Cornelis v Mwangi (Environment & Land Case 14 of 2014) [2015] KEHC 8552 (KLR) (16 April 2015) (Ruling)

Bouhuys Johaned Eduard Cornelis v Obadiah Njora Mwangi [2015] eKLR

Neutral citation: [2015] KEHC 8552 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

ENVIRONMENT & LAND CASE 14 OF 2014

AA OMOLLO, J

APRIL 16, 2015

BETWEEN

BOUHUYS JOHANED EDUARD CORNELIS .... PLAINTIFF

AND

OBADIAH NJORA MWANGI .... DEFENDANT

RULING

1. The defendant/applicant's motion premised under Section 6 of the *Arbitration Act* and Section 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act* seeks for an order that the proceedings herein be stayed and the parties referred to arbitration in accordance with Clause 3.0 of the Memorandum of Understanding dated September 17, 2011. He also prayed for the costs of the application. The application is supported by the grounds listed on the face of it and the affidavit of the applicant.

2. The motion is opposed by plaintiff/respondent vide his replying affidavit sworn on the 29th of May 2014. In the replying affidavit, the respondent deposes that as regards the issue of arbitration, the applicant has conducted himself in a fraudulent manner and his refuge in Clause 3.0 of the Memorandum of Understanding ismischievously orchestrated to continue delaying this matter. That the duration between when the suit was filed and this motion, the applicant had ample time to exhaust Arbitration Dispute Resolution but he did not. Lastly that this suit was filed after the defendant failed to answer to the respondents requests cunningly aimed at defeating the plaintiffs rightful entitlements.

3. Mr. Njoroge for the applicant submitted that under Clause 3.0 of the Memorandum, parties agreed that in the event of dispute, the matter would be refered to arbitration. This document was executed by five (5) people yet this suit is between two (2) people only. He relied on Section 6 of the *Arbitration Act* and case law of the following;

   1) *Nectel (K) Ltd -vs- Easter & Southern African Bank* (2008) eKLR.

II) *Exquisite Services Ltd. -vs- Mwashime Ali Mwakuzimu & 4 others* (2014) eKLR.

He urged the court to allow the motion as arbitration is one of the means of alternative dispute resolution recognized in law.

4. Ms. Koki opened her submissions in opposition to the motion by stating that the cardinal rule for arbitration is for parties to submit to it in good faith. The transfer was done before the loan agreement and from July 28, 2011 there has been no response from the applicant as regards the plaintiff's entitlement. The applicant refused to talk to the plaintiff and further the plaintiff is a foreigner therefore submitting to arbitration will be costly. She submitted that this court has original jurisdiction to hear any dispute therefore the provisions of the *Arbitration Act* cannot oust this court's jurisdiction. Finally she says the suit is not premature as attempts to settle this suit out of court was made with no success.

5. To begin with, I have looked at the two agreements one of which forms the basis of this application. The loan agreement dated 11th August, 2011 was signed between the plaintiff and the defendant only. In this agreement,the plaintiff gave the defendant Kshs. 1116000 towards purchase of land no Kwale/Diani/1934. In paragraph 10 of the plaint, it is stated that the loan agreement and the memorandum of understanding contained the entire agreements between the parties and in the event the borrower (defendant) did not honour the memorandum of understanding relating to the suit property, the loan agreement superseded the memorandum of understanding and all previous discussions, agreements or arrangements. The memorandum of understanding annexed to the supporting affidavit is dated September 17, 2011. It was signed by five people who among them are the parties in the suit. The five agreed to enter into a joint venture for the purchase and development of land Kwale/Diani/1934.

6. In the memorandum of understanding, parties agreed to have the defendant purchase the land in his name pending registration of a company Ltd. In clause 3.0 the parties agreed to refer any dispute arising under this agreement to arbitration. A look at the plaint as filed reveals the plaintiff's claim is a based both on the contents of the loan agreement and the memorandum of understanding. The agreements are referred to in paragraph 4, 9, 10,11 18 of the plaint and prayer (a) of the plaintiff. The plaintiff contends that the loan agreement superseded the memorandum of understanding but it appears from his own pleadings that he still relies on the provisions of the Memorandum.

7. Since it is not denied by either parties that there was a clause providing for arbitration, then section 6 of the *Arbitration Act* as regards stay of legal proceedings become relevant. The respondent fears the applicant is seeking arbitration in bad faith since he had refused to receive his calls and efforts made by the respondent in attempting out of Court settlement. That may be true but the applicant has now shown his willingness to this process by filing this application. The case law cited by the applicant are applicable in present instance except in the said cases both parties conceded to have their cases go to arbitration unlike here where the respondent is opposed.

8. The spirit of the *Constitution* of Kenya 2010 recognizes the importance of alternative dispute resolution under Article 159 (2) (c) in resolving disputes. The respondent is worried of costs given that he is a foreigner but this court believes that is a matter that can be resolved by the arbitrator and the parties by minimizing the number of meetings to be held. I am therefore satisfied that the motion has merit. These proceedings shall be stayed to enable the parties herein try and resolve the dispute through arbitration. The costs of the motion shall be in the cause.

DATED AND DELIVERED ON IN OPEN COURT AT MOMBASA THIS 16TH APRIL 2015.

A. OMOLLO

JUDGE

16.4.2015