



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 158 OF 2019**

**ILA P HARIA.....1<sup>ST</sup> PLAINTIFF**

**SUSHILA R SHAH.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**BISHOP PETER IKATWA INANGA.....1<sup>ST</sup> DEFENDANT**

**WORLD HOUSE OF PRAYER MINISTRIES.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiffs filed the instant suit vide a plaint dated 16<sup>th</sup> December 2019. By the plaint the plaintiffs sought judgment against the Defendants for :-

*(a) Kenya Shillings One Hundred and forty-five million ( Kshs.145,000,000/=) together with interest thereon at the prevailing commercial rates from the respective due dates until payment in full;*

*(b) General damages for breach of contract.*

*(c) Costs of this suit with interest thereon at court rates;*

*(d) In the alternative,*

*a. The cancellation of the sale Agreement dated 13<sup>th</sup> December 2013 in terms of clause 15 (d) of the said Agreement.*

*b. An order for the cancellation of the registration of the transfer of the parcel of lands number LR Nos12573/5 and 12573/12 in favour of the 1st Defendant and the said titles to revert in the name of Kasturben Laiji Shah, now deceased.*

*c. An order for repossession of lands numbers LR No.s 12573/5 and 12573/12 to the Estate of Kasturben Laiji Shah.*

*e. Any other such and further relief that this Honourable Court may deem just and fit to grant.*

2. The defendants upon being served on 9<sup>th</sup> January 2020 filed a memorandum of appearance. The defendants did not file defence but on 28<sup>th</sup> January 2020 filed a Notice of preliminary objection predicated on the grounds that the suit was statute barred under the Limitation of Actions Act, Cap 22 Laws of Kenya; that the suit was filed in contravention of Clause 19.2 of the agreement of sale between the parties which provided for resolution of any dispute arising from the agreement through arbitration and that the court lacked jurisdiction to entertain the matter in view of the arbitration clause in the Agreement for sale and that the parties were bound by section 6 of the Arbitration Act to resolve the dispute by way of arbitration.

3. The plaintiffs filed grounds of opposition to the preliminary objection on 12<sup>th</sup> March 2020. The plaintiffs contended the Agreement for sale having been entered into on 18<sup>th</sup> December 2013 and the suit having been filed on 17<sup>th</sup> December 2019 the period of limitation had not expired. The plaintiffs further contended this Court has jurisdiction to entertain the matter and that the existence of the Arbitration Clause in the sale agreement did not oust the jurisdiction of the Court. The plaintiffs further averred the preliminary objection did not comply with the procedural requirements of Section 6 of the Arbitration Act and could not therefore preclude the Court from exercising jurisdiction in the matter. Additionally the plaintiff contended that by the defendants raising a question of law as to whether or not the plaintiffs action was

barred by limitation had subjected the issue to the determination of the Court and that it is the Court that has the jurisdiction to determine such issue and not an arbitral tribunal.

4. The parties canvassed the preliminary objection by way of written submissions. The defendants submissions in support of the preliminary objection were filed on 8<sup>th</sup> May 2020 and the plaintiffs submissions in reply were filed on 16<sup>th</sup> July 2020.

5. The Court is satisfied the preliminary objection raises a point of law and therefore meets the threshold of what constitutes a preliminary objection as established in the case of **Mukisa Biscuit Manufacturing Co. Ltd – Vs- West End Distributors Ltd (1969) EA 696** where Sir Charles Newbold, P. stated as follows:-

*“---A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.*

6. The dispute between the plaintiff and the defendants arose from the agreement of sale entered into between the parties dated 18<sup>th</sup> December 2013. By the Agreement for sale the plaintiffs had agreed to sell to the defendants land parcels **LR Nos.12573/5 and 12573/12** measuring 4.045ha and 2.05ha respectively for the agreed aggregated consideration of Ksh.217,500,000/=. The agreement provided for the completion date as within 180 days from the date of the sale agreement. It is common ground the sale transaction was not completed as envisaged within the 180 days provided for completion under the agreement for sale and that precipitated the present proceedings. The sale agreement under clause **20** provided for the applicable law and arbitration in the subheading . However in the subclauses under the subheading the sale agreement made the reference to subclause **19.1-19.4** while providing for the applicable substantive law . This could have been some inadvertent error in numbering. Be it as it may be, I set out hereunder subclauses **19.1 to 19.4** for ease of reference as they are relevant in the determination of the preliminary objection.

