



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO 46 OF 2018

GENO SHER SHAMO.....1ST PLAINTIFF

LARS JONAS GEJKE.....2ND PLAINTIFF

=VERSUS=

GANZA LIMITED.....1ST DEFENDANT

HOMEX HOUSING LIMITED.....2ND DEFENDANT

ECOBANK KENYA LIMITED.....3RD DEFENDANT

VALLEY AUCTIONEERS.....4TH DEFENDANT

RULING

1. The plaintiffs, **Geno Sher Shamo** and **Lars Jonas Gejke**, initiated this suit through a plaint dated 14/2/2018. Pursuant to leave granted by the Deputy Registrar of the Court on 8/7/2021, the plaintiffs filed an amended plaint of even date. Their case was that, in April 2014, the 1st defendant, through the agency of the 2nd defendant, offered to sell to them **Maisonette Nos 97 and 105** in a development described as **Kitisuru Gardens**, which was to be built on the 1st defendant's property title number **Kabete/Kibichiko/906 [the suit property]**. The agreed purchase price was Kshs 10,000,000. On the strength of a letter of offer dated 24/4/2014, they paid a total of Kshs 4,000,000. The development project was, however, not implemented. In 2015, they sought a progress report from the 2nd defendant relating to the development, but none was forthcoming. On 24/10/2017, through their advocates, they demanded a refund of their money, on the ground that the development had not been actualized. They did not get the refund. Further, they discovered that, subsequent to the 1st and 2nd defendants marketing the project and "selling" to them the two units, the 1st defendant had charged the suit property to the 3rd defendant without their knowledge.

2. Aggrieved, they brought this suit, seeking the following verbatim orders against the defendants:

- a) *An order that the 1st and 2nd respondents refund the plaintiffs the sum of Kshs 4,000,000 with interest for breach of their obligations under the offer letter dated 24th April 2014 and agreement for sale by failing to complete the development on time.*
- b) *A declaration that the 3rd respondents' (chargee's) statutory power of sale over the suit premises can only be exercised if and when the plaintiffs interest in the suit premises is registered as the charge was registered with the 3rd defendant having notice of the transactions between the 1st and 2nd defendants and various purchasers including the plaintiffs.*
- c) *Inhibition is issued under section 68 of the Land Registration Act, 2012 in respect of title number Kabete/ Kibichiko/906 until further orders.*
- d) *Conservatory orders to prevent any dealings in the property title number Kabete/Kibichiko/906 pending the determination of this suit.*
- e) *Costs of the suit and interlocutory applications.*

3. Together with the original plaint, the plaintiffs brought a notice of motion dated 4/2/2018, seeking interlocutory injunctive orders restraining the 3rd defendant against disposing the suit property in exercise of the chargee's statutory power of sale. Further, they sought an

order of inhibition under Section 68 of the Land Registration Act, 2012, and a conservatory order preventing any dealings in the suit property. Vide a ruling dated 4/10/2019, Gacheru J dismissed the plaintiffs' application dated 14/2/2018 for lack of merit. She found that the letters of offer and the sale agreements had not been signed by the parties, hence the plaintiffs had failed to demonstrate that they had a beneficial interest in the suit property. The learned judge was of the view that the money that was paid to the 2nd defendant was recoverable as a civil debt.

4. On 23/3/2018, the firm of *Muri Mwaniki & Wamiti Advocates* filed a notice of appointment dated 28/2/2018 on behalf of the 3rd defendant. On 16/4/2018, they filed a statement of defence dated 22/3/2015 on behalf of the 3rd defendant.

5. The firm of *Kitur & Co Advocates* filed a notice of appointment dated 16/4/2018 on behalf of the 1st and 2nd defendants. Subsequently, on 2/3/2020, the 1st and 2nd defendants brought a notice of preliminary objection dated 3/3/2020, objecting to this suit on the following verbatim grounds:

a) That clause 19 of the agreements for sale have an arbitral clause for resolution of disputes through arbitration.

b) That the suit is therefore in contravention of the arbitration clause.

c) That parties are bound by Section 6 of the Arbitration Act to resolve the dispute by way or arbitration.

d) That by dint of arbitration clause in the agreements between the plaintiffs and the 1st and 2nd defendants which form the subject matter of the dispute between parties, this honourable court lacks the requisite jurisdiction to entertain the plaintiff suit.

