



**Sprinter Real Estate Investment Limited v Diaspora Housing Management (Environment & Land Case E010 of 2022) [2022] KEELC 15432 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15432 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E010 OF 2022**

**JG KEMEI, J**

**DECEMBER 19, 2022**

**BETWEEN**

**SPRINTER REAL ESTATE INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**DIASPORA HOUSING MANAGEMENT ..... DEFENDANT**

**RULING**

1. This ruling concern applications brought by the parties herein for the court’s determination. The first is the notice of motion dated the February 2, 2022 filed by the Plaintiff seeking *inter alia* interlocutory injunction; the second is the chamber summons dated the February 17, 2022 filed by the defendant seeking stay of proceedings to allow the dispute be referred to arbitration; and the third one is the defendant’s Notice of Motion dated the June 20, 2022 seeking to set aside the interim orders issued by the court on the March 21, 2022.

**The Plaintiff’s Notice of Motion dated 2/2/2022**

2. The plaintiff/applicant filed the instant motion seeking orders That;
  - a. Spent.
  - b. Spent.
  - c. A temporary injunction be issued by this court restraining the defendant by himself, its servants, agents or otherwise from entering or occupying the Plaintiff’s property known as Kiambaa/ruaka7048 (formerly Kiambaa/ruaka/6495 & Kiambaa/ruaka/6496 in Kiambu County hereinafter referred to as the suit property) pending the hearing and determination of this suit.



- d. This honorable court be pleased to issue a temporary injunction restraining the Defendant from receiving any payments from any of the unit purchasers, using, leasing, chagrining, transferring the suit property pending the hearing and determination of this suit.
  - e. This Honorable Court be pleased to order that the deposits being made to both the Applicant and the Respondent for the purchase of units in the suit property be deposited in the joint interest earning account in the names of the Advocates for the parties or this Honorable Court pending the hearing and determination of this suit.
  - f. The officer in charge Kiambu police station be directed to ensure enforcement of the orders granted by this Honorable Court.
3. The Application is based on the grounds thereat and Supporting Affidavit of even date sworn by Richard Mbugua Ng'ethe, the Plaintiff's Director. He averred that the instant suit arises from breach of a contractual sale agreement. That he owned Kiambaa/ruaka/6495 & Kiambaa/ruaka/6496 that were amalgamated to form Kiambaa/ruaka/7048 (the suit property) as shown by copies of title deed marked RMN1a&b respectively. That the suit property was then transferred to the Defendant vide RMN2a, b &c upon execution of a sale agreement- RMN3 by both the Plaintiff and Defendant on February 11, 2021. That before executing the sale agreement, the Plaintiff was in the process of constructing a commercial building with 90 units on the suit property and it was expressly agreed that upon signing the agreement, the Defendant would pay the Plaintiff a deposit of Kshs. 3M. That the balance of the purchase price would be paid upon delivery of completion documents but to date no single payment has been paid to the Plaintiff. That negotiations to have the Defendant pay the agreed deposit were held to no avail and the Plaintiff is apprehensive that the Defendant may not honor its obligations despite the fact that unsuspecting unit purchasers stand to lose substantial amounts of money hence the Application.
  4. Strictly speaking the Application is not opposed. The Defendant opted to file a chamber summons dated July 17, 2022 challenging this Court's jurisdiction to entertain the suit in light of Clause 16 which provided arbitration as the agreed form of dispute resolution as contained in the sale agreement.
  5. Directions were taken and parties agreed to canvass the application by way of written submissions.
  6. The Plaintiff through the firm of VN Aminga & Co Advocates filed submissions dated March 18, 2022 highlighting the background of the case and drew five issues for determination. On the first issue, whether the Plaintiff entered an agreement of sale of the suit property, the answer was in the affirmative that the same was done on February 11, 2022. Secondly on whether the Defendant breached the terms of the sale agreement, again the answer is positive that the Defendant has failed to show any evidence of payment of the agreed deposit as contained in the sale agreement. The third issue is whether either party shall suffer loss and damage if the orders sought are not granted. The Plaintiff submitted that despite failing to pay the deposit, the Defendant continues to collect money from innocent unsuspecting unit purchasers thereby exposing both the Plaintiff and purchasers to loss and damage. That the Defendant through her counsel is engaging in delaying tactics by filing applications and this Court should not countenance such.
  7. Further the Plaintiff submitted that it is entitled to the reliefs sought having demonstrated that the Defendant breached the express term of the sale agreement. That the Respondent directors are proxies of Mary Njambi Njonjo and Peter Kiruthi who are based in the UK and they continue to collect funds from unit purchasers and entering into new contracts without the Plaintiff's knowledge. That the Defendant cannot purport to pass any better title than it has. The Plaintiff reiterated the principles for granting an injunction as stated in the case of *Giella vs Cassman Brown* (1973) EA and the definition



