REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 354 OF 2017

CAROL NASIMIYU MYENDO.....PLAINTIFF

VERSUS

BAMBOO DEVELOPMENT LIMITED.....DEFENDANT

RULING

1. On 4/9/2017 the defendant, Bamboo Development Limited, brought a notice of motion dated 29/8/2017 in which it sought an order of stay of proceedings herein pending reference of this matter to arbitration. The application was supported by an affidavit sworn on 29/8/2017 by Benjamin Kiptanui. The defendant contended that the dispute herein arose from an agreement for sale dated 30/4/2012, executed between the plaintiff and the defendant, for sale/purchase of Apartment Number A8 which was to be developed on Land Reference Number 2/244. The defendant further contended that clause O of the said agreement for sale contained an arbitration agreement stipulating that all claims and disputes arising under the agreement would be referred to arbitration in accordance with the provisions of the Arbitration Act, No. 4 of 1995 as amended from time to time. The defendant added that a dispute had arisen between the parties herein as to their respective obligations under the agreement, which dispute should be determined within the framework of the arbitration agreement. It contended that the plaintiff initiated this suit in complete disregard of clause 0 of the agreement for sale which obligated her to refer the dispute to arbitration.

2. The plaintiff opposed the application through a replying affidavit sworn on 15/11/2017. She deposed that upon being served with a demand letter, the defendant through a letter dated 20/1/2017 admitted, inter alia, that it had received full purchase price from the plaintiff; the apartment was encumbered with a charge in favour of the Co-operative Bank Limited; the defendant had taken long to complete the transaction; and the defendant had not registered the plaintiff's lease despite having received the full purchase price. The plaintiff contended further that in view of the said admissions, there was no dispute capable of being referred to arbitration; all that was there was the plaintiff's right to have her lease registered as per the agreement.

3. Secondly, the plaintiff opposed the application on the ground that Section 6(1) of the Arbitration Act does not permit an application for stay of proceedings after appearance has been entered, contending that the defendant lost the right to make the application the day it entered appearance.

4. The application was argued in open court on 23/7/2018. Mr Kiche for the applicant submitted that parties to this suit have an arbitration agreement which binds them to refer all disputes to arbitration. He added that Article 159 of the Constitution and Section 20 of the Environment and Land Court Act enjoin this court to promote alternative dispute resolution mechanisms. Mr Kiche further submitted that under Section 6 of the Arbitration Act, the plaintiff was estopped from filing the present suit. On the objection based on the ground that the present application was brought long after the defendant had entered appearance, counsel urged the court to be guided by Article 159(2) (c) of the Constitution and treat that as a procedural technicality. Lastly, he argued that Section 6(1) of the Arbitration Act is not couched in mandatory terms. Lastly, counsel submitted that there is a dispute to be determined by the arbitrator.

5. In opposition to the applicant, Ms Kemigisha, counsel for the defendant, submitted that the application was fatally defective because it was filed outside the mandatory timelines stipulated under Section 6(1) of the Arbitration Act. She argued that the application ought to have been presented prior to or on the day of entering appearance. Secondly, Ms Kemigisha submitted that there is no dispute between the parties capable of being referred to arbitration, contending that the defendant having made an admission through the letter dated 20/1/2017, what remains is the enforcement of the contract.

6. I have considered the application and the reply thereto. I have also considered the applicable constitutional and statutory frameworks and the relevant jurisprudence on the key questions in the application. Two questions fall for determination in this application. The first question is whether the application is fatally defective by dint of the fact that it was brought long after the defendant had entered appearance in the suit. The second question is whether there is a dispute capable of being referred to arbitration. I will determine the two questions in the order in which they are framed. Before I pronounce myself on the two questions, I will make a few general observations about the place of arbitration as an alternative dispute resolution (ADR) mechanism in Kenya's legal system.

7. 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.

8. 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 dispute resolution forum. 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."***

9. Guided by the above legal philosophy, I proceed to determine the two issues in this application. The framework on stay of court proceedings and 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 proceeding 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.***
>
> ***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 the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.***

10. Contrary to the contention by Mr Kiche that Section 6(1) is not couched in mandatory terms, Parliament used the word "**shall**" in Section 6(1) of the Act. My understanding of the legal framework in Section (1) of the Act is that a party seeking to stay court proceedings and obtain an order referring the dispute to arbitration is required to bring the application not later than the time when the party files a memorandum of appearance.

