REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 968 OF 2012

1. JAMES MICHAEL NDUNGU KIGATHI

2. EMMAH WANGU KIGATHI..... PETITIONERS

VERSUS

THE HON. ATTORNEY GENERAL..... 1ST RESPONDENT

PERMANENT SECRETARY MINISTRY OF

STATE FOR PROVINCIAL ADMINISTRATION &

INTERNAL SECURITY..... 2ND RESPONDENT

PERMANENT SECRETARY MINISTRY

OF STATE FOR DEFENCE..... 3RD RESPONDENT

PERMANENT SECRETARY MINISTRY

OF LANDS.....4TH RESPONDENT

COMMANDER OF THE KENYA AIR FORCE.....5TH RESPONDENT

HOUSING FINANCE COMPANY

OF KENYA LIMITED.....INTERESTED PARTY

RULING

What is before the court is the Petitioners' (hereinafter referred to only as "the Applicants") Notice of Motion dated 28th January 2019 in which they have sought the following orders;

1. Further proceedings in the matter be stayed and the dispute be referred to arbitration for final determination under the Rules of the Chartered Institute of Arbitrators (Kenya Chapter).

2. The Honourable Court to appoint any one of the following as Sole Arbitrator and the said Arbitrator do file the Arbitration Award within 90 days from the date of appointment;

a) Justice (Rtd) J.B Havelock

b) Justice (Rtd) Joseph Nyamu

c) Advocate/Engineer Paul Thang'a Gichuhi

d) Advocate David Karanja Kiarie

3. Costs be in the cause.

The application was based on several grounds set out on the face thereof and supported by the affidavit of James Michael Ndungu Kigathi. The Applicants' case has been set out as follows: The Applicants' property known as L.R No. 209/12047 Eastleigh, Nairobi (hereinafter referred to only as "the suit property") was demolished under the orders of the 2nd to 5th Respondents on 22nd November 2011. In the circumstances, the property brings in no income to the Applicants despite an existing debt owed to Housing Finance Company of Kenya Limited (hereinafter referred to only as "the Interested Party") continuing to accrue. Relying on Article 159(2) of the Constitution and Section 20 of the Environment and Land Court Act, the Applicants have urged the Court to appoint one of the above mentioned persons as sole arbitrator to expeditiously determine the dispute between the parties.

The Applicants filed written submissions on 28th April 2021 in which they framed a number of issues for determination. The first issue was whether the court has inherent power to refer a matter to arbitration in the absence of a written arbitration agreement. Relying on Article 159(2)(c) of the Constitution, Section 20 of the Environment and Land Court Act, Section 59 of the Civil Procedure Act, Section 3A of the Civil Procedure Act, Order 46 Rule 20 of the Civil Procedure Rules and the cases of Nyameino Mageto *v* Simion Mageto Nyameino [2014] eKLR, Nanchang Foreign Engineering Company (K) Limited *v* Easy Properties Kenya Limited [2014] eKLR and CO-K Fast Company Ltd *v* Jiang Nan Xiang [2012] eKLR, the Applicants submitted that the Court has jurisdiction to refer a matter to arbitration even in the absence of an agreement between the parties. This they argued would ensure that the ends of justice are met.

The second issue framed for determination by the Applicants was, whether in the interest of justice and fairness and in the circumstances of a raging pandemic, the orders sought should be granted as prayed. The Applicants argued that it was in the interest of justice and fairness to refer this matter to arbitration. Firstly, because the Applicants' right to property was violated by the Respondents who brought down the suit property and have continued to cordon off the same. Secondly, the ability of the Judiciary to deal with matters has been abruptly interrupted by the Covid-19 pandemic and the downscaling of the Judiciary's operations will greatly hinder the disposal of the suit. Thirdly, it was submitted that the Chartered Institute of Arbitrators, Kenya issued guidance on remote Dispute Resolution Proceedings and as such ensuring the safety and well-being of participants. The Applicants argued that referring the dispute to arbitration would ensure that it is determined expeditiously, safely and will help the court in dealing with backlog.

