



**Osman v Gulaam Enterprises Limited (Environment & Land Case
E013 of 2023) [2024] KEELC 108 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 108 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E013 OF 2023
CG MBOGO, J
JANUARY 24, 2024**

BETWEEN

ABDI NASIR SHEIKH OSMAN PLAINTIFF

AND

GULAAM ENTERPRISES LIMITED DEFENDANT

RULING

1. On 19th June, 2023 the Notice of Motion Application dated 16th June, 2023 was filed by the defendant/ applicant and which application is expressed to be brought under Section 6 of the Arbitration Act, 1995, Order 7 Rule 1, Order 40 Rule 7, Order 51 Rule 1 & 15 of the Civil Procedure Rules and Article 159 (2)(c) of the Constitution seeking the following orders: -
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to stay all proceedings in this matter and refer the parties to arbitration as envisaged by clause 13 of the agreement of sale dated 1st October, 2014 between the plaintiff and the defendant which agreement has given rise to the present suit.
 4. That pending the hearing and determination of this application, this honourable court be pleased to stay the period within which the defendant is enjoined to file its defence in this matter.
 5. That the costs of this application be provided for.
2. The application is premised on the grounds inter alia that what is before this court is a dispute arising out of the agreement dated 1st October, 2014, and the same should be resolved by an arbitrator as contained in the agreement.



3. The application is supported by the affidavit of Abdi Haji Gulleid sworn on even date. The defendant/applicant deposed that the matter revolves around the agreement entered into between the parties dated 1st October, 2014 and as such, the plaintiff/ respondent's claim before this court is a contravention of the dispute resolution mechanism agreed on by the parties. Further, that contrary to what the plaintiff/respondent averred herein, the defendant/applicant duly fulfilled its obligations under the agreement and it is not true that the agreement was not terminated on 15th April, 2017. Further, that it is not possible that the plaintiff/respondent would have slept on his right from 15th April, 2017 upto the filing of this application if it had not performed its obligation.
4. The defendant/applicant further deposed that it has effected multiple payments which the plaintiff/respondent has not disclosed and that upon fulfilment of the conditions as set out, the plaintiff/respondent allowed it to take over the premises of the suit property which it has been in occupation from 1st January, 2019. Further, that the plaintiff/respondent has failed to disclose to this court that it has discharged its obligations including tax obligations and that the reason its transfer was not noted on the title was due to existing land rates not cleared with a pending matter being ELC Case on. E008 of 2021.
5. On 4th July, 2023, the plaintiff/respondent filed his replying affidavit in opposition to the application sworn on 27th June, 2023. The plaintiff/respondent deposed that the defendant/ applicant has conveniently elected to quote portions of the agreement to hoodwink this court and that as per clause 4 of the agreement, there has been no such compliance. Further, as at 31st December, 2018, there was no compliance by either party rendering the impugned sale agreement ineffective, null and void and therefore no enforceable contractual obligation was ever created.
6. The plaintiff/respondent deposed that since the arbitration clause is part and parcel of the agreement, the validity and enforceability therefore is strictly tied to the validity of the agreement which is invalid and the said clause cannot stand. Further, that the court should first determine whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Further, it was deposed that it is incumbent upon the court seized of such nature to deal with it as a whole to discover whether any of the legal impediment set out in the section exists as to disentitle the defendant/ applicant a stay.
7. The plaintiff/respondent further deposed that the defendant/applicant has not stated the nature of the dispute in its application and that it has the burden to prove that there is a dispute which falls within the arbitration clause. Further, that his contention that consideration has not been paid has not been challenged or rebutted by the defendant/applicant.
8. The defendant/applicant filed a supplementary affidavit in response thereto which was sworn on 19th September, 2023. The defendant/applicant while reiterating the averments contained in its application and supporting affidavit, deposed that contrary to what is misrepresented in the replying affidavit, it has been in actual possession of the suit property from 1st January, 2019, and it would have not have been so if it had not discharged its obligations under the sale agreement. Further, that since the plaintiff/respondent resided in Canada, he was a holder of a number of mobile numbers, through which he made instructions on payments to be made. That on account of the difficulties in complying with the second limb of the agreement on exchange of properties, the parties agreed that the defendant/applicant purchases a house for him, in Somaliland for a sum of Kshs. 129,595,284. /- and that once the matter is referred to arbitration, he will demonstrate that the plaintiff has received over Kshs. 246,727,289.90/-.



