



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 458 OF 2017

JOHN MWEHA MATHERI.....PLAINTIFF

VERSUS

KAMUTHI HOUSING CO-OPERATIVE

SOCIETY LTD.....DEFENDANT

RULING

1. On the 18/9/2011 the Plaintiff filed the above suit against the Defendant. The Plaintiff claim is for recovery of Kshs 625,000/- paid to the Defendant as purchase price for a piece of land measuring 100ft *100ft in Parcel No KAKUZI/ITHANGA/GITUAMBA 3/1177 (suit land).

2. On the 29/9/2011 the Defendant filed a memorandum of appearance under protest and a preliminary objection. The Defendant did not file a defence within the time prescribed by the law resulting in judgement being entered against it in default of the defence on the 5/3/18. A decree was issued pursuant to the said judgement and execution was levied against the Defendant.

3. On the 19/4/2018 the Defendant filed a Notice of Motion dated 18//4/18 and sought the following orders;

a. Spent

b. Pending the *inter-parties* hearing of this application, the Honourable Court do issue a stay of execution order against the Judgement and Decree passed on 5th of March 2018 together with all other consequential orders including the warrant of attachment of moveable property in execution of Decree for money as well as the Warrant of Sale of Property in Execution of Decree for money dated 29th of March 2018 against the Defendant/Applicant herein.

c. Pending the hearing and determination of this Application, the Honourable Court do issue a stay of execution order against the Judgement and Decree passed on 5th of March 2018 together with all other consequential orders including the warrant of attachment of moveable property in execution of Decree for money as well as the warrant of sale of property in execution of Decree for money dated 29th of March 2018 against the Defendant/Applicant herein.

d. The Honourable Court to set aside the Judgement and Decree passed on 5th of March 2018 against the Defendant.

e. The Costs of this Application be provided for.

4. The application is supported by the affidavit of Eliud Perminus Njoroge who is the Honorary Secretary of the Defendant. In the affidavit, the Defendant avers that this honourable Court has no jurisdiction to determine the suit because the agreement between the parties makes provision for any dispute arising between them to be referred to arbitration. The Defendant has annexed the agreement for sale signed by the parties on the 3/12/14.

5. The application was opposed by the Plaintiff/Respondent who filed grounds of opposition on the 2/7/18 on the following grounds ;

a) That the application is bad in law, frivolous, scandalous and an abuse of the process of the Court.

b) That the Defendant failed to file its defence within the stipulated time known in law.

c) That the sale agreement between the parties has no force of law for want of registration.

d) That the Defendant has refused deliberately to refund Kshs. 625,000/= it received and receipted from the Plaintiff.

e) That entry of interlocutory judgement against the Defendant for the liquidated sum of Kshs. 625,000/= was lawful.

f) That the execution of the decree against the Defendant was lawful.

6. I have read and considered the submissions filed by both parties.

7. Order 10 Rule 11 of the Civil Procedure Rules makes provision for setting aside judgement on such terms as the Court considers just. Among the matters that become relevant in consideration setting aside *ex parte* judgment are: Whether the Defendant was served with the pleadings; Whether the time prescribed for filing a defence to the pleading has expired before judgment is entered; The reason why the Defendant failed to file a defence within the time prescribed; Whether the Defendant has a triable case for the determination of the Court.

8. In this case the Defendant was indeed served and entered appearance, the Defendant did file a Preliminary objection on 25/9/2017 *inter alia* that the suit offends the provisions of special clause (i) of the agreement of sale dated the 3/12/17. Secondly that The Court has no jurisdiction to hear and determine the dispute between the Plaintiff and the Defendant. It is noted that the said Preliminary objection was not prosecuted. I will say no more about it for that reason for the reason that the parties it still unprosecuted.

9. Section 6 of the Arbitration Act states provides the manner in which a party approaches the Court for purposes of stay of proceedings and reference of a matter to the arbitral forum. It states 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 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. From the above provision, it is clear that the Court has to be moved by a party through an application which should be filed not later than the time that party enters appearance. The format of the application is by way of chamber summons as provided for under the Arbitration Rules, 1997 under section 2 thereof.

11. According to the provisions of section 6 aforesaid, it is mandatory for the Court upon being moved by a party through an application and subject to the Court being satisfied that such application meets the conditions set out under section 6(1) (a) and (b), to stay the proceedings so that the matter may be heard and determined at the arbitral fora. The rationale for this is informed by public policy that one matter cannot be heard in concurrent fora as it can embarrass the Court and lower its confidence in the eyes of the public. Thirdly judicial resources should be not be put into waste. Section 6 of the Civil Procedure Act disapproves parallel concurrent proceedings before two or more fora. Likewise, section 6(2) of the Arbitration Act do not permit parallel proceedings to be handled simultaneously once the application for stay of proceedings has been made and the matter remains undetermined.

12. Section 7 of the Arbitration Act gives the Court the power to grant interim reliefs before, during and after the Arbitral process. The jurisdiction of the Court is really never ousted. Subject to section 6(1) a and b, the proceedings in the Court are stayed to allow parties have their dispute arbitrated in the arbitral fora that they have elected in the contract.

13. It is the view of this Court that once a party is served with a plaint, it can elect to file a defence or file a chamber summon seeking stay of the proceedings in accordance with the Provisions of the Arbitration Act. Once the Defendant files an application under section 6 (1) the duty to file a defense stands suspended.

14. In this case the Defendant has not obeyed the statutory provisions as set out in the Arbitration Act and the Rules thereof. Instead it is on record that upon service the Defendant entered appearance under protest and filed the Preliminary Objection. In the Court's view even if the Preliminary objection was to be heard (as it should have) and determined it would not have served the purpose of the application for stay of proceedings with a view to making a reference of the dispute to arbitration. The Preliminary objection, was, with respect, therefore misplaced in view of the procedure set out under section 6 of the Arbitration Act.

15. The foregoing notwithstanding, the Court has noted that in the agreement for sale annexed to the affidavit referred above a dispute arising out of the suit land is provided for settlement by way of arbitration. It is trite law that where parties have bound themselves in a contract to refer their dispute to arbitration, the parties should be accorded the opportunity to do so subject to the statutory provisions above.

16. It must be noted that the Defendant has nevertheless not offered an answer to the Plaintiffs claim either by way of a draft defence attached to this application or otherwise. It is also noted that the presence of a provision for arbitration does not defeat or invalidate the Plaintiff's claim. More so where the Defendant has not filed a defence as it is in this case. The Court has considered all the pleadings so far

filed by the parties and in the interest of justice exercise discretion and set aside the default judgement in the following terms;

- a. The Defendant pays all the costs occasioned and incurred by reason of execution of the decree in the sum of Kshs 190,227/- directly to the Auctioneer and Court broker who executed the decree within 7 days from this ruling.
- b. The Defendant shall pay the Plaintiff's costs of this application to be assessed and certified by the Deputy Registrar of the Court within 7 days from the date of this ruling.
- c. In default of the Defendant complying with orders made within the time prescribed above the Notice of Motion dated the 18/4/2018 stands dismissed with costs to the Plaintiff.
- d. Subject to compliance to the above the Defendant is at liberty to file its written statement of defence and/or any application it considers necessary to the suit within the next 14 days from the date of the ruling.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 15TH NOVEMBER 2018

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff/Respondent – Absent

Washe for the Defendant/Applicant

Irene and Njeri, Court Assistants