Kamau v Joyroom Heights Limited & 2 others (Environment & Land Case E245 of 2023) [2024] KEELC 478 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 478 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E245 OF 2023

EK WABWOTO, J

JANUARY 31, 2024

BETWEEN

NJERI LAUREEN VIRGINIA KAMAU ..... PLAINTIFF

AND

JOYROOM HEIGHTS LIMITED ..... 1ST DEFENDANT

TEVODY HEIGHTS LIMITED ..... 2ND DEFENDANT

LUCY RINGERA ..... 3RD DEFENDANT

RULING

1. This ruling is in respect to 2nd and 3rd the Defendants' preliminary objection 15th August 2023 seeking that the entire suit be struck out with costs or alternatively be stayed for reference to arbitration. The objection was raised under the following grounds:-

    a. The suit offends the provision of Clause 9 of the Project Development Agreement dated 15th August 2018 between the Plaintiff and the 1st Defendant, which expressly provides for Arbitration as the parties preferred method of dispute resolution.

    b. The said Clause in the agreement, which was mutually negotiated and signed by the parties, ousts the jurisdiction of this court to entertain the Plaintiff's suit herein and the matter ought to be referred to Arbitration.

2. The Plaintiff filed grounds of opposition dated 22nd September 2023 which included the following:-

    a. The Defendants have failed to comply with the procedural requirements of Section 6 of the *Arbitration Act* and cannot therefore preclude the Court from exercising jurisdiction in the matter.

b. The validity of the agreement dated 15th August 2018 is contested, am issue of fact which cannot be canvassed by way of a preliminary objection.

c. The Preliminary Objection is incompetent and an abuse of the court process and ought to be dismissed with costs.

3. The preliminary objection was canvassed by way of written submissions pursuant to the directions issued by the court.

4. The 2nd and 3rd Defendants filed written submissions dated 18th October 2023 and submitted that their application did fall on a point of law and the parameters outlined in the landmark *Mukisa Biscuits Case*. They further relied on the case of *Kenneth Kinoti Muriuki & 5 Others v Dinara Developers Limited & Another* (2020) eKLR to submit that parties are bound by the terms of contracts and therefore the Court cannot re-write a contract.

5. The 1st Defendant filed written submissions dated 19th October 2023, in which it was argued that the first issue that this court ought to determine is whether the application has been brought promptly and not by any other step outside Section 6 of the *Arbitration Act.* It was submitted that the 2nd and 3rd Defendants ought to have filed the objection immediately after entering appearance and not one month later. It was argued that the project development agreement was marred by fraud and misrepresentation therefore was void and the arbitration clause within it could not stand. The 1st Defendant urged the court to dismiss the preliminarily objection.

6. In her submissions dated 25th October 2023, the Plaintiff equally opposed the application and raised the following issues for determination:

i. Whether the 2nd and 3rd Defendant have satisfied the grounds to refer the matter to arbitration?

ii. Whether the arbitration clause is valid?

iii. Whether the arbitration clause is inoperative due to the presence of a non-party to the dispute?

iv. Whether the notice of preliminary objection application complies with the procedural requirements of Section 6 of the Arbitration Act?

7. Relying on the cases of *Niazsons (K) Ltd v China Road Bridge* [2001] eKLR and *Techno service Limited v Nokia Corporation & 3 others* [2021] eKLR, it was argued that the 3rd Defendant lacked contractual capacity and therefore the agreement and the arbitration clause would be void ab-initio and incapable of performance. It was further argued that under Rule 2 of the *Arbitration Rules*, 1997, it was stipulated that applications under Section 6 & 7 of the *Arbitration Act* shall be brought via summons and not as in this instance where the Defendants had filed a notice of preliminary objection.

8. I have considered the preliminary objection, the respective written submissions and the authorities cited. The sole issue for determination is whether the preliminary objection is merited.

9. It is clear that a Preliminary Objection must be raised on a point of law.

The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR highlighted the principle when it stated:

> "...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the 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..."