of a prima facie case as determined by the appellate Court in *Mrao Ltd vs First American Bank* [2003] eKLR. That Clause 16.2.6 of the sale agreement allows an aggrieved party to seek relevant orders from any Court of law notwithstanding the forgoing arbitration clause. That there is a real likelihood that the Defendant may sell or dispose the suit property since it's already registered in its name and therefore the conservatory orders are crucial to preserve the suit property. Lastly on the issue of costs, the Plaintiff maintained that costs follow the event and having proved its case, the Plaintiff is deserving of such costs.

8. The Defendants filed omnibus submissions dated July 5, 2022 in respect of all the three motions before Court through the firm of Kithinji Marete & Co Advocates. Opposing the instant motion, the Defendant submitted that the Plaintiff has not satisfied the threshold for grant of injunctive orders as stated in the case of Giella supra. That the Plaintiff is not the proprietor of the suit property and instead the Defendant is the registered owner of the suit land. That the Defendant is therefore entitled to the protection of the law under Article 40 Constitution of Kenya and Sections 24 and 26 of the *Land Registration Act*. Reliance was placed on this Court's holding in the case of *Margaret Njeri Wachira vs Eliud Waweru Njenga* [2018]eKLR that Courts are mandated to consider a title deed as a *prima facie* evidence of ownership of land and conclusive evidence of proprietorship of land.
9. The Defendant was emphatic that the Plaintiff has come to Court with unclean hands by misrepresenting matters to the Court and therefore not entitled to the equitable reliefs sought. That any injunctive orders against sale of units affects would adversely affect 3<sup>rd</sup> party purchasers without according them a fair hearing. That the Plaintiff's claim is chiefly a claim for money which can easily be quantifiable and compensated by way of damages. That the balance of convenience tilts in favour of the Defendant and the unit purchasers and ultimately the Application ought to be dismissed.

#### **The Defendant's Chamber Summons dated February 17, 2022**

10. The Defendant craves for Orders That;
  - a. There be stay of all proceedings herein pending arbitration.
  - b. The dispute between the parties herein be referred to arbitration.
  - c. The costs of the Application be awarded to the Defendant against the Plaintiff.
11. The Summons is premised on the grounds on its face and Supporting Affidavit of even date of Nancy Wangui Maina, the Director of the Defendant. She confirmed that on February 11, 2021 the parties herein entered into a sale agreement annexed as NWM1 for the purchase of the suit property. That the Plaintiff willfully executed the sale agreement and agreed to be bound by the terms of the Agreement including Clause 16 on dispute resolution. That the Plaintiff's move to file the instant suit is premature and in violation of Clause 16 of the agreement that requires any dispute to be referred to Arbitration as intimated by the parties' communication through their counsel annexed as NWM2. She deponed that she verily believes that Section 6(1) of the *Arbitration Act* provides that the Court shall grant a stay of legal proceedings subject to the exceptions set out therein which exceptions don't apply to this suit. She urged the Court to allow the Application as prayed.
12. In opposition the Plaintiff's Director Richard Mbugua Ng'ethe swore his replying affidavit on May 20, 2022. He deposed that the Plaintiff was the registered proprietor of the two parcels of land – 6495 and 6496, before they were amalgamated to form the suit land for the joint venture with the Defendant. He reiterated that the Defendant breached the express terms of the sale agreement by failing to make any payment of the purchase price as agreed. That he attempted to reach out to the Defendant for amicable settlement of their differences in the manner stated therein in vain prompting him to seek



injunctive reliefs that can only be granted by this Court and not by an Arbitrator. He beseeched the court to dismiss the Application.

