Itoga Investments Holdings Limited v Company for Habitat and Housing in Africa (Shelter Afrique (Commercial Case E334 of 2019) [2024] KEHC 12929 (KLR) (Commercial and Tax) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12929 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E334 OF 2019

JWW MONG'ARE, J

OCTOBER 25, 2024

BETWEEN

ITOGA INVESTMENTS HOLDINGS LIMITED ..... PLAINTIFF

AND

COMPANY FOR HABITAT AND HOUSING IN AFRICA (SHELTER AFRIQUE ..... DEFENDANT

RULING

1. There are two applications for the court's consideration; the first being the Plaintiff's application dated 18th April 2023 that seeks to have the suit marked as compromised in terms of the Head of Terms Agreement made between the parties dated 5th February, 2021 ("the HTA") and further, that the parties do agree on the Settlement Agreement under Resolution 6 of the HTA.

2. The second application is the Defendant's application also dated 18th April 2023 that seeks to have the suit to be referred to arbitration pursuant to clause 8.5 of the Joint Venture Agreement dated 8th October, 2013 ("the JVA") and in the alternative, for the suit to be stayed pending the determination of the dispute through arbitration. The Plaintiff's application is supported by the affidavits sworn by its director on, Jesse Gacharira Ngari on 18th April 2023 and 5th February 2024. It is opposed by the Defendant through the replying affidavit of its Senior Legal Officer, Kuria Njiinu, sworn on 21st July 2023.

3. The Defendant's application is supported by the affidavit of Kuria Njiinu sworn on 18th April 2023 and opposed by the Plaintiff through the replying affidavit of Jesse Gacharira Ngari sworn on 6th June 2023. The applications were canvassed by way of written submissions which are on record.

4. It is common cause that the dispute herein is in respect of the JVA where the parties entered into a profit-sharing partnership agreement and agreed to develop apartments on the Plaintiff's property known as Land Reference No. 1/157 situated off Marcus Garvey Road in Kilimani Estate, Nairobi ("the suit property"). As consideration for the JVA, the Defendant was to provide financing through a mix of straight equity of Kshs. 85,000,000.00/= and subordinated debt of Kshs. 232,000,000.00/=. On its part, the Plaintiff was to provide the title to the suit property in addition to the Kshs. 44,256,495.41/= already spent on the project.

5. In due course, the construction stalled due to differences and disputes between the parties which led the Defendant to foreclose on the project which culminated in the advertisements of the same in the Daily Nation of 7th October 2019 and 15th October 2019 for sale by public auction which was scheduled on 25th October 2019. The foregoing actions of the Defendant precipitated this suit with the Plaintiff seeking an order of injunction to stop the intended sale which was granted by the court(Odero J.,) on 24th October 2019.

6. This matter was screened and scheduled for mandatory court annexed mediation and as the parties mediated, they also engaged directly and signed the Heads of Terms Agreement(HTA) which was intended to resolve or settle the primary disputes. Clause 6 thereof provides that the parties are to sign a settlement agreement/mediation agreement to be deposited in court in line with the parties' resolutions therein to settle this matter and focus on completing the project. It is this provision that the Plaintiff seeks to enforce through its application.

7. On their part, the Plaintiff contends that the Settlement Agreement has not been signed as the Defendant has failed to address the Plaintiff's concerns on the draft of the said settlement agreement without any reasons and as such, the same has not yet been completed. It contends that it would be a waste of judicial time to proceed with this suit when the dispute between the parties has been negotiated and settled through the HTA and that the only matter outstanding is to agree on the settlement/mediation agreement.

8. The Plaintiff argues that it is optimistic that the parties are capable of completing the settlement/mediation agreement and in default, the court can settle the terms thereof. That although the parties have todate not agreed on the terms of the 'settlement agreement/mediation agreement' under Clause 6, the Plaintiff believes that the HTA itself is a full agreement which is capable of being performed. As such, it urges that it is in the interest of justice that the orders sought in its application be granted.

9. In response, the Defendant depones that the parties made attempts to agree on mutually agreed terms for the intended settlement agreement but they were unable to agree on the terms so as to comply with the provisions of clause 6 of the HTA. Consequently, the Defendant initiated reference of the dispute to arbitration as provided by clause 8.5 of the JVA vide the letter dated 3rd March, 2023 and efforts to agree on mutually agreed terms for the intended settlement agreement failed to bear fruits. The defendant avers that the Plaintiff did not respond to the said letter and instead filed the present application herein.

10. On the Defendant's application seeking to refer the dispute to arbitration, it avers that the JVA provides for resolution of disputes, firstly, through negotiations, then mediation, and in default of a compromise or agreement, by way of arbitration with the Sole Arbitrator being appointed by the Chairman of the Chartered Institute of Arbitrators, Kenya Branch.

11. The Defendant restates that no settlement agreement has been subsequently executed as per the HTA as the parties were unable to agree on the terms despite various attempts to agree on the same. That efforts to resolve the dispute between the parties herein through negotiations and mediation failed and

hence the reason why the Defendant initiated reference of the dispute to arbitration vide its advocate's letter dated 3rd March, 2023 and subsequently filed the instant application seeking referral of the dispute to arbitration.

12. In reply, the Plaintiff does not dispute the existence of the arbitration agreement in the JVA but it avers that the withdrawal by the Defendant of its application to compromise the suit on the basis of the HTA was done in bad faith. It thus urges the court to facilitate the parties to exhaust the discussions on the draft Deed of Settlement so as to settle the same and should they fail to do so, the court can settle such terms.

Analysis and Determination

13. I have carefully considered the parties' pleadings and written submissions and I find that this court is called to determine "whether to compromise this suit as per the terms of the HTA and or whether the court should order the parties to agree on the settlement/mediation agreement under Clause 6 of the HTA failing to which the terms thereof be settled by the court." The other issue for determination is "whether this suit ought to be stayed and the dispute be referred to arbitration."

14. A reading of the HTA reveals that the parties agreed on a number of resolutions. Clause 6 thereof provided that the parties were to sign a settlement agreement/mediation agreement to be deposited in court in line with the said resolutions to settle the case and focus on completing the project. The parties agree that they have not been able to agree on the terms of the said settlement agreement and that all such attempts have failed. Whereas the Plaintiff urges that the HTA as is still capable of being enforced by the court, I am inclined to agree with the Defendant that the same was not conclusive and was a "subject to contract" document, the subsequent contract being the settlement agreement.

15. I further note that as per the HTA, the parties intended to sign the settlement agreement incorporating the terms of their resolutions with much more specificity and whose terms would have comprised of the contract between the parties. I agree therefore with the Defendant that the HTA was a preliminary agreement and I am persuaded by the decision cited by the Defendant; *Eldo City Limited v Corn Products Kenya Limited & Equip Agencies Limited* [2013] KEHC 5916 (KLR) where the court held as follows:

> In the Case of Masters v Cameron (1954) 91 CLR 353; (1954) 28 ALJR 438, the High Court of Australia had an occasion to deal with the issue enforceability of preliminary agreements in Australia. It identified three categories of preliminary agreements. The Court delivered itself thus:-
>
> > Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three cases. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

> In each of the first two cases there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution. Of these two cases the first is the more common...
>
> Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own ... The parties may have so provided either because they have dealt only with major matters and contemplate that others will or may be regulated by provisions to be introduced into the formal document ... or simply because they wish to reserve to themselves a right to withdraw at any time until the formal document is signed. (Underlining mine)

16. To my mind I am satisfied that the HTA was disclaimed and was subject to the settlement agreement and therefore it is my finding that the same cannot be enforced as is unless and until it is concretized by the settlement agreement. In my view, it is the settlement agreement that is capable of compromising the dispute and since the parties have not agreed on the same, it follows that the suit cannot be compromised as there exists no such agreement by the parties.

17. It is my considered opinion that since the parties have failed to agree on the settlement agreement, the court cannot force them to do so. I therefore fully agree with the Defendant's submission that it is not the business of the court to make contracts for the parties and that this is the business for the parties and all the court is to do after the agreement is made by the parties is to protect the rights and enforce the obligations of the parties therein (see *Laser Eye Centre Limited v PBM Nominees Limited* [2020] KEELC 1459 (KLR)].

18. I further find that it will acting in vain for the court to order the parties to agree on the terms of the settlement agreement as similar attempts have previously failed. As the parties themselves have not agreed to settle their issues, it follows the same can only be done by a third party arbiter, the question being whether this is to be the court or an arbitral tribunal. Since as the JVA, the parties agreed to refer their disputes to arbitration and since they have failed in their negotiations to come up with a settlement agreement, I am of the view that any pending issues between them should be referred to arbitration. I say so based on the doctrine of exhaustion which posits that where a dispute resolution mechanism exists outside the court, the mechanism should be first exhausted before the court's jurisdiction is invoked.

19. This principle is consistent with Article 159 of *the Constitution* which enjoins the court to promote alternative dispute resolution mechanisms and where possible the court ought to give it full effect. Whereas the Plaintiff avers that there is no dispute between the parties that can be referred to arbitration, the parties' pleadings reveal otherwise. It appears that the parties have not agreed on various issues such as financing of the project, costing, project management, time frames and these issues remain live disputes that ought to be resolved. The resolution of these outstanding issues can only be by way of arbitration as the parties intended and since the Defendant has not filed a defence or counterclaim to the Plaintiff's suit, it cannot be stated that it has acquiesced to the court's jurisdiction.

Conclusion and Disposition

20. In the foregoing, it is my finding that the Plaintiff's application fails and the same is hereby dismissed whereas that of the Defendant is allowed with this dispute being referred to the arbitral tribunal for hearing and determination in accordance with JVA agreement. Subsequently the court orders that the

proceeding herein being stayed until conclusion of the said arbitral proceedings. Each party should bear their own costs of both applications.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 25TH DAY OF OCTOBER 2024.

.....

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Opole holding brief for Mr. Muge for the Defendant.

2. Mr. Wanyonyi for the Plaintiff.

3. Godfrey - Court Assistant