9. The defendant/applicant further deposed that it is not true that he has been collecting rent on his behalf, and that the plaintiff/respondent having made clear instructions on how payment was to be done to his wife, daughter, mother and other parties cannot be heard to feign the payment made to him by the defendant/ applicant. Further, that the plaintiff/respondent cannot take advantage of his own wrong to defeat the instant application and owing to the bulk of paragraph relating to the issues of law, the defendant/applicant sought that the court proceeds to strike off paragraphs 20 to 36 of the replying affidavit. Further, that it is inequitable for a party who has received a sum of Kshs. 246,727,789/- to drive it out which is unjust enrichment. Also, that there is no prejudice that would be occasioned to the plaintiff/respondent if the matter is heard and determined by an arbitrator.
10. On 6th October, 2023, the plaintiff/respondent filed his further affidavit sworn on 2nd October, 2023 in response to the supplementary affidavit. The plaintiff/respondent while reiterating the averments contained in his replying affidavit, deposed that he has not had an agreement with the defendant/ applicant for the purchase of a house and if at all he did it on his behalf, he should have produced a copy of the said agreement. Further, that the photographs annexed are inadmissible as evidence as they offend Section 65(8) as read with Section 106 and 106B of the Evidence Act. In addition, it was deposed that the parties would not have entered into the sale agreement if Narok Town Council had transferred the property on 29th November, 2012.
11. The plaintiff/respondent went on ahead to question the authenticity of the transfer of the suit properties to the defendant/applicant and deposed that an applicant whose fraudulent activities have been brought to the attention of the court is undeserving of the court's discretion.
12. The application was argued by way of written submissions. On 26th October, 2023, the defendant/ applicant filed its written submissions dated 24th October, 2023 and submitted that the court should affirm the choices of the parties to the suit. To buttress on this submission, the defendant/applicant relied on the cases of National Bank of Kenya Limited versus Pipeplastic Samkolit (K) Limited & Another [2001] eKLR and Kenneth Kinoti Muriuki & 5 Others versus Dinara Developers Limited & Another [2020] eKLR.
13. The defendant/applicant further submitted that from 1st January, 2019, upon fulfilment of his obligations under the agreement, he has had possession of the suit property and the issues raised by the plaintiff/respondent can only be determined by an Arbitrator in terms of the agreement executed by the parties. The defendant/applicant relied on the case of Yes Cooperative Society Limited versus Kenneth Onsare Maina [2020] eKLR. Further, that the instant application was filed timeously as it was observed in the case of Charles Njogu Lofty versus Boudin Enterprises Limited [2005] eKLR and Monique Oraro versus AAR Insurance Company Limited [2019] eKLR.
14. The defendant/applicant further submitted that the reliefs sought by the plaintiff in this suit relate to the same agreement dated 1st October, 2014 and that the plaintiff/respondent cannot approbate and reprobate in the same matter. Further, that the claim that the agreement for sale was terminated is highly contested and if that was the case, it could not have had possession from the year 2019. Further, that there are serious issues to be referred to arbitration among many other issues. Reliance was placed in the cases of Kabew Kenya Limited versus Inabensa-Kenya [2016] eKLR and Jimmy Mutuku Mwithi t/a Oasis Farm versus Eric Okondo Omanga t/a Cidai Farm [2016] eKLR.
15. On 8th November, 2023, the plaintiff/respondent filed his written submissions dated 3rd October, 2023 where he raised two issues for determination as listed below: -
 1. Whether the suit should be referred for arbitration.



2. What orders should be made as to costs.
16. On the first issue, the plaintiff/respondent submitted that since the arbitration clause is part and parcel of the agreement, the validity and enforceability is strictly tied to the validity of the agreement. That the agreement being invalid, all the provisions including the arbitration clause cannot stand. Further, that Section 6 (1) of the *Arbitration Act* is mandatory but has a limitation and that where a party alleges these matters and they are proved, the court will not stay the proceedings and refer the matter to arbitration.
17. The plaintiff/respondent further submitted that consideration goes to the core of any agreement and its significance in a contract is too plain for argument and that the defendant/applicant having failed to prove payment of the consideration for purchase of the suit property, makes the impugned sale agreement invalid and unenforceable. As such, the court should first determine whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Reliance was placed in the cases of Lee versus The Showmen's Guild of Great Britain (1952) 2 QB 329 (CA) quoted in Niazsons K Limited versus China Road & Bridge Corporation Kenya [2001] eKLR, Esmaj versus Mistry Shamji Lalji & Co. (1984) KLR, Neptune Credit Management Limited & Another versus Jani & Another (Civil Appeal 201 of 2019) [2022] KECA 619(KLR)(13 May 2022)(Judgment), Corporate Insurance Company versus Wachira [1996] eKLR and UAP Provincial Insurance Company Limited versus Michael John Beckett C.A No. 26 of 2007.
18. The plaintiff/respondent further submitted that the application and the affidavits in support thereof have not stated the nature of the dispute between the parties to refer the matter to arbitration. Secondly, that the defendant/applicant has the burden to prove that there is a dispute which falls within the arbitration clause. Further, that an arbitration clause or agreement in a contract is an impediment to resolving disputes in court. That in granting stay of proceedings, the court has to have regard that there exists an arbitration agreement which is valid and enforceable.
19. I have carefully analysed and considered the application, the replies thereof, the written submissions and authorities cited by both parties and the issue for determination is whether this matter ought to be referred to arbitration.
20. The plaintiff/respondent filed a plaint dated 6th June, 2023 seeking judgment against the defendant/applicant for the following: -
 1. A declaration that all parcel of land known as plot 60,61 & 62 (formerly 243, 244 & 245) Block 4 Narok Township belong to Abdi Nasir Sheikh Osman.
 2. A declaration that the defendant is in fundamental breach of the terms and conditions of the sale agreement dated the 1st October, 2014.
 3. A permanent injunction restraining the defendant from entering, remaining on or in any other way dealing with or interfering with the plaintiff's property known as plot nos. 60,61 & 62 (formerly 243,244& 245) Block 4 Narok Township.
 4. An order of injunction to restrain the defendant, its servants and/or agents from collecting rent or interfering or in any way dealing with the plaintiff's property known as Narok Township plot nos. 60,61 & 62 Block 4 (Original nos. 243,244 & 245) Block 4 Narok.
 5. A declaration that the plaintiff is entitled to 30% of the purchase price for compensation for breach of the sale agreement.
 6. General damages for breach of contract.



