



**Jung v Kencom Sacco Society Limited (Environment & Land Case
E180 of 2022) [2023] KEELC 20526 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20526 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E180 OF 2022
EK WABWOTO, J
OCTOBER 5, 2023**

BETWEEN

KYUNG SOOK JUNG PLAINTIFF

AND

KENCOM SACCO SOCIETY LIMITED DEFENDANT

JUDGMENT

1. This dispute is in respect to House No. 88 on LR No 12825/141 located in Runda. The suit property forms part of a mixed development comprising of 113 four-bedroom houses, a nursery and recreation center. The Plaintiff filed the subject suit vide a Plaint dated 13th April, 2022 accompanied by a verifying affidavit of even date in which the Plaintiff sought orders of specific performance against the Defendant in the following terms;
 - a. Release the lease or transfer of the suit property, to the Plaintiff together with all requisite completion documents, to enable the Plaintiff to have the lease registered in her favor.
 - b. To otherwise co-operate fully with the Plaintiff in order to ensure that the said lease is registered in favor of the Plaintiff and;
 - c. To pay costs of the suit together with interest thereon, calculated at court rates from the date of the Judgment
2. Following the filing of the subject suit, the defendant herein entered appearance on 9th February 2023 via their appointed advocates from the firm of Makhandia and Makhandia Advocates. The Defendant did not however file any defence to contest the Plaintiff's claim.
3. Subsequently, on 18th July 2022 the Court granted the Defendant a final chance to file their defence and witness statement and bundle of documents within 30 days. The same was not complied by the Defendant and the matter was set down for hearing.



4. On 14th March 2023, the Counsel for the Defendant sought an adjournment for lack of proper instructions from their Client. The Court took cognizance that the reasons provided were unmerited but reluctantly adjourned the matter and ordered throw away costs of Kshs 10,000 to the Plaintiff who had expressed readiness to proceed and whose witness had travelled from South Korea to attend the hearing. The matter was once again set down for hearing on 18th July 2023 when the hearing proceeded in the absence of the Defendant.

The Plaintiff's case

5. Kyung Sook Jung testified as PW1. She informed the Court that had purchased House No 88 of LR No 12825/141 in 2015. She had attached receipts of the payment amounting to Kshs 33,000,000 as the purchase price.
6. In support of her case, PW1 adopted her amended witness statement dated 9th November 2022 and bundle of documents and list of documents dated 13th April 2022 in her evidence in chief.
7. She testified that she took possession in 2016 but had not received the title. Through her advocates, she wrote several letters requesting completion of the transfer process but did not get a response.
8. Following the close of the Plaintiff's case, the Defendant's case was also marked as closed.
9. The Plaintiff also filed written submissions dated 25th July 2023 and 7th September 2023. The Defendant filed submissions dated 15th September 2023. It was submitted that specific performance of a sale agreement was a generally acceptable remedy for breach. Relying on the case of Gurdev Singh Birdi & Marinder Singh Ghatora vs Abubakar Madhuti- Civil Appeal 165 of 1996, it was argued that specific performance can become an entitlement where a party could prove performance of all terms.
10. It was submitted that the Plaintiff was entitled to orders of specific performance since; there was uncontroverted evidence that she duly complied with the Sale Agreement including ,paying the full purchase-price, and the fees for the transaction Advocates; the Defendant duly gave possession of the suit-property to her, in the year 2016, and she remains in possession (albeit through her tenant) to date; and the Defendant has not denied any of the above-stated facts, or offered any reasons for its failure or refusal to honor its part of the Agreement for Sale.
11. It was also submitted that the Defendant entered appearance on or about the 9th February, 2023 and did not see fit to apply for stay of proceedings on that date. The Defendant's Counsel has not demonstrated that there is in existence a basis for a dispute between the parties that ought to be referred to Arbitration.
12. It was further submitted that the Defendants have blissfully taken part in the proceedings, sought time from and obtained directions from the Court, without once notifying the Court that they object to the proceedings and that other than the bare and unsupported assertions in the Defendant's Counsels Submissions, there is no application made to Court in terms of Section 6 of the *Arbitration Act* (1995), or at all. The court was urged to grant the prayers sought in the plaint.