10. In respect to the contention raised as to whether the preliminary objection is not the proper form to seek stay of proceedings, Article 159 2(d) of the *Constitution* as read with Section 1A, 1B and 3A of the *Civil Procedure Act* allows for the Court to exercise its overriding objective and paramount duty to ensure access to justice for all in a just and expeditious manner.

11. Section 6 of the *Arbitration Act* stipulates as follows:

> "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: -
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> (a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or
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> (b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
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> Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined. If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings"

12. This Court has considered that although the use of the word "shall" in Section 6 places a mandatory action for reference to arbitration and consequent stay of proceedings, this is pegged upon a party's swift action to present the given application. In the case *Mt Kenya University v Step Up Holding (K) Ltd* [2018] eKLR , the Court of Appeal held that:

> "….. All that an applicant for a stay of proceedings under section 6 (1) of the *Arbitration Act* of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:
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> (a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;
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> (b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and
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> (c) Whether the suit intended concerned a matter agreed to be referred to arbitration…."

13. It was argued that the reference to arbitration was made a month after entering appearance. A perusal of the Court record confirms that the Defendants Memorandum of Appearance was dated 25th July 2023 and filed on 8th August 2023 by Were and Oonge Advocates. Exactly one week later on 15th August 2023 a Notice of Preliminary Objection was filed. On the off chance that an argument is raised that one week would not suffice as prompt, the court record confirms that the Defendants did not acknowledge the claim against them before filing the objection.

14. The Plaintiff also raised an issue that the agreement and arbitration clause were void and inoperable. Section 10 of the *Arbitration Act* emphasizes that no court shall intervene in matters governed by this

Act, except in circumstances outlined by the *Act*. Additionally, the Court is cognizant of the key tenets of international arbitration such as doctrine of separability and Kompetenz-Kompetenz.

15. The above mentioned principles complementarily lay out that arbitration clauses would survive a void agreement and the tribunal has the capacity and competence to determine its own jurisdiction. These are mirrored domestically in Sections 4 and 17 of the *Arbitration Act*. In *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax), the Court determined:

> " ..... Undoubtedly, Kenya's arbitration legislation did not depart from the Uncitral Model Law in any significant way. The laws reflected most of the Uncitral Model Law principles, including finality of arbitral awards, limited court intervention or interference, and principles such as separability and kompetenz-kompetenz (the ability of the arbitral tribunal to rule on the question of whether it has jurisdiction before intervention by national courts). Kenyan arbitration law was not only consistent with but also in full harmony with, prevailing international best practices in the field. Court intrusion in arbitration proceedings was limited only to circumstances expressly permitted by the *Arbitration Act*.....
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> ..... The objective of arbitration was to obtain the fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense. The second objective ought to have been the promotion of party autonomy (arbitration being a consensual process in that the primary source of the arbitrator's jurisdiction was the arbitration agreement between the parties). The third objective was balanced powers for the courts: court support for the arbitral process was essential, the price being supervisory powers for the court to ensure due process. True to the principle of party autonomy, the tribunal's statutory powers could only be excluded or modified by the parties in their arbitration agreement. They were also subject to the tribunal's statutory duty to conduct the proceedings in a fair and impartial manner...."

16. In the upshot, I find that the reference was raised in accordance to Section 6 of the *Arbitration Act*. At this juncture, the Court must down its tools and allow parties to exhaust remedies availed by the Project Development Agreement dated 15th August 2018. The Court hereby finds that the preliminary objection dated 15th August 2023 is merited. The suit is struck out and the matter referred to arbitration. Parties are directed to proceed with the appointment of an arbitrator with 90 days herein. Each party shall bear own costs of these proceedings.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31st DAY OF JANUARY 2024

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Githiri for the Plaintiff.

Mr. Omuya for the 1st Defendant

Mr. Ntuati h/b for Mr. Muruingi the 2nd Defendant and for the 3rd Defendant.

Court Assistant; Caroline Nafuna.