



**Moon Valley Limited & another v Mwai (Civil Appeal E575 of 2023)
[2024] KEHC 14459 (KLR) (Civ) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14459 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E575 OF 2023

LP KASSAN, J

NOVEMBER 19, 2024

BETWEEN

MOON VALLEY LIMITED 1ST APPELLANT

VAAL REAL ESTATE 2ND APPELLANT

AND

ELIZABETH MWAI RESPONDENT

*((Being an appeal arising from the ruling of Hon L M Njora (SPM)
Delivered on 30th May 2023 in the Nairobi CMCC NO. E 3390/2022))*

JUDGMENT

1. This is an appeal from the decision of Honourable Lucy Njora (SPM) delivered on 30th day of May 2024 specifically in which the honourable Magistrate dismissed a Preliminary Objection seeking reference to Arbitration. I have read the Submissions, list of Authorities and proceedings in general and in a view to disposing this appeal, I wish to make the following notes;
2. Was there a binding agreement between the Appellants and the Respondents? Paragraph 10 of the Complaint states and I quote

“That from the above, the defendants were clearly desirous to sell and the Plaintiff was willing to purchase the above property which culminated into the parties executing the Reservation Form on the 22nd day of January 2022. Paragraph 22 of the same complaint states ” That having executed the aforementioned reservation Form and the subsequent sale agreement coupled with the fact that the defendants had granted her access to the suit premises, the plaintiff



set off on an extensive renovation exercise of the suit property in bid to make it suitable for the salon business...."

3. The Plaintiff elaborated several expenditures that the Plaintiff incurred in preparation of doing business. At paragraph 31 of the Plaintiff, the plaintiff says;

"... Plaintiff was projecting an income of Ksh 85776 per month.... which she now has to forgo solely on account of the Defendants failure to honour their Contractual Obligations.

The Plaintiff then goes ahead to set out particulars of breach of contract. From this excerpt, it is clear that there was a contract between these parties.

4. The Appellant is said not to have signed the agreement but their conduct of releasing the keys to the Respondent sealed the agreement. Performance which is an integral part of an agreement is evident in this discourse given that the premise was released, money paid and renovations got under way. In other words, and as supported by the Plaintiff there was indeed a valid contract between these parties. Now if one is inclined to take a version that there was no contract because the Appellant did not sign the agreement then what recourse would the Respondent here have? Would it be breach of contract/ specific performance? would it be obtaining money by false pretense? The answers to these questions can be deciphered by looking at the prayers being sought in the plaintiff. - and I need not add anything further.
5. Having held that there was a valid contract between the two parties who is to blame for nonperformance of the contract? The amount to be paid was Ksh 7,000,000 yet Ksh 6,500,000 was paid by the Respondent. I have perused the Lower court file and noted that there is no copy of the agreement and so I cannot tell when the balance of Ksh 500,000 was to be paid. The Appellants are blamed as per Paragraph 26 of the Plaintiff for stopping the Respondents' technicians from accessing the premises. Now here, there two conflicting issues jutting out; Failing to complete payments and obstruction. Who is to blame or who carries a bigger blame?
6. Is there an arbitral clause? The answer is yes. Are there issues that can be resolved through arbitration? The answer is yes; breach of contract, Interpretation of the contract/ arbitration clause, repudiation and Specific performance.
7. Can a court interfere with terms of contracts where parties have freely set an arbitration clause? Again, the answer is no unless there are instances of exceptional circumstances such as illegality, mistake and so on and so forth that would make a contract null. Such exceptional circumstances are not evident here.
8. Would it be right to claim implementation of parts of the contract to exclusion of other parts? The answer is an emphatic no because parties would then be at liberty to choose parts that favour them. In this case, the Respondents are seeking favour in some terms of the contract which deals with payments and not reference to arbitration. That selectivity is against public policy which protects a contract holistically.
9. The onset of the above is that prayers 4,5,6,8 and 9 are granted. Consequently, the lower court Ruling is overturned. Given the nature of this appeal, each party shall bear own costs.

Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF NOVEMBER 2024.

L KASSAN

JUDGE



In the presence of:

Wagama holding brief Hassan for Appellant

Ongoro for the Respondent

Carol – Court Assistant

