



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 6 OF 2019

KIMANI WA NYOIKE.....PLAINTIFF

VERSUS

CHUNA HOUSING CO-OPERATIVE SOCIETY LTD.....DEFENDANT

RULING

1. In the Notice of Motion dated 21st January, 2019, the Plaintiff is seeking for the following orders:

a. That Mwaniki Gachoka, Esq. Advocate a Senior Partner in the firm of Mwaniki Gachoka Advocates be appointed as the Arbitrator under the Arbitration Clause contained in a Sale Agreement dated 29th January, 2013 made between the Plaintiff/Applicant and the Defendant/Respondent on such terms and conditions as to this Honourable Court may seem just.

b. That pending the aforesaid resolution of the dispute before the proposed Arbitrator, a temporary injunctive order do issue restraining the Defendant/Respondent from making withdrawals or transfers from Defendant's Account bearing the following particulars:

- 1. Account Name:- Chuna Housing Co-operatives Society Ltd*
- 2. Account Number:- 01120062564704*
- 3. Bank:- Co-operative*
- 4. Branch:- University Way*

c. And/or in the alternative, pending the aforesaid resolution of the dispute before the proposed Arbitrator, an order to freeze or to restrain the Defendant/Respondent do issue from making such withdrawals or transfers from Defendant's Account bearing the following particulars:

- 1. Account Name:- Chuna Housing Co-operatives Society Ltd*
- 2. Account Number:- 01120062564704*
- 3. Bank:- Co-operative*
- 4. Branch:- University Way or such other account the Defendant may be holding, amount that shall be equivalent to the Plaintiff/Applicant's claim herein being Kshs. 12,120,000 together with accrued interest at the current prevailing commercial market rate from 1st June, 2013 being the due date after the lapse of the completion date.*

d. That the costs of this Application be shouldered by the Defendant/Respondent.

e. Such further or other relief or order as this Honourable Court may deem fit and just to grant.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he is the registered proprietor of land known as L.R. No. 8783 situate at Athi River within Mavoko Sub-County, Machakos; that by a Sale Agreement dated 15th September, 2010 he sold 100 acres of the suit property to the Defendant which was registered in favour of the Defendant as L.R. No.8783/10 and that the Defendant subdivided the said land into over 700 portions measuring approximately 1/8 of an acre.

3. The Plaintiff has deponed that later on, he agreed to sell to the Defendant a portion of land to be excised from his portion known as L.R. No. 8783/9 to constitute an access road for the benefit of the Defendant's members at a consideration of Kshs. 12,120,000 and that after the said survey, the access road was surrendered to the State as per the law.
4. The Plaintiff's complaint is that the Defendant has refused to make good payments of the said land amounting to Kshs. 12,120,000 plus accrued interest; that a dispute has arisen under the terms of the Sale Agreement and that the Application for appointment of an Arbitrator should be allowed by the court.
5. In his Replying Affidavit, the Defendant's employee deponed that the freezing of the Defendant's bank accounts has far reaching consequences and is highly prejudicial; that every land owner of a portion of the size of the land the Plaintiff sold to the Defendant is under an obligation to provide roads of access and grounds for public utilities surrendered to the government and that by coming to court, the Plaintiff waived his right to seek for the appointment of an Arbitrator.
6. The Defendant's employee finally stated that the Plaintiff has admitted that the road in question has become a public road; that the Plaintiff could not have sold a "locked block with no road access" and that there are other third parties accessing their properties using the same road.
7. In his submissions, the Plaintiff's advocate submitted that the Plaintiff has since the said Agreement was executed performed his obligations in full; that the Defendant has failed, refused and or neglected to honour its obligations by failing to make payments of the purchase price and that under the terms of the subject Sale Agreement, all disputes are to be resolved by way of Arbitration. Counsel relied on numerous authorities which I have considered.
8. The Defendant's counsel submitted that once the Defence was filed, then the right to turn to arbitration is waived and that the reference can only be achieved through a consent by the parties.
9. In the Plaint dated 21st January, 2019, the Plaintiff averred that by a written agreement dated 29th January, 2013, he agreed to sell to the Defendant a further 3.03 acres to cater for a further alternative access road to the parcel purchased earlier on at a consideration of Kshs. 12 million.
10. According to the Plaintiff, both parties agreed to be bound by the terms of the Agreement and that despite the Plaintiff performing his obligation as per the terms of the Agreement dated 29th January, 2013, the Defendant has refused to make the payments.
11. The Plaintiff has further averred in the Plaint and his Affidavit that the Defendant has refused to agree to the appointment of an Arbitrator to determine the dispute between the parties. The Plaintiff is seeking an order of the court appointing an Arbitrator and also to freeze the Defendant's bank account pending the determination of the dispute by the Arbitrator.
12. Together with the Plaint, and before the Defendant could enter appearance and file a Defence, the Plaintiff filed the current Application. Indeed, the Defendant filed his Memorandum of Appearance and Defence a few weeks after the current Application had been filed by the Plaintiff.
13. In the Defence and the Replying Affidavit, the Defendant has not denied that it signed the Sale Agreement dated 29th January, 2013. In the said Agreement, the Defendant agreed as follows:

