



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO 49 OF 2015**

**THE GREENHOUSE MANAGEMENT LIMITED..... PLAINTIFF/RESPONDENT**

**VERSUS**

**JERICHO DEVELOPMENT COMPANY LIMITED.....DEFENDANT/APPLICANT**

**RULING**

**INTRODUCTION**

1. The application before the court is a Chamber Summons dated and filed in court on 27th April 2015 by the Defendant. The application seeks for the following orders:-
  - a. *That his application be certified as urgent and be heard ex-parte in the first instance.*
  - b. *That this suit be stayed and the dispute herein and all proceedings arising therefrom save for the hearing of this application be referred to arbitration.*
  - c. *That the costs of this application be awarded to the Defendant.*
2. The application is supported on the grounds that:-
  - a. *That there is an imminent danger of Defendant being slapped with a judgment in default of defence and/or other adverse interlocutory orders if this application is not heard urgently.*
  - b. *That the contract between the Plaintiff and the Defendant forming the subject matter of the dispute and generally the suit herein provides in express and unambiguous terms in Clause 16 of the Terms and Conditions for reference to arbitration in the event of a dispute.*
  - c. *That it is imperative that this honourable court be pleased to order stay of court proceedings pending reference to arbitration in order to give effect to the intentions of the parties to the said contract.*
  - d. *That the costs of this application be awarded to the Defendant.*
3. The application is supported by affidavit of Miriet Gachathi sworn and filed in court on 27th April 2015 who deposed that the dispute arises out of the terms of the Agreement entered between the Defendant and the Purchaser in the Defendant's development land registration Number 209/406/1 Ngong Road. The Plaintiff has annexed a sample Agreement for Sale entered between the Defendant and one Anastasios D. Thomos who is a shareholder in the Plaintiff Company. It is alleged that all the Agreements for Sale entered by the Defendant with all Purchases (otherwise known as Grid Owners) contained standard clause save of course in respect of the sizes of units bought and the price. The Agreement for Sale dated 16<sup>th</sup> August 2010 aforementioned is annexed to the Affidavit of Mr. Thomos dated 30<sup>th</sup> March 2015 at page 1-15.

4. To give effect to the Agreement for Sale and/or in order to achieve completion, the Defendant entered into a long term lease with the Grid Owners a sample of which is annexed to the Affidavit of Mr. Thomos at page 14-51 thereof. The rights and obligations of the parties in the above described sale was governed by the Agreement for Sale and the Lease Clause 4 of the Agreement sale was clear that the Defendant:-

***“shall grant and the purchaser shall accept a sub-lease over the premises in the standard from as drawn by the Vendor’s Advocates”.***

Hence all the Leases were standard and therefore the Lease attached to Mr. Thomos Affidavit substantially represents the terms contained in the Leases signed by all the other Grid Owners. Both the Agreement for Sale and the Lease contained an Arbitration Clause:-

- i. Clause 16.2 of the Agreement for Sale sated as follows:-

***“Any dispute arising out of or in connection with this Agreement shall be referred to Arbitration by a single Arbitrator to be appointed by agreement between the parties or in default of such agreement, within 14 days of the notification of a dispute, upon the application by either party, by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators”.***

- ii. Clause 6 13.2 of the Lease (in which the Plaintiff is a party) stated:-

***“This Lease and its performance shall be governed by and construed in all respect in accordance with the laws of Kenya. Any dispute arising out of or in connection with this Lease shall be referred:***

***6.13.2 to arbitration by a single Arbitrator to be appointed by agreement between the parties or in default of such agreement within fourteen (14) days of the notification of a dispute by one party to the others, upon the application of any party, by the Chairman for the time being of the Chartered Institute of Arbitrators (Kenya Branch). Such Arbitration shall be conducted in Nairobi in accordance with the Rule of Arbitration of the said Institute subject to and in accordance with the provisions of the Arbitration Act (1995) or any modification or substitutes thereof. To the extent permissible by law, the determination of the Arbitration shall be final and binding upon the parties”.***

