



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 116 OF 2013**

**ZAID IQUBAL DEAN ..... PLAINTIFF**

**V E R S U S**

**SAMUEL GAKIRIA KINGORI ..... 1<sup>ST</sup> DEFENDANT**

**ROMI HOLDINGS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff who was the beneficial owner of L.R. No. 214/269 withdrew his interest in that property upon representation that 1<sup>st</sup> Defendant would pay him a consideration of Kshs. 21,500,000/-. Plaintiff and 1<sup>st</sup> Defendant entered into a settlement deed dated 13<sup>th</sup> May 2013.
2. Plaintiff by this suit alleges that the 1<sup>st</sup> Defendant paid to him a down payment of Kshs. 2,150,000/- where upon the Plaintiff fulfilled the obligations in the deed which obligations included Plaintiff withdrawing a complaint filed by him with Director of Criminal Investigation and the withdrawal of caveat registered against the property.
3. Plaintiff alleged that 1<sup>st</sup> Defendant breached the terms of the Deed and proceeded to register the property in the name of the 2<sup>nd</sup> Defendant.
4. Plaintiff has prayed in the plaint for injunction to restrain both Defendants from alienating, constructing or in any manner interfering with the property. Plaintiff also seeks a prayer for 1<sup>st</sup> Defendant to pay Kshs. 19,350,000/- being the balance of the consideration.
5. Plaintiff filed an interlocutory application by Notice of Motion dated 9<sup>th</sup> October 2013 seeking an injunction to issue interms of the prayer in the plaint pending the hearing and determination of this suit.
6. The Defendant also filed a Notice of Motion dated 24<sup>th</sup> October 2013 seeking for the striking out of this suit and also filed a Preliminary Objection dated the same date which objection was to the effect that the Deed provided that any dispute relating to the property be resolved through an Alternative Dispute Resolution Mechanism (ADR). The objection is to the effect that because of the ADR Clause this Court had no jurisdiction to hear this case.
7. I will begin by considering the Defendants Preliminary Objection and Notice of Motion because if

indeed this Court has no jurisdiction, or if this suit should be struck out there would not be any basis to rule on the Plaintiff's application.

8. Both the Preliminary Objection and Notice of Motion raise the same grounds that the Deed had an ADR Clause and therefore this Court has no jurisdiction and that this suit should be struck out. Clause 11 of the Deed is in the following terms-

**“DISPUTE RESOLUTION**

**If any dispute, difference or questions shall arise whether during the continuance of this Deed or upon or after its determination between the parties hereto touching or concerning this Deed or as to any other matter in any way connected with or arising out of or in relation to the subject matter of this Deed such dispute, difference or question whatsoever shall first be resolved by negotiation in good faith failure to which the same referred to an arbitrator under the rules of the Arbitration Act No. 4 of 1995 of the Laws of Kenya or any statutory modification or re-enactment for the time being in force, such arbitrator to be appointed by agreement of both parties and in the absence of agreement within fourteen (14) days of the notification of the dispute by either party to the other then on the application of anyone party by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) and the decision of such arbitrator shall be final and binding on the parties hereto.”** (underlining mine)

9. In the light of the above Clause the Defendant ought to have moved this Court as provided under Section 6 of the Arbitration Act for stay of this case. That Section provides-

**“6.(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.”**

10. As can be observed what is required to be done under Section 6, above, is not what the Defendant has done. The Defendant instead of seeking stay proceeded to file a Preliminary Objection and an application to strike out a suit. Justice P. Kihara Kariuki (as then was) in the case **PETER MWEMA KAHORO & ANOTHER V BENSON MAINA GITHETHUKI (2006)eKLR** was faced with similar circumstances as are before me. After referring to Section 6 the learned Judge proceeded to state as follows-

**“It is clear from the foregoing that an application by the Defendant ought to have been brought under Section 6(1) of the Arbitration Act, 1995 and that to be successful, such application ought only to have sought orders-**

- a. to stay these proceedings; and
- b. to refer the parties to arbitration unless the court finds otherwise as is stated in the Section.

**Further, and in order to succeed on the application, the Defendant ought not, in the words of**

the Section, to have taken “any other steps in the proceedings.”

