



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 372 OF 2016 (O.S)

IN THE MATTER OF THE THREE SALE AGREEMENTS ALL DATED 20TH JUNE 2013

FOR THE SALE OF THE PROPERTIES KNOWN AS LAND REFERENCE

NUMBERS 1870/IV/75, 1870/IV/76 AND 1870/116/IV NAIROBI

AND

IN THE MATTER OF AN APPLICATION UNDER ORDER 37

RULE 3 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REVINE PARK LIMITED.....PLAINTIFF

VERSUS

GAETANO RUFFO.....DEFENDANT

JUDGMENT

Background:

The plaintiff and the defendant entered into three (3) agreements for sale all dated 20th June, 2013 (hereinafter referred to as “the agreements for sale”) in respect of the parcels of land known as L.R. No. 1870/IV/75, L.R No. 1870/IV/76 and L.R No. 1870/116/IV (hereinafter referred to as “the suit properties”). Under the said agreements for sale, the defendant agreed to sell to the plaintiff the suit properties on terms and conditions that were set out therein. Save for the purchase price, the other terms and conditions in the said agreements for sale were similar. The agreements for sale provided among others that:

- (i) The completion date was 30 days from the date of the agreements.
- (ii) The plaintiff was to pay a deposit of 10% of the purchase price to the defendant.
- (iii) The plaintiff was to pay to the defendant interest at the rate of 18% per annum on the balance of the purchase price that remained outstanding from the date of completion until payment in full provided the defendant had fulfilled his obligations as regards handing over of the completion documents.
- (iv) In the event that a dispute arose between the parties arising from the agreements, the parties were to attempt amicable resolution thereof and failing such resolution the dispute was to be referred to a sole arbitrator to be mutually agreed upon and failing such agreement to be appointed by the Chairman of the Chartered Institute of Arbitrators.

The plaintiff paid to the defendant a deposit in the sum of Kshs. 27,000,000/= leaving a balance of Kshs.247,500,000/=. The balance of the purchase price was not paid to the defendant on the completion date and pursuant to the terms of the agreements for sale, the defendant claimed from the plaintiff interest on the said balance in the sum of Kshs. 4,492,465/75 from 26th July, 2013 to 8th September, 2013. The defendant also proceeded to register a caveat against the title of L.R. No. 1870/116/IV on 10th October, 2013 to stop any dealings with the same pending the resolution of the said issue of interest. The parties entered into negotiations with a view to resolve the dispute over interest

which negotiations collapsed when the plaintiff discovered that while on the one hand the defendant was engaging it in discussions, on the other hand and without notice to it, the defendant had registered a caveat on the title of one of the suit properties. The plaintiff insisted that the defendant lifts the said caveat before it could resume negotiations which request was turned down by the defendant.

The plaintiff thereafter wrote to the Land Registrar demanding the removal of the said caveats. This prompted the defendant to file an application by way of an Originating Summons before this court on or about 10th December, 2014 seeking an order for the extension of the said caveat until the determination of arbitral proceedings which he had commenced against the plaintiff. This was in ELC Civil Case No. 1535 of 2014 (O.S) (hereinafter referred to as “the caveat removal suit”). The defendant’s application for the extension of the caveat was dismissed by the court on 25th September, 2015 and the court ordered the immediate removal of the said caveat.

On 15th January, 2016, the Chairman of the Chartered Institute of Arbitrators following a request by the defendant appointed Mr. Kamau Karori as a sole arbitrator to determine the dispute between the plaintiff and the defendant over interest that was claimed by the defendant from the plaintiff under the agreements for sale.

The application before the court:

What is now before the court is the plaintiff’s application brought by way of Originating Summons dated 14th March, 2016 in which the plaintiff has sought the following principal reliefs:

- (i) That the purported appointment of Kamau Karori as sole arbitrator in an alleged dispute between the plaintiff and the defendant concerning or arising from three sale Agreements all dated 20th June, 2013 between the plaintiff and the defendant be set aside.
- (ii) That this honourable court do find and declare that the defendant is not entitled to refer his alleged claim against the plaintiff concerning or arising from the three sale Agreements all dated 20th June, 2013 between the plaintiff and the defendant to arbitration.