13. Similarly, the instant Application was prosecuted by way of submissions. The Defendant submitted that its Application is properly before Court in line with Section 6 of the *Arbitration Act* (AA) and the holding of the Court in *Shaffie A Weru v Ganza Limited and Anor*. ELC Case No E032 of 2020 that a party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration. That the effect of Clause 16 in the sale agreement is to oust the jurisdiction of this Court over any disputes arising therefrom and without such jurisdiction, then the Court must down its tools.
14. On the other hand, the Plaintiff contended that notwithstanding the provisions of Section 6 any arbitration clause that provides for interim injunctive relief, allows a party to such a clause to move the Court for the said relief to protect the subject matter of the Agreement. That it is only a competent Court that can order such reliefs sought in a formal suit and not an Arbitrator.

### **Defendants' Notice of Motion dated June 20, 2022**

15. The Defendant seeks Orders That;
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. Pending the reference to arbitration of the dispute between the parties herein, this Honorable Court be pleased to grant the Applicant an interim measure of protection by way of an injunctive relief directed at Sprinter Real Estate Investment Limited the Plaintiff Company restraining it, whether by itself or through its Director Richard Mbugua Ngethe, or any of its agents and/or employees from interfering in any way whatsoever with or disrupting the Applicant's re-entry into and quiet possession, use and development of the land comprised in Kiambaa/Ruaka 7048.
  - e. The Officer Commanding Station at Ruaka police station do ensure that the Orders above are peacefully complied with.
16. The Application is based on grounds that the Defendant is the registered owner of the suit land; the Plaintiff's Director deliberately misled this Court to restrain the Defendant from entering its own land and the Plaintiff has purported to take over control of the same by posting M/s SeaGull Security Services Ltd thereon; that on account of the restraining order, the Defendant is facing huge losses and liabilities in excess of Kshs 200M and there is no undertaking from the Plaintiff to reimburse it; that the Plaintiff has filed multiple suits against the Defendant including Kiambu Misc App No E032 of 2022 seeking to bar the Defendant's Directors from operating its bank accounts; that the Court was not informed of the Defendant's enormous investment on the suit land and unit purchasers' payments thereto; that the Plaintiff has misapplied over Kshs 6M received from 3<sup>rd</sup> parties and the claim of unpaid deposit of Kshs 3M is a mere ruse and in the event the Defendant is willing to deposit the same in Court or in a joint interest earning account and therefore it is pertinent for the Court to set aside its orders and allow the Defendant to re-enter the suit land and carry on with the developments.
17. The Application is further supported by the Affidavit of Nancy Wangui Maina. She recapped the above grounds and urged the Court to consider the bundle of documents marked NWM1 including photos of the developments on the suit land, list of unit purchasers and a report on eminent loss of over Kshs



200M prepared by M/s Muita Njoroge & Associates. She deposed that she was aware that on March 21, 2022 this Court issued an injunctive Order restraining the Defendant from entering or occupying the suit land thereby evicting the Defendant from the suit land. that this is despite the fact that the Defendant is the registered owner of the suit land and at the material time the Court was not informed that it was developing a block of residential apartments known as 'Fanisi Tigoni View Project' for sale. That the said project has attracted massive investments of over Kshs 200M and identified potential buyers. Concerning the payment of deposit, the deponent averred that the Plaintiff's director was paid Kshs. 6M and the allegation of non-payment of Kshs 3M is a hoax.