In the application before me dated the 5<sup>th</sup> November 2005, the Defendant does not only seek to strike out the suit, which is beyond the ambit of Section 6 of the Arbitration Act, 1995 aforesaid, but has also failed to move the court to refer the parties to arbitration pursuant to the 13<sup>th</sup> August 1981 Agreement.

In addition, and by filing the Grounds of Opposition dated the 5<sup>th</sup> November 2005, the Defendant has also actively taken other step in the proceedings and thereby waived his right to invoke and rely on the Arbitration Clause in the said Agreement.

The result is that the Chamber Summons application dated the 5<sup>th</sup> November 2005 fails and it is ordered that the same be and is hereby dismissed with costs to the Plaintiffs/Respondents.”

11. Similarly in this case the Defendant took a step forbidden under that Section 6 by filing the application for striking out the suit and the Preliminary Objection and also failed to move this Court to stay the proceedings. What was stated in the case of PETER MWEMA KAHORO (supra) was re-emphasized in the case MARGE ENTERPRISES LTD V KENYA ALLIANCE INSURANCE COMPANY LTD (2006)eKLR where the Court had this to say-

**“Section 6 of the Arbitration Act does not render a suit filed in the existence of arbitration agreement frivolous or an abuse of the process of court in light of Order VI Rule 13 of the Civil Procedure Rules but gives an opposing party a right to have those proceedings stayed and if found appropriate by the Court, to have the matter in dispute referred to arbitration.”**

12. Further and perhaps most importantly I find that there is merit in the Plaintiff’s submissions that the property having been transferred to the 2<sup>nd</sup> Defendant who was not a party the Deed the ADR Clause could not apply to this case. That submission is correct because the wording of the Deed refers to disputes between the parties that is the Plaintiff and 1<sup>st</sup> Defendant.

13. The Defendant’s application in seeking the striking out of the Plaintiff suit also overlooked the provisions of Section 7 of the Arbitration Act. That Section provides that a suit can be filed where there is in existence an Arbitration Clause for the purpose of obtaining interim measure of protection. That Section is in the following terms-

**“7(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.**

**(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.”**

That Section authorizes the orders sought by the Plaintiff for interim protection of the property from further transfer.

14. For the above reasons the Defendant’s Preliminary Objection and application must fail. Having failed I will proceed to consider the Plaintiff’s application.

15. The Plaintiff application is for injunction to restrain both Defendants from alienating, trespassing, transferring or construction or in any manner whatsoever interfering with the property pending the determination of this suit. The Defendant did not oppose the application.

16. The Plaintiff by his affidavit in support deponed that the 1<sup>st</sup> Defendant in contravention of the Deed transferred the property to the 2<sup>nd</sup> Defendant. The Plaintiff in my view has shown a prima facie case with probability of success in that there is a Deed which provided that he would receive consideration of Kshs. 21,500,000/- and would in turn remove caveat over the property. The Plaintiff has alleged the full consideration has not been paid and the 1<sup>st</sup> Defendant has transferred the property to the 2<sup>nd</sup> Defendant. There is indeed need to issue restraining orders to ensure that the 2<sup>nd</sup> Defendant does not in turn transfer the property to another person before the hearing of this suit.

17. It is for that reason that I grant the orders-

- a. **An injunction is hereby issued restraining the Defendants from alienating, transferring, trespassing, constructing or dealing in any manner whatsoever with L.R. No. 214/269 File No. 7794 Muthaiga Nairobi pending the determination of this case. In accordance with the provisions of Order 40 Rule 6 the injunction issued herein shall subsist for one (1) year.**
- b. **The Notice of Motion dated 24<sup>th</sup> October 2013 and the Preliminary Objection dated 24<sup>th</sup> October 2013 are dismissed with costs to the Plaintiff.**
- c. **The costs of the Notice of Motion dated 9<sup>th</sup> October 2013 are awarded to Plaintiff as against both Defendants.**

**DATED and DELIVERED at MOMBASA this 3<sup>RD</sup> day of APRIL, 2014.**

**MARY KASANGO**

**JUDGE**