The application was brought on the grounds set out on the face of the application and on the supporting affidavit of Favaaz Tejani sworn on 14th March, 2016. The plaintiff contended that prior to entering into the agreements for sale with the defendant, the deed file in respect of L.R No. 1870/116/IV had been missing for a considerable length of time and the defendant had instructed the Chief Land Registrar to keep the said deed file in the safe and that no transaction be permitted without his express authority. The plaintiffs averred that these facts were not disclosed to it by the defendant when they entered into the agreements for sale with the result that the plaintiff’s advocates encountered severe difficulties when they attempted to register the transfer in respect of L.R. No. 1870/116/IV since the deed file could not be traced at the Land Registry.

The plaintiff averred that it was until 5th September, 2013 that the defendants wrote to the Land Registry authorising the registration of the transfer in respect of L.R No. 1870/116/IV in the plaintiffs’ favour that the deed file was made available and the transfer registered soon thereafter. The plaintiff averred that the defendant thereafter claimed a sum of Kshs. 5,492,465/75 to be paid to him as interest on account of the delay in the payment of the balance of the purchase price and proceeded to register a caveat against the title of L.R No. 1870/116/IV to secure the said amount that he had demanded. The plaintiff averred that it demanded that the defendant withdraws the said caveat before it could engage him on the issue of the said interest but the defendant refused to do so and instead filed an application to extend the caveat pending arbitration after he purported to invoke the provisions of clause 22 of the agreements for sale on dispute settlement. The plaintiff averred that since the defendant had chosen to register a caveat against L.R. No. 1870/116/IV he was not entitled to invoke clause 22 of the agreements for sale on dispute settlement which also provided for arbitration if amicable resolution failed.

The plaintiff contended that the appointment of Mr. Kamau Karori as an arbitrator in the dispute between the plaintiff and the defendant was improper, invalid, illegal, null and void for the following reasons:

- (a) The same was done in breach of the express mandatory provisions of Clause 22 of the agreements for sale.
- (b) The parties did not engage in any amicable negotiations to resolve the dispute prior to resorting to arbitration as required under clause 22 of the agreements for sale.
- (c) No attempts were made by the parties to agree on a sole arbitrator as required under the said clause 22 of the agreements for sale.
- (d) The appointment was made without notice to the plaintiff.

The plaintiff contended further that the defendant was not entitled to rely on the arbitration clause in the said agreements for sale as he had breached and ignored the same by registering a caveat and filing an application in court for the extension of the same. The plaintiff averred further that the defendant was also not entitled to rely on the said arbitration clause as he had created circumstances which gave rise to the claim sought to be determined through the said arbitration.

The application was opposed by the defendant through a replying affidavit sworn on 6th December, 2016. The defendant contended that this court has no jurisdiction to intervene in arbitral process that has commenced save as provided in the Arbitration Act, Chapter 49 Laws of Kenya and that even in such case, it is only the High Court that can intervene and not this court. The defendant averred that the dispute between the parties related to interest arising from delayed payment of the purchase price under clause 14 of the agreements for sale and that in the removal of caveat suit, the court had categorically observed that the dispute was subject to arbitration and that the little said by the court on the matter the better. The defendant averred that with that observation, it would be contradictory for the court to set aside the arbitral proceedings in which the dispute over interest is to be resolved. The defendant averred that before he referred the dispute to arbitration, attempts had been made to resolve the same amicably through negotiations which failed to bear any fruit. The defendant

contended further that the plaintiff was well aware of the commencement of the arbitral proceedings. The defendant contended that if the plaintiff had any genuine grievance against the arbitral proceedings, the proper forum to raise the same was the arbitral tribunal.

The Originating Summons was heard by way of written submissions. The plaintiff filed its submissions on 31st October, 2017 while the defendant filed his submissions in reply on 20th February, 2018. I have considered the Originating Summons together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the defendant in response to the application. Finally, I have considered the submissions by the advocates for the parties and the numerous authorities which were cited in support thereof. The only issue that arises for determination in the Originating Summons is whether the court should set aside the arbitral proceedings which have been commenced at the instance of the defendant to determine the dispute between him and the plaintiff over interest claimed by him from the plaintiff under the agreements for sale. Before I go to the merit of the application, it is necessary to determine a preliminary issue that was raised by the defendant namely, whether this court has jurisdiction to determine the application before it.

It was not disputed that the dispute between the parties which has given rise to these proceedings arose from the agreements for sale of land. The dispute essentially relates to the parties' rights under the said agreements for sale. The jurisdiction of this court which is derived from Article 162(2) (b) of the Constitution is set out in Section 13 of the Environment and Land Court Act, 2011 ("the ELC Act"). Section 13(1) of the ELC Act provides that this court has jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution, the ELC Act or any other law applicable in Kenya relating to environment and land. Section 13(2) of the ELC Act provides that the court has power to hear and determine among others disputes relating to public, private and community land, contracts, choses in action or other instruments granting any enforceable interests in land, and any other dispute relating to environment and land.

