



REPUBLIC OF KENYA



**Wagaki v Abdi & another (Environment & Land Case E064 of 2023)
[2024] KEELC 306 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 306 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E064 OF 2023
NA MATHEKA, J
JANUARY 31, 2024**

BETWEEN

NJERI NJAU WAGAKI PLAINTIFF

AND

ABDIZACK OSMAN MOHAMED ABDI 1ST DEFENDANT

THE REGISTRAR OF LANDS, MOMBASA 2ND DEFENDANT

RULING

1. The application is dated 4th October 2023 and is brought under Section 6 of the [Arbitration Act](#) 1995, Rule 2 of the [Arbitration Rules, 1997](#) Section 3A of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya seeking the following orders;
 1. That there be a stay of all proceedings herein pending arbitration.
 2. That the dispute between the parties be referred to arbitration.
 3. That the costs of this application be awarded to the 1st Defendant /Applicant against the Plaintiff/ Respondent.
2. It is based on grounds that the parties hereto on 31st August 2020 entered into a Joint Venture Agreement whereby the Plaintiff, being the registered owner of Swahili House erected Land Reference No Mombasa/Block XVI/493 (suit premises) gave out her land to the 1st Defendant, being the Developer for purposes of constructing modern residential premises and the consideration thereof being that the Plaintiff would be entitled to 3 Apartments of 2 Bedroom and Kshs 1,000,000 as per the specifications and conditions contained in the said Agreement. Clause 5 of the Agreement stipulated that any dispute or difference arising therefrom shall be referred to Arbitration. That this suit has been instituted by the Plaintiff in violation of the Agreement and prematurely without the dispute being referred to arbitration as stipulated by clause 5 thereof. That by virtue of the Agreement the parties



hereto have agreed and are bound to proceed to arbitration on matters in dispute arising therefrom. That Section 6 of the *Arbitration Act* 1995 (hereinafter called "the Act") empowers the Court before which proceedings are brought in a matter which is subject to an arbitration agreement, to stay the proceedings and refer the parties to arbitration. Section 6 (I) of the Act further provides that the Court shall grant a stay of legal proceedings subject to the exceptions set out therein. None of those exceptions apply to this suit. That the Plaintiff ought to exhaust the avenues agreed upon by the parties before approaching this Court. That this suit offends the doctrine of exhaustion and as such, this matter ought to be referred to arbitration as the avenue agreed by the parties in case of any dispute arising out of the Agreement. That the Defendant/Applicant is ready, willing and able to proceed to arbitration on any dispute arising from the parties as stipulated in the Agreement.

3. By an application dated 23rd June 2023 the Plaintiff filed an application for injunction against the defendants and a caution to be placed on the property because she is the lawful beneficial owner and had never transferred the suit property to the 1st Defendant and the agreement was only for the construction.
4. In response to the Plaintiff's Notice of Motion Application dated 23rd June 2023 the 1st Defendant stated that this Court lacks jurisdiction and cannot proceed to hear this application pending the determination of the stay of proceedings application made by the 1st Defendant/Respondent in respect to referring this matter to arbitration. That without prejudice to issue of jurisdiction they entered into a Joint Venture Agreement with the Plaintiff herein on 31st August 2020 for the development of Apartment units on the Property. That as per the terms of the Joint Venture Agreement the Plaintiff agreed to transfer the Property to the developer as soon as construction of the Apartment units commenced. That he is the legal and registered owner of Mombasa/Block/XVI/493 through a legal transfer executed on the 5th January 2021 (Annexed herewith and Produced as exhibit is the Transfer instrument dated January 2021 marked as 'AOMA-3'). That pursuant to the said Agreement, he embarked on the construction on the land as agreed and completed the same sometimes in the year 2021 whereon he erected a Seven Storey Building consisting of 14 Flats of Two Bedroom. That all the payments were made to the Plaintiff in terms of the Joint Venture Investment Agreement. The figure of Kshs 8,000,000/= contained in the Transfer Instrument was the approximate value of the land and was for purpose of stamp duty payment only. That the Plaintiff herein has been occupying Flats No I, 2, & 4 erected on Mombasa/Block/XV1/493 since September 2021.
5. This court has considered the application and submissions therein. In determining this issues, Section 6(1) of the *Arbitration Act* No 4 of 1995 is key. It provides that;
 - “(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 files any pleadings or takes any other step in the proceedings, 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 in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”
6. The provision is mandatory but has a limitation. It is expressly provided that if the arbitration agreement is “null and void, in operative or incapable of being performed,” and where there is no dispute between the parties with regard to matters agreed to be referred to arbitration. Where a party



alleges these matters and they are proved, the court will not stay the proceedings and refer the matter to arbitration.

