



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC NO E151 OF 2021

OLIVIA ADONG' GEORGE LOMORO.....PLAINTIFF

-VERSUS

SPRING HILLPARK LIMITED.....DEFENDANT

RULING

1. The **Notice of Preliminary Objection** dated 2/08/2021 was filed by the Defendants/ Objectors herein on the grounds that;

1. *Clause 20 of the Agreement for Lease has an arbitral clause for resolution of disputes through arbitration.*
2. *The Plaintiffs suit is in contravention of the Arbitral clause thus incompetent, fatally defective. It is an abuse of the court process.*
3. *The Court lacks the requisite jurisdiction to take cognizance hear and determine the intended suit.*
4. *The Parties are bound by the Arbitration Act to resolve the dispute by way of Arbitration.*

2. On 16/11/2021, the Court directed that the Preliminary Objection be canvassed by way of written submissions. In compliance with the Court's directives, the Defendant through the **Law Firm of Igeria & Ngugi Advocates** filed their written submissions dated 12/01/2022 and submitted that the Plaintiff bypassed the provided means of **Dispute Resolution** Mechanism and did not exhaust the available remedies that are expressly provided by the agreement for sale. It was their submissions that the suit is premised on the Agreement for Sale and the said agreement under Clause 20 which provides for Arbitration as the **Dispute Resolution** Mode. The Defendant urged the Court to respect the intention of the parties as the parties entered into the said sale agreement freely and opted to oust other means of dispute resolution. They relied on the cases of

- *Niazsons (K) Ltd -v- China Road & Bridge Corporation Kenya [2001] eKLR,*
- *Eunice Soko Mlagui Versus Suresh Parmar & 4 Others [2017] eKLR,*
- *Wringles Company (East Africa) -versus- Attorney General and 3 Others(2013) eKLR, as quoted in County Government of Kirinyaga-v-African Banking Corporation Ltd [2020] eKLR*
- *Joab Henry Onyango Omino -v- Lalji Mehji Patel & Co. Ltd (1995 -1998) 1EA 264*

3. The defendant therefore submitted that the suit before this court is supposed to be referred to arbitration, since they have ably demonstrated so in their submissions.

4. The following are the issues for the court's determination in the preliminary objection;

- a) Whether the plaintiff's suit is an abuse of the arbitral clause and *therefore defective*
- b) Whether this court has jurisdiction to hear and determine this suit

Brief Historical Background

5. It is not in dispute that the defendant made an offer to sale an apartment to the plaintiff vide a letter of offer dated 11/06/2014. The letter of offer provided that the plaintiff had to pay 24.5% upon execution of the letter of offer and this was Kshs. 4,300,000 (Four Million and Three Hundred Thousand). The formal lease agreement would later be negotiated by the parties. The parties exchanged many letters relating to the suit property including a request by the Plaintiff to the Defendant requesting for a Deed of Variation dated 8/03/2016 which was rejected by the Defendant vide a letter dated 24/06/2016. The Defendant then promised to procure Change of User in October 2016 which was never executed and the letter from the plaintiff dated 29/06/2020 to the defendant was the last one seeking information on the change of user. The plaintiff's advocate issued a notice to sue to the defendant vide a letter dated 14/09/2020. The Defendant's advocates in their response vide the letter dated 28/09/2020 informed the plaintiff of their inability to complete the contract and offered alternative apartments which the parties were to negotiate the prices afresh. This was not acceptable to the plaintiff who declined vide a letter from the plaintiff's advocates dated 15/10/2020. The Plaintiff did seek a rescission of the contract and a refund of all the monies paid but the Defendants rejected and asked the plaintiff to wait for the apartments whose construction would commence in the future.

Analysis and Determination

6. The sale agreement between the parties required that any disputes to be referred to arbitration for resolution. **What is the dispute between the plaintiff and the defendant?** The plaintiff claims she has no dispute with the Defendant on the lease but that she has come to court to claim damages, loss of profit, recession of the agreements and restitution of the parties because the Defendant failed to provide the completion documents six years since they signed the sale agreement instead he made an offer for a new apartment in a different location. Further that the defendant declined to refund the monies as provided under the Law Society conditions of sale. She therefore avers that there is no contract between her and the defendant that can be enforced because six (6) years since they entered into an agreement of sale the defendant has refused and or failed to procure a change of user and also failed to transfer the apartment to the plaintiff. That for there to be arbitration a dispute must be in existence and the same has to arise from the instrument/agreement incorporating the arbitration agreement.

7. I will revisit the arbitration clause 20 in the agreement, it states:

“ In the event of any disagreement and/or dispute between the parties herein

pertaining to this Agreement to lease and subscription of shares and/or interpretation of any of the terms and/or clause herein contained which the parties have been unable to resolve amicably, the same shall be determined by arbitration as hereunder...”

