



**Samuel v Rono (Environment & Land Case E022 of 2023)
[2023] KEELC 21092 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21092 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E022 OF 2023
JM ONYANGO, J
OCTOBER 25, 2023**

BETWEEN

WANGUBA OLULA SAMUEL PLAINTIFF

AND

NANCY CHEPKOECH RONO DEFENDANT

RULING

1. This ruling is in respect of the defendant/applicant’s notice of motion dated May 23, 2023 in which he seeks an order of stay of proceedings in Eldoret Elc. case No. E022 pending the hearing and determination of the arbitration proceedings.
2. Secondly, he seeks that the subject matter herein be referred to arbitration as per clause “D” under the Special Conditions of the agreement dated 10th April, 2024.
3. The application is based on the grounds set out on the face of the notice of motion and the defendant/applicant’s supporting affidavit sworn on the 23rd May, 2023. In the affidavit she deposes that sometime in 2014, she jointly bought a parcel of land with the Plaintiff in the upmarket Elgon View Estate in Eldoret town from one Nicodemus Muli Mutunga. The said property is known as Eldoret Municipality Block 14/1113 and the agreed purchase price was Kshs. 16,000,000/= . She deposed that under the special terms of the said agreement in part “D” it is provided that all claims and disputes arising under the agreement shall be referred to Arbitration in accordance with the provisions of the Arbitration Act of Kenya. She has annexed copy of the said agreement to her affidavit.
4. Pursuant to the said agreement, the suit property was transferred to the plaintiff and herself and a title deed was issued in their joint names. She further deposes that 7 years after the purchase of the said property, she fell out with the plaintiff and a dispute arose over the suit property.



5. It is the applicant's contention that in view of the arbitration clause in the Sale Agreement, the plaintiff ought not to have instituted this suit. It is on this basis that she prays that the proceedings be stayed so that the dispute can be referred to arbitration.
6. The plaintiff did not file any response to the application even though he was granted time to do so. The court further directed that the application be disposed of by way of written submissions but only the Applicant filed her submissions which I have carefully considered.
7. Although the application is unopposed, I will still consider it on its merits.
8. The singular issue for determination is whether the suit herein ought to be stayed pending the hearing and determination of the arbitration proceedings and whether the dispute should be referred to arbitration.

Analysis and Determination

9. It is not in dispute that the sale agreement dated April 10, 2014 executed between the plaintiff, defendant and Nicodemus Muli Mutunga contains the following provision under part D of the Special Conditions:

“Arbitration

All claims and disputes whatsoever arising under this agreement shall be referred to arbitration in accordance with the provisions of the *Arbitration Act* of Kenya by a single arbitrator to be appointed by agreement between the parties or, failing agreement within 14 days of 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, Kenya Branch, Nairobi on application of either party”.

10. The above clause makes it very clear that all disputes under the agreement ought to be referred to arbitration.

Section 6 (1) of the *Arbitration Act* provides as follows:

1. “A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party applies not later than the time when the party enters appearance or otherwise acknowledges the claim against which the stay 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.
2. Proceedings before the court shall not be continued after an application under sub-section (1) has been made and the matter remains undetermined.
3. If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of the legal proceedings in respect of any matter is of no effect in relation to those proceedings”



11. As provided in subsection (1) above, a party who intends to rely on the Arbitration clause ought to apply for stay of proceedings soon after filing the memorandum of appearance which is what the applicant has done.
12. In the case of *Esmajji v Mistry Shamji Lalji & Co* (1884) KLR the court laid down the following principles governing the grant of stay of proceedings under section 6 of the *Arbitration Act*:
 - i. The court is not bound to grant a stay but has discretion to grant or not to grant.
 - ii. The discretion to grant should not be exercised when strong cause for not doing so is shown.
 - iii. The burden for proving such strong cause is on the plaintiff
 - iv. In exercising its discretion, the court should take into account the circumstances of the particular case.
 - v. A mere balance of convenience is not enough.
13. The court further held that the onus of proving that the matters in dispute fell within a valid and subsisting arbitration clause is on the party applying to the court for stay of proceedings. Once this burden is discharged, then the burden shifts to the opposing party to show cause why effect should not be given to the arbitration clause.
14. In the instant case, the applicant has annexed the sale agreement which contains the arbitration clause in part D of the Special Conditions. The said clause is fairly wide and covers “all disputes under the agreement”. It has not been demonstrated by the Plaintiff that the dispute that has arisen does not fall within the said clause. Furthermore, the Applicant filed this application soon after entering appearance.
15. In the circumstances and bearing in mind the provisions of article 159(2)(c) of *the Constitution* of Kenya which enjoins this court to promote alternative forms of dispute resolution including reconciliation, mediation arbitration and traditional dispute resolution mechanisms, I am satisfied that the application has merit.
16. Accordingly, the application is granted and the proceedings herein are hereby stayed. The dispute shall be referred to arbitration within 60 days. I make no order as to costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF OCTOBER 2023.

J.M ONYANGO

JUDGE

In the presence of;

No appearance for the parties.

Court Assistant: A. Oniala

