REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MACHAKOS

ELC. CASE NO. E015 OF 2021

ANTONY O.B. OMORO.....PLAINTIFF

VERSUS

LORINE ADHIAMBO OTIENO.....1ST DEFENDANT

SAMUEL MWAURA KARANJA.....2ND DEFENDANT

LAND REGISTRAR MACHAKOS.....3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

What is before Court for determination is the 2nd Defendant's Notice of Motion application dated 7th September, 2021 brought pursuant to sections 1A, 1B, 3, 3A and 59 of the Civil Procedure Act and Order 2 Rule 15(b), (c) and (d); Order 46; and Order 51 Rule 1 of the Civil Procedure Rules. The 2nd Defendant seeks the following orders:

a. That this Honourable Court be pleased to strike out the 1st Defendant's counterclaim against the 2nd Defendant with costs.

b. That in the alternative to prayer (1) above, this Honourable Court be pleased to stay proceedings in this suit pending reference of the dispute between the 1st and 2nd Defendants to arbitration and its final determination.

c. That costs of this application be borne by the 1st Defendant.

The application is premised on the grounds on the face of it and the supporting affidavit of SAMUEL MWAURA KARANJA. The 2nd Defendant contends that together with the 1st Defendant they entered into an agreement dated 11th July 2018 in relation to sale and purchase of title number Mavoko Town Block 2/454 hereinafter referred to as the 'suit land'. He refers to Clauses 10.1, 10.2 and 10.3 thereof and avers that they were elaborate on dispute resolution between them and expressly provided that such dispute be dealt with by way of consultations in good faith failing which the same be referred to arbitration. He states that the process of appointment of such an arbitrator including the timelines is provided for in the aforementioned clauses. Further, despite the above, the 1st Defendant has purported to make a claim against him by way of a counterclaim in this suit. He reiterates that the Plaintiff does not stand to suffer any prejudice or loss should the application herein be allowed since his claim against them remains in this court and shall be at liberty to advance the same once the arbitral proceedings are determined.

The Plaintiff opposed the application by filing a replying affidavit sworn by ANTONY O.B. OMORO, where he deposes that he is the owner of the suit land. He opposes reference of the matter to arbitration and staying the proceedings herein. Further, that this is very intentionally calculated to delay this case in Court for years. He insists the 2nd Defendant stole his land and purported to sell it to the 1st Defendant. He states that he will suffer serious prejudice if the case is delayed as he has already logged materials for building on the site and his bags of cement are now expiring. Further, his proposed project is at a standstill because of this Court case since January,2021. He contends that the purported sale agreement dated 11th July,2018, cannot transfer any rights or interests in land from a person who has stolen in favour of the 1st Defendant. Further, justice delayed is justice denied and the Court should decline the application so that the main case is heard on merits and issues in controversy are settled once and for all. He makes reference to paragraph 4 of the 1st Defendant's defence showing that she was sold to the suit land in September,2014 and insists, during that time, he was in Botswana and not in Kenya. He explains that the 2nd Defendant has not attached any document to show how he got the land from him. He denies selling the suit land to any of the Defendants.

The 1st Defendant LORINE ADHIAMBO OTIENO opposed the application by filing a replying affidavit where she deposes that she is the Plaintiff in the Counterclaim. She confirms executing a Sale Agreement with the 2nd Defendant which provides for an Arbitration at Clauses

10.1 and 10.2 respectively. She insists the Arbitration was in respect to interpretation, application and implementation of the Sale Agreement. She contends that nothing in this arbitration clause warranted that the 2nd Defendant should be subjected to arbitration in a clear case of fraud as evidenced in the transaction which is subject of this suit. She claims she has no dispute with the 2nd Defendant in respect to interpretation of any clauses of the Sale Agreement, nor are they in dispute as to the application and implementation of the said Sale Agreement. She reiterates that a party cannot willingly participate in a criminal activity such as fraud and run to court to seek to stop the legal processes claiming that the Agreement provided for arbitration clause. Further, that this Application seeks to waste judicial time and prevent the Applicant from facing justice. She insists the Counterclaim as filed is as a result of the suit filed by the Plaintiff who is seeking drastic orders against her and yet the 2nd Defendant is the author of the dispute herein.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 7th September, 2021 including the respective affidavits, annexures and rivalling submissions, the only issue for determination is whether the 1st Defendant's counter-claim against the 2nd Defendant should be struck out with costs or in the alternative this suit be stayed pending reference of the dispute between 1st and 2nd Defendants to arbitration.

