



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CIVIL SUIT NO. 4 OF 2020**

**VIPINGO RIDGE LIMITED.....PLAINTIFF**

**VERSUS**

**SAN VALENCIA LIMITED.....DEFENDANT**

**RULING**

1. By a Plaint dated 23<sup>rd</sup> September 2019 as filed herein on 27<sup>th</sup> January 2020, Messrs Vipingo Ridge Ltd (the Plaintiff) prays for Judgment against the Defendant for: -

***a) The sub-lease dated 1<sup>st</sup> September 2011 registered in Mombasa land Registry as CR No. 53321/1 be forfeited by the Defendant;***

***b) The Registrar of Titles be directed to cancel the entry CR No. 53321/1;***

***c) The Plaintiff be authorized to take vacant possession of the Plot;***

***d) Costs and incidentals to this suit;***

***e) Any other measure deemed fit by this Honourable Court.***

2. Those prayers arise from the Plaintiff's contention that Messrs San Valencia Ltd (the Defendant) purchased from it the leasehold interest in the said parcel of land registered as CR No. 53321/1 on 1<sup>st</sup> September 2011. The Plaintiff avers that the Defendant is in breach of its obligations and covenants under the sub-lease and that in particular, the Defendant has failed and or neglected to pay the service charges as well as the membership subscription fees in accordance with Clause 2.1 of the Sub-Lease with the outstanding amount as at 15<sup>th</sup> February 2019 being in the sum of Kshs 3,639,874/-.

3. The Plaintiff asserts that despite notices served upon the Defendant to remedy the situation, it has failed to do so within the timelines provided and it continues to be so in breach and hence the prayers sought herein.

4. But in its Statement of Defence dated 9<sup>th</sup> March 2020 as filed herein on 12<sup>th</sup> March 2020, the Defendant while admitting that it acquired the leasehold interest in the suit property by way of purchase denies that the right of forfeiture was envisaged in the lease. The Defendant avers that the sub-lease Clauses on membership and payments are standard form covenants that have been varied and vary from time to time and cannot therefore be used to take away ownership.

5. The Defendant further avers that the Plaintiff's claim is only motivated by malice as no accounts has been taken and the figures shown on the Plaint are exaggerations and do not form a true account of the affairs of the two parties.

6. The Defendant on its part accuses the Plaintiff of failing to meet its obligations under the sub-Lease by failing to make the roads to the Defendant's parcel of land and denies receipt of any notices as required from the Plaintiff prior to the institution of this suit.

7. At paragraph 19 of the Statement of Defence, the Defendant avers that this Court has no jurisdiction to determine the dispute on account of a mandatory arbitration clause in the sub- lease.

8. Consequently, and by a Notice of Preliminary Objection dated 9<sup>th</sup> March 2020 and filed herein simultaneously with the Statement of

Defence on 12<sup>th</sup> March 2020, the Defendant urges this Court to dismiss the suit on the ground that: -

**(1) Clause 5.7 of the Sub-Lease for the property the subject matter of this suit has an arbitral clause for resolution of disputes through arbitration;**

**(2) That the suit is therefore in contravention of the arbitration clause; and**

**(3) That parties are bound by the Arbitration Act to resolve the dispute by way of arbitration.**

9. When the Preliminary Objection came up for hearing, the parties agreed to dispose of the same by way of written submissions. I have accordingly perused and considered the Objection as well as the rival submissions and authorities placed before me by the Learned Advocates for the parties.

10. It was not in dispute that the Plaintiff and the Defendant herein have executed a Sub-Lease dated 1<sup>st</sup> September 2011 by virtue of which the Plaintiff as the Landlord has granted the suit property to the Defendant as a tenant upon certain terms and conditions as contained in the Sub-Lease.