18. That accordingly the plaintiff is estopped from contesting the transfer of the suit land and by virtue of the existing interim orders various events have taken place to the detriment of the defendant; stalling of the construction project; removal of the contractor from the project site; replacement of the security firm on the site and Plaintiff has taken full control of the site. That the Plaintiff company is involved in other suit for instance ELC 110B OF 2021 before this court (Eboso J) but the same was not disclosed; that the Plaintiff deceptively obtained interim orders herein and now the potential buyers are exposed to immense loss and therefore with the interim orders ought to be set aside.
19. The Application is opposed. The Plaintiff's Director Richard Mbugua Ngethe swore his Replying Affidavit dated September 23, 2022. He avowed that the defendant has not established a case for this court to set aside its Orders of March 21, 2022, three months after they were issued. That the defendant has not tabled cogent evidence of any harm or loss it's likely to suffer as a result of the impugned Orders but instead annexed a schedule of alleged buyers and their payments and the estimated loss of Kshs 200M is without basis. He also accused the defendant for failing to comply with Court's direction to file reply to the Application dated February 2, 2022 and a statement of defence herein. That the defendant alleges to have paid the Plaintiff sums of money yet there is no iota evidence produced to that end but the defendant contradicts itself by offering to deposit the Kshs 3M deposit into court/ Joint account. That the defendant's allegations on eviction are untrue and unproven and it is only fair that the status quo be maintained and the matter proceeds for full hearing.
20. In a rejoinder, the defendant filed its further affidavit dated July 5, 2022 and averred that it has been barred from entering its own property. That the plaintiff has orchestrated loss of the defendant's materials on the suit land prompting the defendant to report the incidents at Ruaka Police Station OB No 27 of July 2, 2022 but the police hands are tied by this Court's order of March 21, 2022.
21. In a similar fashion parties canvassed this motion by way of written submissions. Supporting the Motion the Defendant submitted that under Order 40 Rule 7 Civil Procedure Rules an order for injunction may be discharged or varied or set aside by a dissatisfied party.

### **Analysis and determination**

22. The court finds it appropriate to determine the chamber summons first since it is challenging the jurisdiction of this court in favour of arbitration proceedings. Depending on the outcome of this summon, the court will then proceed appropriately with the notices of motion dated the February 2, 2022 and June 20, 2022.
23. It is not in dispute that parties chose the arbitration forum for their dispute resolution in the agreement of sale. Section 16 of the said agreement states as follows;

### **Dispute Resolution**

- 16.1 Should any dispute arise between the parties with regard to the interpretation rights, obligations and/ or implementation of any one or more of the provisions of this Agreement, the parties, in dispute, shall



- in the first instance attempt to resolve such dispute by amicable negotiation. Such negotiations shall begin immediately after one or more parties deliver to the others written request for such consultation.
- 16.2 Should such negotiations fail to achieve a resolution within ten (10) days of the dispute arising, a party may within the next ten (10) days declare a dispute by written notification to the other parties, whereupon such dispute shall be referred to arbitration under the following terms:
- 16.2.1 The dispute shall be resolved by arbitration in Nairobi or any other location mutually agreed by the parties, in accordance with the rules of the *Arbitration Act 1995*.
- 16.2.2 The arbitral tribunal shall consist of one (1) Arbitrator appointed by the parties. In case of failure by the parties to agree on the Arbitrator within ten (10) days of either party requiring agreement between them for such appointment, the Arbitrator shall, at the request of any party to the dispute, be appointed by the Chairperson of the Chartered Institute of Arbitrators (Kenya Branch).
- 16.2.3 The arbitration proceedings shall be conducted in the English language.
- 16.2.4. The Arbitrator shall have the authority to allocate between the parties the costs of arbitration in such equitable manner as the Arbitrator may determine. The prevailing party in the arbitration shall be entitled to receive reimbursement of its reasonable expenses incurred in connection therewith.
- 16.2.5. The award of the arbitration tribunal shall be final and binding upon the parties to the extent permitted by law and a party may apply to a Court of competent jurisdiction or enforcement of such award.
- 16.2.6. Notwithstanding the above provisions of this Clause, a party shall be entitled to seek preliminary injunctive relief or interim or conservatory measures from any Court of competent jurisdiction pending the final decision or award of the Arbitrator, and
- 16.2.7. Any arbitration under this Clause (including any appeal proceedings) shall be conducted in camera and the parties shall treat as confidential details of the dispute submitted to arbitration, the conduct of the arbitration proceedings and the outcome of the arbitration.
- 16.3 This Clause 16 shall survive the termination of this Agreement.”
24. The parties contemplated a dispute and provided that all disputes with respect to the transaction be referred to arbitration. The dispute as I can glean from the Complaint is an alleged breach of contract between the parties. I find that this is an appropriate dispute that the parties wished to be resolved by way of arbitration.
25. Section 6 of the AA provides as follows;
- “Stay of legal proceedings
- (1) 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 otherwise acknowledges the claim against which the stay of proceedings is sought, 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.