The 2nd Defendant in his submissions avers that he has made out a case in granting the orders sought. He made reference to the prayers sought by the 1st Defendant in the Counterclaim and insists that the proceedings herein should be stayed pending reference of the dispute to arbitration. He submits that the counterclaim was filed contrary to the Arbitration Clauses contained in the Sale Agreement dated the 11th July, 2018. To buttress his averments, he relied on the case of ***MITS Electrical Company Limited V Mitsubishi Electric Corporation (2018) eKLR.***

The Plaintiff in his submissions reiterates the averments in his replying affidavit and insists the purported sale of the suit land by the 2nd Defendant to the 1st Defendant was a fraudulent transaction, which a Court of law must refuse to enforce. He strongly urged the Court to decline the prayers as sought by the 2nd Defendant to purport to refer the dispute to Arbitration based on the grounds or terms in a purported Contract entered into through an illegality. To support his arguments, he relied on the following decisions: ***Mapis Investment (K) Ltd –Vs- Kenya Railways Corporation (2006) eKLR and Patel Vs Singh [1987] eKLR.***

The 1st Defendant in her submissions insists that striking out the pleadings is a draconian remedy that a court should issue sparingly. She avers that the 2nd Defendant has failed to even transfer the suit land to her culminating in her registering a caution against the said title. She reiterates that there are weighty allegations that cannot be determined at this juncture. She contends that the suit herein is not premised on interpretation, application or implementation of the Sale Agreement and therefore outside the scope of the Arbitrator. Further, that the present application is premised on Order 2 Rule 15(b) and Order 46 of the Civil Procedure Rules, which does not give this court requisite jurisdiction to stay proceedings. She explains that the 2nd Defendant filed a Memorandum of Appearance and Statement of Defence, amounting to acknowledgement of the Plaintiff's claim and the court's jurisdiction to determine the suit. To support her arguments, she has relied on the following decisions: ***Kivanga Estates Limited V National Bank of Kenya (2017) eKLR; Addock Ingram East Africa Limited V Surgilinks Limited (2012) eKLR; Mt. Kenya University V Step Up Holding (K) (2018) eKLR; Eunice Soko Magui V Suresh Parmar & 4 Others (2017) eKLR; Gourmet Meats Producers & Importers Ltd V Paul Lainan Nkina (2021) eKLR; Diocese of Marsabit Registered Trustee V Technotrade Pavilion Ltd (2014) eKLR and Telcom Kenya Limited Vs Rapid Communications Limited (2015) eKLR***.

In this instance the 2nd Defendant has sought for the court to strike out the 1st Defendant's Counter-claim as the Sale Agreement dated 11th July 2018 in relation to sale and purchase of suit land contains clauses indicating therein that should there be a dispute, the same should be referred to arbitration in accordance with Clauses 10.1, 10.2 and 10.3 of the Sale Agreement. I note the 2nd Defendant proceeded to file a Memorandum of Appearance and Defence in this matter contrary to the provisions of Section 6(1) of the Arbitration Act which only required him to file a Memorandum of Appearance and seek the matter to be referred to arbitration. I further note that the fulcrum of the dispute herein revolves around title to land and the Plaintiff's allegation that the 2nd Defendant proceeded to fraudulently sell his land to the 1st Defendant.

In the case of ***Diocese of Marsabit Registered Trustee Vs Techotrade Pavilion Ltd (2014) eKLR***, the Court held that:

> ***"The court too takes the same view but 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 which 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. Needless to state that arbitration falls in the alternative forms of dispute resolutions which under Article 159(2) (c) of the Constitution should be promoted by courts except in so far as they are not inconsistent with any written law."***

While in the case of ***Addock Ingram East Africa Limited V Surgilinks Limited (2012) eKLR*** it was held that:

> ***"I would agree with the defendant that it is an abuse of court process for parties to refer their disputes to court if the agreement that gives rise to the proceedings contains an arbitration clause. However, if a certain portion of a claim is not in dispute it is improper to refer the entire claim to arbitration. Before a court can order parties to go to arbitration it has to be satisfied that there is indeed a dispute over the claim in issue."***

See also the decisions in **Eunice Soko Magui V Suresh Parmar & 4 Others (2017) eKLR**.

I note the 1st Defendant has raised triable issues in her Defence and Counterclaim where she confirms it is the 2nd Defendant that sold her the suit land but has failed to furnish her with completion documents. It has also emerged that the Plaintiff is the owner of the suit land and holds document of title to that effect. Further, that at the point of the alleged sale of the suit land by the 2nd Defendant, he was not residing in Kenya and denied disposing of the said land to the 2nd Defendant. Both the Plaintiff and 1st Defendant have raised allegations of fraud as against the 2nd Defendant. To my mind, I find that the Plaint and 1st Defendant's Defence and Counterclaim raise triable issues which cannot be wished away.

In relying on the facts as presented including the Legal provision I have cited above while associating myself with the quoted decisions, I find that the 2nd Defendant relinquished his right to have this matter referred to arbitration when he filed a Defence. Further, I find that the 1st Defendant's Counterclaim raises triable issues which can only be determined once the suit is set down for hearing on merit. I opine that it would be improper to refer this matter to arbitration as a portion of the claim herein that confirms the Plaintiff owns the suit land, is not in dispute.

It is against the foregoing that I find the Notice of Motion application dated the 7th September, 2021 unmerited and will dismiss it with costs to the Plaintiff and 1st Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF MARCH, 2022

CHRISTINE OCHIENG

JUDGE