REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 16 OF 2018

MARY JOY WANGUI GITAU.....APPLICANT

-VERSUS-

UMBERTO PAOLETTI.....1ST RESPONDENT

TONELLO GRAZIANO.....2ND RESPONDENT

MJANJA VILLAS MANAGEMENT LIMITED.....3RD RESPONDENT

Coram: Hon. Justice R. Nyakundi

Lumallas Achieng & Kavere Advocates for the Applicant

Onyango & Ameyo Advocates for the Defendants

R U L I N G

This is a Ruling on an application by **MARY JOY WANGUI GITAU** as the lease holder with the 1st and 2nd Respondent dated **19.1.2016** upon purchase of **Villa Number 2 Bongo House in Mjanja Villas,** constructed on **Portion Number 1893 Malindi.** That the lease duly registered provided for inter alia payment of service charge in accordance with the terms, conditions and warranties in the lease agreement.

The applicant in accordance with the contract declared a dispute on the computation of service charge without the provisions of audited accounts for the financial year under review.

On that ground alone the applicant invoked the Court's jurisdiction for grant of conservatory orders in the Chamber Summons filed in Court on **21.12.2018**. The applicant placed reliance on the grounds in the body of the Chamber Summons and her own corresponding affidavit dated the same day.

The Respondents took the liberty to answer the issues raised in the Chamber Summons and approached it in opposition through replying affidavit filed in Court on 29.9.2019. In the interim, pursuant to the terms of the lease agreement both parties agreed to subject the dispute to a mediation protocol. The motion Judge at the time granted interim orders of stay on any action being taken by the Respondents to demand payment of service charge, or obstruction of visitors to the property owned by the applicant. From the record it is not clear as to the outcome of the mediation proceedings to their dispute.

Feeling aggrieved and dissatisfied with the manner in which the applicant is litigating under a forum of inconvenience the Respondents raised a preliminary objection dated 26.3.2021 crafted as follows; -

> ***a) That there is no suit before the honourable court capable of sustaining any reliefs sought.***
>
> ***b) That the proceedings have been commenced through unprocedural means contrary to the provisions of the Court process and should therefore be dismissed with costs.***

In view of the framework set out in the supporting and replying affidavits in canvassing the application it is clear that at the heart of the dispute are matters arising in the lease agreement dated 19.1.2016 and a further management lease made on 22.3.2017 as covenanted between the disputants. The applicant had accepted the terms of the Respondents form and substance on management services agreement.

> ***"In the primary lease of 19.1.2016 in page 12 clause (ii) under the terms of agreement the parties were required to resolve any dispute that arises touching on the lease, construction or application through a single arbitrator to be appointed in accordance with the provisions of the Arbitration Act No. 4 of 1995 – of the Laws of Kenya or any Act amending or replacing the same decision of such Arbitrator shall be final, conclusive and binding on the parties".***

As a binder clause in dispute resolution, it was expressly provided for in the main lease agreement of 19.1.2016 and management lease of 22.3.2017. Based on both agreements the road map for dispute resolution mechanism in the context of the parties relationship had been fully addressed. By virtue of all these issues, it is an arguable issue for purposes of this Chamber Summons to consider, first whether the aforesaid proceedings are rendered nugatory and invalidated due to the existence of arbitration clauses. This question will be considered alongside the substance in the preliminary objection raised by the Respondents.

Determination

My first task therefore is to reflect on the Court's applicable principles on arbitral clauses in a lease agreement/contract. The governing law in our country is the Arbitration Act No. 4 of 1995 or in any event as amended or repealed by Parliament.

In accordance to both agreements, any dispute, conflict, or controversy howsoever arising out of the terms, interpretation or construction, broadly connected with the relationship created between the applicant and Respondents was mandatorily submitted to arbitration, and not mediation. The language in the clauses is couched to the effect that the ***"dispute shall be resolved by a single arbitrator appointed inline with the Arbitration Act".*** The Arbitration clauses required of the parties to submit first to mandatory arbitration. I consider the terms of the lease in question to constitute a commercial contract for all intent and purposes. Therefore, it will be necessary to borrow a leaf from the ***International Arbitration Act 2017*** which defines the term commercial as follows; -

> ***"The term commercial should be given a wider interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions any trade transactions for the supply or exchange of goods and services, distribution agreement, commercial representation or agency factoring leasing, construction of works, consulting engineering, licencing, joint ventures and other related agreed terms to an agreement."***

Under this definition the nature of the dispute can be termed as commercial and the parties had provided in the respective agreements for any dispute to be referred to arbitration. It is trite law that there is no provision to withdrawal from an arbitration clause as it remains so unless and until a court or an arbitrator declares it unconscionable or for being in contravention of public policy.