The Defendant's case

13. On 18th July 2022, the defendant did not attend the hearing and consequently the Defendant's case was marked as closed.
14. The Defendant filed submissions dated 15th August 2023 in which it was submitted that the parties were subject to arbitration in the first instance as the appropriate legislatively mandated mechanism for resolution of the dispute and agreed upon under Clause 30 of the Sale Agreement. . Relying on the



cases of *Wringles company (East Afriva) v Attorney General & 3 Others* (2013) and *Benard Murage vs Finserve Africa Limited & 3 Others* (2015), it was argued that Courts cannot rewrite what parties have already set out in the agreement.

Analysis and Determination

15. The Court having considered the pleadings, written submissions and evidence tendered, is of the view that the following issues are for determination herein;
 - i. Whether the proceedings herein should be stayed and be referred to arbitration.
 - ii. Whether the Plaintiff is entitled to the prayers sought?
 - iii. Who bears the costs of the suit?
16. I will proceed to analyse all the issues sequentially.
17. According to the Plaintiff, the Defendant has willfully neglected to complete the transfer of the suit property. On the other hand, the Defendant argues that the Court lacks jurisdiction by virtue of the arbitration clause in the Sale Agreement.
18. The question of jurisdiction where an arbitration clause is pleaded has been dealt with by several instances. First, Section 6 of the *Arbitration Act* stipulates an effect of stay of proceedings that:

“...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.
19. The Court of Appeal has pronounced itself in the case *Mt. Kenya University v Step Up Holding (K) Ltd* [2018] eKLR:

“...We find it prudent to highlight the case of Niazsons(K) Ltd v China Road & Bridge (supra) the court held inter alia that:“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 court will then be obligated to consider the threshold things:(a)Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;(b)Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and(c)Whether the suit intended concerned a matter agreed to be referred to arbitration...”
20. Similarly in *Eunice Soko Mlagui v Suresh Parmar & 4 Others* [2017] eKLR, it was held that;

“Section 6 of the *Arbitration Act* is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitrating where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution. We do not therefore find anything in the provision that can be described as derogating or subverting the constitutional edict



as regards alternative dispute resolution. The provision, for example, of section 6 which require parties to make an application for referral of a dispute to arbitration at the earliest opportunity and before taking any other action, or those that require the court not to refer a dispute to arbitration if the arbitration agreement is null and void, or is incapable of being performed, or if there is no dispute capable of being referred to arbitration, cannot be described as inconsistent with the constitutional principle of promoting alternative dispute resolution because the court is also obliged to take into account the equally important constitutional principle that justice shall not be delayed, by for example sending to arbitration a non-existent dispute, or allowing a party who has otherwise elected to pursue proceedings in the court, to belatedly purport to opt for arbitration.

21. In this instance, I must underscore that the Defendant had over 1 year to enter appearance and file for stay pending arbitration proceedings. Secondly, on more than one occasion, the progress of the suit was hampered by the Defendant's inaction. For this reason, I find that the Defendant's assertions to trigger the arbitration clause fall short and are brought late in the day.
22. Having arrived at the conclusion that this Court has jurisdiction, we must determine the merit of the Plaintiff's claims. I have perused the offer letter dated 29th April 2015, the Sale Agreement dated 22nd May 2015 and receipts No. 320,740 and 621 which confirm the existence of a valid agreement between the parties and consideration of Kshs 33,000,000 that was paid by the Plaintiff. I therefore find that the Plaintiff has successfully proven the case in its favor.
20. On the issue of costs, the general rule is that costs shall follow the event in accordance with Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court for good reason directs otherwise. In the instant case, the Plaintiff has diligently and successfully presented her claim and being the successful party, I will grant her costs of the suit.

Final orders

20. In the end, it is the finding of this court that the Plaintiff has proven her case on a balance of probabilities against the Defendant and in this regard, this Court makes the following orders:
 - i. An order of specific performance is hereby issued against the Defendant, compelling the Defendant to release the lease and/or complete the transfer of the suit property known as House No. 88 situated on LR 12825/141.
 - ii. Costs of the suit together with interest calculated at court rates from the date hereof until payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF OCTOBER 2023.

E. K. WABWOTO

JUDGE

In the Presence of:

Mr. Kimani for the Plaintiff.

N/A for the Defendant.

Court Assistant: Caroline Nafuna.

