



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 26 OF 2015

KENNETH CHESIYNA KIPTOON.....PLAINTIFF/RESPONDENT

VERSUS

1. SASAM LIMITED.....1ST DEFENDANT/APPLICANT

2. SAMUEL KIMUCHU GICHURU.....2ND DEFENDANT/APPLICANT

JUDGMENT

1. The defendants by their application dated 6th May 2015 sought the following orders:

- 1. That there be a stay of all proceedings herein pending arbitration.*
- 2. That the dispute between the parties be referred to arbitration in accordance with Clause 15 of the sale Agreement dated 1st February 2014.*
- 3. That the Arbitrator be appointed by agreement of the parties and in default the Chairman of the Kenya Chapter of the Institute of Arbitrators within fourteen (14) days notification of failure of an agreement between the parties.*
- 4. Costs of the application be borne by the plaintiff/Respondent*

2. The above application arose from a Sale Agreement entered into between the respondent and the applicants dated the 1st February 2014 for the sale and purchase of a property known as **L.R No. 13187/1** the property of the defendants situated in Rongai town, Nakuru Count. The purchase price was agreed at Kshs.60 Million.

At the date of execution of the agreement, the Respondent had paid a sum of Kshs.9,000,000/= being deposit and balance was to be paid as stated therein, but on or before the completion date which was stated as 90 days from the 1st February 2014.

3. Paragraph 10 of the Sale Agreement contained the default clause, that if the purchaser was in default in payment as specified, the vendor was entitled to serve a 21 days notice to the purchaser to complete, and if the default persisted, the vendor was entitled to two options:

- a. To extend the time for completion, and in consideration accept interest from the date of completion of default at the agreed rate, or*
- b. To rescind this agreement by notice in that behalf of the purchaser as aforesaid and shall*

forfeit 10% of the deposit together with interest thereon to the vendor...”

If default is by the Vendor, Clause 11 provides that the purchaser is entitled to serve a notice in writing to the vendor requiring them to within 21 days remedy the default and if not so remedied, the purchaser would be entitled to refund the full amount paid with interest and damages as may be agreed or decided in accordance with the law.

4. Clause 15 of the Sale Agreement is of interest to application 15.2 states:

“Any dispute arising out of or in connection with this agreement shall be referred to arbitration by a single arbitrator to be appointed by agreement between the parties or in default of such agreement within 14 days of the notification of a dispute, upon the application of either party, the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators.”

5. The applicant sought an order for referral of this dispute to Arbitration in terms of **Clause 15(2)** of the Agreement.

The Respondent opposed the application vide his replying affidavit dated 22nd May 2015.

He states that it is the defendant who vitiated and nullified the sale agreement on an alleged repudiation by the plaintiff, he says that he has always been ready to complete the sale within the stipulated completion date.

By a letter dated 29th May 2014 the defendants advocates Mwaura & Kiguatha Advocates wrote to the plaintiffs Advocates Mboga G.G. & Co. Advocates to the effect that the purchaser had failed to pay the agreed 30% deposit of the agreed price as stated in **Clause 4(a) (b) and (c) of the Agreement**.

He therefore notified the plaintiff that:

“By reason of his repudiation of the agreement by none payment of the total 30% deposit, the agreement has been rendered null and void for all intents and purposes, and all the parties have been released from all their obligations under the Agreement.”

6. The Plaintiff states that he had paid 15% of the deposit – a sum of Kshs.9,500,000/= by the time of the purported repudiation of the agreement by the defendant. And that even after the said repudiation, the defendant has failed to refund the 15% deposit.

The Applicant submits that the repudiation of the sale agreement by the respondent raised a dispute between the parties that ought to be referred to **Arbitration**.

On the other hand, the Respondent submits that the dispute ought to be determined by the court as the only dispute is refund of the deposit paid to the defendants by the plaintiff.

7. The court has considered the pleadings and submissions by counsel.

The court ought to determine first whether there is a dispute arising from the sale agreement dated 1st February 2014. In this regard, the applicant claims that it is the Respondents who repudiated the contract by its advocates letter dated the 29th May 2014 pursuant to the Law Society Conditions of Sale. By that letter, the defendant nullified and avoided the Sale agreement.

8. The contract of sale was mutually entered into by both parties. A court of law cannot be expected to rewrite the contract. Its duty is to interpret the terms and conditions therein. The parties in this matter voluntarily, and with assistance of counsel, agreed by **Clause 15** that if any dispute arises in respect of the Sale agreement, it shall be referred to Arbitration. See **Vihar Construction Co. Ltd -vs- Uhari Ltd (2015) e KLR**.

In the cases **Niazsons (K) Ltd -vs- China Road & Bridge Corporation Kenya (2001) e KLR** and **Spirits Ltd -vs- Prerab Enterprises Ltd (2014) e KLR**, the court held that where there is a valid Arbitration Clause in a Contract, a court ought to stay proceedings and refer the dispute to arbitration. It is submitted by the respondent that the Arbitration Clause is null and void, referring to the defendants notification letter that:

“--- the agreement has been rendered null and void for all intent and purpose and the parties have been relieved and released from their obligations under the agreement.”

To that, it is submitted that they are estopped from relying on the Arbitration Clause.

The above notification to the plaintiff is the basis of the dispute.

9. **Section 6(1) (a) and (b) of the Arbitration Act, 1995**, enjoins the court to interrogate the Arbitration Clause as to its validity and legality. The court has already made a finding that both parties are bound by their agreement, entered to voluntarily that disputes arising therefrom shall be referred to arbitration.

In the cases **Telkom Kenya Ltd -vs- Rapid Communications Ltd (2015) e KLR** and **Nanchang General Engineering Co. -vs- Easy Properties Ltd (20140 e KLR**, the courts rendered themselves that parties cannot be referred to arbitration before an amicable settlement has been attempted.

The parties from the various correspondence between themselves and attached to the Respondents list of documents attest to negotiations to settle the dispute. It is evidence that the negotiations did not bear fruit leading to this suit.

10. It is clear that the plaintiff is resisting referral of the dispute to arbitration, and stay of proceedings.

A stay and referral to arbitration should only be allowed if the court is satisfied that there is infact a dispute between the parties with regard to the subject matter before it, and that such matter is subject to the Arbitration Clause as agreed by the parties.

Arbitration is an alternative form of dispute resolution and enjoys quasi-judicial authority. It is used to promote the overriding objective and principles of dispensation of Justice and is anchored in **Article 159 of the Kenya Constitution**.

The courts are enjoined to promote Alternative Dispute Resolution(ADR) as a faster dispute mechanism, and should not be used to delay dispute resolution especially in commercial disputes.

11. The court having considered all relevant submits, it is convinced and persuaded that there is a dispute that ought to be determined by an arbitrator.

The parties when interring into the sale agreement were conscious of this fact hence the Voluntary Clause 15 in the Sale Agreement. There being a dispute on matters arising from the said agreement, none of the parties can be estopped from seeking enforcement of the terms of the agreement unless such terms are unreasonable, illegal and prejudicial to either of them.

12. For those reasons the applicant's application dated 6th May 2015 is allowed. The court proceeds to direct that there shall be a stay of all proceedings in this court pending arbitration. The dispute is hereby referred to arbitration, and the Arbitrator shall be appointed by agreement of both parties within 30 days of this ruling.

In default of agreement on the Arbitrator within the thirty day period, the parties shall approach the chairman of the Kenya Chapter of the Institute of Arbitrators who will within fourteen days appoint such arbitrator.

13. The costs of this application shall be costs in the cause.

Dated, signed and delivered in open court this 28th day July of 2016

JANET MULWA

JUDGE