



Webb Royale Ltd v Tamarind Properties Ltd & 2 others (Environment & Land Case 80 of 2018) [2024] KEELC 152 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEELC 152 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 80 OF 2018
A NYUKURI, J
JANUARY 24, 2024**

BETWEEN

WEBB ROYALE LTD PLAINTIFF

AND

TAMARIND PROPERTIES LTD 1ST DEFENDANT

TAMARIND MEADOWS LTD (TML) 2ND DEFENDANT

**TAMARIND MEADOWS MANAGEMENT COMPANY LIMITED
(TMMCL) 3RD DEFENDANT**

RULING

Introduction

1. Before court is a Notice of Motion dated 27th January 2023 filed by the defendants seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to stay further proceedings in this suit pending the reference of the dispute to arbitration under Clause 21 of the sale agreement dated 16th April 2010.
 - d. That as an alternative to (3) above, this Honourable Court be pleased to strike out this suit and/or to stay further proceedings in the same pending the determination of Court of Appeal Nairobi Civil Appeal No E356 of 2020; Tamarind Meadows Ltd v Wibeso Investments & others.
 - e. That the costs of this application be provided for.



2. The application is anchored on the grounds on its face as well as the supporting affidavit sworn on 27th January 2023 by Robert Darby, the director of the 2nd defendant. That applicants' case is that the issues raised in this suit touch on title to the house sold to the plaintiff and it is the same issue that will be adjudicated upon by the Court of Appeal in Civil Appeal E356 of 2020 where the plaintiff is a party as affected person. They stated that this suit is therefore barred by the doctrines of *res judicata* and or *sub judice*.
3. They further stated that clause 21 of the sale agreement dated 16th April 2010 provides that disputes arising therefrom should be referred to arbitration and that under Section 6 of the [Arbitration Act](#), this court has power to stay these proceedings and refer the dispute herein to arbitration. The applicant relied on the rule in the case of *Nyutu Agrovet Limited v Airtel Networks Kenya Limited: Chartered Institute of Arbitrators Kenya Branch (Interested Party)* [2019] eKLR and stated that parties agreed to submit their disputes to arbitration and therefore relinquished their courtroom rights.
4. Further they stated that on 12th May 2017 the High Court quashed criminal proceedings instituted at the behest of the plaintiffs, who were complainants against three directors of the 1st defendant in Nairobi Chief Magistrate Criminal Case No 1297 of 2016, who were charged with obtaining credit and obtaining execution of a charge by false pretence. That consequently the plaintiffs herein filed Machakos ELC Suit No 226 of 2017, and ultimately obtained judgment against the 2nd defendant. That the 2nd defendant sought and obtained stay of execution of the above judgment vide Court of Appeal Civil Application No NAI 128 of 2020. He attached the Memorandum of Appeal in Civil Appeal No E356 of 2020; sale agreement dated 16th April 2020; certificate of title; decision from the High Court; and a ruling dated 10th July 2020.
5. The application was opposed. Kathleen Linda Webb, a director of the plaintiff swore a replying affidavit dated 14th June 2023 opposing the application. It was the respondent's case that the instant application has been filed after 8 years since the suit herein was filed vide Nairobi HCCC No 489 of 2015 and that the matter ought to have been referred to arbitration as soon as the defendant became aware of the claim or as soon as when they entered appearance as required under Section 6 of the [Arbitration Act](#). Counsel therefore argued that the defendant is guilty of laches for not seeking stay of proceedings earlier hence the application is an abuse of the court process.
6. She further argued that the sale agreement dated 16th April 2010 which contains the arbitration clause is only between the plaintiff and 2nd defendant and that by virtue of privity of contract, it is untenable to include the 1st and 3rd defendants in any arbitration as they are not privy to the aforesaid sale agreement. Counsel also pointed out that Clause 21 of the sale agreement dated 16th April 2010, state that arbitration could be invoked where any dispute between the parties arose and therefore the 1st to 3rd defendants are not included, hence this claim could not be resolved by arbitration.
7. She deposed that the issues raised in the instant suit are beyond interpretation of the agreement provisions, which are matters to be resolved by arbitration under clause 21. They argued that the plaintiff's claim has a wider scope to include the management of Tamarind Meadows Estate, and payment of service charges among other issues.
8. On whether the suit is *sub judice* or *res judicata*, she contended that the plaintiff's claim herein not only touches on issuance of certificate of lease but also on the management of Tamarind Meadows Estate, payment of service charges, an alternative prayer for refund of Kshs 7,700,000/- plus interest, which is a prayer that cannot be awarded in Civil Appeal E356 of 2020 or High Court HCCC No 539 of 2012. Counsel submitted that in the witness statement of the 2nd defendant, it is clear that the plaintiffs in Machakos ELC No 226 of 2017 were denied an application to join Civil Suit No 539 of 2012. Counsel