The Respondents' case:

The 1st Respondent who is on record for all the Respondents filed grounds of opposition on 11th March 2020 while the 3rd and 5th Respondents who seem to be represented by a special state counsel in the 1st Respondent's office filed a replying affidavit sworn by Major George Moses Otieno on 6th March 2020. In the grounds of opposition, the 1st Respondent contended as follows: The Respondents do not have any arbitration agreement with the Applicants, do not wish to submit to arbitration and cannot be compelled to submit. It was also contended that under Section 6(1) (b) of the Arbitration Act 1995, the court cannot stay proceedings or refer parties to arbitration after the defendants have entered appearance and filed pleadings. In conclusion it was contended that the Applicants should stop forum shopping and exhaust the court process they have commenced.

In his affidavit, Major George Moses Otieno stated that he was a Staff Officer II and that he was responsible for administering military land on behalf of the Ministry of Defence. He stated as follows: The Applicants filed this suit in 2012 but have never fixed it for hearing therefore delaying its expeditious disposal. All the parties have filed their pleadings and the matter should be heard and determined rather than having it start afresh before an arbitrator. The 3rd and 5th Respondents have not consented to the referral of this suit to arbitration. The application has been brought in bad faith as the Applicants have already listed names of potential arbitrators without consulting the 3rd and 5th Respondents.

The 3rd and 5th Respondent filed their submissions dated on 16th June 2021. They submitted that there is no legal basis for the court to issue the orders sought by the Applicants. Relying on Xxcel Africa Limited t/a Mathare United Football Club (MUFC) *v* Kenyan Premier League Limited (KPL) & another [2017] eKLR, the 3rd and 5th Respondents submitted that the Constitution enjoins the court to promote alternative dispute resolution mechanisms but not to force the same on parties. Secondly, they submitted that Section 20 of the Environment and Land Court Act only comes into play where there is a written arbitration agreement in accordance with Section 4 of the Arbitration Act or where there is an agreement by both parties to submit the matter to alternative dispute resolution. The case of Peris Ndagara w/o Kaumbuthu (Deceased) & 3 others *v* Joseph Njiru s/o Mbogo & 5 others [2018] eKLR was relied upon in support of this submission. Thirdly, relying on Section 6 of the Arbitration Act, they submitted that there was no arbitration agreement between the parties and if there was one, the application for stay should have been filed at the time of entering appearance. Fourthly, relying on the case of County Government of Kirinyaga *v* African Banking Corporation Ltd [2020] eKLR they submitted that the onus of proving the existence of an arbitration agreement lay with the party seeking to invoke it.

The 1st Respondent filed his submissions dated 20th September 2021. The 1st Respondent reiterated the contents of his grounds of opposition that arbitration must be agreed upon by the parties and that the Respondents cannot be compelled to arbitrate. The 1st Respondent submitted further that the Applicants should have sought stay of proceedings if there was any basis for it after the Respondents entered appearance and not at this stage.

The Interested Party's case:

The Interested Party filed a replying affidavit sworn by its Legal Manager, Christine Thuguri Wahome on 25th January 2021. The Interested Party conceded that the court cannot compel the Respondents to submit to arbitration. It contended however that the court's jurisdiction to hear the dispute does not derogate from the court's power to promote referral of disputes arbitration. The Interested Party argued that such referral is not inconsistent with the Constitution or any written law. Further, it was argued that such move would be in line with the overriding objective of the Civil Procedure Rules, Section 3 of the Environment and Land Act and Order 40 Rule 20 of the Civil Procedure Rules which gives the Court authority to adopt alternative dispute resolution methods. It was argued that in view of the COVID-19 pandemic slowing down court processes, the court should consider innovative ways of disposing of disputes.