11. Clause 2.1 of the Sub-Lease as attached to the Plaintiff's List of Documents filed herein on 27<sup>th</sup> January 2020 provides as follows:

**"2. The Tenant hereby Covenants with the Landlord as follows: -**

**2.1 Throughout the Term to pay the Rent(if demanded) and the Service Charge on the days and in the manner in which the same are made payable and shall pay and make good to the Landlord on demand all losses, damages costs, interest and expenses thereby arising or incurred by the Landlord in case of default of such payment of Rent or Service Charge PROVIDED ALWAYS AND IT IS HEREBY AGREED that any neglect or forbearance of the Landlord or its authorized agents and assigns in endeavouring to obtain payment of the Rent or Service Charge when the same become payable shall not release or exonerate or in any way affect the liability of the Tenant hereunder;**

**2.2....."**

12. According to the Plaintiff, the Defendant is in breach of its obligations under the said Clause 2.1 of the Sub-Lease in that it has failed and or neglected to pay the Service Charge and membership subscription fees which as at 15<sup>th</sup> February 2019 were outstanding in the sum of Kshs 3,639,874/-. The Plaintiff avers that despite notices served upon the Defendant, the Defendant has failed to remedy the situation and that the Defendant should accordingly forfeit the Sub-Lease as provided under its terms and conditions.

13. On its part however, the Defendants avers that this suit is actuated by malice as the parties are yet to take accounts to establish the outstanding accounts. The Defendant thus accuses the Plaintiff of not only exaggerating the sums due but also and more importantly, prematurely instituting this suit contrary to the requirements of Clause 5.7 of the Sub-Lease which provided for arbitration as a condition for settling any dispute.

14. The said Clause 5.7 of the Sub-Lease provides in the relevant part as follows: -

**"5.7 Save as may be hereinabove otherwise specifically provided all questions hereafter in dispute between the parties hereto and all claims for compensation or otherwise not mutually settled and agreed between the parties shall: -**

**Firstly be referred to the Board for mediation by one of the Board's mutually acceptable directors. If such process should fail; then**

**Secondly the matter shall be referred to arbitration in accordance with the provisions of the Arbitration Act 1995 or any amendments or superceding acts replacing the same by a single Arbitrator to be appointed by Agreement between the parties or in default of such agreement within fourteen (14) days of the notification of such dispute by either party to the other, upon application by either party to the Chairman for the time being of Chartered Institute of Arbitrators (Kenya Branch) ....."**

15. The "Board" referred to in the foregoing Clause is defined in the pre-amble to the Sub-Lease as follows: -

**"Board" means the board of directors of the Landlord of which not more than twenty-five percent (25%) of the members of the Board shall be nominees of the House Owners Association in accordance with and as more particularly provided in the Articles of Association of the Landlord."**

16. While indeed I did not from the material placed before me find any evidence that the subject matter of the dispute had been either referred to the Board and or for mediation as stipulated under Clause 5.7 of the Sub-Lease, I did not think however that such an omission would amount to a ground for the dismissal of the suit herein. I say so because as I understood them, arbitration clauses are meant to provide an alternative mode of dispute resolution and cannot limit or oust the jurisdiction of the Court to hear and determine the suit before it.

17. In this respect, Section 6 of the Arbitration Act, Chapter 49 of the Laws of Kenya provides at Section 6 thereof as follows: -

**“6. (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 Sub-Section (1) has been made and the matter remains undetermined.**

**(3) .....**”

18. In the matter before me, the Defendant has not brought any application for stay as contemplated under Section 6(1) of the Arbitration Act. Instead after filing its Memorandum of Appearance stated to be under protest on 12<sup>th</sup> March 2020, it proceeded on the same day to file not only its Statement of Defence but also a list of Witnesses and a Witness Statement.

19. I think it is now settled in law that if the Defendant had wished to invoke the arbitration clause, it ought to have applied for stay of proceedings after entering appearance and before delivering any pleading. Otherwise as the Court of Appeal stated in **Adrec Limited –vs- Nation Media Group Limited (2017) eKLR: -**

**“It should be emphasized that the right to seek and obtain stay of proceedings under Section 6(1) of the Arbitration Act is lost the moment a defence is filed in the proceedings. By dint of the defence, the party filing it subjects itself to the jurisdiction of the Court and cannot thereafter resile from that position.**

20. Accordingly, and having elected to file its Statement of Defence and a Witness Statement herein, the Defendant cannot be heard objecting to the jurisdiction of this Court on account that the Sub-Lease provided for the matter to go for arbitration.

21. In the premises, the Preliminary Objection is clearly misconceived and unfounded. It is hereby dismissed with costs to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF APRIL, 2021.**

**J.O. OLOLA**

**JUDGE**