



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 301 OF 2016**

**PREM LAL RAMNATH GUPTA.....PLAINTIFF**

**-VERSUS-**

**IAN McCLEOD HUTCHISON.....DEFENDANT**

**RULING**

1. For determination is the application dated 25<sup>th</sup> November 2016 by the defendant seeking for orders that:

**i. Spent**

**ii. That the Court be pleased to order stay of the proceedings in this suit.**

**iii. That the Court be pleased to refer the parties to arbitration in accordance with the agreement dated 25<sup>th</sup> September 2014.**

**iv. The applicant be awarded costs of this application and the suit**

2. The application is supported by the grounds that the agreement of 25.9.2014 provided for parties to appoint an arbitrator in the event of failure or breach of contract. Secondly that the matters in dispute in this pleading refer to allegations of breach of the said contract. The application is further supported by an affidavit sworn by the defendant. The applicant deposed that he entered into a sale agreement over the sale of his house on plot No. Nyali Sub Division No 5303 at a cost of Kshs 65,000,000. He deposes that the plaintiff has paid him a sum of Kshs 31,000,000 leaving a balance of Kshs 34,000,000 that was to be paid on or before 15<sup>th</sup> December 2014.

3. The applicant continued that the Respondent made a further payment of Kshs 3,400,000 now leaving a balance of Kshs 30,600,000= which is outstanding to date and urge the Court to find it is the plaintiff who is in breach of the contract therefore his advocates could not complete the transaction. Consequently the plaintiff should be made to pay the 10% non – refundable deposit, costs and expenses he has incurred in the transaction and that the matter be referred to arbitration. The applicant deposes further that the Respondent's advocate letter dated 12.1.2015 was meant to harass him to leave the country so that the plaintiff could take the house before completing payment. He states that he is ready and willing that this matter be referred to arbitration as per the letter dated 4<sup>th</sup> June 2015 addressed to his advocates.

4. The application is opposed through grounds of opposition dated 13<sup>th</sup> December 2016. The plaintiff

states that the application is incompetent as it was brought after the defendant had submitted to the jurisdiction of the Court. That it is an afterthought, over taken by events and is made in bad faith. The Respondent states that since the applicant has admitted the claim that he received Kshs 34,400,000= therefore there exists no dispute to be referred to arbitration. That in light of the express admission by the defendant/applicant, this Court should enter judgement in favour of the plaintiff for Kshs 34,400,000 together with interest.

5. In the plaint filed in Court the Plaintiff/Respondent is seeking judgement against the defendant in the following terms:

**a) A declaration that the Defendant was in breach of the Sale Agreement dated 25<sup>th</sup> September 2014.**

**b) Refund of Kshs. 34,400,000/= paid to the Defendant by the Plaintiff in respect of the purchase of property No 5303 Section Mainland North.**

**c) Compounded interest on the above at commercial rate from 25<sup>th</sup> September 2014.**

**d) General damages (on the footing of aggravated damages) for the breaches set forth in paragraph 31 herein above; and**

**e) Costs and interest to this suit.**

6. On being served with the summons to enter appearance, plaint and the interlocutory application, the defendant filed appearance on 7<sup>th</sup> November 2016. Subsequently he filed the current application dated 25.11.2016. I also see from the record a replying affidavit sworn on 28<sup>th</sup> November 2016 and filed on the same date in opposition to the application dated 18<sup>th</sup> October 2016. There is no defence yet filed and on record.

7. Both parties filed written submissions to the application. The applicant submits this suit is premature as clause 16 of their sale agreement gave the option of arbitration for the arbitrator to determine who has breached the contract as per section 6 (1) of the Arbitration Act. He supported his submissions by citing the case of **Corporate Insurance Company vs Lois Wanjiru Wachira C. A No 151 of 1995**. That because he has not filed a defence this case can be referred to arbitration.

8. The Plaintiff/Respondent on his part submits that there is no dispute to be referred to arbitration in light of the defendant's express admission. He cited inter alia the case of **UAP Provincial Insurance Co. Ltd vs Michael John Becket Civ. App No 26 of 2007**. Further that the respondent contends the applicant has submitted to the jurisdiction of this Court by filing an appearance. Lastly the respondent contends that the alleged arbitration agreement is ambiguous, inoperative and incapable of being performed in the manner it is worded.

9. I have taken all these issues raised by the pleadings and the submissions into consideration and in order to determine this application, I will answer the first question raised by the respondent i.e. whether the applicant has submitted to the jurisdiction of this Court hence this matter should not be referred to arbitration. All the cases cited by the Respondent on this has quoted section 6 (1) of the Arbitration Act which stipulates as hereunder;

***“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 .... stay the proceedings and refer the parties to arbitration.”***

10. In the instant case, the applicant filed this application after entering appearance. The plaintiff has not satisfied me on his argument that the applicant already submitted to the jurisdiction of the Court as he

failed to give any reasons to support that argument. The plaintiff does not state what the applicant did beyond filing an appearance. Further the section gives provision that **where a party acknowledges the claim**. In this instant, the defendant acknowledges receipt of the deposit. I find the applicant has complied with the proviso having taken steps to ask the Court to refer the matter to arbitration. The fact that the application was not filed at the same time with the memo of appearance does not in my mind change the state of affairs and cannot be construed contradicting the provisions of section 6 (1) of the Act.

11. The second question is whether there is a dispute to be referred to the arbitrator. The defendant/applicant states there is in terms of determining **who is in breach of the contract**. The Respondent states there is none because the defendant has admitted receipt of Kshs 34,400,000= which he should be refunded. From the plaintiff's pleadings, he is accusing the defendant as the one guilty of the breach. This is brought out in paragraphs 8 – 14 & 31 of the plaint. The issue of breach is also contained in prayer (a). Since the defendant has denied he is in breach, this becomes an issue in dispute as per the contract between the parties. The plaintiff has even introduced new issues such as aggravated damages. The case of **UAP Insurance** quoted *Supra* is therefore distinguishable since the facts were that the insurance and the claimant had agreed on the amount payable. Consequently there was nothing in dispute.

12. The last issue is whether the arbitration clause is ambiguous, incorporative and incapable of being performed. Clause 16 of the agreement was quoted by the Respondent verbatim thus ***“That in event of failure or breach of contract, the parties first to appoint an arbitrator to solve the problem and any breach on the part of the purchasers, the vendor shall be entitled to his cost and expenses and refund the rest of deposit. The non-refundable deposit is 10% of the purchase price shall be fortified in event of breach by the purchase ad vice versa.”*** The Respondent submitted that it is not clear what provisions and or covenants the parties are referring to. That the clause dealt with an instance where the purchaser was the one at fault. However clause 16 ended with the words and **vice versa**. In simple English vice versa means the terms apply to the other side mutatis mutandis. In my reading of the clause, I find nothing ambiguous in it. It simply stated that in the event of failure or breach of covenant to mean ***“any breach of any of the clauses of the agreement.”*** I find this ground of opposition to be without any basis. The last limb of the submission is inapplicable in this instant as what we are dealing is an arbitration clause not an arbitration agreement. The arbitration agreement is for the arbitrator to craft/draw at the commencement of the arbitral proceedings.

13. In conclusion, I am satisfied there is merit in the motion dated 25.11.2016 and do allow it in terms of prayer (ii) & (iii). The costs of this application will be awarded to the winning party either in this suit or the arbitral proceedings.

**Dated, signed and delivered at Mombasa this 25<sup>th</sup> day April 2017**

**A. OMOLLO**

**JUDGE**