advocates to appoint any of its advocates as an arbitrator.

17. From the parties' depositions, the parties have been in communication since February 2020 regarding the units and in an attempt to resolve the matter. Following the meeting of 4th February 2020, the Applicants' advocates addressed to N. K. Mugo and Company Advocates a letter dated 9th March 2020 threatening to invoke Clause 26 of the Shareholders Agreement. By a letter dated 18th June 2020, Mogeni and Company Advocates, responded referring to the Shareholders Agreement dated 30th December 2015 and raising certain concerns and stating that, "*there now exists a dispute in terms of Clause 26.1 of the agreement as read with the 2017 agreement.*" As regards the appointment of the arbitrator, the applicants went further and stated as follows:

Kindly note that in view of your firm's subsequent involvement in the dispute your firm is not competent and is therefore disqualified in being a sole arbiter under Clause 26.2. We shall require you, since you represent the other Shareholder and the Company to concur in the appointment of an independent person as an arbitrator. By a copy of this letter Mr. Patel is also notified. Please note that failure by you or the Company and/or Mr. Patel to concur, we shall move the High Court to so appoint.

18. Following the letter, the Applicants moved the court on 2nd July 2020. The 1st and 2nd Respondents are correct in pointing out that the Applicants failed to follow the procedure set out in the arbitration clause. As a prelude to the invoking Clause 26, the aggrieved party is required to give a 30-day notice with sufficient descriptive of the dispute. In this case, there are two letters that, in my view, sufficiently describe the dispute. The letter dated 9th March 2020 and the letter dated 18th June 2020 notifying the 1st and 2nd Respondent of the dispute. The letter was intended to be a notice of the dispute within the meaning of the arbitration clause. This means that the parties were required to attempt resolution of the dispute within 30 days of the notice. Assuming that the last letter dated 18th June 2020 was the notice of the dispute, then it is apparent that the Applicants moved the court for relief before the time for amicable resolution expired.

19. Even accepting that both letters amounted to a notification of the dispute, the Applicants failed to adhere to the second stage of the dispute resolution process. In the event the attempt at amicable settlement failed, then the next step was to agree on a single arbitrator. The Applicants did not propose to the 1st and 2nd Respondents their list of proposed arbitrators for consideration. There is no evidence that the parties agreed on a single arbitrator as required by the arbitration agreement. It is only upon the parties failing to so agree that the firm of N. K. Mugo and Company Advocates is granted authority to nominate one of its advocates as an arbitrator. All this goes to show that prayer 4 of the application is premature and cannot be granted.

20. **Section 10** of the **Act** does not permit the court to intervene in arbitration matters except as provided for in the **Act**. **Section 11** of the **Act** confirms that position that parties to an agreement are free to determine the number of arbitrators while **section 12** thereof affirms party autonomy by providing that parties are free to agree on the procedure of appointment of an arbitrator. It also provides for the procedure to be followed in the event of default in the following manner:

12(1) No person shall be precluded by reason of that person's nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairman and failing such agreement—

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the arbitrator;

(b) in an arbitration with two arbitrators, each party shall appoint one arbitrator; and

(c) in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.

(3) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default")—

(a) has indicated that he is unwilling to do so;

(b) fails to do so within the time allowed under the arbitration agreement; or

(c) fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party), the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

(4) If the party in default does not, within fourteen days after notice under subsection (3) has been given —

(a) make the required appointment; and

(b) notify the other party that he has done so,

the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.

(5) *Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.*

(6) *The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.*

(7) *The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator.*

(8) *A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.*

(9) *The High Court in appointing an arbitrator shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.*

21. Juxtaposing the above provisions to this case, Clause 26 of the Shareholders Agreement contemplates the appointment of a sole arbitrator as agreed by the parties as provided in **section 12(2)** of the **Act**. **Section 12(3)** of the **Act** goes on to provide what happens when a party defaults or does not participate in the appointment. **Section 12(4)** then stipulates that once notice has been given, the party not in default may appoint the sole arbitrator. In this case, the arbitration agreement takes care of the default by the parties to agree when it empowers the firm of N. K. Mugo and Company Advocates to appoint an arbitrator.

22. The **Act** respects party autonomy hence the High Court is not involved in the process of appointment of an arbitrator even where one party has defaulted. It is only after the party has made an appointment under **section 12(4)** of the **Act**, that the party in default is entitled to move the High Court to set aside that appointment. The Shareholders Agreement, as I have stated, precludes interference by the High Court as it ultimately places the appointment of an arbitrator in the hands of a third party.

23. I also agree with the argument by counsel for the 1st and 2nd Respondents that the Applicants cannot challenge an arbitrator who has not been appointed. This manner of intervention is neither provided for nor contemplated in the **Act**. **Sections 13** and **14** of the **Act** provides the grounds and procedures for challenging an arbitrator when the arbitrator is *in situ*. The less I say on this issue, the better. Prayer 5 of the application must therefore collapse.

