



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC CASE NO. E 032 OF 2020**

**SHAFFIE A WERU.....PLAINTIFF**

**- VERSUS -**

**GANZA LIMITED .....1<sup>ST</sup> DEFENDANT**

**HOMEX HOUSING LIMITED....2<sup>ND</sup> DEFENDANT**

**RULING**

(In respect of the Defendants application dated 25<sup>th</sup> October 2021 seeking for an order that this matter be referred to an arbitrator in accordance with a clause 19 in the agreement between the parties herein).

**Background.**

1. The Application before me for consideration was filed by the Defendants seeking 2 orders namely: -

- a. An order directing that the matter be referred to an arbitrator for settlement of the dispute between the parties, and**
- b. A stay of the proceedings in this suit pending reference to arbitration.**

2. The Plaintiff opposed the application by way of a preliminary objection dated 19<sup>th</sup> January 2022.

**Applicants' case.**

3. The Applicants' case is that the dispute in this matter arises out of an agreement entered into between the parties for sale of a maisonette unit No. 42 on a parcel of land known as title number Kabete/ Kibichiko/906.

4. The Defendants /Applicants assert that clause 19 of the said agreement provided that any dispute arising between the parties would be referred to arbitration. It is the Defendants/Applicant's case that the dispute herein should therefore be referred to arbitration in accordance with the clause 19.

5. The Defendant's application is brought under the provisions of section 6(1) & (2) of the Arbitration Act of 1995, Sections 1A, & 1B of the Civil Procedure Act and Article 159(2) , (c) of the Constitution.

**Court's Directions**

6. The Court directed that the application and the preliminary objection be canvassed by way of written submissions. Both sides have complied and the court has had occasion to peruse the submissions and the precedents relied on in support of the submissions.

**Issues for Determination.**

7. The sole issue for determination is whether the court should refer this matter to arbitration in accordance with provisions of section 6 of the Arbitration Act of 1995.

**Determination.**

8. The Defendants/Applicants urge the court to give effect to the intentions of the parties herein expressed in their agreement. According to the Defendants, the clear intentions of the parties was that in case of any dispute arising they would submit it for arbitration in accordance with the clause 19 of the agreement.

9. The Defendants/Applicants placed reliance on the case of the **County Government of Kirinyaga Vs African Banking Corporation (2020) e KLR** In the said case, the court said that it would give effect to the parties' intention as expressed in the agreement between them. The court further stated that referring the matter to arbitration was in line with the provisions of Article 159(2) (c) of the Constitution which enjoins courts to promote alternative forms of dispute resolution.

10. The Defendants/Applicants affirms that section 6 of the Arbitration Act buttresses the position expressed by the court in the County Government of Kirinyaga case.

11. The Defendants/Applicants state that there is no dispute as to the existence of the agreement between the parties which is the basis of the Plaintiff's case anyway. It is their position that the parties are bound by the terms of the said agreement, including the arbitration clause.

12. In the case of **Nyutu Agrovet Ltd Vs Airtel Networks Ltd (2015) eKLR** , the Court of Appeal was emphatic that Courts should uphold the party autonomy concept' where parties have incorporated an arbitration clause in their contract. The court stated that where parties incorporate the arbitration clause in the contract between them, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails.

13. The Defendants/Applicants submit that the court lacks the jurisdiction to handle this matter at this stage as it was instituted before exhaustion of the alternative dispute resolution mechanism being arbitration. They urge the court to lay down its tools and not to make one more step in this matter.

14. The Plaintiff/Respondent on his part submits that the Defendants filed a statement of defence thereby admitting and submitting to the jurisdiction of the court.

15. The Plaintiff's position is that this court has the jurisdiction to hear this matter. An arbitration clause according to the Plaintiff, does not necessarily oust the jurisdiction of the court but only prescribes arbitration as a procedure that parties intend to adopt in settling their grievances.

