



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE E005 OF 2021

NOBERT NYARIKI NYABERI.....PLAINTIFF/APPLICANT

-VERSUS-

COMSTER INTERNATIONAL (KENYA) LIMITED.....1ST DEFENDANT/RESPONDENT

EDWARD M. O. NYAMAO.....2ND DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. This Ruling is in respect of the Defendants' Preliminary Objection dated 11th March, 2021 challenging the jurisdiction of this court to entertain the Plaintiff's suit by dint of clause "P" of the agreement purportedly entered between the Plaintiff and Defendants that required the parties to refer any dispute between them to an arbitrator in line with the provisions of the Arbitration Act of 1995.

2. The Plaintiff filed this suit seeking an order compelling the Defendants to transfer the property known as Apartment No. B7 erected on LR. No. KISII MUNICIPALITY BLOCK 1/93 (herein referred to as the "suit property") which he alleges to have bought from the Defendants. The Plaintiff also sought a permanent injunction to restrain the Defendants from transferring the suit property to third parties among other orders.

3. The court directed that the Preliminary Objection be heard first. With the consent of both parties, the court further directed that the Preliminary Objection be canvassed by way of written submissions and both parties filed their submissions accordingly.

FACTUAL BACKGROUND

4. Before making a determination on the Preliminary Objection raised by the Defendants, it is necessary to give the background of this case.

5. By an offer letter dated 16th January, 2020 the Defendants offered to sell to the Plaintiff a property known as Apartment No. B7 erected on LR. No. KISII MUNICIPALITY BLOCK 1/93 situate in Kisii town at a consideration of Seven Million, three hundred Thousand Shillings (Kshs. 7,300,000) only.

6. In the letter of offer, it was indicated that an agreement would be drawn by the Defendants' advocate upon the return of the endorsed letter of offer by the Plaintiff together with all his identification documents. The said letter also indicated that the Defendants' advocate shall only endorse the agreement upon payment of the consideration by the Plaintiff.

7. The letter of offer provided that the Plaintiff was entitled to a refund of the purchase price if he was unable or unwilling to complete the agreement within 30 days of the Defendant completing the sale.

8. The Plaintiff did send back the endorsed offer letter with all his documents and made several transfers totaling four million, three hundred and ten thousand, five hundred and one shillings only (4, 310, 501) which was 59% of the purchase price.

9. A sale agreement was sent to him and he executed the same and sent it back to Defendants. Afterwards the Plaintiff started demanding for the property to be transferred to him since the completion period had lapsed. The company's advocate wrote back to him informing him that the Defendants could not execute any agreement or transfer documents if the buyer did not pay the full amount.

10. The Plaintiff therefore filed this suit and in response to the Plaintiff's suit, the Defendant filed the Preliminary Objection which is the

subject of this ruling.

ISSUES FOR DETERMINATION

11. Having considered the pleadings, Preliminary Objection and rival submissions the sole issue for determination is whether the Preliminary Objection should be upheld.

ANALYSIS AND DETERMINATION

12. In his submissions learned counsel for the Defendants contended that this court lacks jurisdiction to hear and determine the Plaintiff's suit since clause "P" of the agreement entered into by the parties on 8th June, 2020 provides that a dispute of any nature between the parties including interpretation of rights and liabilities should be referred to an arbitrator under the provisions of the Arbitration Act of 1995.

13. It is counsel's submission that the Plaintiff's claim is governed by the Arbitration Act which under section 10 thereof limits the jurisdiction of the court. It is his contention that the arbitration clause "P" is couched in mandatory terms and therefore it cannot be ignored.

14. In response to the submissions by the Defendants, learned counsel for the Plaintiff submitted that the agreement dated 8th June, 2020 was never executed by the Defendants since up to the time the Plaintiff was filing this suit, the Defendants had not sent the same to him as agreed. Counsel therefore contended that the said agreement cannot be treated as a valid enforceable agreement.

15. Counsel further argued that the basis of the Plaintiff's claim was the letter of offer dated 16th January, 2020 which is a valid contract having been executed by all parties and which has no arbitration clause to warrant reference of this matter to arbitration. Counsel submitted that it was on the basis of the said offer letter that he paid 59% of the purchase price and that the Plaintiff cannot be referred an agreement that is unexecuted.

16. Without considering the rest of the arguments by counsel for the Defendants some of which have gone beyond the scope of the Preliminary Objection, I will confine myself to the agreement dated 8th June, 2020 which is the basis of this Preliminary Objection.

17. As correctly submitted by counsel for the Plaintiff, a perusal of the agreement dated 8th June, 2006 reveals that the same was not executed by the Defendants. In fact, there is letter drawn by the Defendants' advocate in response to the demands by the Plaintiff to effect a transfer of the suit property stating that the defendant was only going to execute the agreement upon full payment of the contractual sum.

18. It is therefore clear that the Preliminary Objection cannot be based on the agreement dated 8th June, 2006 which was not executed by the Defendant. The agreement violates the provision of Section 3(3) of the Law of Contract Act provides as follows: -

"3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded:

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

19. However, it is important to note that the letter of offer that was executed by all parties as required and acted upon by the Plaintiff by making part payment of the consideration which is acknowledged by the Defendants is the only valid agreement binding the parties and from which a claim can arise. Since the same does not have a clause for referring the matter to Arbitration, the Preliminary Objection raised by the Defendants has no basis.

20. In the final result, it is my finding that the Preliminary Objection is not well founded in law and the same is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF OCTOBER, 2021.

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J.M ONYANGO

JUDGE