The plaintiff's Originating Summons was brought under Order 37 rule 3 of the Civil Procedure Rules which provides as follows:

"A vendor or purchaser of immovable property or their representatives respectively may, at any time or, times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract)."

It is clear from section 13(2) of the ELC Act that this court has jurisdiction to determine disputes arising from agreements for sale of land. In the circumstances, this court has jurisdiction to determine an application under Order 37 rule 3 of the Civil Procedure Rules between a vendor and a purchaser of land relating to any question arising out of or connected with the contract of sale between them. For the foregoing reasons, it is my finding that this court has jurisdiction to determine the Originating Summons before it. As to whether it can grant the reliefs sought in the application under Order 37 rule 3 of the Civil Procedure Rules is a different matter. The question goes to the merit of the application which I will consider next.

The questions which this court has been called upon to determine under Order 37 rule 3 of the Civil Procedure Rules are; whether the defendant was entitled to refer the dispute between him and the plaintiff arising from the agreements for sale to arbitration and whether the appointment of Kamau Karori as a sole arbitrator in the said dispute should be set aside.

Whether the defendant was entitled to refer the dispute between him and the plaintiff relating to interest to arbitration:

It was common ground that the agreements for sale had an arbitration clause (clause 22). The terms of the arbitration clause were also not disputed. The plaintiff's contention in the Originating Summons was that the conduct of the defendant was such that it precluded him from relying on the arbitration clause. The plaintiff submitted that the defendant's acts of registering a caveat against the title of L.R No. 1870/116/IV and filing a suit for the retention of the said caveat was a violation of the said arbitration clause and as such disentitled the defendant from relying on the same clause to refer the dispute between the parties to arbitration. The plaintiff submitted that to allow the plaintiff to rely on the said arbitration clause would be tantamount to allowing him to approbate and reprobate the said clause in the agreements for sale which is against the doctrine of approbation and reprobation. The plaintiff cited a number of authorities in support of its submissions on the issue. The plaintiff cited the cases of Agricultural Finance Corporation and Another v Kenya Alliance Company Ltd. & Another (2002) eKLR, Republic v Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Gateria (2010) eKLR and Behan & Okero Advocates v National Bank of Kenya (1997) eKLR. In the case of Republic v Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru (Supra), the court cited with approval the definition of the doctrine of approbation and reprobation that was given in the case of Evans v Bartlam (1973) 2 ALL ER 649 at page 652 where Lord Russel of Killowen said:

"The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit."

I am not in agreement with the contention by the plaintiff that the registration of a caveat by the defendant against the title of L.R No. 1870/116/IV and seeking to retain the same through a court order precluded the defendant from invoking the arbitration clause. I am also not in agreement that registering the said caveat and also filing a suit to retain the same amounted to approbation and reprobation of the arbitration clause.

When the court is considering whether a party has a right to refer a dispute to arbitration pursuant to an arbitration clause in an agreement, the arbitration clause is considered as an independent agreement. In the agreements for sale, arbitration was provided for in clause 22. The terms of the arbitration clause were not disputed. According to the said clause, reference of a dispute to arbitration was conditional only on one thing namely, that the parties had to attempt in the first instance to resolve the dispute amicably. It was upon the failure by the parties to resolve the dispute amicably that either party could declare a dispute and subsequently refer the same to arbitration. I am of the view that neither the registration of a caveat nor the filing of a suit to retain the caveat could bar either party from referring a dispute between them to arbitration under clause 22 of the agreements for sale. These are matters which were not provided for in the arbitration clause that was agreed upon by the parties. I am of the view that the plaintiff is trying to introduce into the arbitration clause matters which were not provided for when parties entered into the agreements for sale.

I have looked at the caveat that was registered against the title of L.R No. 1870/116/IV and the Originating Summons dated 10th December, 2014 which was filed by the defendant to maintain and extend the said caveat. There is no indication in the said documents that the defendant intended to forego his rights under the arbitration clause. In fact, in his application to the court, the defendant sought the maintenance and extension of the said caveat pending the arbitration proceedings. The contention by the plaintiff that by filing the said suit, the defendant had breached the arbitration clause and was not entitled to refer the dispute to arbitration is hard to understand in the circumstances. It was also common ground that the said caveat was lifted by the court and the defendant did not derive any benefit from the same in connection with the dispute it had with the plaintiff. In the circumstances, I am unable to appreciate the plaintiff's approbation and reprobation argument.