"NOW THIS AGREEMENT WITNESSETH:

- 1. The agreed purchase price for the alternative access road above shall be Kshs. 4,000,000.00 (four million) per acre thus totaling to Kshs. 12,120,000.00 (twelve million one hundred and twenty thousand) for the 3.03 acres.***
- 2. That the purchase price shall be payable in two installments as hereunder***
 - a. Kshs. 6,120,000.00 after the execution of this Agreement.***
 - b. Kshs. 6,000,000.00 within ninety (90) days.***
- 3. That this Agreement for the alternative access road shall be read in conformity and shall import the terms of the earlier Sale Agreement.***
- 4. That the Vendor shall be responsible for obtaining the necessary consent to transfer and rates clearance whereas the Purchaser shall meet the stamp duty and registration fees.***
- 5. In the event at any disagreement between the Vendor and the Purchaser, then the parties shall refer the dispute to a mutually agreed Arbitrator for reconciliation."***
14. The Agreement shows that the Defendant agreed to pay to the Plaintiff Kshs. 12,120,000 for the "3.03 acres to cater for an alternative access road to the parcel bought earlier herein above."
15. After the creation of the access road as agreed between the Plaintiff and the Defendant, the Defendant has declined to pay the sum of

KShs. 12,120,000 on the ground that “in Plaintiff hiving out the 3.3 acres to provide for road access to the property sold to the Defendant and other third parties, the Plaintiff undertook an exercise he was obligated to take or under statutory requirements to do and the Plaintiff cannot seek to regroup any expense cost or value of such acreage given for road access.”

16. The Agreement between the Plaintiff and the Defendant in respect of the 3.03 acres is in writing. The Defendant agreed to pay to the Plaintiff KShs. 12,120,000 which it has not done. The Agreement provided that in the event of any disagreement between the Plaintiff and the Defendant, then the parties shall refer the dispute to a mutually agreed Arbitrator for reconciliation.

17. The Plaintiff has exhibited letters showing the efforts he made to have an Arbitrator appointed to resolve the dispute. In one of the letters dated 5th June, 2015, the Plaintiff’s advocate proposed the appointment of either Mr. Mwaniki Gachoka advocate or Mr. Martin Munyu advocate as arbitrators. From the record, the Defendant never responded to the letter. It is after the Defendant declined to agree to the appointment of an Arbitrator that the Plaintiff filed the suit and the Notice of Motion.

18. It is trite that where parties have agreed to refer their dispute to arbitration, the jurisdiction to deal with substantive disputes and differences is given to the Arbitrator. The courts only retain residual jurisdiction to deal with peripheral matters and to see that the dispute is dealt with in the manner agreed between the parties under the Agreement (*See Indigo EPZ Limited vs. Southern African Trade and Development Bank (2002) KLR, 810*).

19. The evidence before me shows that the Plaintiff has since the Agreement of 29th January, 2013 performed his duties. Having agreed that any dispute arising from the Sale Agreement of 29th January, 2013 should be referred to an Arbitrator, I find that indeed a dispute as to the payment of KShs. 12,120,000 has arisen. That dispute can only be referred to an Arbitrator.

20. David John Sutton, *et al*, in “*Russell on Arbitration*” has stated that the court’s jurisdiction to appoint an Arbitrator depends on two conditions: first, a failure of the contractual procedure and secondly, the absence of an agreement between the parties on the steps to be taken as a result.

21. The Agreement between the Plaintiff and the Defendant did not provide a procedure on how the Arbitrator should be appointed, or the steps to be taken by the parties in appointing an Arbitrator. That being the case, and the Defendant having not given any reason why this court should not appoint the Arbitrator suggested by the Plaintiff, I shall allow the appointment of the Arbitrator suggested by the Plaintiff.

22. The Plaintiff has sought for an order freezing the Defendant’s account pending the resolution of the dispute before the proposed Arbitrator.

23. Although this court has the powers to make an order for interim measure of protection, there is no evidence before me to show that the Defendant will not be in a position to pay to the Plaintiff any amount that the Arbitrator will find to be due to the Plaintiff. The closure of the Defendant’s bank account cannot be equated with the protection of the *status quo* contemplated under Section 7 of the Arbitration Act.

24. Considering that the Defendant’s bank account is used by the Defendant to run the affairs of the Defendant, and in the absence of evidence that the Defendant will not be able to pay the Plaintiff as and when the Arbitrator makes his decision, I decline to make an order freezing the Defendant’s bank account.

25. For the reasons I have given above, I partially allow the Plaintiff’s Application dated 21st January, 2019 as follows:

a. Mwaniki Gachoka Advocate, a Senior Partner in the firm of Mwaniki Gachoka Advocates be and is hereby appointed as the Arbitrator under the Arbitration Clause contained in the Sale Agreement of 29th January, 2013 made between the Plaintiff and the Defendant.

b. This suit is stayed pending the hearing and resolution of the dispute between the Plaintiff and the Defendant by the aforesaid appointed Arbitrator.

c. The Defendant to pay the costs of the Application.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JANUARY, 2020.

O.A. ANGOTE

JUDGE