



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1145 OF 2014

JAMES NGATA KIMONDO.....PLAINTIFF

VERSUS

MAJOR (RTD) MARSDEN MADOKA.....1ST DEFENDANT

ELIZABETH MUMBI MADOKA.....2ND DEFENDANT

RULING

The Preliminary Objection

The matter that is before the court for determination is a preliminary objection by the Defendants dated 15th July 2013. The objection arises from a Plaint dated 22nd August 2014 filed by the Plaintiff, wherein he claims that he entered into a lease agreement dated 18th May 2009 pursuant to which he purchased House number 3, Taita Villas constructed on Land Reference Number 1008/55, Nairobi (hereinafter referred to as “the suit property”), for Kshs.24,000,000/=. Further, that the Plaintiff thereafter requested for variations works which were to be undertaken at a cost of Kshs.2,862,787/= bringing the total purchase price to Kshs.26,862,787/=.

The Plaintiff stated that he had paid to the Defendants Kshs.11,800,000/= as at 10th April 2010, receipt of which is acknowledged by the Defendants, and that he thereafter made payments to the Defendants totaling Kshs.7,857,736/=. However, that by August 2012, neither the contracted works nor the variations authorized by the Plaintiff of Kshs.2,862,787/= had been undertaken at the suit property. Hence that the Defendants are in breach of contract, and have also neglected and declined to sign the sublease for the suit property in favour of the Plaintiff.

Further, that the Defendants have illegally, unlawfully, irregularly and unprocedurally issued the Plaintiff with a Compliance Notice and demanded that the Plaintiff pay them a sum of Kshs.9,411,786.90 being the alleged balance of the purchase price owing to the Defendants and rent of Kshs.4,000,000/= making a total of Kshs.13,811,786.90. The Plaintiff accordingly claims for specific performance of the agreement for lease, and damages of Kshs.15,205,051.26 together with interest thereon.

The Plaintiffs also filed a Notice of Motion dated 22nd August 2014 seeking temporary injunctive orders against the Defendants restraining them from effecting the said compliance notice and from dealing with the suit property.

The Defendants subsequently filed a Notice of Preliminary Objection dated 19th September 2014 objecting to the Plaintiff's suit on the grounds that the same is an abuse of Court process and ought to be struck out or stayed, and the parties ordered to go for arbitration as per the lease agreement referred to by

the Plaintiff.

The Submissions

The Defendants' counsel filed submissions dated wherein he argued that the Notice of Preliminary Objection is founded on Clause 19 of the Agreement for Lease between the Plaintiff and the 1st and 2nd Defendants dated 18th May 2009, in which the parties agreed that disputes emanating from the contract were to be referred to arbitration, and that the suit herein was filed before the arbitral process had been exhausted.

The Defendants' counsel relied on Article 159(2)(c) of the Constitution which enjoins courts to encourage arbitration as a mode of dispute resolution. He also relied on section 6 of the Arbitration Act, section 59 of the Civil Procedure Act and Order 46 Rule 20(1) of the Civil Procedure Rules, 2010 for the position that a Court can refer matters in a suit before it to arbitration, either of its own motion or at the request of the parties.

It was further submitted that the fact that the 1st and 2nd Defendants filed a Statement of Defendant dated the 19th of September, 2014 in response to the Plaint dated 22nd of August, 2014 does not serve to preclude the resolution of the dispute between the parties by arbitration, but rather it is an admission of the jurisdiction of the Court. The decisions in the cases of **Nanchang Foreign Engineering Company (k) Limited v. Easy Properties Kenya Limited (2014) eKLR**, **Talewa Road Contractors Limited – vrs- Kenya National Highways, HCCC 274 of 2013** and **Seven Twenty Investments Limited vs. Sanhoe Investments Kenya Limited, (2013) eKLR** were cited for the position that the conditions for arbitration have been met in this suit.