5. The Applicant submitted that it is therefore abundantly clear that it was the intention and the agreement of the parties that all disputes arising out of the lease would be referred to Arbitration.
6. The Applicant’s case is that by a letter dated 2<sup>nd</sup> September 2014, the Defendant invited the Plaintiff to undertake mediation but the Plaintiff did not accede to this request. Since the Agreement between the parties was clearly that all disputes arising out of the Agreement for Sale and the Lease must be referred to Arbitration, the Applicant states that the Plaintiff has acted in contravention of the said Agreement by filing this matter in court without first exhausting the dispute resolution mechanism agreed to by the parties, and hence it is just and fair that the court proceedings that have been commenced be stayed and the dispute be referred to Arbitration in accordance with Clause 6.13.2 of the Lease as read together with Clause 16.2 of the Agreement for Sale.
7. The application is further supported by a Supplementary Affidavit of the same deponent filed in court on 28th May 2015.
8. The application is opposed by a Replying Affidavit of **Captain Anastacion Thomos** sworn on **20th May 2015**. In the affidavit the deponent states that it is true that the agreement for sale and the lease agreements entered into between the Defendant and the various purchasers contained provisions for resolutions of disputes. However, the deponent states that under Clause 6.13.1 the dispute is firstly to be referred to the Manager for the Plaintiff company for purposes of mediation by the Board of Directors within 30 days of such a dispute occurring. If such a process fails

within 14 days of the dispute being referred to mediation by the Board of Directors, the parties will resort to arbitration as provided in the agreement. It is the Respondent's case that pursuant to Clause 6.13 of the leases, the dispute between the owners of the leases and the Defendant Developer was referred to the Plaintiff's Manager for mediation by the Board of Directors, who, after carrying out the mediation, passed unanimous resolutions. It is those resolutions which the Defendant has refused to comply with, and the suit herein seeks to enforce the outcome of that mediation process.

9. In his supplementary affidavit, Mirie in reply to the replying affidavit of the Respondents stated that whilst the contents of Clause 6.13 of Lease are clear, the importance of the said clause regarding resolution of dispute is not as represented by Captain Thomos because of the following reasons:-

- i. The dispute envisaged in clause 6.13.1 is not of the nature as evident in the current dispute. This clause assumes that the dispute is between parties other than the manager and therefore the manager is capable of acting impartially. However in the present dispute, the contestants are the Manager on one hand and the Lessor (Vendor). How then can the Manager mediate in a dispute in which it is one of the contestants? This is clearly absurd and contrary to the rules of natural justice. It was never intended to achieve such an absurd result.
- ii. The above notwithstanding, clause 6.13.1 is clear that where mediation fails, the parties will resort to Arbitration as provided in clause 6.13.2 which is the clause the Applicant is asking this court to give effect to.
- iii. It is therefore the Plaintiff who breached the terms of the Lease by filing a court action when parties had agreed that their disputes would be resolved through Arbitration.

10. Mr. Mirie deponed that the averments in paragraph 12 of the Replying Affidavit of Captain Thomos is totally misleading for the following reasons:-

- i. There was no mediation process undertaken by the parties as envisaged in clause 6.13.1 of the Lease or at all. Indeed when the Defendant invited the Plaintiff to go to mediation, the request was never acknowledged.
- ii. If any such mediation as alleged was ever held, it was a unilateral proceeding and the alleged unanimous decision a self serving exercise by a contestant in a dispute to steal a match on an opponent.
- iii. The alleged unanimous decision of the manager's Board of Directors is not binding upon the Defendant whether in terms of clause 6.13.1 of the Lease or at all. Mediation by its nature could not result to a unanimous decision of the Board of one party to the dispute. The results of mediation must be a mutual agreement between the parties to the dispute.
- iv. Since there has been no mutual resolution of the dispute at hand, then this matter must proceed to arbitration in accordance with clause 6.13.2 of the Lease.
- v. The alleged attendance of Mr. Ilan Baratz in the Plaintiff's Board meeting was not to represent the interest of the Defendant. He was neither authorised nor did he hold himself out as representing the Defendant in the said meeting. His attendance was clearly in his capacity as a member of the Board of Directors of the Plaintiff (he himself being a Grid Owner in the development) and therefore such Board meeting was manifestly a one-sided affair.

