



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 128 OF 2020

KIKAMBALA DEVELOPMENT COMPANY LIMITED PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY RETIREMENT BENEFIT SCHEME 2012 DEFENDANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION..... INTERESTED PARTY

RULING

(Application for consolidation of this suit with other suits, or that this suit be stayed, and for joinder of EACC to this case; plaintiff and defendant having entered into an agreement for sale of various parcels of land; agreement not being completed; plaintiff filing suit claiming breach of contract and damages; defendant filing counterclaim asserting that it was the plaintiff who was in breach and claiming refund of the sum of Kshs. 70,000,000/= paid as deposit under the contract; EACC having filed suit for recovery of this amount of Kshs. 70,000,000/= from various individuals who were involved in the transaction; there also having been other cases where the defendant had sued other parties to stop them from interfering with its decisional independence; issue of decisional independence of defendant not a question in this suit; court of view that the rights of the parties under the contract first needs to be determined and that determination can only be made in this suit which is the suit between the parties to the contract; this suit cannot therefore be stayed and neither can it be consolidated with the suit filed by the EACC; application for consolidation disallowed; EACC however allowed to join the suit as interested party)

1. There are two applications before me. The first is dated 2 February 2021 filed by the Ethics and Anti-Corruption Commission (EACC). It seeks the following three substantive orders :-

- (i) That EACC be joined to this suit as interested party or any other capacity the court may deem fit.
- (ii) That this suit be consolidated with Nairobi HCCC Acec No. 16 of 2017.
- (iii) That in the alternative this suit be stayed pending hearing and determination of Nairobi HCC Acec No. 16 of 2017.

2. The second application is dated 4 February 2021 and I will advert to it later in this ruling.

3. The background is that this suit was commenced through a plaint which was filed on 17 September 2020. The plaintiff avers that through an agreement dated 18 December 2014, it sold to the defendant the land parcels LR No. 5025/1191 , 1192, 1194, 1195, 1196, 1197, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1224, 1225, 1227, 1228, 1229 and 1230 (the suit properties) at the price of Kshs. 700,000,000/=. It is pleaded that the defendant paid a 10% deposit on the date of the agreement and there was a completion period of 90 days which fell on 17 March 2015. The plaintiff avers that the completion period was by consent extended to 17 April 2015 which the plaintiff alleges that the defendant breached as a result of which the plaintiff rescinded the agreement. In this suit, the plaintiff seeks a declaration that the defendant breached the agreement for sale dated 18 December 2014; damages for breach of contract; and costs.

4. The defendant entered appearance and filed a defence and counterclaim. It admitted the agreement of 18 December 2014 but pleaded that the plaintiff did not have an interest that could be transferred to the defendant before the completion date and also failed to assemble all the completion documents. It contended to have established that the suit properties were owned by Amkeni Farm Limited and not the plaintiff. It further pleaded that the 10% deposit paid was to be held by the plaintiff's advocate as stakeholder but that in breach of the agreement the amount was disbursed as follows :- Kshs. 43,000,000/= to Amkeni Farm Limited; Kshs. 22,000,000/= to Seline Consultants Limited; and Kshs. 5,000,000/= was invested in British American Asset Managers Limited. It is averred that the defendant has established that the plaintiff did not own the land but wished to utilize the sale transaction so as to purchase from Amkeni Farm Limited the same land for Kshs. 430,000,000/= which is contended to be commercial fraud. In the counterclaim, the defendant seeks an order for refund of the sum of Kshs.

70,000,000/= paid as deposit and general damages for breach of contract.

5. The plaintiff filed a reply to defence and defence to counterclaim. It pleaded inter alia that the amount of 10% was held by the plaintiff's advocate as stakeholder and was never misused. It is pleaded that it is in fact deposited in an escrow account vide a consent order entered into in the case Nairobi ACEC Case No. 16 of 2017. It is further pleaded that the agreement of 18 December 2014 was executed after the defendant had confirmed that the plaintiff had an equitable interest in the suit properties. It is averred that on 17 December 2014, the plaintiff had entered into an agreement for sale with Amkeni Farm Limited.

