



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 1131 OF 2016**

**MARTIN NJUGUNA NGUGI.....PLAINTIFF**

**VERSUS**

**AHMED NOOR SHEIKH.....1ST DEFENDANT**

**SHEIKH DEVELOPMENT MANAGEMENT**

**COMPANY LIMITED.....2ND DEFENDANT**

**R U L I N G**

1. On 16/9/2016, the plaintiff brought this suit against the two defendants, Ahmed Noor Sheikh and Sheikh Development Management Company Limited. He contends that on 2/9/2014 he entered into an agreement pursuant to which the 1st defendant agreed to sell to him Apartment Number C1 Block C erected on Land Reference Number 1/509 at a price of Ksh. 5,500,000. He further contends that he has paid a substantial portion of the purchase price, leaving a balance of Kshs 1,850,000. He seeks, among other prayers; (i) an order of specific performance; and (ii) *mesne* profits.

2. On 1/11/2016, the two defendants brought a Notice of Motion dated 31/10/2016 seeking an order referring this matter to mediation and/or arbitration pursuant to the arbitration agreement contained in Clause 19 of the material agreement for sale dated 2/9/2014. They also sought a stay of the proceedings herein. The application is supported by an affidavit sworn by the 1st defendant on 31/10/2016. Annexed to the affidavit is an agreement for sale dated 2/9/2014 between Ahmed Noor Sheikh and Martin Njuguna Ngugi.

3. The plaintiff opposes the Notice of Motion through Grounds of Opposition dated 16/1/2017 and filed on 20/1/2017, in which he contends that: (i) the application is misconceived and bad in law; (ii) an arbitration clause does not act as an ouster of this court's jurisdiction; (iii) the applicants ought to have made the application prior to or at the time they entered appearance in the matter as provided for under Section 6(i) of the Arbitration Act; (iv) the high court has unlimited original jurisdiction in all matters criminal and civil; and (v) the application is frivolous, vexatious and an abuse of the process of the court.

4. The application was canvassed through written submissions. The defendants/applicants filed written submissions dated 12/5/2017 while the plaintiff/respondent filed written submissions dated 8/6/2017.

5. I have considered the application, the plaintiff's response, and parties' respective submissions. I have also considered the relevant legal framework and the prevailing jurisprudential principles on the key issue. The key issue falling for determination in the application is whether the applicants have satisfied the criteria for stay of court proceedings and referral of a dispute to arbitration. The legal framework on referral of disputes to arbitration is contained in **Section 6 of the Arbitration Act** which provides as follows:

**(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 a fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.**

**(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.**

**(3) 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 bringing of legal proceedings in respect of any matter of no effect in relation to those proceedings**

6. The arbitration agreement in the present suit is contained in an agreement for sale dated 2/9/2014 between **Ahmed Noor Sheikh** on one part and **Martin Njuguna Ngugi** on the other part. It is to be noted that the 2nd defendant against whom the arbitration clause is invoked is not a party to the arbitration agreement. For avoidance of doubt, the arbitration agreement provides thus:

**19.1 Should any dispute arise between the parties with regard to the interpretation, rights, obligations and/or implementation of any one or more of the provisions of this Agreement, the parties shall in the first instance attempt to resolve such dispute by amicable negotiation.**

**19.2 Should such negotiations fail to achieve a resolution Within fifteen (15) days, either party may declare a Dispute by written notification to the other, whereupon such dispute shall be referred to arbitration under the following terms:**

**19.2.1 Such arbitration shall be resolved in accordance with the provisions of the Kenyan Arbitration Act 1995 (as amended from time to time);**

**19.2.2 the tribunal shall consist of one arbitrator to be agreed upon between the Parties which such arbitrator shall be appointed by the Chairman for the time being of Chartered Institute of Arbitrators of Kenya upon the application of either party;**

**19.2.3 the place and seat of arbitration shall be Nairobi and the language of arbitration shall be English;**

**19.2.4 the award of the arbitration tribunal shall be final and binding upon the parties to the extent permitted by law and either party may apply to a court of competent jurisdiction for enforcement of such award; and**

**19.2.5 Notwithstanding the above provisions of this clause, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from any court of competent jurisdiction pending the final decision or award of the arbitrator.**

7. Without further consideration of the parties', respective positions on the broad issue in the present application, I do not think that the legal framework in the Arbitration Act, and indeed our prevailing jurisprudence, contemplates a scenario where a non-party to an arbitration agreement is to be compelled to submit to arbitration as a party to the arbitral proceedings. An arbitration agreement binds parties to the agreement, not non-parties. I would have exhaustively considered all the other aspects of the parties' respective submissions had the applicants demonstrated that the parties to this suit are parties to the arbitration agreement and are bound by it. As stated, the 2nd defendant is not a party to the arbitration agreement and cannot be properly compelled to submit to the jurisdiction of an arbitral tribunal under the arbitration agreement.. A referral order would, in the circumstances, not be available to compel the 2nd defendant to submit to an arbitral tribunal.

8. In light of the foregoing, the Notice of Motion dated 31/10/2013 is dismissed with costs to the plaintiff.

9. Lastly, I have noted that the purchase price of the suit property was Ksh 5,500,000 in 2014. I doubt that the value of the suit property has since risen beyond Ksh 20,000,000 which is the pecuniary jurisdiction of the chief magistrate court at Milimani. Consequently, I hereby transfer this suit to the chief magistrate court at Milimani Commercial Courts for hearing and disposal.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF MAY 2018.**

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**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Mwihuri holding brief for Mr Chege Advocate for the Plaintiff

Mr Conge holding brief for Mr Ochieng Advocate for the Defendants

Ms Kajuju - Court clerk