11. The Respondent's case is that the Replying Affidavit of Captain Thomos demonstrates no good ground why this court should not give effect to clause 6.13.2 of the Lease and the Defendant therefore prays that the proceedings herein be stayed and the dispute be referred to Arbitration in accordance with the agreement between the parties. In effect, the Respondent denies that there was any or any valid mediation of the dispute and so, this court should allow this application so that parties can go for arbitration which is mandated under the foregoing clauses.

12. I have carefully considered the application and submissions of the parties. The only issue I raise for determination herein is whether or not an arbitration or mediation did take place as alleged by the Plaintiff.

13. There is no doubt that the agreement and the leases herein contained arbitration and mediation processes which had to be exhausted before a party could move to court. Indeed Clause 6.13.1

allows for mediation. Now, one party contends that there was mediation, and now seeks to enforce the outcome of the alleged mediation, while the other party alleges that there was never a mediation. As far as I know, however, mediation is a voluntary process which is conducted by a neutral person who commits to confidentiality. Before the parties go into mediation, there must be firstly, a mediation agreement binding the parties to mediation. After mediation, there is an agreement containing the terms of mediation. This agreement must be signed by all the parties to the mediation. In the agreement the parties agree that they were bound with the resolutions reached by the mediator. This final agreement is a document which can be tabled in court to show that one party is reneging from the agreed resolutions.

14. From the foregoing, it is clear that the alleged mediation which the Plaintiff now says took place was quite irregular or invalid for the following reasons:-

- The alleged mediator being the Manger of the Plaintiff could not be a mediator since he was not a neutral person given to confidentiality.
- There was no agreement to go into mediation. This also means that the alleged mediation was not voluntary and freely entered into by the parties especially the Defendant. At least no agreement showing the parties agreed to mediation was attached to these proceedings.
- There was no agreement containing the resolution of mediation. The law requires that agreement to contain all the agreed terms and resolutions and the same must be executed by all the parties.

15. It is therefore clear to me that there was no mediation. If there was ever an attempt at mediation, the best outcome is that it failed. Mediation having failed the next cause of action was arbitration under Clause 6.13.2.

16. Before I leave this Section, it is important for the parties to carefully distinguish between a mediation process and arbitration process. An arbitrator is like a judge. Once the process is provided for it takes effect as per the rulers. It is an impartial process. In mediation, however, even if it is provided for in an agreement, it is entered into with a very human face. This is so because it is a voluntary process, carried out by an impartial and neutral person who commits to confidentiality under an agreement to enter into mediation whether or not the process is provided for in the agreement. At the end of it there must be another agreement containing the resolutions. This document can be submitted evidenced in court, that the parties had agreed to mediation, and had reached certain resolutions. It is therefore important, before parties resort to mediation, to take care of these delicate attributes of the mediation process, since it is a process, where at any one time before signing of the mediation agreement, any party is always at liberty to bolt from the process. It seems to me that either the Defendant herein did not consent to mediation, that it bolted out of the process. Whichever option it is, it does not matter. What matters is that there was no final agreement signed and executed between the parties detailing the resolutions arrived at by the mediators.

17. For the foregoing reasons, the Defendant's application by way of Chamber Summons dated 27th April 2015 is allowed as follows:-

- a. ***The suit herein is hereby stayed and the dispute herein is referred to arbitration.***
- b. ***The costs of this application shall be for the Defendant.***

Orders accordingly.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 2ND DAY OF OCTOBER 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mr. Kimani for Plaintiff/Respondent

Mr. Khasiani holding brief for Michuki for Defendant/Applicant

Teresia – Court Clerk