



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISC. CIVIL CASE NO. E105 OF 2021

BETWEEN

1. **BLAGA HRISTEVA OMUKUBA**
2. **SHARYCE WAMBUI**
3. **TERESIA ITHA**
4. **CHRISTINA WANJIKU.....APPLICANTS**

VS

1. **BELASI DEVELOPERS LIMITED**
2. **MARTIN MBURU MWANGI (also known as
MAXWEL MARTIN MBURU MWANGI)**
3. **JAMES MWIIRI KAGOI**
4. **BONIFACE MUTURI MBURU.....RESPONDENTS**

RULING

1. The three applicants hereof, filed this matter seeking orders of interim measure of protection as provided under **Section 7** of the **Arbitration Act, Cap 49**. That Section provides as follows:-

***“It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.*”**

2. The background of the applicants seeking that interim measure of protection is based on the applicant’s allegation that their contract to purchase three bungalows has been breached by **Belasi Developers Limited, Martin Mburu Mwangi, James Mwiiri Kagoi and Boniface Muturi Mburu** (Collectively referred to as the respondents). That contract of purchase dated 28th October, 2018 has an arbitration clause in the following terms:-

“Arbitration

All claims and disputes whatsoever arising under this Agreement shall be referred to arbitration in accordance with the provisions of the Arbitration Act of Kenya (Act Number 4 of 1995) by a single arbitrator to be appointed by agreement between the parties or, failing agreement within fourteen (14) day of the notification by either party to the other of the existence of a dispute or claim, to be appointed by the Chairman for the time being of The Chartered Institute of Arbitrators, Kenya Branch, Nairobi on the application of either party. The decision of the arbitrator is final.”

3. For consideration in this Ruling is chambers summons application dated 24th May, 2021. That application is filed by **Wamae Muu**, (herein after Wamae) on behalf of a donor of power of attorney that is **Charity Muthoni Muu**. Wamae, in support of the application deponed that Charity also entered into a contract with the respondents to purchase a bungalow from the respondents’ development and she too is alleging

breach of that contract by the respondent. Wamae therefore seeks by his application to be joined as a party to this action.

ANALYSIS

4. Both the applicants and Charity entered into two distinct contracts to purchase immovable properties from the respondents. Those distinct contracts provided an arbitration clause similar to the one produced above. That clause provided that any dispute that arises between the contracting parties would be referred to arbitration. It is a principle of law that a court of law cannot re-write a contract between the parties. Parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved: See the case of **NATIONAL BANK OF KENYA LIMITED VS. PIPEPLASTIC SAMKOLIT & ANOTHER (2001) eKLR.**

5. Bearing the above principle in mind this Court cannot treat the contract between the applicants and the respondents as similar as that between Charity and the respondents, for one reason: the contracts related to the purchase of different immovable properties and involve different parties.

6. The logic of the above discussion is further buttressed by the provisions of Section 10 of the Arbitration Act, which provides:-

“Except as provided in this Act, no Court shall intervene in matters governed by this Act.”

7. For this Court to join Charity into this action, and yet Charity’s contract is distinct to the one involved in this matter would lead to absurdity, because Charity will file her own arbitration cause to have her own dispute litigated thereof, and the applicant will also file their own arbitration cause for the litigation of their dispute.

8. The applicants have invoked the provisions of **Section 7** of the Arbitration Act, reproduced above, seeking interim measures of protection pending the filing of their arbitration cause. That interim measure would end once the matter is taken to arbitration. Charity will be entitled to seek her own interim measure of protection pending the filing of her own arbitration cause but that interim measure of protection should be under its own distinct action before this court. Charity cannot benefit from the interim measure of protection sought by the applicants in this action because the arbitration causes will be separately filed. I find support in my finding in the determination made in the case World Vision International vs. synthesis limited & another (2019) eKLR as follow:-

“27. In this case the Plaintiff entered into two separate agreements with each of the Defendants. Those agreements provided for the settlement of dispute arising thereof to be settled through Arbitration.

28. Those agreements provided distinct process of appointing arbitrator.

29. Even without going to the statutory provision, touching on this matter, I do find that it would not be in the interest of justice for consolidation of the two Arbitral processes. It would indeed, as argued by the Defendant, be to re-write the parties contract. I find support from the decision of HANIF SHEIKH -V- ALLIANCE NOMINEE LTD & 17 OTHERS (2014) eKLR as follows:-

“16. It is clear who the parties to the aforeside agreements and what the governing laws, seat and venue of the different Arbitral proceedings were. It would be outside the scope of this Court to purport to add other parties who were not parties to the said agreements an order that their disputes be resolved by way of amicable settlement of dispute or referral to Arbitration. If the Court were to do so, this would amount to it re-writing the said agreement, something it did not have power or jurisdiction to do...”

9. It is for the above reason that the chamber summons dated 24th May, 2021 is rejected.

CONCLUSION

10. In the end, the chamber summons dated 24th may, 2021 is dismissed, and because it was unopposed, there shall be no orders as to costs thereof.

RULING DATED AND DELIVERED AT KIAMBU THIS 5TH DAY OF OCTOBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Ndege

For applicants, Balaga Omukuba & Others:- Mr. Ondari

For Respondents, Belasi developers Ltd & others:- Mr. Kairu

For Wamae Muu :- Mr. Ondari holding brief for Mr. Denis Muiruri

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE