



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 634 OF 2017**

**MUNGAI NGARUIYA.....1ST PLAINTIFF**  
**WANJIKU MUNGAI NGARUIYA..... 2ND PLAINTIFF**  
**KENNETH KIMATHI NGAINE..... 3RD PLAINTIFF**  
**LUCY WAMBUI MBUGUA..... 4TH PLAINTIFF**  
**NJERI MUNGAI NGARUIYA..... 5TH PLAINTIFF**  
**ASUMPTA WANGARI MURIITHI..... 6TH PLAINTIFF**  
**FOURTY EIGHT RIVERSIDE DRIVE LIMITED..... 7TH PLAINTIFF**  
**GARDEN CITY LIMITED..... 8TH PLAINTIFF**  
**VITAS FOOD LIMITED..... 9TH PLAINTIFF**

**VERSUS**

**MAHA PROPERTIES LIMITED.....DEFENDANT**

**R U L I N G**

**Introduction**

1. On diverse dates between 2013 and 2014, the plaintiffs and the defendant entered into agreements for sale of various maisonettes to the plaintiffs. The maisonettes were sold at the commencement of their construction on two parcels of land, namely, Land Reference Number 12825/190 (Original Land Reference Number 12825/44) and Land Reference Number 12825/189 (Original Land Reference Number 12825/50), situated within Kiambu County. The project was christened Runda Paradise Estate. Each maisonette was sold at Ksh. 20,000,000/-. The plaintiffs were required to pay a deposit of Ksh. 2,000,000 for each maisonette.
2. Balance of the purchase price was to be paid on or before the property completion date. The Property completion date was defined in the definitions and interpretation clause of the agreements for sale as follows:

**“Property Completion Date” means the date of issuance:**

- i. by the architect of a certificate of partial or sectoral practical completion of the Sale**

**property and the development as evidence in the architect's opinion of sufficient access to the sale property for the purpose of the purchaser being able to occupy the Sale property (the "architect's certificate"); and**

**ii. the occupation certificate by the municipal council of Kiambu in respect of the sale property (the "occupation certificate");**

**whichever is later.**

3. Subsequent to the execution of the contracts and payment of the deposits, disputes arose between the plaintiffs and the defendant on a myriad of issues, among them: the question as to whether the balance of purchase price was due and payable in the absence of certificate of practical or sectoral practical completion issued by the architect; the question as to whether the balance of purchase price was due and payable in the absence of certificate of occupation issued by the County Government of Kiambu; the question of road works on the stretch from Kiambu Road to Runda Paradise Estate; and the question of paving of internal roads within the Runda Paradise Estate.

4. The above disputes culminated in the initiation of arbitration proceedings by the plaintiffs. This in turn culminated in the appointment of Justice (Rtd) Joseph Nyamu, by the Chairman of the Chartered Institute of Arbitrators, to constitute an arbitral tribunal and resolve the dispute through arbitration.

5. Following the constitution of the arbitration tribunal, the plaintiffs, through a plaint dated 2/10/2017, and filed in court on 5/10/2017, instituted this suit, seeking the following measures of protection within the framework of **Section 7 of the Arbitration Act**

**a) A permanent Injunction to restrain the Defendant, its employees, agents or any other person or entity claiming under the Defendant from offering for sale, advertising, negotiating with any other person to purchase or alienate, lease out or in any other way from dealing with Maisonettes No. Maisonettes on L.R. No. 12825/190 (Original No. 12825/44) and L.R. No. 12825/189 (Original No. 12825/50) pending the hearing and determination of arbitration proceedings commenced by the Plaintiff.**

**b) A permanent Injunction do issue to restrain the Defendant herein from dealing in any manner prejudicial to the Plaintiffs' interests in respect of Houses No. 39, 58, 60, 64, 66, 69, 71, 72, 74, 75, 76, 90 and 106 pending the hearing and determination of the Arbitral proceedings**

**c) Costs of this suit;**

**d) Any other further relief deemed fit.**

### **Plaintiffs' application**

6. Together with the plaint, the plaintiffs filed a Notice of Motion dated 2/10/2017 seeking the following orders:

**a) THAT pending the hearing and determination of the suit, the Defendant, its employees, agents or any other person or entity claiming under the Defendant be restrained and/or stopped from offering for sale, advertising, negotiating with any other person to purchase or alienate, lease out or otherwise transacting with the Plaintiffs' Maisonettes Nos. 39,58,60,64,66,69,71,72,74,75,76 constructed on LR. No. 12825/189 (original number 12825/50).**

**b) THAT the Defendant be restrained from dealing in any manner prejudicial to the Plaintiffs' interest in respect of Houses No. 39,58,60,64,66,69,71,72,74,75,76,90 and 106 pending the hearing and determination of the Arbitral proceedings.**

7. The above Notice of Motion is one of the two applications under consideration in this Ruling.

### **Defendant's application**

8. The other Application under consideration in this Ruling is the defendant's Notice of Motion dated 1/11/2018 seeking the following orders:

**a) That an order does issue staying further any proceedings before the Arbitration Tribunal convened by Hon. (Rtd) Joseph Nyamu and touching on the parties herein pending hearing and determination of this Application Interpartes**

**b) That an order does issue staying any proceedings before the Arbitration Tribunal convened by Hon. (Rtd) Joseph Nyamu and touching on the parties herein pending hearing and determination of this suit.**

### **Plaintiff's Case**

9. In summary, the plaintiffs' application is premised on the grounds that the defendant issued completion notices and subsequently issued rescission notices, yet the project was not yet complete and the requisite certificates had not been issued. They contend that a dispute has arisen as to whether the development as contemplated in the agreement for sale is complete entitling the defendant to issue completion notices. They further contend that the parties having failed to resolve the dispute through negotiations, they have initiated arbitration proceedings. They add that the defendant has declined to submit to the Arbitration Tribunal yet that is the dispute resolution mechanism which the parties agreed on. Lastly, they contend that the defendant is keen to dispose the suit properties to new purchasers. In this regard, they contend that on 14/9/2017, the defendant advertised for sale of the suit properties in the Daily Nation Newspaper. It is for this reason that they seek interim protection measures. Pending resolution of the dispute through arbitration.

### **Defendant's Case**

10. The defendants concede that indeed the plaintiffs instituted arbitration proceedings and the defendant was notified on 4/10/2017. They are opposed to the arbitration proceedings on the ground that the subject matter of the arbitration proceedings relates, *inter-alia*, to the rescission of the material agreements and the removal of the various caveats registered by the plaintiffs against the various maisonettes owned by the defendant. They contend that these are land disputes and the only adjudication body with exclusive jurisdiction to hear and determine those disputes is the Environment and Land Court (the ELC). Secondly, they contend that the body with jurisdiction to deal with the issue of removal of caveats is the Environment and Land Court. For this reason, they contend that the arbitral tribunal does not have jurisdiction to entertain the dispute before it. For the above reasons, they urge the court to dismiss the plaintiffs' application and grant the defendant's application.

### **Determination**

11. Before I pronounce myself on the key issues in the present application, I would like to observe that the issues in the two applications revolve around **Sections 6 and 7 of the Arbitration Act and Section 73 and Section 101** of the Land Registration Act. The Arbitration Act is a pre-2010 statute that pre-existed our current court architecture. **The Constitution of Kenya 2010** redesigned and reconstructed Kenya's judiciary. Suffice to say that under **Section 33** of the Sixth Schedule to the **Constitution of Kenya 2010**, the Environment and Land Court is the constitutional and legal successor institution to the pre-2010 high court of Kenya in all disputes relating to the environment and the use and occupation and title to land in Kenya. On this account, the "high court" which is contemplated under the Arbitration Act in relation to the above disputes is the Environment and Land Court.

12. The two applications raise two key issues for determination. The first issue is whether the arbitral tribunal as currently constituted has jurisdiction to deal with the dispute between the parties herein. The

second issue is whether the plaintiff has laid a basis for interim protection measures within the framework of **Section 7** of the **Arbitration Act**.

13. The Constitution of Kenya 2010 at Article 159 recognizes arbitration as one of the alternative forms of dispute resolution. Secondly, promotion of arbitration is one of the principles that guide Kenyan courts when exercising judicial authority. Thirdly, under Article 2(5) of the Constitution of Kenya 2010, the general rules of international law form part of the law of Kenya. Fourthly, under Article 2(6) of the Constitution of Kenya 2010, any treaty or convention ratified by Kenya forms part of the law of Kenya.

14. Kenya ratified the United Nations Commission on International Trade Law (UNCITRAL Model Law) which obligates courts to uphold the principle of party autonomy in resolving commercial disputes. The essence of the principle of party autonomy is that, where parties to a contract have consensually and in unequivocal terms provided for the forum through which to resolve their disputes, the courts are obligated to give effect to that choice of forum of dispute resolution. The Court of Appeal in **Nyutu Agrovet Ltd Vs Airtel Networks Limited (2015) eKLR** reaffirmed the supremacy of the principle of party autonomy in the resolution of commercial disputes in the following words:-

**“Our Section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to recognize this autonomy, we would become a pariah state and would be isolated internationally.”**

15. The agreements for sale in relation to all the maisonettes are identical. The arbitration agreement in the said agreements is contained Clauses 8.19 and 8.20 which provide as follows:

**8.19 Any dispute, controversy or claim arising out of or relating to this Agreement or a termination hereof (including without prejudice to the generality of the foregoing, whether as to its interpretation, application or implementation), shall be resolved by way of consultation held in good faith between the parties. Such consultation shall begin immediately after one party has delivered to the other written request for such consultation. If within fifteen (15) Business Days following the date on which such notice is given the dispute cannot be resolved amicably, the dispute, controversy or claim shall provide that the such dispute, controversy or claim is not required to be adjudicated by the Environment and Land Court pursuant to the Land Laws) be submitted to arbitration in accordance with clause 8.20.**

**8.20 Should any dispute, controversy or claim as is referred to in clause 8.19 arise between the parties and the consultation process referred to in clause 8.19 arise between the parties and consultation process referred to in 8.19 shall have not resolved such dispute, the dispute shall upon application by any party be referred for arbitration to a person acceptable to the parties or if the parties cannot agree on the appointment of such person within a period of thirty(30 days from the date of such application, then the dispute shall be referred to arbitration by a single arbitrator to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch upon the written request of either party. The appointment of the arbitrator shall be final and binding on the parties. The arbitration shall take place in Nairobi and the language of arbitration shall be English. The arbitration Act, 1995. The decision of the arbitrator shall be final and binding on the parties and may be made an order of a court of competent jurisdiction. Notwithstanding the foregoing, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from a court in Kenya of competent jurisdiction pending the final decision of award of the arbitrator.**

16. The contention of the defendant is that, because the plaintiffs lodged caveats against titles to the suit properties, the jurisdiction of the arbitral tribunal has been ousted and the only adjudicative organ with jurisdiction to deal with the disputes between the parties to this suit is the Environment and Land Court. It

contends that this position is informed by the view that under **Section 73** as read together with **Section 101 of the Land Registration Act**, the Environment and Land Court has the sole statutory mandate to order removal of a caveat registered against a title.

17. I have carefully examined the materials presented to the court in this matter. It is not disputed that arbitration proceedings were duly initiated and the arbitral tribunal constituted prior to the filing of this suit. The plaintiffs filed this suit to seek interim protective measures pending conclusion of the arbitration proceedings.

18. The key disputes arising under the material agreements for sale include: (i) the question as to whether either of the parties in each contract is in breach of the contract; (ii) the question as to whether the vendor was entitled to issue completion notice and the consequential rescission notices; (iii) the question as to whether the respective contracts were properly terminated by the vendor through rescission; and (iv) the question as to whether the plaintiffs were properly entitled to lodge caveats against the respective titles;

19. I have carefully interrogated each of the above limbs of the dispute between the parties to this suit. I have similarly interrogated our constitutional and legislative framework on the jurisdiction of the Environment and Land Court. There is no legal framework which divests arbitral tribunals of jurisdiction in these disputes. Removal of the existing caveats in my view is an enforcement process. Once the arbitral tribunal makes a finding, the issue of removal of the caveats will be dealt with by the Environment and Land Court as part of the enforcement motion by parties to the arbitration proceedings. The framework in **Sections 73 and 101 of the Land Registration Act** does not in any way divest arbitration tribunals of jurisdiction to deal with disputes leading to the lodging of caveats. The arbitration tribunals properly have jurisdiction to pronounce themselves on the propriety of a caveat lodged pursuant to a sale contract. The Environment and Land Court would come in, if necessary, to order removal of the caveats as part of the arbitration award enforcement procedure.

20. My finding on the first issue therefore is that, the arbitral tribunal consisting of Hon. Justice (Rtd) Joseph Nyamu is properly seized of jurisdiction to deal with the dispute arising from the contracts subject matter of this suit, including the dispute relating to the propriety or otherwise of the caveats lodged by the plaintiffs herein.

21. I now turn to the second issue, which is the question as to whether the plaintiffs have laid a basis for grant of interim measures of protection within the framework of **Section 7 of the Arbitration Act**.

22. I must caution myself against delving deep into the merits of the parties' respective cases in considering this issue. This is because, there is need to avoid exposing any party to prejudice when ventilating their respective cases before the arbitral tribunal.

23. The plaintiffs have presented to the court rescission notices and subsequent sale advertisement in the Daily Nation Newspaper. The maisonettes are the subject matter of the arbitral proceedings. If they are sold to other purchasers and the arbitral tribunal thereafter makes an award in favour of the plaintiffs, the proceedings and the award will be rendered nugatory. For this reason, I am satisfied that there is need to preserve the subject matter of the arbitral proceedings.

24. The upshot of this ruling is that the plaintiff's Notice of Motion dated 2/10/2017 is allowed in terms of prayer 4. The defendant's Notice of Motion dated 1/11/2017 is dismissed for lack of merit. Because of the background of this dispute, I direct that each party shall bear own costs of the two applications.

25. A mention date will be fixed for the purpose of confirming the award of the arbitral tribunal and marking this suit appropriately.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF FEBRUARY 2018.**

**B M EBOSO**

## **JUDGE**

### **In the presence of:-**

M/s Thamara holding brief for Asega Advocates for the Plaintiff

Mr. Njenga for the Defendant

Halima - Court clerk