argued that this suit was filed in 2015 and Machakos ELC No 226 of 2017 was filed in May 2017, and hence this application is an afterthought.

9. She maintained that the facts, issues and parties in this suit and in Machakos ELC No 226 of 2017 and High Court Civil Suit 539 of 2012 are different. Counsel argued that this suit and HCC No 539 of 2017 do not touch on the issue of ownership of and or validity of the applicant's title to LR No Block 18469 Mavoko Municipality, Machakos District; which is the main issue in Civil Appeal No E356 of 2020. They argued that the determination of the two other suits will not settle the dispute and issues raised by the plaintiff in this suit. They argued that parties in those suits are not litigating in the same capacity as the claimants in the appeal suit are litigating as claimants to the suit property while the suit in the High court, the parties are litigating as chargor and chargee and the issue therein is payment of the loans owned.
10. The application was disposed by way of written submissions. On record are the applicant's submissions filed on 19th May 2023 and the respondent's submissions filed on 14th June 2023.

Submissions

11. Counsel for the Applicants submitted that a party who does not controvert an affidavit is deemed to have accepted the facts therein; and relied on the cases of *Punch Nigeria Ltd v Attorney General 1996* Commonwealth Human Rights Law Digest 46 and *Kariuki Gathitu v Attorney General* [2013] eKLR.
12. It was further contended for the applicant that Section 6 of the *Arbitration Act* empowers the court to stay further proceedings and refer a dispute to arbitration, where parties have agreed to refer their dispute to arbitration. Counsel relied on the case of *Directline Assurance Company Ltd & 4 others v Suninvest & 15 others* [2019] eKLR for the proposition that as a matter of law and policy, the role of the courts in relation to arbitration has been one of non-intervention.
13. On their part, counsel for the respondent submitted that the sale agreement of 16th April 2010 is between the plaintiff and the 2nd defendant, while clause 21 states that disputes between the parties to the agreement shall be referred to arbitration, and that the dispute herein involves parties that are not privy to the aforesaid sale agreement.
14. Counsel for the respondent argued that this matter cannot be referred to arbitration because there has been inexcusable inordinate delay contrary to Section 6 of the *Arbitration Act*; that the suit does not concern matters agreed to be referred to arbitration; and the suit involves parties other than the parties to the agreement.
15. Reliance was placed on the case of *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] eKLR for the proposition that an application for stay of proceedings under Section 6(1) of the *Arbitration Act* must be brought promptly. Counsel argued that this matter has been pending for about 8 years having been filed in Nairobi in 2015; that several applications have been heard; all defendants have filed their defence; and that therefore this court is now fully seized of this matter hence it cannot be referred to arbitration.
16. The court was referred to the cases of *Martin Otieno Okwach & Charles Ong'ondo Were t/a Victoria Cleaning Services v Kenya Post Office Savings Bank* [2014] eKLR and *Safaricom Limited v Flashcom Limited* [2012] eKLR for the proposition that where a defendant has acceded to the jurisdiction of the court by filing defence after entering appearance, they are deemed to have waved their right to refer the dispute to arbitration under the agreement.
17. On the issue of sub judice and res judicata, counsel submitted that the court ought to examine the substance of the suit and pleadings and argued that the parties herein are not the same as those in the



two suits and that the 11th respondent in Civil Appeal E356 of 2020 is Kathleen Webb who is not the plaintiff herein.