6. In the first application dated 2 February 2021, EACC avers that it has instituted the suit Nairobi HCCC Acec No. 16 of 2017 against Kanyi Joseph Karanja T/A Kanyi J & Company Advocates and Kikambala Development Limited. It avers that the issues raised in that case are similar to those raised in this suit. It contends that this suit was mischievously filed and is an abuse of the court process, and that the plaintiff deliberately left out the EACC. It is further claimed that this suit was filed after the court in Nairobi HCCC Acec No. 16 of 2017 declined an application to transfer the case to Mombasa and the applicant accuses the plaintiff of forum shopping. The supporting affidavit is sworn by Culent S. Lunyolo. He has deposed that on 21 June 2017, EACC filed the suit Nairobi HCCC Acec No. 16 of 2017 for recovery of public property, being the sum of Kshs. 70,000,000/= belonging to Kenya Ports Authority Retirement Benefits Scheme, the defendant herein, which is said to be a public body. A copy of the plaint is annexed. He avers that the EACC investigations revealed that the trustees of the defendant corruptly entered into the subject sale agreement of 18 December 2014. He has stated that within the case Nairobi HCCC Acec No. 16 of 2017, a consent was entered where the sum of Kshs. 70,000,000/= was deposited in an escrow account. He has mentioned that the plaintiff applied to transfer the matter to Mombasa Court which motion was rejected in a ruling dated 8 July 2020 which ruling he has annexed. He has stated that dissatisfied, the plaintiff filed an appeal to the Court of Appeal and sought a stay pending appeal which was rejected in a ruling dated 24 November 2020. He believes that the plaintiff has engaged in forum shopping in filing this suit and has also violated Section 6 of the Civil Procedure Act since the issues in the two suits are similar.

7. The second application is that dated 4 February 2021 and filed on 8 February 2021 by the plaintiff. It seeks orders to have this suit consolidated with the suits Mombasa HCCC No. 64 of 2015; Mombasa Constitutional Petition No. 24 of 2015; and Nairobi ACEC No. 16 of 2017. The application is supported by the affidavit of Ephraim Maina Rwingo a director of the plaintiff company. He has alluded to the agreement of 18 December 2014 and stated that it has given rise to various litigation. He has averred that the subject matter is the same and it is imperative that the matters be consolidated. He has annexed the pleadings in the three suits that he has mentioned.

8. The EACC has opposed the application dated 4 February 2021. It is deposed inter alia that within the suit Nairobi Acec No. 16 of 2017, the court ruled that Mombasa Constitution Petition No. 24 of 2015 was not similar to Nairobi Acec No. 16 of 2017 thus the issue has already been decided. He avers that the substratum of the case Nairobi Acec No. 16 of 2017 is to recover public property of Kshs. 70,000,000/= as they aver that the agreement was tainted with corruption. He avers that the suit Mombasa HCCC No. 64 of 2015 and Mombasa Constitutional Petition No. 24 of 2015 are not seeking orders with regard to the Kshs. 70,000,000/=. He has also mentioned that EACC is not party to the two cases. He reiterates that this suit should be consolidated with Nairobi Acec No. 16 of 2017.

9. The defendant filed two replying affidavits both sworn by Caroline Kodo in respect of the applications dated 2 February 2021 and 4 February 2021. She has deposed inter alia that this suit and the suits Mombasa HCCC No. 64 of 2015; Mombasa Constitutional Petition No. 24 of 2015; and Nairobi Acec No. 16 of 2017 involve different causes of action regardless of the fact that they arise from the same transaction and that they involve different questions of law. She has deposed that consolidation will adversely prejudice the defendant and delay its efforts to recover the amount of Kshs. 70,000,000/=. She however does not oppose the joinder of EACC to this suit.

10. The 6th and 11th defendants in Nairobi Acec No. 16 of 2017 aligned themselves with the position of the plaintiff.

11. The plaintiff in Mombasa Petition No. 24 of 2015 and Mombasa HCCC No 64 of 2015 filed a replying affidavit sworn by Randolph Tindika, their counsel on record. Inter alia he deposed that the genesis of all the cases is the conveyancing transaction. He avers that conflicting decisions are now trickling in from the different courts. He mentions Mombasa Constitutional Petition No. 1 where the High Court in Mombasa declined to transfer the case from Mombasa to Nairobi and ruling in Nairobi Acec No. 16 of 2017 where the court declined to transfer the case to Mombasa. He also avers that there is a pending appeal before the Court of Appeal being Nairobi Civil Appeal No. E281 of 2020 arising from the above ruling. He has further stated that there was a criminal case filed. He has annexed a ruling from the High Court Mombasa over the said criminal case being Mombasa HCCC Constitutional Petition No. 1 of 2019. He thus supports the motion dated 4 February 2021.

12. I invited counsel to file submissions and I have taken note of the submissions filed alongside the authorities cited.

13. What is before me are two applications. Both seek consolidation of this suit with other cases. There is the additional prayer for joinder of EACC to this suit as interested party.