The said decisions were also cited for the proposition that the question as to whether or not the Plaintiff is entitled to restrain the Defendants from effecting the compliance notice dated 3rd July, 2014 or whether the 1st and 2nd Defendants ought to be restrained from dealing in any manner with the suit property as contained in the Notice of Motion Application dated the 22nd of August, 2014 are matters that should rightly be resolved by the arbitrator.

The Plaintiff's counsel filed submissions dated 20th February 2015 wherein it was argued that the Defendants' Preliminary Objection does not meet the test set in **Mukisa Biscuit. V. Westend Distributors Ltd (1969) E. A**, as it does not raise pure points of law for the reason that the Court would be required to investigate and ascertain whether parties have exhausted the process of arbitration as provided in clause 19 of the agreement for lease. Further, that the contents of the said Preliminary Objection are also false as it is the Defendants who have refused to concur on the appointment of an Arbitrator.

It was further submitted that it is settled law that an objection to the jurisdiction of this Court to hear and determine any matter ought to be raised at the very outset before any steps have been taken in the matter, and that the Defendants having entered appearance and filed a statement of defence in the matter have already acquiesced to the jurisdiction of this Court to hear and determine the matter. Reliance in this respect was placed on the decisions in **Roofspec & Allied Works Co. Ltd. vs George Kamau Thugge, HCCC 190 of 2013**, **China Sichuan Corporation For International – Techno-Economic Co-operative vs Kigwe Complex Limited** and **Lofty vs Bedowin Enterprises Ltd (2005) 2 EA 122**

Lastly, it was submitted for the Plaintiff that the Court has discretion to decide whether or not to stay proceedings under section 5 of the Arbitration Act as held in the cases of **Kenya Pipeline Company Limited vs. Datalogix Limited & Another, (2008) 2 EA 192** and **Mugih vs. Speedway Investment Limited and Another, (2010) 1 EA 259**. Further, that the Defendants herein have failed to satisfy the Court that they were at all material times willing to do everything necessary for the determination of this dispute.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issues to be decided in this preliminary objection are firstly, whether the Defendants' preliminary objection raises pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. The circumstance in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the present objection, the lease agreement relied upon by the Defendants is not disputed. The fact that the said lease agreement provides for arbitration of any disputes, differences and questions between the parties in clause 19 thereof is also not disputed. Section 6 of the Arbitration Act in this regard 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 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.

(2) Proceedings before the court shall not be continued after an application under subsection (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 legal proceedings in respect of any matter is of no effect in relation to those proceedings.

The Court of Appeal stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion. It is notable in this regard that the provisions of section 6 of the Arbitration Act give the Court discretion to investigate whether a claim that is brought before it is one that should be referred to arbitration, and therefore an application for stay pending arbitration ideally should not be brought by way of preliminary objection but by way of a normal application. The Plaintiff's preliminary objection therefore ought to technically fail for this reason.

This finding notwithstanding, and having regard to the provisions of sections 1A, 1B, and 3A of the Civil Procedure Act, and of Article 159 (2) of the Constitution as regards not paying undue regard to procedural technicalities, I am of the opinion that this matter ought to be stayed for reference to arbitration in accordance with the agreement entered into by the parties. I note in this regard that no other steps in this suit have been taken by the Defendants other than the acknowledgment of the claim made against them by way of filing their memorandum of appearance and filing of defence, and they are therefore properly within the remit of section 6 of the Arbitration Act.

This Court accordingly stays this suit for a period of one year from the date of this ruling pending arbitration by the parties, and the costs of the Defendants' Preliminary Objection dated 19th September

2014 shall be in the cause. The *status quo* to be maintained during the period of stay is as ordered by this Court on 8th September 2014, namely that the Plaintiff shall continue to be in occupation of the suit property, and that the Defendants shall not sell or transfer the suit property and/or evict the Plaintiff from the same.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 23rd day of March, 2015.

P. NYAMWEYA

JUDGE