18. In addition, counsel submitted that the main issues herein are issuance of a certificate of lease for unit No 4 in Tamarind Meadows Estate; issuance of a share in the management company 3rd defendant; mismanagement of Tamarind Meadows Estate; misapplication of funds collected for services; failure to pay service providers and more importantly the refund of Kshs 7,700,000/- plus interest. Counsel argued that those issues are not under adjudication in Civil Appeal No E356 of 2020.
19. Counsel relied on the case of *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* [2017] eKLR and submitted that the issues herein are not moot; they are alive and ought to be determined herein.

Analysis and determination

20. The court has carefully considered the instant application, response thereto and the parties rival submissions. The issues that arise therefrom are;
 - a. Whether this court's jurisdiction in this matter is ousted by dint of Section 6 of the *Arbitration Act*.
 - b. Whether this suit is subjudice and resjudicata.
21. Section 6 (1) of the *Arbitration Act* of 1995 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.
22. Essentially, the court has power to stay proceedings and refer a dispute to arbitration, where parties have an arbitration agreement yet one of the parties has brought the dispute to court. In such case, a party who wishes to have the matter referred to arbitration ought to apply to court for stay of proceedings and reference of the dispute to arbitration at the stage when that party enters appearance or otherwise acknowledges the dispute. Therefore where a party intends to seek stay of proceedings and referral of a dispute to arbitration, they must do so promptly upon entering appearance. It is not disputed in this case that clause 21 of the agreement between the plaintiff and 2nd defendant dated 16th April 2010 provides for arbitration where a dispute arises between them regarding interpretation, rights, obligations or implementation of any of the provisions of their agreement.
23. This suit having been filed on 4th June 2015 and the application herein having been filed on 30th January 2023, it is clear that the latter was filed 7 years 7 months after filing suit. The record also shows that the 2nd and 3rd defendants filed their defence on 5th January 2016; which is an acknowledgement of the dispute. This is 7 years before filing the instant application. It is my view therefore that the 2nd defendant having acknowledged the dispute therein seven years ago, he is guilty of laches and cannot invoke Section 6(1) of the *Arbitration Act* to seek stay of proceedings and for this dispute to be referred to arbitration, as no explanation has been tendered for the inordinate delay of over 7 years which cannot



be excused in their circumstances of this case. In the premises, I find and hold that the applicant is deemed to have waived his right to refer this matter to arbitration by his silence of 7 years after filing defence.

24. On whether this suit is subjudice or res judicata; Sections 6 and 7 of the [Civil Procedure Act](#) provides for the above doctrines respectively as follows;

Section 6 provides as follows;

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court

Section 7 provides as follows;

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

25. Therefore, a court is barred from trying a matter where a similar matter is pending where the parties and issues are substantially the same; and also where a similar matter has been determined where parties



and issues are the same and where a competent court with jurisdiction determined such matter and made a final determination of the issues which have been raised again in a current suit.

26. Having considered the parties herein and the parties in Nairobi Civil Appeal No E356 of 2020 Tamarind Meadows Ltd v Wibeso Investments & others, I note that the parties therein are different from the parties herein and the plaintiff in this suit is not party to that suit. Even the 11th respondent who the applicant argues that she is a party herein is not a primary party seeking substantive redress in No 226 of 2017 and is also not the plaintiff herein. I therefore find and hold that the parties herein are not the same as those in Machakos ELC No 226 of 2017 or Appeal No E356 of 2020.
27. In addition, the substantive issue in Machakos ELC 226 of 2017 was ownership of LR No 18469 IR No 71611 between the parties therein while the issue herein is whether there was breach of the agreement between the plaintiff and the 2nd defendant and whether there should be a refund of the paid premium of Kshs 7,700,000/- plus interest. That being the case, it is my finding that the issues herein are not the same as the issues in Civil Appeal No E356 of 2020. In the premises, I find and hold that this suit is neither subjudice nor res judicata as the parties and issues in the instant suit and in Civil Appeal No E356 of 2020 are different.
28. Consequently, I find no merit in the notice of motion dated 27th January 2023 and I hereby dismiss the same with costs to the plaintiff.
29. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24TH DAY OF JANUARY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Gachugu holding brief for Mr. Ambani for plaintiff/respondent

Mr. Munyori for defendants/applicants

Josephine - Court Assistant

