



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 32 OF 2015

1. JOHN HABEL WERE
2. JOSEPH CHENGO
3. ROBERTSON BINAYO OSANGALE
4. DAVID NDUNGU KURIA
5. RICHARD MWANZIA
6. JOHN CHARO MASHA
7. WILSON WAMBUGU MWANGI & SERAH WAIRIMU WAMBUGU
8. VASCOLINE MWANIA
9. MERCY NJERI GACHARA
10. SAMMY TIROP TOGOM
11. MIKE MUCHAI MWANGI
12. WINNIE JELAGAT MARU
13. SILVIA AGASA
14. THOMAS CHACHA MUNIKO
15. HUSTIN INVESTMENT LIMITED
16. K-PALS LIMITED
17. AFRICAN LEADERSHIP & RECONCILIATION MINISTRIES.....PLAINTIFFS/RESPONDENTS

=VERSUS=

HARON OSORO NYAMBOKI.....1ST DEFENANT

ENESI INVESTMENT LIMITED.....2ND DEFENDANT/APPLICANT

RULING

2. It seeks orders:-

(1) That the honourable court may be pleased to issue an order of stay of proceedings herein and refer the parties to arbitration.

(2) That the suit filed by the 1st, 11th and 16th plaintiffs do proceed to hearing.

(3) That the costs of this application be provided for by the 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15 and 17th plaintiffs/respondents.

3. The grounds are on the face of the application and are.

(a) There exist an arbitration clause in the individual sale agreements entered between 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 17th plaintiffs/respondents and the 2nd defendant/applicant.

(b) The suit herein is premature as the 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 17th plaintiffs/respondents have not exhausted the process they committed themselves in the individual sale agreements they signed with the 2nd defendant/applicant.

(c) That the arbitration agreement is in writing and signed by the 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17th plaintiffs/respondents be stayed and the matter be referred to arbitration.

4. The application is supported by the affidavit of Haron Osoro Nyamboki one of the directors of the 2nd defendant sworn on the 24th October 2014.

5. The application is opposed. There is a replying affidavit sworn by Daniel K. Musyoka Advocate for the plaintiffs/respondents sworn on the 24th November 2014.

6. The parties filed written submissions which were highlighted on 22nd November 2018.

7. I have considered the notice of motion and the affidavit in support. I have also considered the replying affidavit, the written submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.

8. I have looked at the annexures "HON1-7" on the supplementary affidavit of Haron Osoro Nyamboki. They are sale agreements between Ensi Investments Limited (2nd defendant) and various plaintiffs. Clause 8 provides that:-

"That any dispute arising from the agreement shall be referred to an arbitration in accordance with the provisions of the Arbitration Act of Kenya 1995 (Act NO. 4 of 1995) by a single arbitrator to be appointed by agreement between the parties or, failing agreement within fourteen (14) days of the notification by either party to the other of the existence of a dispute or claim, to be appointed by the chairman for the time in being of the Chartered Institute of Arbitrations Kenya branch Nairobi on the application of either party".

9. It is clear from the above clause that the parties intended for any dispute to be referred to the arbitration. Article 159 of the Constitution of Kenya 2010 provides for alternative forms of dispute resolution. Arbitration is one of them.

10. Section 6(1) of the Arbitration Act 1995, provides that;

"A court before which proceedings are brought in a matter which is the subject of 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, in operative 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".

The above provision is clear. I find that this application was made promptly. In the case of **Niazsons (K) Ltd vs China Road & Bridge Corporation Limited [2001] eKLR**, the Court of Appeal observed that :-

"...The court will then be obliged to consider three basic aspects. First, whether the applicant has taken any step in the proceeding other than the steps allowed by the said section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred.....".

11. The plaintiffs/respondents have not raised any of the exceptions set out in Section 6(1) of the Arbitration Act. In the case of **Adrec**

Limited vs Nation Media Group Limited [2017] eKLR the Court of Appeal observed thus;

“The Constitution of Kenya 2010 recognises alternative dispute resolution mechanisms including arbitration. Parties have freedom of contract and even to resolve disputes away from the courts, subject to supporting court intervention in specific areas of law to ensure fairness in the arbitral process.....”-

12. In conclusion, I find merit in this applicant and this application and grant the orders sought namely:-

- a. That the proceedings be and are hereby stayed and the matter referred to arbitration.**
- b. That the suit filed by the 1st, 11th and 16th plaintiffs do proceed for hearing.**
- c. That costs of this application be in the cause.**

It is so ordered.

Dated, signed and delivered in Nairobi on this 9TH day of APRIL 2019.

.....

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court Assistant