

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS

ELC. MISC. CASE NO. 288 OF 2015

ANNE WAMBUI BANCROFT.....1ST APPLICANT

ANDERSON CAMERON BANCROFT.....2ND APPLICANT

VERSUS

DAVID NJOGU KIBUI.....1ST RESPONDENT

DISTRICT LAND REGISTRAR NAIROBI.....2ND RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 11th February 2016 in which the 1st Respondent seeks for an order to stay these proceedings and an order to refer all disputes between the parties to arbitration.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 1st Respondent, David Njogu Kibui, sworn on 11th February 2016 in which he averred that he is the Purchaser in the Sale Agreement dated 20th May 2014 which he entered into with the Applicants (hereinafter referred to as the “Sale Agreement”). He further averred that upon execution of the Sale Agreement, he made a deposit towards the purchase price of the land which the Applicants refused, failed or neglected to refund to him upon collapse of the sale transaction. He averred that the Applicants purported to forfeit the said deposit without complying with the provisions of the Sale Agreement. He further stated that it was provided in clause 24 of the Sale Agreement that in case of a dispute arising between him and the Applicants, then such dispute would be solved through negotiations failing which the dispute should be referred to arbitration. He stated that in conformity with that clause, he wrote a letter dated 27th October 2015 to the Applicants in which he declared a dispute and requested the Applicants to concur to the appointment of an arbitrator. He further averred that the Applicants failed to respond to that letter which led him to enter a caution upon the subject property. He further averred that instead of complying with clause 24 of the Sale Agreement, the Applicants proceeded to file this suit without referring this dispute to arbitration. On those grounds, he sought for this Application to be allowed.

The Application is contested. The 1st Applicant, Anne Wambui Bancroft, filed her Replying Affidavit sworn on 13th February 2016 in which she averred that she is married to the 2nd Applicant who executed an irrevocable general power of attorney in her favour. In response to the Application, she averred that the correct position is that both she and the 2nd Applicant did indeed enter into the Sale Agreement with the 1st Respondent but pointed out that the Sale Agreement was in respect to the parcel of land known as Nairobi/Block 82/6165 and not the parcel of land known as Nairobi/Block 82/6164 which is the subject matter of this suit and hence the suit property. She informed the court that this suit seeks the removal of a caution against the suit property entered by the 1st Respondent and not the Nairobi/Block 82/6165 which is the subject matter of the Sale Agreement. She therefore informed the court the clause 24 of the Sale Agreement requires arbitration of any dispute relating to Nairobi/Block 82/6165. It was therefore her

averment that the 1st Respondent is mistaken in seeking to apply the Sale Agreement to the suit property. On those grounds, she sought for the Application to be dismissed.

Both the parties filed their written submissions.

The issue arising for my determination is whether or not to stay these proceedings and refer this dispute to arbitration in accordance with clause 24 of the Sale Agreement. Indeed, both parties concede to having entered into the Sale Agreement which relates to a parcel of land known as Nairobi/Block 82/6165. Both parties also concede that any dispute relating to this parcel of land should be referred to arbitration in accordance with clause 24 of the Sale Agreement. However, the position taken by the 1st Applicant is that there is no agreement between her and the 1st Respondent to refer any dispute relating to the suit property to arbitration. In fact, it is her averment that she did not sell the suit property to the 1st Respondent. The 1st Respondent has not responded to this assertion. My finding is that the arbitration agreement comprised in clause 24 of the Sale Agreement has nothing to do with the suit property. Accordingly, I find that there is no arbitration agreement between the 1st Respondent and the Applicants that can form the basis of referring this suit to arbitration. This Application is accordingly dismissed with costs to the Applicants.

It is so ordered.

DELIVERED, SIGNED AND DATED AT NAIROBI THIS 15TH DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE