



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

**AT NAIROBI**

**ELC SUIT NO. 391 OF 2010**

**GACHONI ENTERPRISES LIMITED ..... PLAINTIFF**

**VERSUS**

**D.N. NYAGA**

**T/A NJERU, NYAGA & COMPANY ADVOCATE .....1<sup>ST</sup> DEFENDANT**  
**ARTHI HIGHWAY DEVELOPERS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

The plaintiff entered into a sale agreement with the second defendant on 19<sup>th</sup> February, 2010 in respect of a parcel of land known as L.R. No. 7149/115. The plaintiff was the purchaser and the second defendant was the vendor. The purchase price was Kshs.55, 000, 000/= and upon execution of the said agreement, the plaintiff paid Kshs. 5,500,000/= to the 1<sup>st</sup> defendant who is an advocate of this court in his capacity as a stake holder. Subsequently however, the plaintiff discovered that the 2<sup>nd</sup> defendant was offering this parcel of land yet there was existing litigation, this being HCC NO. 167 OF 2007, upon which an injunction had been issued to restrain the 2<sup>nd</sup> respondent from dealing with the said parcel of land.

It was clear to the plaintiff at that stage that the property was not being sold free from all encumbrances of adverse claims. The plaintiff then raised allegations of fraud against the 2<sup>nd</sup> defendant and moved the court to declare that the agreement between the plaintiff and the 2<sup>nd</sup> defendant was fraudulent, illegal a nullity and void *ab initio*. There was also a claim for damages for frustration of a contract and lost business opportunities.

There is now before me an application by the 1<sup>st</sup> defendant by way of Notice of Motion under Order 50 Rule 1, of the Civil Procedure Rules Sections 1,3 and 3A of the Civil Procedure Act and Section 6 of the Arbitration Act, 1995 and rule 2 of the Arbitration Rules, 1997 for orders that this suit be stayed and that any disputes in respect of the parcel of land herein be heard and determined by way of arbitration. The grounds advanced for the orders sought are;

1. That the agreement in which the plaintiff seeks to enforce envisages disputes and has a provision for the issues emanating therefrom to be referred to arbitration.
2. That the plaintiff has been put on notice to proceed for arbitration by the defendants.

3. That the plaintiff has failed to avail documents in their custody emanating from this suit and or serve the defendants with summons.

4. That justice delayed is justice denied.

The application is further supported by an affidavit sworn by David Njeru Nyaga who is the 1<sup>st</sup> defendant herein. The application is opposed and a replying affidavit has been filed on behalf of the plaintiff.

Both learned counsel for the parties have filed submissions which I have noted. The said agreement it is true, provides for arbitration. Clause 15.1 provides as follows;

**“Each party hereto should use its best effort to settle amicably all disputes arising out or in connection with this agreement or in its interpretation”.**

Clause 15.2 of the same agreement says in part as follows;

**“ Any disputes between the parties hereto touching on this agreement or relating to the rights and liabilities of either party hereto in connection with this agreement shall be referred to the decision of a single arbitrator.....”**

The parties to this agreement are the 2<sup>nd</sup> defendant and the plaintiff whose directors executed the same. The 1<sup>st</sup> defendant is not a party to that agreement. The only role he played is to witness the signatures of the directors of the 2<sup>nd</sup> defendant. The plain interpretation of the two clauses that I have cited herein above, that is, 15.1 and 15.2 clearly refer to the parties to the agreement and no other. It has now emerged that the 1<sup>st</sup> defendant is the advocate who received the deposit of 10% in this transaction paid by the plaintiff in his capacity as state holder. That does not make him a party to the said agreement of sale. Indeed, the 1<sup>st</sup> defendant cannot move the court to enforce any term and conditions relating to that agreement because he will lack the *locus stadi* so to do.

The plaintiff has indicated that since the subject matter appears to have been encumbered even at as the time this agreement was entered into, it is no longer interested in this transaction and therefore its only interest is the refund of the 10%, that is, Kshs. 5,500, 000/= paid in this transaction. That being the case, the provisions in the agreement executed between itself and the 2<sup>nd</sup> defendant are no longer relevant.

I have noted the submissions of both learned counsel and with respect, agree with the learned counsel for the plaintiff that the refund of the 10% deposit is the only issue that is holding the parties herein. And so, the present application must be dismissed for the two main reasons that the 1<sup>st</sup> defendant cannot move the court under the said agreement and secondly the only issue at hand is the refund of a sum of Kshs. 5,500, 000/=.

I hasten to add that, even if the 2<sup>nd</sup> defendant were to move the court for the same orders, I would still dismiss the application because there was lack of good faith on its part in failing to disclose that the property was not free from encumbrances.

Accordingly, this application is hereby dismissed with costs to be paid by the defendants to the plaintiff.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 8<sup>th</sup> day of March, 2011.***

**A. MBOGHOLI MSAGHA  
JUDGE**