



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 549 of 2009

MABEL KALEGI AYINO.....PLAINTIFF/RESPONDENT

VERSUS

CATHERINE WANJIKU NJUGUNA.....DEFENDANT/APPLICANT

RULING

The plaintiff entered into a Sale Agreement with the defendant on 19th December, 2008 in respect of plot No. B in LR NO.2327/68 Simba Hill Karen, for a sum of Kshs.16 million. The property is owned by the plaintiff. The defendant paid a sum of Kshs.1,600,000/= being 10% of the purchase price.

Subsequently, another agreement was executed this time known as Possession Agreement dated 4th March, 2009. The defendant is said to have breached both the Sale and Possession Agreements and the plaintiff is said to have rescinded the same. The defendant then filed a caveat against the title in respect of the said parcel of land and in

particular sub plot B. Aggrieved by the said move, in addition to the breach of the two agreements, the plaintiff moved the court by way of Originating Summons for orders that the caveat dated 12th June, 2009 lodged with the Registrar be withdrawn forthwith, damages and costs.

The Originating Summons is supported by an affidavit sworn by the plaintiff herein setting out the terms of the agreements, the breach by the defendant and her unwillingness to renegotiate with the defendant in respect of the said property.

The said Originating Summons was followed by an application by way of Chamber Summons under Order XXXVI Rule 3B of the Civil Procedure Rules seeking the same substantive order of removing the said caveat. The defendant responded by filing a Notice of Motion under Order L rule 1 and Section 6(1) of the Arbitration Act No.4 of 1995, for orders that;

- a. The proceeding in this matter be stayed.**
- b. The dispute in this matter between the applicant and the respondent be referred to arbitration in terms of clause Nos 11 and 16 respectively of the agreements between the parties dated 29th December, 2008 and 4th March, 2009 and that the costs be in the cause.**

The said application is supported by an affidavit sworn by the defendant herein and the grounds set out on the face of the application.

The plaintiff replied to the defendant's application by way of an affidavit sworn on 25th November, 2009 wherein she reiterated, among other things, the breach on the part of the defendant of the two agreements.

Both learned counsel appearing for the parties herein have filed written submissions and cited several authorities which I have noted. The Sale Agreement between the plaintiff and the defendant dated 19th December, 2008 provides under special conditions No.11 as follows;

“Any dispute with regard to any matter in connection with the sale and purchase of the said property shall be referred to an arbitrator to be appointed by the parties hereto and failing such agreement as to the appointment of the arbitrator by a single arbitrator to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators (Kenya Branch) and every award made under this clause shall be expressed to be made under the Arbitration Act 1995 or other Act or Acts for the time being in force in Kenya in relation to arbitration.”

On the other hand, the Possession Agreement dated 4th March, 2009 provided at clause 7 as follows;

“Any dispute with regard to any matter in connection with the retaking of the property by the Licensor from the Licensee shall be referred to an arbitrator to be appointed by the parties hereto and failing such agreement as to the appointment of the arbitrator by a single arbitrator to be appointed by the Chairman for the time being for the Chartered Institute of Arbitrators (Kenya Branch) and every award made under this clause shall be expressed to be made under Arbitration Act 1995 or other Act or Acts for the time being in force in Kenya in relation to arbitration.”

It has been submitted on behalf of the plaintiff that the agreement having been rescinded the avenue of arbitration is now closed and therefore there is nothing to stay because the contract no longer exists. On the other hand, it is the submission of the defendant that she was all along willing and able to complete the agreement and that is still willing to do so.

While correspondence was still going on between the parties herein, the plaintiff entered into another sale agreement in respect of the same property on 12th September, 2009 with other 3rd parties. I note that this was before she moved the court to have the caveat withdrawn. It is a logical presumption that as at the time she entered into this latter agreement, she knew of the existence of the caveat and, with respect, took the risk of exposing herself to litigation by these other 3rd parties.

Be that as it may, it is the court's duty to respect and enforce the intention of parties and more so, when there is in existence express provisions that tend to oust the jurisdiction of the court. By providing for arbitration, the parties herein intended to pursue other avenues to the exclusion of the court in resolving any disputes that may occur. The interpretation of the agreement and whether or not the said agreements have been rescinded are disputes which I believe fall within the ambit of the arbitration clauses incorporated in the two agreements between the parties herein.

In that regard, the law mandates the court to stay any proceedings brought before it until the arbitration proceedings are heard and determined. Indeed in the case of *Niazsons (K) Limited Vs – China Road and Bridge Corporation (Kenya) (2001) KLR 12* the Court of Appeal held inter alia that the policy of the law is that concurrent proceedings before two or more fora is disapproved. Section 6(2) of the Arbitration Act 1995 did not permit parallel proceedings to be handled simultaneously. All that an applicant for a stay of proceedings under Section 6(1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly.

The plaintiff's Chamber Summons seeking the withdrawal of the caveat was filed on 14th October, 2009. The defendant's application by way of Notice of Motion to stay proceedings and have the matter referred to arbitration was filed on 18th November, 2009. There was no delay on the part of the defendant.

It is the duty of the court at this stage and in proceedings of this nature to consider inter alia, whether the suit indeed concerned a matter agreed to be referred to arbitration and whether there are any legal impediments on the validity, operation or performance of the arbitration agreement.

The defendant entered an appearance to the Originating Summons. She did not file any replying affidavit in a form of defence. Had she done so, she would have lost her right to invoke the arbitration clause. *See Corporate Insurance Co. Ltd – vs – Wachira (1995-1998) I EA 20. See also Kisumuwalla Oil Industries Ltd – vs – Pan Asiatic Commodities PTE Ltd and another (1995-1998) I EA 153.*

In view of the foregoing, I see no legal impediment in the path elected by the defendant.

In the case of *Omino – vs – Lalji Maghji Patel and Co. Ltd (1995-1998) I EA 264 at page 266* the Court of Appeal had this to say:

“When an application, under Section 6(1) of the Act is made by a party to an arbitration agreement, it

is incumbent upon the court to which such application is made to deal with it so as to discover whether or not a dispute or difference arises within the arbitration agreement for if it does, then it is for the opposing party to show cause why effect should not be given to the agreement. Indeed, once parties to an agreement have chosen to determine their disputes or differences through a domestic forum other than resorting to the ordinary courts of law, that choice should not easily be brushed aside.”

My view in this particular case is that triable issues exist at this stage and to order the withdrawal of the caveat may lead to injustice on the party claiming advantage thereof. It has not been alleged by the plaintiff that the arbitration proceedings shall be prejudicial to her. I believe I am right to hold that the arbitration proceedings take precedence before any other proceedings in view of the provisions of the two agreements.

The foregoing being the case, I order that the proceedings in this case shall be stayed and the matter be forthwith placed before the arbitrator in line with the spirit, intent and tenor of the two agreements. Each party shall bear her own costs in this application.

Orders accordingly.

Dated, signed and delivered at Nairobi this 21st day of September, 2010.

A. MBOGHOLI MSAGHA

JUDGE