14. The issue in all suits revolve around the agreement for sale of land entered into between the plaintiff and the defendant on 18 December 2014. That agreement for sale is a contract between two parties and nobody else. In this suit, the plaintiff claims that the defendant breached the agreement and seeks damages for breach of contract. The defendant has a counterclaim where it contends that it is the plaintiff who breached the contract and seeks refund of the amount of Kshs. 70,000,000/= paid as deposit under the contract. You cannot stop either party to an agreement from suing on the contract. One cannot therefore blame the plaintiff for filing this suit citing breach of contract and neither can the defendant also be faulted for filing a counterclaim also seeking a declaration of breach by the plaintiff and refund of what it paid under the contract. This case is therefore properly before this court for determination of the question whether it is the plaintiff or defendant who breached the agreement for sale of land and/or whether the defendant is entitled to refund of the amount of Kshs. 70,000,000/= that it paid.

15. I have seen that EACC had filed the suit Nairobi High Court Acec No. 16 of 2017 seeking to recover the sum of Kshs. 70,000,000/= on behalf of the defendant herein on the allegation that the agreement for sale was tainted with corruption. The sole prayer in that suit is for payment of the sum of Kshs. 70,000,000/=. If you ask me, I do not see the need of that suit since the person who paid that money is already

seeking to have it back through this suit. At the end of the day, it will have to be determined whether or not there was a party in breach before the court can order refund of the amount of Kshs. 70,000,000/=. The question of whether there was breach ; which party breached the agreement; whether there is a right to claim damages for breach of contract; and whether the defendant has a right to claim refund of the sum of Kshs. 70,000,000/= paid as deposit, can only properly be tried in a suit between the parties to the agreement, which is this suit. It is this case which will determine the rights of the parties under the agreement. A determination of rights under the agreement is one that can only be made in a suit between the parties under the agreement. The plaintiff herein cannot sue for breach of contract within Nairobi High Court Acec No. 16 of 2017. The fact that EACC has chosen to sue claiming that there is corruption does not fetter the right of the plaintiff or defendant to sue under the contract or claim damages under it. In my humble view, I do not see how Nairobi High Court Acec No. 16 of 2017 can be properly determined without first the rights of the parties under the contract having been settled. It is thus my humble position that it is actually the suit Nairobi High Court Acec No. 16 of 2017, which should be stayed, until this court pronounces the rights of the parties under the contract which will be done in this suit. It is not for this suit to be stayed pending determination of Nairobi High Court Acec No. 16 of 2017. That will be putting the cart before the horse. Depending on whatever findings this court will make, EACC can then make a decision as to whether or not it is worth pursuing a claim for recovery of the monies against the persons that is has chosen to sue in Nairobi Acec No. 16 of 2017. I am not thus persuaded to order that this suit be stayed, or even to be consolidated with the suit Nairobi High Court Acec No. 16 of 2017.

16. On whether this suit should be consolidated with Mombasa HCCC No. 64 of 2015 and Mombasa Constitutional Petition No. 24 of 2015, I am again not persuaded. I have gone through the pleadings in that case. It appears to me that in those two suits, the defendant herein is complaining of interference in its internal affairs and decision making, including the decision to purchase the properties in issue in this suit, and asserts its right of decisional independence. That is not a suit which seeks to determine the rights of the parties under the agreement of 18 December 2021. It is a general suit over the independence of the defendant. I do not see why I should consolidate that suit with this one. A consolidation will only lead to a convolution of the issues. We should not lose focus that this suit is limited to determining the rights of the parties under the agreement of 18 December 2021 and not any other question. The issue of independence of the defendant is different and should not be tried alongside the issue of whether there was breach of contract and whether there is a right of refund of the sum of Kshs. 70,000,000/= to the defendant.

17. It will be seen from the above that I have declined the order for consolidation.

18. The only issue left is whether I should allow joinder of EACC to this suit. Strictly speaking, where a suit is over a contract, then it is the parties to the contract who should be parties to the suit. However, in this instance, EACC alleges collusion between the plaintiff and defendant and claims that public money was lost. It is its assertion that the whole transaction was tainted by corruption. I think EACC has displayed a public element to this suit. It is for that reason only that I will allow EACC to be joined to this suit as interested party. I will also allow them liberty to call witnesses and adduce evidence that may assist this court in arriving at a just determination. But since they are neither plaintiff nor defendant they are not at liberty to file pleadings.

19. I make no orders as to the costs of the two applications.

20. Orders accordingly.

DATED AND DELIVERED THIS 27TH DAY OF APRIL 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.