- (2) Proceedings before the court shall not be continued after an application under subSection (1) has been made and the matter remains undetermined.
  - (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.”
26. In the case of *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] eKLR stated as follows regard parameters for an Application of stay of proceedings under this Section;
- “Whether or not an arbitration clause or agreement is valid is a matter the Court seized of a suit in which a stay is sought is duty bound to decide. The aforementioned Section does not expressly state at what stage it should do so. However, a careful reading of the Section leaves no doubt that the Court must hear that application to come to a decision one way or the other. It appears to me that all an applicant is obliged to do is to bring his application promptly. The Court will then be obliged to consider three basic aspects. First, whether the applicant has taken any step in the proceeding other than the steps allowed by the said Section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred.”
27. The Defendant is emphatic that the Plaintiff willingly submitted itself to the Sale agreement and is therefore bound by its express terms as executed. That the instant suit is premature for want of the arbitral proceedings that should be pursued first in light of the mandatory language used in Section 6 AA above. The Plaintiff contended that the amicable attempts to settle the matter bore no fruit prompting him to seek injunctive reliefs which can only be issued by this Court and not by an Arbitrator. However, the Plaintiff did not adduce evidence of the alleged attempt to reach out to the Defendant to settle the matter amicably.
  28. Applying the above criteria, it is not in doubt that the Defendants entered appearance and promptly filed the instant Application. Secondly the Court ought to consider whether there any legal impediments on the validity or performance of the Arbitration clause. The Defendants averred that the suit before Court is premature for bypassing the settlement procedures provided for under Clause 16 above. They did not attach any evidence of any attempt to have the dispute resolved by an Arbitrator but maintained that the exceptions under Section 6(1) AA don’t apply herein. On his part, the Plaintiff deponed that his efforts to reach out to the Defendants to amicably settle the issue were in vain hence his decision to sue. The Plaintiff did not controvert this averment and on the face of it, a position that could only point to a failed negotiations did not yield fruit.
  29. I find that none of the exceptions mentioned above apply to this case. I also find that there is an apparent dispute between the parties. The question as to whether the application has merit is therefore answered in the positive.
  30. Having arrived at the conclusion as I have above, I find that the notice of motion dated the February 2, 2022 and that of the May 4, 2022 are spent. This is because the dispute is now referred to arbitration in accordance with clause 16 of the agreement of sale. Consequently, there be stay of the proceedings pending the outcome of the arbitration.
  31. What should the court do in the interim period before the commencement of the arbitration proceedings? It is to be noted that the court had issued interim orders which shall now lapse with this ruling. To preserve the substratum of the subject matter the court shall rely on Clause 16.2.6 of the



Dispute Resolution clause above that; notwithstanding the above provisions of this Clause, a party shall be entitled to seek preliminary injunctive relief or interim or conservatory measures from any court of competent jurisdiction pending the final decision or award of the Arbitrator.

32. That clause is buttressed by Section 7 AA which states;

“Interim measures by court

(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”

33. I also rely on the case of *Progressive Credit Limited v Mombasa Trade Centre Limited* [2022] eKLR that the purpose of the interim measure orders are to preserve evidence, to protect assets or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves.

34. In the upshot the orders of the court are as follows;

- a. The chamber summons dated the February 17, 2022 is allowed.
- b. The Notice of Motion dated February 2, 2022 and June 20, 2022 are spent.
- c. This matter is now referred for arbitration under Section 16 of the agreement of sale.
- d. In the interim status quo orders as at the date of this Ruling are ordered for purposes of preserving the substratum of the subject matter and pending the commencement of the arbitral proceedings.
- e. For that reason the suit is hereby stayed pending hearing and determination of the arbitration.
- f. Costs shall be in the cause.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 19TH DAY OF DECEMBER, 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

F. N. Njanja for Plaintiff

Defendant – Absent

Proposed Interested Party 1st & 2nd – Absent

3rd – 30th Proposed Interested Parties - Absent

Court Assistant – Phyllis / Kevin