The plaintiff had also contended that the defendant was not entitled to refer the matter to arbitration because the way he conducted the transaction was such that he intended to contrive a claim for interest against the plaintiff so as to unjustly enrich himself. I am of the view that this is an issue which should be raised before the arbitral tribunal. The same cannot however prevent the defendant from referring the dispute to arbitration as it was not provided for in the agreement to arbitrate between the parties as an impediment to arbitration.

For the foregoing reasons, it is my finding that the defendant was entitled to refer the dispute between him and the plaintiff to arbitration since that was the dispute resolution mechanism that the parties had agreed on in resolving any dispute arising from the agreements for sale. If this court was to hold that the defendant was not entitled to invoke the arbitration clause in the agreements for sale, the defendant would have been denied a right to have the dispute he has with the plaintiff resolved in a manner that they had agreed upon.

Whether the appointment of Kamau Karori as a sole arbitrator in the dispute between the plaintiff and the defendant should be set aside:

The plaintiff had put forward four (4) grounds on which the appointment of Mr. Kamau Karori as a sole arbitrator was challenged. All the grounds related to the manner in which the said arbitrator was appointed. I am in agreement with the defendant that these are issues which should have been raised before the arbitral tribunal. Once an arbitrator has been appointed, all objections relating to his jurisdiction and validity of his appointment should be raised before him. The manner in which an arbitrator has been appointed goes to his jurisdiction. As was held in the cases of Safaricom Limited v Ocean View Beach Hotel Ltd. & 2 Others [2010] eKLR and Bellevue Development Company Ltd. v Vinayak Builders Ltd. & Another [2014] eKLR cited by the defendant, it is not for the court to rule on the jurisdiction of the arbitral tribunal. Under the principle of *competence/competence* which is recognised under Section 17 (1) of the Arbitration Act, 1995, the arbitral tribunal is competent to rule on its jurisdiction. The question as to whether the sole arbitrator Mr. Kamau Karori was validly appointed to act as such is therefore not properly before this court.

I wish to add that if I was to determine the issue, I would have decided the same against the plaintiff. Upon review of the correspondence that was exchanged between the parties after the defendant made a demand for interest, I am satisfied that Mr. Kamau Karori was validly appointed in accordance with clause 22 of the agreements for sale. I am satisfied that prior to the letter by the defendant's advocate to the Chairman of the Chartered Institute of Arbitrators to appoint an arbitrator to arbitrate on the dispute between the defendant and the plaintiff, the parties had been engaged in negotiations with a view to resolve the dispute. In fact, the plaintiff had admitted that after the defendant demanded to be paid interest, the parties entered into negotiations until the plaintiff discovered that the defendant had registered a caveat on L.R No. 1870/116/IV and decided to stop any further negotiations with the defendant until the caveat was lifted. I am of the view that the fact that the negotiations commenced and stopped when the plaintiff refused to continue with the same did not mean that there were no negotiations. What it means is that the negotiations were held with a view to resolve the matter but the same did not yield anything positive which left arbitration as the only option of resolving the dispute.

I am also not in agreement with the plaintiff's contention that it was not given an opportunity to participate in the appointment of the arbitrator. The letters dated 4th June, 2014 and 20th June, 2014 from the defendant's advocates to the plaintiff's advocate at pages 155 and 157 respectively of the plaintiff's application leave no doubt that the plaintiff was given an opportunity to participate in the appointment of a sole arbitrator which opportunity it failed to utilise. The plaintiff's claim that Kamau Karori was appointed a sole arbitrator without notice to it is also not correct. I have noted from the material on record that the letters which the defendant's advocates wrote to the Chartered Institute of Arbitrators requesting for appointment of an arbitrator were copied to the plaintiff's advocates and that when Kamau Karori was appointed a sole arbitrator, he notified the plaintiff's advocates of his appointment.

Due to the foregoing, it is my finding that Kamau Karori was appointed as sole arbitrator in accordance with clause 22 of the agreements for sale and that no valid reasons have been put forward to warrant the setting aside of his appointment.

The upshot of the foregoing is that the plaintiff's Originating Summons dated 14th March, 2016 is without merit. The same is dismissed with costs to the defendant.

Delivered and Dated at Nairobi this 27th day of June, 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

N/A for the Plaintiff

Mr.Khaseke for the Defendant

Mr.Waweru-Court Assistant