7. Punitive or exemplary damages and the costs of the suit.
21. The defendant/applicant on the other hand, filed a memorandum of appearance and the instant application, seeking that the matter be referred to arbitration for the reason that the parties are bound by the terms contained in the agreement.
22. The plaintiff/respondent has consistently maintained that the sale agreement entered into by the parties dated 1st October, 2014 was terminated on 15th April, 2017 and as it is, there is no valid and an enforceable contract between the parties. The main contention by the plaintiff/respondent was that the defendant/applicant has never honoured the terms of the agreement.
23. Section 6 (1) of the *Arbitration Act* 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 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”
24. The obligation of the court upon being moved in terms of the above provision has been crystalized by case law. In the case of Niazsons(K) Ltd versus China Road & Bridge [2001] KLR 12 the court held inter alia 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:
- (a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;
 - (b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and
 - (c) Whether the suit intended concerned a matter agreed to be referred to arbitration.”



25. Clause 13.2 of the impugned agreement for sale dated 1st October 2014, provides that
- “Any dispute arising out of or in connection with this agreement shall be referred to arbitration by a single arbitrator being a practicing lawyer of not less than fifteen (15) years standing to be appointed by agreement between the parties or in default of such agreement within fourteen (14) days of the notification of a dispute, upon the application of either party, by the chairman for the time being of the law society of Kenya.”
26. Clause 13.3 further provides that “Such arbitration shall be conducted in accordance with the Rules of Arbitration of the said Institute and subject to and in accordance with the provisions of the Arbitration Act 1995.”
27. At the centre of the dispute is the payment of the purchase price of the suit properties which the plaintiff/respondent contended that he has never been paid. On the other hand, the defendant/applicant contended that it would not have been possible for it not to have paid consideration and taken possession since the year 2019.
28. I have noted the fact that the defendant/applicant has not disclosed the nature of the dispute to be referred to arbitration gives the implication that there is no valid contract.
29. My attention has been drawn to clause 3.1 which reads as follows: - “The sum of Kshs. 285,000,000/= (Two Hundred and Eighty-Five Million Kenya Shillings) only is upon the execution of this agreement. (Receipt of which is hereby acknowledged)”. My understanding of this provision is that the plaintiff/respondent herein may have received the purchase price save that its mode of receipt is not disclosed.
30. Already, there is contention as to whether there was consideration. The question then does this fall under the wording of “any dispute”? In my view, this is one of the issues which I find ought to be determined by an arbitrator. Most notable is that the parties have not abandoned the arbitration clause. In the case of Kenya Airports Parking Services Ltd & another versus Municipal Council of Mombasa [2010] eKLR , it was held inter alia that “where there exists an agreement with an arbitration clause, under the principle of separability of the arbitration clause, if a party to the agreement is of the opinion that the agreement is unlawful and therefore invalid, such view does not invalidate the arbitration clause in the agreement.”
31. I further note that no party has made claims of undue influence or duress to enter into the contract and in the absence of fraud or misrepresentation, they are therefore bound by the terms thereof and this court cannot rewrite the terms thereof.

In the House of Lords decision in Premium Nafta Products Limited (20th defendant) and others (respondents) versus Fili Shipping Company Limited (14th claimant) and others (appellants) {2007} UKHL 4, it was stated -

“Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader’s understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language. In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its



face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction. If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention. A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause... In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked...: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."

32. Arising from the above, it is my finding that both parties are bound to the terms of the agreement dated 1st October, 2014, and arbitration which parties chose would as their mode of dispute resolution is capable of determine any dispute arising out of the contract.
33. As such, I find merit in the notice of motion application dated 16th June 2023, and in the circumstances, I hereby proceed to issue the following orders: -
 - a. That there be stay of all proceedings in this matter and refer the parties to arbitration as envisaged by clause 13 of the agreement of sale dated 1st October, 2014 between the plaintiff and the defendant which agreement has given rise to the present suit.
 - b. That pending the hearing and determination of this application, this honourable court be pleased to stay the period within which the defendant is enjoined to file its defence in this matter.
34. I make no orders as to costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL this 24TH day of JANUARY, 2024.

HON. MBOGO C.G.

JUDGE