The arbitration clause in the said joint venture agreement reads inter alia as follows;

Governing Law and Dispute Resolution

- 6.1 The Agreement shall be governed by and construed in accordance with the laws of the Republic of Kenya.
 - 6.2 Any dispute arising out of or in connection with this Agreement shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty (30) days of the notice. The dispute shall be referred to the arbitration and the final decision of a person to be mutually agreed upon between the parties. Failing an agreement to concur in the appointment of arbitrator, the Arbitrator shall be appointed by the Chairman of the Kenya Branch of the Chartered Institute of Arbitrators on the request of either party.
7. The clear intentions of the parties was that if any dispute arises they oust the jurisdiction of the court and have preference to have the dispute settled through arbitration. This in line with Judicial Authority, under Article 159(2)(c) of the Constitution which states;
- “In exercising Judicial authority courts and Tribunals shall be guided by the following principles –
- “alternative forms of dispute resolution including reconciliation, mediation, arbitration ----- shall be promoted.”
8. The court will therefore promote other forms of dispute resolution where the circumstances of the case so allows and the parties have agreed to an alternative mode of dispute resolution other than the court.
 9. The tenor and import of Article 159(2) (c) of the Constitution as read together with Section 6(1) of the Arbitration Act is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement. Secondly, where a party elects to come to court and the other party to the arbitration agreement seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance.
 10. The 1st defendant after filing memorandum of appearance duly filed the application seeking to stay the proceeding pending Arbitration. Since the 1st defendant filed the application within the time frame set out in Section 6(1) of the Act, the court should proceed to consider it.
 11. In the case of Blue Limited v Jaribu Credit Traders Limited Nairobi (Milimani) HCCS No 157 of 2008 where Kimaru, J stated inter alia as follows:

“It is now settled law that where parties have agreed to resolve any issue arising out of a commercial agreement, the courts are obliged to give effect to the said agreement of the parties by staying proceedings and referring the dispute for resolution by arbitration. Before staying proceedings, the court has to be satisfied that there is a valid arbitration clause in the agreement capable of performance. At the stage of the application for stay of proceedings, the court is not called upon to determine the merits or otherwise of the plaintiff’s suit nor the counterclaim filed by the defendant. The court is further not required at this stage of proceedings to consider the validity, legality or otherwise of the agreement that was



entered between the plaintiff and the defendant. The court is only required to consider whether there was a valid arbitration clause in the agreement capable of being enforced by the court...That principle recognises the fact that where there is an arbitration clause in an agreement, such clause is considered as a separate and severable agreement between the parties who have agreed to resolve any dispute arising from the agreement by arbitration. A party to an agreement cannot raise issues relating to the validity or otherwise of the agreement to defeat the arbitration clause in the agreement. The issue as to whether the agreement which was entered between the plaintiff and the defendant is valid or not is an issue which can only be determined during the hearing of the dispute on arbitration. The court's concern is whether the arbitration clause in the agreement is valid and therefore capable of being performed as envisaged by section 6(1)(a) of the Arbitration Act, 1995. Having considered the agreement, the court holds that the arbitration clause is valid and is capable of being performed...Section 7(1) of the Arbitration Act, 1995 grants to the court jurisdiction to grant interim measure of protection where it is established that there exists a valid and enforceable arbitration agreement.”

12. The rationale for respecting the parties' agreement was explained in the case of Eunice Soko Mlagui v Suresh Parmar & 4 others (2017) eKLR, where it was held that;

“Section 6 of the Arbitration Act is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitration where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution.”

13. Guided by the law, facts and the authorities cited above, I find that the 1st defendant's application dated 4th October 2023 is merited and I grant the following orders;

1. That there be a stay of all proceedings herein pending arbitration.
2. That the dispute between the parties be referred to arbitration.
3. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31ST DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