It is important to keep in mind the principles to be followed in the context of arbitration clauses as reflected in the comparative dicta in ***Rogers Wireless Inc. V Muroff (2007) 2 S.C.R. 921*** where the court held that; -

> ***"When an arbitration clause exists, any challenges to the jurisdiction of the arbitrator, must first be referred to the arbitrator, Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone. Where a question concerning jurisdiction of an arbitrator requires, the admission and examination of factual proof normally Courts must refer such questions to arbitration. For questions of mixed Law and fact Courts must also favour referral,to arbitration……"***

Nearer home in the case of ***Corporate Insurance Co. V Wachira (1995-1998) 1 EA 20*** it was held that ***"the arbitral clause in the contract in question was in the nature of Scott V Avery Clause which provides that disputes shall be referred to arbitration."*** This caution is of greater significance to accord autonomy to the parties who have entered into a contract and clearly outlines the model to be followed on dispute resolution. In the case of ***International Consultancy Co. Ltd suing*** by a ***Power of Attorney No. P/A 65175/1 of Apex Vision Ltd V Telkom Kenya & Another (2019) eKLR***. The court held interalia; -

> ***"Needless to say, the parties herein, under clause 24 of the said agreement chose to bind themselves to the arbitration clause, and this Court cannot therefore be seen to remove them from the terms of their agreement by determining this case as to do so would be tantamount to rewriting the agreements between the parties."*** See also ***Musimba Investment Ltd Vs Nokia Corporation (2019) eKLR.*** In *the* ***Anne Mwangi Hinga Vs Victoria Njoki Gathara(2009)eKLR,*** the Court of Appeal affirmed further that; ***"All the provisions including the Civil Procedure Act and Rules do not apply to arbitral proceedings, because section 10 of the Arbitration Act makes Arbitration Act a complete code and Rule 11 of the Arbitration Rules cannot override section 10 of the Arbitration Act which states;-"Except as provided in this Act, no Court shall intervene in matters governed by this Act"***

The Court also expressed the view that there is limited reach by the Court to interfere with a dispute resolution clause. The purpose of the model to be followed is as clearly stated by the Court in ***UAP Provincial Insurance Co. Ltd V Michael John Beckett*** where the guiding consideration and necessity for the parties to invoke section 6 of the Arbitration Act to compel and initiate arbitral proceedings on all circumstances surrounding the agreement. (See further discussion in the case of ***Eunice Soko Mlagui V Suresh Parmar & 4 Others (2017) eKLR).*** Given the principles in the above cases the Court should not create an exception to the rule of systematic referral.

In instant case the same principles elucidated in the cases cited applies to ***Mutatis Mutandis***. There were no exceptions to the arbitration clause in the agreement that would have motivated the parties to depart from the general rule of referring the dispute on service charge to the arbitrator. That contract having incorporated the clause to arbitrate did not give room to mediation as varied by the parties in the course of the litigation. The arbitration clause in the agreements is founded on mutuality of the parties. Not only does this mean that they must have consented to arbitrate the dispute that may arise or has arisen between them. It also means that the authority of the arbitral tribunal is the first and last forum of convenience.

The applicant in this case turned to the Court without first submitting herself to the arbitral tribunal. The Court in its wisdom got seized of jurisdiction in the subject matter in respect of which the parties had made an agreement in the meaning of section 6 of the Arbitration Act. There is no material or evidence availed to the Court that the said agreement was null and void, inoperative, unconscionable or incapable of being performed. Therefore, being a condition precedent there was no basis for the parties to involve the Court's jurisdiction, for arbitration is not part of the Country's system of Courts. It is a consensual procedure based on the agreement or contract of the parties to a transaction to regulate their relationship. The general well-known rule under this scheme of Alternative Dispute Resolution is entrenched in Article 159 (2) (c) of the Constitution which mandates the parties full autonomy in the conduct of proceedings, subject only to the laid down exceptions. In the ***case of BCC Tropical Nigeria Ltd V The Government of Yobe State of Nigeria & Anor (2011) LPELR-9230(CA) (P.13, paras D-F), an arbitration clause is a provision inserted in a contract providing for compulsory arbitration in case of dispute as to rights and liabilities under such contract. Being a clause embedded in a contract between parties, the Court would ordinarily enforce the arbitration clause against the parties as it is settled law that parties are bound by the terms and provisions of their contracts and that the Court would as much a possible uphold and enforce the provisions of the contract agreed upon by parties and not allow parties to renege on their undertakings." (***See ***Larmie V Data Processing Maintenance & Services (D.P.M) Ltd (2005) 12 SC (Pt. 1) 93 at 103).***