*19.1 This agreement and its performance shall be governed by and construed in all respects in accordance with the Laws of Kenya;*

*19.2 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 30 days of notification of a dispute upon application of either party by the chairman for the time being of the Kenya Branch of Chartered Institute of Arbitrators;*

*19.3 Such Arbitration shall be conducted in Nairobi in accordance with the rules of arbitration of the said Institute and subject to and in accordance with the provisions of The Arbitration Act 1995 or its successive legislation;*

*19.4 To the extent permissible by Law, the determination of the arbitrator shall be final, conclusive and binding upon the parties hereto.*

7. The defendants preliminary objection is predicated on subclauses 19.2 set out herein-above which provided that any dispute arising out of or in connection with the sale agreement would be referred to arbitration in the manner provided thereunder. The defendants contend that the plaintiffs were bound under the agreement to refer the dispute to arbitration. The defendants have submitted that the Court should allow the parties to the contract to exhaust the dispute resolution that they had chosen before invoking the jurisdiction of the Court. In support of their submissions the defendants have placed reliance on the following cases **Geoffrey Muthinja Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others (2015) eKLR, Anchor Limited -Vs- Sports Kenya (2017) eKLR** and **Speaker of the National Assembly –vs- Karume (1992) eKLR**. In the cases referred to the courts observed that where there is an alternative dispute resolution mechanism provided the parties had an obligation to exhaust that mechanism before they could resort to the Court.

8. Section 6 (1) of the Arbitration Act, upon which the present preliminary objection is predicated provides as follows:-

*Stay of legal proceedings*

*6(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—*

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

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

9. This provision requires that where a party avers that there was an arbitration agreement in respect whereof proceedings have been instituted in Court, such party may apply to have the Court proceedings stayed at the same time he enters appearance in the suit or at the time he acknowledges the claim against which the stay of proceedings is sought. The Court will however not grant stay of the suit where the arbitration agreement is null and void, inoperative or incapable of being performed or where the Court holds that there is in fact no dispute between the parties in regard to the matters agreed to be referred to arbitration.

10. Section 6 of the Arbitration Act clearly sets out what a party who seeks to rely on some arbitration agreement where a party to such an

agreement has commenced a suit in a Court of law. The party has to apply not later than the time he or she enters appearance in the suit, to stay the proceedings in the Court and to have the parties referred to arbitration. Rule 2 of the Arbitration Rules, 1997 provides the procedure to be followed by a party seeking to apply for stay of proceedings under section 6 of the Act. Rule 2 provides thus:-

*2. Application under sections 6 and 7 of the Act shall be made by summons in the suit.*

11. In the instant matter the defendants after being served with the suit papers filed a memorandum of appearance on 9<sup>th</sup> January 2020 and on 28<sup>th</sup> January 2020 filed the Notice of preliminary objection under consideration. The defendants definitely did not comply with the procedure as laid out under section 6(1) of the Arbitration Act and Rule 2 of the Rules made under the Act. The defendants did not file a summons in the suit simultaneously with entering appearance in the suit. The Notice of preliminary objection by the defendants was filed on 28<sup>th</sup> January 2020 at least 19 days after the memorandum of appearance was filed. The Notice of preliminary objection invited the Court to make a determination on a point of Law, whether or not the action was statute barred. The Court could not make such determination unless it was seized of the matter.

12. Section 6(1) of the Arbitration Act is couched in mandatory terms in regard to what a defendant who desires the matter to be referred to arbitration must do. Similarly Rule 2 of the Arbitration Rules is in mandatory terms in regard to the procedure to be adopted if a party applies stay under section 6(1) of the Act. The defendants did not comply with these provisions. The filing of a Notice of Preliminary objection by the defendants constituted filing of further pleadings in the suit and therefore invoking the jurisdiction of the Court to Rule on the preliminary objection. The filing of the Notice of preliminary objection cannot be construed to be such an application as is contemplated under section 6 (1) of the Arbitration Act and Rule 2 of the Rules made thereunder. The defendants in my view lost the option to have the suit stayed and the matter referred to arbitration under the arbitration agreement when they failed to adhere to the procedure spelt out under the Arbitration Act in regard to stay of proceedings. The defendants in fact subjected themselves to the jurisdiction of the Court and are deemed to have waived their right to have the dispute referred to arbitration in accordance with the arbitration agreement.

13. Having carefully considered the submissions made by the parties, I am satisfied the preliminary objection dated 28<sup>th</sup> January 2020 does not constitute an application for stay of the present suit under Section 6 (1) of the Arbitration Act. Without an appropriate application made pursuant to the provisions of section 6(1) of the Arbitration Act, there would be no basis to order a stay of the proceedings. As relates to the plea of limitation of the action, the documents availed in support of the plaintiff's suit is a sale agreement dated 18<sup>th</sup> December 2013 on which the suit is founded. The present suit was filed on 17<sup>th</sup> December 2019 which suggests the suit may indeed have been filed on the last day before the expiry of the limitation period of 6 years from the date the sale agreement was entered into. Without making any determination whether or not the suit is time barred, it is my view that the issue could be a triable issue at the trial.

14. The upshot is that I decline to allow the preliminary objection. In view of the fact that the defendants are yet to file their defence I grant them leave within the next 21 days from the date of this ruling to file their defence. The costs of the preliminary objection will be in the cause.

15. Orders accordingly

**Ruling dated signed and delivered virtually at Nakuru this 24<sup>th</sup> day of September 2020.**

**J M MUTUNGI**

**JUDGE**