16. The Plaintiff relies on the case of **Kisumu Walla Oil Industries Ltd Vs Pan Asiatic Commodities Pte Ltd and Another (1997) eKLR** where the court held that parties can expressly agree to ignore the clause. "*They may also do so by conduct*". The court expressed the view that where parties have submitted to the jurisdiction of the court, they lose the right to rely on the arbitration clause as a condition precedent.

17. The plaintiff is categorical that according to the procedure provided under section 6 of the Arbitration Act the Defendants ought to have contemporaneously, on entering appearance in this matter, filed their application seeking to have the matter, referred to arbitration otherwise, once they filed their statement of defence, they submitted to the jurisdiction of the court.

18. In support of his preliminary objection the Plaintiff relies on the case of **Safaricom Ltd Vs Flashcon Ltd (2012) eKLR** where the court held that the application by the Defendant to refer the matter for arbitration, "*should have been made before delivering a defence*".

This is in accordance with the provisions of section 6 of the Arbitration Act. By delivering a statement of defence, the Defendant submitted to the jurisdiction of the court and therefore 'waived its right to have his matter referred to arbitration.

19. In respect of the Defendants/Applicants invocation of article 159 (2) (c) of the Constitution, the Plaintiff relied on the case of **Diocese of Marsabit registered Trustees Vs Techno Trade Pavilion Ltd (2014) e KLR** where the court unequivocally expressed itself in the following words;

I should add that the requirement in section 6(1) of the Arbitration Act is not a mere technicality which can be diminished by Article 159 (2) (d) of the Constitution as claimed by the Applicant. It is a substantial legal matter that aims at promoting and attaining efficacious resolution of disputes through arbitration by providing for stay of proceedings but only where a party desirous of taking advantage of an arbitration clause in a contract has applied promptly for stay of proceedings and made a request to have the matter referred to arbitration.

20. The Plaintiff too relied on the case of **Galana Oil (k) Enterprises Ltd Vs Shamata Enterprises Ltd, Nairobi HCCC E 277 of 2020** that re-affirmed the above position.

21. I note that the Defendants/Applicants did not directly address the issue raised in the Plaintiff's preliminary objection.

22. In my opinion, the provisions of section 6(1) of the Arbitration Act are, unambiguous and self-explanatory. Courts have expressed themselves on the tenor and meaning of the section 6 (1) Arbitration Act.

23. The Defendants / Applicants in their submissions at paragraph 22, actually quoted the case of **Adrec Ltd Vs Nation Media Group Ltd (2017) eKLR** where the Court of Appeal restated and re-affirmed the position that in a suit founded on a contract containing an arbitration clause, a defendant ought to contemporaneously with his notice of appointment or appearance file an application for stay of proceedings and to refer the matter to arbitration.

24. The legal position is that a party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.

25. I agree with the court's holding in **Eunice Soko Mlagui Vs Suresh Parmar and 4 others (2017) eKLR**. The court stated that section 6 of the Arbitration Act is a specific statutory provision on stay of proceedings and referral of a dispute to arbitration where parties had entered into an agreement with an arbitration clause. The section prescribes the conditions under which a court can stay proceedings and refer a dispute to arbitration. Its intention is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution. The Court stated that there was nothing in that provision that could be said to be derogating or subverting the constitutional edicts as regards alternative dispute resolution.

26. In the case of **Raila Odiga Vs IEBC & 3 Others**, the Supreme Court observed that Article 159 (2), (d) of the Constitution simply means that a court of law should not apply undue attention to procedural requirements at the expense of substantive justice. The Article 159 was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the courts.

27. The Upshot is that the Plaintiff's objection is upheld and the Defendants/Applicants application is hereby dismissed with costs to the Plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH, 2022**

**M.D. MWANGI**

**JUDGE**

In the Virtual Presence of:-

Ms. Onyango h/b for Mr Kipkorir for the Plaintiff/Respondent

Ms. Odongo for the Defendants/Applicants

Court Assistant: Hilda

**M.D. MWANGI**

**JUDGE**