24. The 5th Respondent opposed the application on the ground that it was not party to the Shareholder's Agreement. It is the authority empowered, under the Shareholders Agreement, to appoint an arbitrator in the event the parties fail to agree. As I have shown, the Applicants cannot pre-emptively challenge a yet to be appointed arbitrator. In reality there is no cause of action against the 5th Respondent.

Whether the court should grant interim measures of protection

25. **Section 7(1)** of the **Act** provides that, "*It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.*"

26. Since the dispute between the parties is the subject of an arbitration agreement, this court has jurisdiction to grant an interim measure of protection. The principles applicable in determining an application of this nature were delineated by the Court of Appeal in **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others Civil Application No. NAI 327 of 2009 [2010] eKLR** where it stated as follows:

Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo, measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are: -

1. *The existence of an arbitration agreement.*

2. *Whether the subject matter of arbitration is under threat.*

3. *In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.*

4. *For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties.*

27. The court in considering whether to grant an interim measure must exercise due circumspection in commenting on the merits of the case

in a manner that would prejudice the decisional independence of the arbitral tribunal. In the *Safaricom Ltd Case (Supra)*, the Court of Appeal added that:

In the matter before us, the court went on to make orders which undermined the arbitration and the outcome of the arbitration contrary to section 17 of the Arbitration Act. A court of law when asked to issue interim measures of protection must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration.

28. The first condition is not in doubt. It is the second condition that is a matter of contention. The Applicants' case is that under the Shareholders Agreement they are both entitled to 54 units over and above the 21 units due to the 1st Applicant and 15 units due to the 2nd Applicant. They claim that the units are due to be sold off and if they are not preserved and they are sold off, they will suffer irreparable damage.

29. The 1st and 2nd Respondents opposed the application for conservatory orders on the grounds that the Applicants have not established any imminent threats warranting the grant of the orders. They contended that the grant of an injunction against the entire Project would cripple the operations of the Company. They accused the applicants of misleading the court to issue a blanket injunction against the entire 264 units when in fact they were only interested in the units' subject of the Shareholder Agreement dated 28th July 2015 and which the Company has no intention of selling.

30. The 1st and 2nd Respondents pointed out that the Project is financed by KCB Bank Kenya Limited to the tune of Kshs. 1,080,000,000.00 and any delay in selling the units would cause untold consequences to the Company. They contended that the claim for the additional units disregards the fact that the Bank has to execute partial discharges in respect of each unit and on the whole Company is required to meet certain statutory obligations to third parties including settlement of claims by contractors, employees, marketing agents and taxes.

31. The 1st and 2nd Respondents have accepted that the 26 units due to the Applicants under the Shareholders Agreement dated 30th December 2015 will not be sold. The dispute revolves around the 54 units which will be resolved in the intended arbitration proceedings. It is worth noting that the units are owned by the Company in which the Applicants are shareholders. Under the Shareholders Agreement, they will only cede their shareholding to the 2nd and 3rd Respondents once the transfer of their units is complete. It follows that until the matter is resolved, the Applicants will always remain shareholders of the Company and will have a cause of action against the other shareholders.

32. As this is a shareholders' dispute, the property of the Company and its relationship with third parties should not be imperiled by the grant of an injunction. I am also alive to the fact that the Company is indebted to KCB Bank Kenya Limited and other third parties who were contracted to offer services in the Project and who would be affected by the grant of any interim measures in the nature of an injunction.

33. Finally, the Applicants' seek a conservatory order restraining the Respondents from, "*transferring, alienating or in any way or manner disposing any interest in the Waiyaki Way Developers Ltd and Waiyaki Ridge Gardens Ltd.*" The order as prayed is indeterminate and nebulous as it does not define the specific interest which the court should restrain.

34. On the whole, I am not convinced that based on the totality of circumstances that the grant of interim measures of protection is warranted.

Disposition

35. For the reasons I have set out above, I now dismiss the Notice of Motion dated 30th June 2020. For avoidance of doubt, the interim orders in force are hereby discharged.

DATED and DELIVERED at NAIROBI this 26th day of NOVEMBER 2020

D. S. MAJANJA

JUDGE

Mr Mogeni instructed by Mogeni and Company Advocates for the Applicant.

Mr Kamotho instructed by Kamotho Njomo and Company Advocates for the 1st and 2nd Respondents.

Ms Kituyi instructed by Waruiru, Karuku and Mwangale and Company Advocates for the 3rd Respondent

Ms Wanja instructed by N. K. Mugo and Company Advocates for the 5th Respondent.