My reading of the arbitration clauses and in the aftermath of the proceedings there is no evidence of waiver by any of the parties to refer the dispute to an arbitrator. In the view of the Court under the circumstances of this case the extent of the High Court to exercise primary jurisdiction was ousted by the Arbitration clause and by necessary implications the provisions outlined in the Arbitration Act. To assume jurisdiction in relation to any matter arising from the lease agreements would be in contravention of the covenant entered between the parties on dispute resolution mechanisms. This dispute which fell within the provisions of the arbitration act is therefore not properly before the court as it should first be arbitrated by an Arbitral tribunal designated as such in the agreements.

In that regard, the High Court is never a first forum of convenience to hear and determine the dispute. Similarly, under the provisions in the agreements on the choice of forum of resolution of disputes, it was not open to the parties, to vary or set aside the clause at whim to place the subject matter of the dispute in Court Annexed – Mediation. The scope of the procedure adopted by the parties to the agreement was limited to arbitration and in this atmosphere, there was very little of what could be the final role of a mediator in this protracted commercial transaction. Based on this legal proposition an order of stay of proceedings is only meant to give effect to the arbitral proceedings.

In the circumstances on the facts of the case the court has no jurisdiction in the first instance to hear and determine the dispute. That being so the court ought and must down its tools. The second issue raised by the preliminary objection touches on the provisions under order 3 of the Civil Procedure Rules. It is the procedure that commencement of a suit shall be instituted by filing a plaint to the Court accompanied with a verifying affidavit. The remedial consideration to input the plaint is provided for in subsection 4 and (2) of Order 3 of the Civil Procedure Rules. In addition, Order 4 Rule (1) of the rules also outlines the particulars to be contained in the Plaint. Both as a matter of construction and procedure, in considering what is the cause of action the Court looks at the pleadings and reliefs applied for in the Plaint. The second model of institution of suits in Kenya is by way of an Originating Summons, as expressly stated under order 37 rule 19(1) of the Civil Procedure Rules. By this rule the Court in ***Hanker Trading Company V ELF Oil Kenya Ltd CA No. 6 of 2010.*** The Court stated; -

> ***"It seems to us that in the exercise of our powers under oxygen principle what we need to guard against is any arbitrariness and uncertainties". For that reason, we must insist on full compliance with past rules and procedures which are oxygen compliant so as to maintain consistency and certainty. We think the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of that power, if improperly invoked, the oxygen principle could easily become an unruly horse."***

Arbitration is an alternative mechanism to litigation and quite distinguishable from civil procedure proceedings. For purposes of the issues raised in the preliminary objection it is important to emphasize that in commencing a suit before the High Court it is not necessary to opt to litigate by either filing a Plaint or an Originating Summons. The core of the Court's jurisdiction is examinable under section 7 of the Arbitration Act. In this manner the arbitration reference can commence without the mandatory provisions on filing of suits as provided for in the Civil Procedure Act and Rules 2010. Indeed, it would be entirely self-defeating if the scope of the arbitration Act was to apply ***Mutatis Mutandis*** with the provisions under the Civil Procedure Act and Rules. This implies that in the face of it the preliminary objection on these grounds is untenable. As a consequence, I have taken issue with the arbitration clause clearly retained in the lease agreement and its validity is for enforcement by the parties as agreed in the sense of resolving disputes arising thereto. In my view it is trite the dispute by this nature is eminently suitable for arbitration and there is no concurrence with the Court's jurisdiction.

In this instant case I am convinced the parties as of now are in the wrong forum and the condition precedent on the right to refer the dispute to a single arbitrator is so compelling and no valuable judicial time should be expended in hearing and determining the claim. Parties are to bear their own costs. It is so ordered.

DATED SIGNED AND DELIVERED AT MALINDI via Email THIS 11TH DAY OF MAY, 2021

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R NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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