



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO.167 OF 2016**

**STUART WARD ALLISON.....PLAINTIFF**

**VERSUS**

**RUTH TRINDER.....DEFENDANT**

**RULING**

1. I have before me for determination a Notice of Motion application dated 23<sup>rd</sup> May 2017. By the said application, Ruth Trinder (the Defendant) prays for Orders that:-

***3. This Honourable Court be pleased to refer the dispute herein to arbitration in accordance with Clause 16 of the Agreement for Sale executed between the parties and dated 26<sup>th</sup> November 2013.***

***4. This Honourable Court be pleased to stay any/all proceedings in this suit pending the conclusion of Arbitration proceedings.***

2. The application which is supported by an affidavit sworn on the same day by the Defendant and a Further one sworn on 28<sup>th</sup> August 2017 is premised on the grounds that:-

***a) The parties to this suit have irrevocably and unconditionally agreed, pursuant to Clause 16 of the Agreement for sale to have any dispute touching on the said Agreement submitted to and decided by arbitration;***

***b) The Plaintiff has brought the present suit in contravention of the said Clause 16.***

***c) The Defendant is ready and willing to submit to the jurisdiction of the Arbitral Tribunal to be set up in accordance with Clause 16.2 of the Agreement for Sale; and***

***d) The Arbitration Act grants jurisdiction to this Honourable Court to stay proceedings and to refer this matter to arbitration as agreed by the parties.***

3. The application is opposed. In a lengthy Replying Affidavit sworn and filed herein on 5<sup>th</sup> July 2017, Stuart Ward Allison (the Plaintiff) admits that the parties executed an agreement for sale dated 26<sup>th</sup> November 2013 and a Deed of Variation on 16<sup>th</sup> April 2014. The Plaintiff avers that in breach of the Agreement and Deed of Variation, the Defendant has to-date failed to pay a sum of GBP 50,000/- despite having taken vacant possession of the property that was being sold.

4. The Plaintiff further avers that the Defendant has never at any one time denied being indebted to the Plaintiff and that on the contrary, she has made numerous unfulfilled promises to repay the outstanding debt of GBP 50,000/-.

5. Accordingly, the Plaintiff asserts that there is no dispute between himself and the Defendant as contemplated in the Agreement as amended by the Deed of Variation. Parties have performed their obligations under the Agreement and all that remains is for the Defendant to pay the balance of the purchase price.

6. I have considered the Defendant's application and the Plaintiff's response thereto. I have equally considered the detailed submissions and the authorities filed herein by the Learned Advocates for the parties.

7. The gist of the Defendant's application is that there is a dispute between the two parties which according to the Agreement for Sale executed between them on 26<sup>th</sup> November 2013 ought to be referred to arbitration for determination. The Plaintiff on the other hand

maintains that there is no such dispute and hence this suit ought to be allowed to proceed as instituted herein.

8. The legal test for determining whether this Court should refer a matter to arbitration has been set out under the Provisions of Section 6 of the Arbitration Act, 1995 as follows:-

***“A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies no later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay 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 no in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”***

9. In the matter before me, the Defendant filed this application simultaneously with her Memorandum of Appearance and it was therefore clear to me that the first test under Section 6 of the Arbitration Act has been satisfied.

10. From the pleadings herein, it is evident that by the Agreement for Sale dated 26<sup>th</sup> November 2013, the Plaintiff agreed to sell and the Defendant agreed to purchase all those properties known as LR Nos. 13300 and 13301 both situated in Kilifi. Clause 16.1 and 16.2 of the Agreement provided as follows:-

***16.1 This Agreement and its performance shall be governed by and construed in all aspects in accordance with Kenyan Laws. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the Court.”***

***16.2 Any dispute arising out of or in connection with this Agreement shall be referred to arbitration by three arbitrators provided that such arbitrators shall be Chartered Arbitrators for the time being of the Kenya Branch of the Chartered Institute of Arbitrators of the United Kingdom. Each party shall nominate one arbitrator and the third one shall in turn be nominated by the other two nominated arbitrators...”***