6. The said preliminary objection is the subject of this ruling. It was canvassed orally in the virtual court by Mr Kitur on 12/10/2021. Counsel relied on the amended plaint and the documents filed together with the amended plaint. He submitted that there was a sale agreement that contained an arbitration agreement at clause 19. It was his further submissions that both parties acknowledged existence of an arbitration agreement. Counsel cited the case of **National Bank of Kenya v Pipe Plastic Kenya Limited [2012] eKLR**, **Kenya Airport Parking Services Limited v Municipal Council of Mombasa [2010] eKLR** and the case of **Kenya Pipeline company Limited v Data Logics Limited & another [2008] 2 EA 193**. Counsel urged the court to allow the preliminary objection.

7. Mr Gichuhi, counsel for the plaintiffs, submitted that an arbitration agreement must be signed by the parties and in the absence of a signed arbitration agreement, there was no arbitration agreement. It was his further submissions that the party invoking the arbitration agreement must do so not later than the day of entering appearance. It was his further submission that the 3rd defendant was not privy to the "agreement" hence proceedings cannot be stayed as against the 3rd defendant.

8. I have considered the tenor and import of the preliminary objection. I have also looked at the entire court record and the pleadings in the file at this stage. Further, I have considered the relevant legal framework and jurisprudence.

9. **Section 6(1) of the Arbitration Act** enjoins a party intending to invoke an arbitration agreement to do so not later than the time when the party enters appearance or files any pleadings or takes any other step in the proceedings. **Section 6(1) of the Arbitration Act** provides thus:

"6(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 the party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay of 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."

10. The 1st and 2nd defendants filed a notice of appointment of advocates on 16/4/2018. In my interpretation of the above legal framework, that is the day when they should have invoked the arbitration agreement, if indeed such agreement existed. Put differently, that is the day when they should have brought the preliminary objection. Regrettably, the preliminary objection was brought on 2/3/2020. On that ground alone, the preliminary objection dated 3/3/2020 (*sic*) fails. That is, however, not all. I will say a little more.

11. At this stage, none of the parties has placed before the court an executed land sale agreement containing the arbitration agreement which the 1st and 2nd defendants are purporting to invoke. The two documents appearing at pages 20 and 26 of the plaintiffs' bundle, both titled "SALE AGREEMENT", are neither executed nor dated. Similarly, the two letters of offer contained in the plaintiffs' bundle were not executed by the parties. There is therefore no evidence of an arbitration agreement which this court may rely on. Indeed, while dismissing the plaintiffs' plea for injunctive orders, Gacheru J noted that there was no signed sale agreement. If the 1st and 2nd defendants had a signed arbitration agreement, they should have brought a formal application and exhibited the said arbitration agreement.

12. Counsel for the 1st and 2nd defendants contended that there was common ground that there was an arbitration agreement. I do not agree with that contention because contracts relating to disposition of interest in land are regulated by the provisions of **Section 3 of the Law of Contract Act**. There cannot be an enforceable arbitration agreement relating to a disposition of an interest in land in the absence of a valid land sale contract under Section 3 of the Law of Contract Act.

13. The third reason why the preliminary objection dated 3/3/2020 will fail is that, there is no evidence that the 3rd defendant was privy to

the transaction between the plaintiffs on one part and the 1st and 2nd defendants on the other part. For the court to down its tools and refer this dispute to arbitration, the objectors must demonstrate that all the parties to this suit have a binding arbitration agreement. No evidence has been presented to the effect that there exists a binding arbitration agreement and that all the parties to this suit are parties to the arbitration agreement.

14. The totality of the foregoing is that the preliminary objection dated 3/3/2020 is unmerited and fails wholly. It is rejected. The 1st and 2nd defendants shall bear costs of the preliminary objection.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 8TH DAY OF DECEMBER 2021

B M EBOSO

JUDGE

In the presence of: -

Ms Ogutu for the Plaintiff/Respondent

Ms Ndanu for the 1st and 2nd Defendants

Ms Njuguna for the 3rd Defendant

Court Assistant: Lucy Muthoni