11. Indeed, Section 6(1) of the Arbitration Act has been a subject of interpretation by Kenyan courts and the prevailing jurisprudence is that a party who does not comply with the timelines set out in Section 6(1) of the Arbitration Act loses the right to seek stay and referral orders. The cases where this interpretation has been affirmed include: **Charles Njogu Lofty v Bedouim Enterprises Limited CA No 253 of 2003; Niaxons (K) Ltd v China Road & Bridges Corporation Kenya (2001) KLR 12** and **Eunice Soka Mlagui v Suresh Parmer & 4 others (2017) eKLR.**

12. The defendant in this suit filed a memorandum of appearance on 27/6/2017. The present application was filed on 4/9/2017, a period of 68 days later. In light of the mandatory requirements of Section 6(1) of the Arbitration Act, it follows that the present application was brought 68 days after closure of the window for bringing the application. The orders of stay and referral are therefore unavailable at this stage of the proceedings

13. The second issue is whether there is a dispute to be resolved through arbitration. The plaintiff in this suit seeks the following orders:

> ***a) An order directed at the Defendant to discharge the encumbrance over Apartment Number A8 Block A erected on Land Reference Number 2/716 (formally known as Land Reference Number 2/44) within 30 days of the issuing of the order;***
>
> ***b) An order of specific performance do issue directed to the defendant to execute and register the plaintiff's lease of apartment number A8 block A erected on Land Reference Number 2/716 (formally known as Land Reference Number 2/44) within 30 days of discharging the encumbrance;***
>
> ***c) An order that the Defendant do hand over all Title documents pertaining to apartment Number A8Block A erected on Land Reference Number 2/716 (formally known as Land Reference Number 2/44) to the plaintiff free of any encumbrance;***
>
> ***d) General damages for breach of contract;***
>
> ***e) Costs and interest of the suit***
>
> ***f) Any other order this honourable court may deem fit and just to grant***

14. I have examined the materials placed before the court by the parties. None discloses evidence of any dispute as to the parties obligations and rights under the agreement for sale. The defendant has not raised any issue against the plaintiff. Indeed, in its advocates' letter dated

20/1/2017 which was a response to the plaintiff's demand letter dated 12/1/2017, the defendant's advocates wrote thus:

> ***Our Ref: 3/007/103***
>
> ***Your Ref: WG/2016/401/GL 3757***
>
> ***Date: 20th January, 2017***
>
> ***Waweru Gatonye Advocates***
>
> ***Timau Plaza – 4th floor***
>
> ***Argwings Kodhek – Timau Rd. Junction***
>
> ***P.O. Box 55207-00200***
>
> ***NAIROBI.***
>
> ***Attn: Mr. Charles W. Gatonye***
>
> ***RE: SALE AND PURCHASE OF APARTMENT NUMBER A BLOCK A ERECTED ON LR. NO 2/716 BETWEEN BAMBOO DEVELOPMENT LIMITED AND CAROL NASIMIYU MYEDO.***
>
> ***We acknowledge receipt of your letter dated 12th January, 2017 in respect to the above purchase the contents of which we have taken instructions.***
>
> ***We regret the delay in registration of your client's Lease despite the full purchase price having been paid. In terms of the agreement for sale, part of the purchase price was applied towards the construction of the apartment and the balance remitted to Co-operative Bank Limited who have charge over the main title.***
>
> ***We confirm that several apartments have been partially discharged and registered and our client is in the process of reconciling the accounts with the Bank to facilitate release of the Partial Discharge of Charge in respect to your client's apartment.***
>
> ***Our client appreciates your client's patience and is working towards ensuring that the Partial Discharge of Charge is released soonest possible and the Lease registered.***
>
> ***We note to keep you updated as soon as our client updates us on the process.***
>
> ***Yours faithfully,***
>
> ***TripleOKLaw LLP Advocates***
>
> ***J. Kipkemoi Kibet***
>
> ***jkibet@tripleoklaw.com***
>
> ***CC. Client***

15. Among the mandatory statutory requirements to be satisfied before a case is stayed and referred to arbitration is that there must be a dispute between the parties with regard to the matters agreed to be referred to arbitration. This requirement is contained in Section 6(1) (b) which is reproduced above. In **UAP Provincial Insurance Company Limited v Michael John Beckett (2018)eKLR**, the Court of Appeal made the following pronouncement in relation to Section 6(1)(b) of the Arbitration Act.

> ***"17. It is clear from this provision that the enquiry that the court undertakes and is required to undertake under Section 6(1)(b) of the Arbitration Act is to ascertain whether there is a dispute between the parties, and if so, whether such dispute is with regard to matters agreed to be referred to arbitration".***

16. The Court of Appeal added thus:

> ***"The words "that there is not in fact any dispute between the parties" appearing in Section 6(1) (b) of the Arbitration Act are in our view not superfluous and require the court to consider whether there is in fact a genuine dispute when considering an application for stay of proceedings"***

17. As observed above, the materials presented to the court do not disclose any dispute capable of being referred to arbitration. In the absence of a dispute, an application for stay of proceedings would not succeed.

18. In summary, the court's finding on the first issue is that the application for stay of proceedings and referral to arbitration was brought long after the defendant had entered appearance and the same is incompetent by dint of the mandatory requirement of Section 6(1) of the Arbitration Act. Secondly, the evidence before court does not disclose any dispute requiring arbitration within the framework of the material arbitration agreement.

19. In light of the above findings, the notice of motion dated 29/8/2017 fails for lack of merit. The same is dismissed. The plaintiff shall have costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF NOVEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

M/S Ms Kemigisha Advocate for the plaintiff

M/S Mutabori Advocate by the Defendants

June Nafula - Court Clerk