The Interested Party averred that the Respondents should yield to the letter and spirit of the law and have the matter disposed of through arbitration. The Interested Party argued further that the Respondents had not demonstrated what they had done to ensure the expeditious disposal of the suit. With regard to section 6(1) of the Arbitration Act, the Interested Party contended that it does not oust the Court's power to refer matters to arbitration as provided in the Constitution. In conclusion the Interested Party contended that it is customary for a party proposing arbitration to propose names of arbitrators. It contended that the proposals by the Applicants was not made in bad faith.

Determination:

I have considered the Applicants' application together with the supporting affidavit, the response thereto by the Respondents and the Interested Party, and the submissions by the advocates for the parties. The following is my view on the matter:

Article 159(2) (c) of the Constitution provides as follows:

> **"In exercising judicial authority, the courts and tribunals shall be guided by the following principles: alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted."**

Section 20 (1) of the Environment and Land Court Act provides as follows:

> **"Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution."**

Order 46 Rule 1 and 20 of the Civil Procedure Rules provides as follows:

> **"1. Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgement is pronounced, apply to the court for an order of reference.**
>
> **20. (1) Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.**
>
> **(2) The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution."**

In Kenya Pipeline Company Limited *v* Kenolkobil Limited [2013] eKLR the court elaborated on the provisions of law set out above as follows:

> **"I must point out that a plain reading of Article 159 of the Constitution of Kenya, 2010 requires the court to promote settlement of disputes by way of alternative dispute resolution. That may be so but such referral must be by the consent of the parties because of the very nature of the resolution methods. It is for that reason that the Constitution uses the words "promote" and not "shall refer to" alternative dispute resolution.**
>
> **Under Order 46 Rule 1 of the Civil Procedure Rules, 2010 which deals with arbitration under an order of the court and other alternative dispute resolution, duty is bestowed upon the parties in a suit pending in court for determination to apply to have the matter referred to arbitration. The said Order stipulates as follows:-**
>
> **"Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference."**
>
> **Order 46 Rule 20 (1) of the said Rules provides that:-**
>
> **"Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation)…"**
>
> **It is clear that it is only where other methods of alternative dispute resolution are concerned that the court can on its own motion, refer a matter under such methods. On the other hand, referral of a matter to arbitration that is in court must be by the consent of the parties. If the court had the power to refer matters pending in court for arbitration suo moto, nothing would have been easier than for the drafters of the legislation to have explicitly stated so.**
>
> **For the simple reason that arbitration is a consensual process, it therefore obtains that unless the parties in this matter consent to proceed for arbitration under Order 46 of the Civil Procedure Rules, 2010, they have no option but to submit themselves to the jurisdiction of this court until the very end of the proceedings."**

The application before me falls for consideration within the law as set out and expounded above. It is common ground that the parties did not enter into an arbitration agreement in relation to the dispute before the court. It is also common ground that the parties have not agreed to refer the dispute to arbitration. I am in agreement with the submission by the Respondents that while the court has power to refer matters to other forms of dispute resolution including arbitration, the court cannot impose the same on parties unless there are in existence qualifying circumstances. In the present case, as I have pointed out, there was no arbitration agreement between the parties. Furthermore, the parties have submitted to the jurisdiction of the court. None of the provisions of the law relied on by the Applicants and the Interested Party support their position that a court can compel parties to arbitrate on a matter before it in the absence of an arbitration agreement. I am of the view that an arbitration process being consensual in nature, the same cannot be imposed upon the Respondents. I find no merit in the Applicants' contention that the Judiciary is unable to handle the matter because of the COVID-19 pandemic. The suit remained unprosecuted for 8 years before COVID-19 arrived in Kenya.

Conclusion:

The upshot of the foregoing is that the Notice of Motion dated 28th January 2019 has no merit. The same is dismissed with costs to the Respondents.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Mutisya h/b for Mr. Karungo for the Petitioners

Ms. Fatma h/b for Mr. Kamau for the Respondents

N/A for the Interested Party

Ms. C. Nyokabi-Court Assistant