



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
Civil Case 768 of 2009**

**MILLICENT W. MUGIH..... PLAINTIFF
VERSUS
SPEEDWAY INVESTMENT LTD.....1ST DEFENDANT
CFC STANBIC BANK LTD.....2ND DEFENDANT**

RULING

Before me is the 1st defendant's application made pursuant to the provisions of **Section 6** of the **Arbitration Act 1995** seeking to stay the proceedings herein pending determination of the dispute between the plaintiff and the defendants by arbitration. The 1st defendant contends that under clause J of the agreement signed between itself and the plaintiff, it was expressly provided that if a dispute arose in the performance of the agreement, then the same would be referred for resolution by arbitration. The 1st defendant states that the present suit was filed in breach of the express provisions of the said agreement and should therefore should be stayed pending the hearing and determination of the arbitral proceedings. It was the 1st defendant's view that under **Section 10** of the **Arbitration Act 1995**, the courts were prohibited from intervening in disputes where parties had agreed for the same to be resolved by arbitration. The application is supported by the annexed affidavit of Eric Mungai, a director of the 1st defendant. The application is opposed. The plaintiff, Millicent Mugih swore a replying affidavit in opposition to the application. She did not deny that indeed a dispute had arisen between herself and the defendants. She however deponed that in so far as the same dispute involved the 2nd defendant who was not a party to the agreement, the arbitration clause in the agreement was incapable of performance. She deponed that since the 2nd defendant was not party to the agreement, and further since the 2nd defendant was a necessary party for the determination of the dispute, the matter cannot be referred to arbitration unless the 2nd defendant was willing to submit to arbitration. It was her case that in light of the fact that the plaintiff's suit as against both defendants cannot be separated, it will be just and fair that the court assumes jurisdiction and hears and determines the dispute.

During the hearing of the application, Mr. Gichuhi for the 2nd defendant submitted that the 2nd defendant was in principle not opposed to the dispute being referred to arbitration provided that no interim orders are granted pending the hearing and determination of the dispute by arbitration. It was evident that other than filing preliminary objection to the entire suit, and a replying affidavit to the substantive application for injunction filed by the plaintiff, the 2nd defendant did not file any papers in opposition to the application filed herein to refer the dispute for determination by arbitration.

At the hearing of the application, I heard rival arguments made by Mr. Ohaga for the 1st defendant and Miss Imende for the plaintiff. Mr. Gichuhi, as stated earlier in this ruling, was not opposed to the dispute being referred for determination by arbitration provided no orders adverse to the 2nd defendant were issued by the court. I have carefully considered the pleadings filed by the parties to this application. I have also considered the submissions made by counsel for the parties to this application. The issue for determination by this court is whether the 1st defendant established a case for this court to stay proceedings herein and refer the dispute for determination by arbitration. The 1st defendant's application is predicated on **Section 6(1)** of the **Arbitration Act 1995** which provides as follows:

“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 files any pleadings or takes any other step in the proceedings, 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.”*

In Niazsons (K) Ltd vs China Road & Bridge Corporation [2001] KLR 12, the Court of Appeal held that in deciding whether or not to stay proceedings pending reference of the dispute for determination by arbitration under **Section 6(1)** of the **Arbitration Act 1995**, the court is obliged to consider, firstly, whether the applicant has taken any steps in the proceedings other than the steps allowed under the section, secondly, whether there are any legal impediments to the validity, operation or performance of the arbitration agreement and finally, whether the suit is indeed concerned with a dispute agreed to be referred for determination by arbitration.

The agreement that is the subject of the dispute between the plaintiff and the defendants is in respect of a sale of a residential flat. The agreement is dated 30th May 2007. It was entered between the plaintiff and the 1st defendant. In the said agreement, the 1st defendant sold to the plaintiff a flat known as Apartment No.A5 situate on LR. No.330/667. The flat was sold at a purchase consideration of KShs.7.7 million. The plaintiff paid 10% of the purchase consideration. It was agreed that the balance of the purchase consideration would be paid within fourteen (14) days from the date a certificate of practical completion would be issued by the architect. It appears that the 1st defendant failed to disclose to the plaintiff that the property had been mortgaged to the 2nd defendant to secure certain funds which were used to develop the property.

According to the 2nd defendant, the 1st defendant was required to secure its consent before it purported to sell any of the flats in the suit property. In that respect, the 2nd defendant is of the view that the agreement between the plaintiff and the 1st defendant is null and void. According to the plaintiff, contrary to the agreement entered between herself and the 1st defendant, the 2nd defendant had purported to unilaterally increase the purchase consideration of the apartment. The plaintiff is apprehensive that unless the court intervenes, she would be deprived of the apartment. It was in that regard that she filed the present suit. The 1st defendant does not wish the matters in dispute to be determined by this court in light of what it considers to be a valid arbitration clause in the agreement.

The parties to this application are agreed that there is in existence an arbitration clause in the agreement between the plaintiff and the 1st defendant. The parties are further agreed that the 2nd defendant is not a party to the agreement. Indeed, it is the 2nd defendant's case that the agreement between the plaintiff and the 1st defendant, having been entered without its consent, was null and void. It is therefore clear that this court cannot stay proceedings herein and refer the dispute to arbitration where one of the necessary parties to the suit was not party to the arbitration agreement. It is evident that the dispute between the plaintiff and the 1st defendant on the one hand, and the dispute between the plaintiff and the 2nd defendant on the other hand, can only be determined in one forum. I agree with the plaintiff that pursuant to **Section 6(1) (a)** of the **Arbitration Act**, the arbitration agreement between the plaintiff and the 1st defendant is incapable of performance in view of the fact that the 2nd defendant, a necessary party in the determination of the dispute, was not a party to the arbitration agreement.

I hold that the 1st defendant failed to establish a case to stay proceedings herein pending determination of the dispute between itself and the plaintiff by arbitration. It has been established that the arbitration agreement between the plaintiff and the 1st defendant is incapable of being performed in light of the intervention by the 2nd defendant in the agreement between the plaintiff and the 1st defendant. The 1st defendant's application lacks merit and is hereby dismissed with costs.

The 1st defendant is granted leave to file and serve response to the plaintiff's application within seven (7) days of today's date. The plaintiff and the 2nd defendant shall be at liberty to file any affidavit in response to the 1st defendant's replying affidavit within seven (7) days after service. Thereafter, the parties shall have seven (7) days by which to file and serve their respective written submissions. The matter shall be mentioned on 16th December 2009 before the Presiding Judge with a view to fixing an appropriate hearing date for the plaintiff's application dated 15th October 2009. Meanwhile, the interim orders granted on 15th October 2009 are hereby extended to that date. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2009

L. KIMARU
JUDGE