



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI MILIMANI LAW COURTS

ELC NO 1410 OF 2014

CHARLES OYAYA.....1ST PLAINTIFF

MARY EDITH OYAYA.....2ND PLAINTIFF

=VERSUS=

LA NYAVU GARDENS LIMITED.....1ST DEFENDANT

BISHOP BONIFACE E ADOYO.....2ND DEFENDANT

DR. JOYCE GIKUNDA..... 3RD DEFENDANT

HARON G. NYAKUNDI.....4TH DEFENDANT

RULING

Background

1. The Plaintiffs filed a suit against the Defendants on 6th November 2014 in which they sought a number of injunctive orders and declarations. The Plaintiffs contemporaneously filed a Notice of Motion in which they sought injunctive orders pending hearing and determination of the suit.
2. The Defendants filed a notice of appointment on 24th November 2014 and filed a replying affidavit in response to the Plaintiffs' application on 11th February 2015. Directions were subsequently given that the Plaintiffs' application was to be disposed of by way of written submissions. The parties filed submissions and a ruling was delivered on the 24th June 2016 dismissing the application. On 5th July 2018, the Plaintiffs amended the plaint in which they sought refund of Kshs. 4,618,000/= together with interest thereon from 10th December 2007 until payment in full.
3. As the parties were proceeding with the Plaintiffs' application, the Defendants had filed an application dated 10th February 2015 under section 6 of the Arbitration act Cap 49 seeking stay of proceedings.

The Application

4. The Defendants /Applicants contend that the agreement which gave rise to the proceedings herein had a clause which provided that should any dispute arise between parties, the dispute was to be referred either to mediation or to a sole arbitrator for arbitration. The Applicants therefore argued that these proceedings should be stayed and the matter referred to arbitration

The response to the Application

5. The Applicant's application has been opposed by the Respondents through a replying affidavit sworn on 24th March 2015 and the one sworn on 30th September 2019. The Respondents contend that there is no dispute to be referred to arbitration; that some of the Applicants are not privy to the contract between the 1st Applicant and the Respondent and the application is only meant to delay the finalization of the case filed herein.

Applicants' further reply

6. In a further replying affidavit sworn on 9th October 2019, the Applicants insist that it is the arbitral tribunal which has jurisdiction to hear this matter and that the allegations of fraud against the Applicants are made in bad faith and are only meant to besmirch the Applicants. The Applicants argue that the 2nd, 3rd and 4th Applicants have been sued as director of the 1st Applicant and that they cannot be forced to remain in court when the matter can be heard by an arbitrator.

Analysis

7. I have considered the Applicants' application as well as the opposition thereto by the Respondents. I have also considered the submissions filed by the parties herein. The only issue for determination is whether the Applicants have made a case for stay of proceedings and reference to arbitration.

8. This application has been brought pursuant to the provisions of section 6 of the Arbitration act Cap 49 laws of Kenya which provides as follows:

“(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 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—

1. (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

2. (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.”

9. The above quoted section 6 of the Arbitration Act is clear that if a party wishes to apply for reference of a matter to arbitration, it should be done not later than the time of entering appearance. As I have said herein above, the suit was filed on 6th November 2014. For unknown reasons, the Applicants filed a Notice of Appointment of advocates on 24th November 2014 as opposed to filing a Memorandum of Appearance as required under the summons to enter appearance served upon them.

10. The Applicants should have filed the application for stay of proceedings not later than the 24th November 2014. Instead of filing the application for stay of proceedings, they took part in the Respondents' applications for injunction. The Applicants only came to file the application for stay on 11th February 2015 after purporting to enter appearance on the same day. This filing of Memorandum of Appearance was only meant to give the Applicants a new lease of life which they lost when they did not file the application on 24th November 2014. I therefore find that Applicants squandered their chance to have this matter referred to arbitration.

11. In any case, the law is clear that one cannot seek to refer parties who were not part of the contract to arbitration. This was the holding of Justice Eboso in the case of Maa "O" Leng Limited vs Warren Rob Walker and another 2018 eKLR where he stated as follows:

“It is trite law that an arbitration agreement is in itself a contract which binds parties to it. Secondly, an arbitration agreement cannot be invoked against a litigant who is not privy to the arbitration agreement.”

12. In the instant case, the 2nd, 3rd and 4th Applicants were not privy to the contract between the Respondents and the first Applicant. They cannot therefore be referred to arbitration. A company is different from its directors and if it is a question of seeking to pierce the corporate veil on grounds of fraud, then arbitration is not the way to go.

Conclusion

13. The Complaint has been amended to seek only a refund of the amount of purchase price. There is really nothing here to refer to arbitration. This is a dispute which can be handled by the court. I therefore find no merit in the application which is hereby dismissed with costs to the Respondents.

It is so ordered:

Dated, Signed and delivered at Nairobi on this 7th day of May 2020.

E. O.OBAGA

JUDGE

In the virtual Presence of :-

M/s Wambui Kyama for Defendants

M/s Bosibori for Plaintiffs

Court Assistant: Hilda

E.O. OBAGA

JUDGE