11. While the Plaintiff submitted that these clauses gave the parties the choice to elect arbitration as the forum for resolving disputes, it was clear to me that Clause 16.2 was couched in mandatory terms and that the parties desired any dispute arising out of or in connection with the Agreement to be referred to arbitration. This is more so given the provisions of Clause 16.5 of the Agreement where the parties clearly restricted the Court process to the aspect of preliminary relief. The said Clause 16.5 provides as follows:-

***“Notwithstanding the foregoing, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from any Court of competent jurisdiction pending the final decision or award of the arbitrator.”***

12. That being the case, the remaining task is for this Court to establish whether there exists a dispute between the parties with regard to the matters agreed to warrant a stay of these proceedings and reference thereof to arbitration. In *UAP Provincial Insurance Company Ltd –vs- Michael John Becker, Civil Appeal No. 26 of 2007(2015) eKLR*, the Court of Appeal observed as follows:-

***“It is clear from these provisions that the enquiry that the Court undertakes and is required to undertake under Section 6(1) (b) of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration.”***

13. The Court of Appeal in the UAP Insurance case(supra) went further to hold at paragraph 18 of its Judgment thus:-

***“The enquiry by the Court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6(1) (b), to the question whether there is in fact, a dispute. In our view, it is within the province of the Court, when dealing with an application for stay of proceedings under Section 6 of the Arbitration Act, to undertake an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings and the question whether there was a dispute for reference to arbitration, Mutungi J. was therefore within the ambit of Section 6(1) (b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a Section 6 application, the Court is enjoined to form an opinion on the merits or otherwise of the dispute.”***

14. Arising from the foregoing, I have carefully considered the issues being raised by the parties herein. It is not in dispute that the two properties were sold by the Plaintiff to the Defendant at the sum of GBP 1,100,000/-. The Plaintiff avers that the Defendant made a part-payment of GBP 1,050,000/- leaving an outstanding balance of the purchase price of GBP 50,000/-.

15. I have looked at the Supporting and Further Affidavits sworn herein by the Defendant. I have not seen anywhere where she disputes the figures as provided in the Agreement for sale and as deposed to by the Plaintiff. Indeed the Plaintiff avers that the Defendant has on a number of occasions acknowledged her indebtedness to the Plaintiff and promised to settle the outstanding balance of the purchase price. In his Replying Affidavit, the Plaintiff has annexed a number of correspondences between the parties to that effect. In at least one instance, she blames her failure to pay the balance of the purchase price on the purport that she did not have the Plaintiff's Bank details.

16. In her Further Affidavit sworn on 28<sup>th</sup> August 2017, the Defendant avers that Clause 2.1.6 of the Deed of Valuation provided for mandatory consequences of default payment. I have looked at the said Clause and it is clear to me that it contemplates a situation where the transfer of the suit property has not taken place and as such the Purchaser's Advocates is still in possession of the completion documents.

17. Those provisions cannot be applicable in a situation such as this where parties have performed their obligations and the suit properties were transferred to the Defendant who remains in possession thereof.

18. In regard to the issue of interest, it was clear to me that the same is covered under Clause 1.1.9 as read together with Clause 14.3 thereof. Those provisions allow interest to be charged on the balance of the purchase price if the same is not paid on the due date.

19. In the circumstances herein, it was clear to me that there is no dispute herein that requires to be referred to arbitration. The Defendant executed the Agreement which is clear on the Purchase Price for the properties. The properties have been transferred to her name and she is in possession thereof. She has also on a number of occasions acknowledged being indebted to the Plaintiff and made promises to settle.

20. In the premises I did not find any merit in the Defendant's Motion dated 23<sup>rd</sup> May 2017. The same is dismissed with costs to the Plaintiff.

**Dated, signed and delivered at Malindi this 13<sup>th</sup> day of March, 2020.**

**J.O. OLOLA**

**JUDGE**