8. Does this clause oust the jurisdiction of this court? I think not. In the case of **Indigo EPZ Limited –V-Eastern and Southern African Trade & Development Bank Nairobi [2002] 1KLR 2002** the court held that,

“In any case.... (there) is a well settled general rule recognized (even) in the English courts which prohibits all agreements purporting to oust the jurisdiction of the court”

Further the court went on to make a holding that ,

“....where parties have agreed to refer disputes to arbitration the position is that the jurisdiction to deal with substantive disputes and differences is given to the arbitrator and the Kenyan Courts retain residual jurisdiction to deal with peripheral matters and to see that any disputes or differences are dealt with in the manner agreed between the parties under the agreement”

9. My understanding of this decision is that the arbitral clause did not oust the jurisdiction of the court but gave an option for the parties to solve their dispute before coming to court. The plaintiff in this matter has not disputed that she continued exchanging correspondences with the defendants about the suit property and the agreement up till 28/09/2020 when the defendant made an offer for an alternative property which required fresh negotiations for the price. The plaintiff declined the new offer and asked for a refund which the defendant declined vide a letter dated 28/09/2020. The plaintiff filed the suit on 27/04/2021 about seven months after declining the defendant's offer. If the defendant was serious on having this dispute dealt with at the arbitration level, then they would have initiated the process immediately the plaintiff sought a refund.

10. The plaintiff has filled their submissions and I agree with the plaintiff's submission that for a court to determine whether arbitration is appropriate the court would need to look at the arbitration agreement to determine whether there is a dispute capable of being referred to arbitration under the arbitration agreement. Where the arbitration agreement is null and void or in operative or where there is no dispute falling under the arbitration agreement, the court will not make a reference to arbitration. The Defendant has not in my view demonstrated there is a dispute which would require to be submitted to arbitration. I do not see how the defendant would possibly be able to demonstrate that there is such a dispute without filing an affidavit and/or making reference to other evidence to show that and if that happens, that would remove the matter from the purview of a preliminary objection as it would then cease to be a pure point of law as was decided in the case of **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** where a preliminary objection was defined as follows:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Further Sir **Charles Nabbold, JA** stated that:-

“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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

11. Having given the description of a **Preliminary Objection**, it is evident that a **Preliminary Objection** raises a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.

12. The plaintiff in the present matter avers that the defendant’s inability to procure the necessary documents to complete the sale agreement was a breach of the agreement. The agreement was supposed to have been completed in 2014 yet the Plaintiff contends that upto 2021 when she approached court the sale agreement had not been finalized. The Defendant had not facilitated the change of user and handed over the apartment that the Plaintiff had now paid Kshs. 16,100,000 for out of the price of Kshs. 17,550,000 which was provided in the letter of offer as the purchase price.

13. I do not suppose the plaintiff had other options other than to approach the court for interim protection given that the process of appointing an arbitrator can often times be a long drawn affair. The opportunity for the parties to resort to arbitration is not at all lost as the parties may if they so desire submit the dispute (if indeed it is) to arbitration in accordance with their agreement. Any party can seek a stay of these proceedings to enable the matter to proceed by way of arbitration and the court would in view of the constitutional provision enjoining it to promote arbitration would use the occasion to implore the parties to use ADR as the constitution requires the court to do.

14. The issue of whether or not the parties agreed that any dispute that arises must be referred to Arbitration goes to the Jurisdiction of this Court. That issue does not require the ascertaining of the facts or probing of evidence as the Court will only need to determine whether there is such an agreement. The Environment and Land court is a court with the status of the High Court, and this gives it an unlimited jurisdiction while dealing with disputes relating to the environment and the use and occupation of and title to land. I however do not agree with the Defendant that an arbitration agreement can oust the jurisdiction of this court to consider whether indeed such an agreement exists, is null and void inoperative and/or incapable of being performed and/or infact whether any dispute between the parties with regard to the matters agreed to be referred to arbitration exists.

15. The issue of jurisdiction is well settled in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) KLR 1*, where **Nyarangi J.** of the Court of Appeal held that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

16. I am therefore persuaded that this court has jurisdiction to entertain the plaintiff’s suit which seeks a refund for monies paid for a suit property that has not been transferred six years after the parties signed the agreement for sale.

17. I am persuaded that in view of the foregoing the preliminary objection raised by the Defendant to the Plaintiff’s suit has no merit and is dismissed with costs. I direct that the costs of the preliminary objection shall be in the cause.

18. I grant leave of 21 days from the date hereof to the Defendant to file a response to the plaintiff’s application with corresponding leave of 7 days to the plaintiff to file a further affidavit if need be from the date of service of the Defendants response. Matter fixed for mention on 31/05/2022 for further directions.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH 2022

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MOGENI J

JUDGE

In the Presence of

N/A for the Plaintiff

Mr. Mbaji for the Defendant

Mr. Vincent OwuorCourt Assistant