REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURTAT NAIROBI

ELC SUIT NO.1222 OF 2015

FAIRVIEW ESTATE LIMITED……...…..…..PLAINTIFF

VERSUS

WANHO INTERNATIONAL HOLDINGS LIMITED…..….DEFENDANT

RULING

At all material times, the plaintiff owned a farm in Kiambu County measuring 320 acres. On 1st March, 2010, the plaintiff and the defendant entered into an agreement for sale under which the plaintiff sold to the defendant a portion of the said farm known as Land Reference No. 28093-Kiambu measuring 100 acres (hereinafter referred to as "the suit property") on terms and conditions that were set out in the said agreement. The agreement provided among others that the purchase price was Kshs.660,000,000/-of which a sum of Kshs. 66,000,000/- being the 10% deposit was to be held in a joint interest earning account to be held at NIC Bank in the joint names of the advocates for the plaintiff and the advocates for the defendant and the balance amounting to Kshs. 594,000,000/- was to be deposited in a joint account held in the names of the same advocates on or before the completion date against the release of the completion documents.

The agreement for sale provided that the sale of the suit property by the plaintiff to the defendant was subject to among others:

> i. The defendant furnishing the plaintiff with a master plan for the development of the entire farm of which the suit property formed part within 90 days of the completion date for the plaintiff's perusal.
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> ii. The defendant developing a 1.3 kilometers four (4) lane tarmac road from the main Kiambu road to the farm prior to or during the course of the development of the suit property.
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> iii. The defendant constructing a boundary wall of 2.5 meters high demarcating the entire farm.
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> iv. The defendant forming a management company with the plaintiff in which the plaintiff was to own 30% of the total issued share capital.
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> v. Subject to the issuance of relevant approvals, the defendant commencing development of the suit property within 12 months from the completion date.

Clause 20 of the agreement provided as follows:

> "Any dispute, controversy or claim a rising out of or relating to this agreement, or the breach, termination or invalidity thereof, shall be referred to arbitration under the rules of the Chartered

Institute of Arbitrators of the United Kingdom, Kenya Branch. The number of arbitrators shall be one (1). In the event of a failure to agree between the parties on the choice of arbitrator, the Chairman of the Chartered Institute of Arbitrators of the United Kingdom, Kenya Branch shall appoint the arbitrator under its rules. The language to be used in the arbitral proceedings shall be English. The proceedings shall take place in Nairobi. The determination of the arbitrator shall be final and binding upon the parties and so far as the law permits."

The parties entered into an addendum to the agreement for sale dated 1st March, 2010 on 10th September, 2010. The said addendum provided that the same was to be read together with the agreement dated 1st March, 2010.

The plaintiff brought this suit against the defendant on 1st December, 2015 seeking several reliefs, among others, an order of rescission of the agreement dated 1st March, 2010 and the addendum thereto dated 10th September, 2010, a declaration that the defendant repudiated the agreement dated 1st March, 2010 and the addendum thereto dated 10th September, 2010, a declaration that the defendant procured the transfer of the suit property to its name by material misrepresentation, an order for the cancellation of the registration of the transfer of the suit property in favour of the defendant as I.R No.123426/2,an order for the cancellation of the suit property so that the title thereof reverts to the plaintiff, an order for possession of the suit property, a temporary injunction to restrain the defendant from trespassing upon, accessing, developing, selling, mortgaging, alienating, wasting, leasing, renting, damaging or taking possession of any part of the suit property pending the hearing and determination of the suit, mesne profits and damages.

In its plaint dated 30th November, 2015, the plaintiff averred that on the faith of the representations made by the defendant, it was induced to agree to sell the suit property to the defendant on the terms and conditions set out in the agreement for sale dated 1st March, 2010. The plaintiff averred that the sale was subject to the defendant fulfilling several obligations which were set out in clause 3 of the agreement. I have set out the said obligations at the beginning of this ruling. The plaintiff averred that vacant possession of the suit property was to be given to the defendant upon payment of the full purchase price and fulfillment of the obligations mentioned above. The plaintiff averred that the completion date was 90 days from the date of execution of the agreement being 1st March, 2010 and time was of essence.

The plaintiff averred that acting on the said representations by the defendant in the agreement for sale and the addendum thereto and prior discussions and meetings with the defendant and duly induced thereby, the plaintiff executed a transfer of the suit property in favour of the defendant which was registered on 8th October, 2010. The plaintiff averred that the time fixed under the agreement for sale for the performance of the parties' respective obligations thereunder had lapsed and whereas it had performed its obligations under the agreement for sale save for giving vacant possession to the defendant, the defendant had refused or neglected to perform its obligations. The plaintiff averred that the defendant had, failed to furnish the plaintiff with the master plan for the development of the entire farm; failed to develop and construct a 1.3 Kilometers four (4) lane tarmac road; failed to construct a boundary wall of 2.5 meters high demarcating the farm; failed to form a management company and failed to commence development on the suit property within 12 months from the completion date.

The plaintiff averred that the defendant had made the said representations fraudulently knowing that the same were false and untrue. The plaintiff averred that the defendant procured the transfer of the suit property to its name through misrepresentation. The plaintiff averred that it served the defendant with a notice dated 15th September, 2015 to complete the agreement which notice the defendant failed to comply with. The plaintiff averred that as a result of the defendant's default, it rescinded the said agreement together with the addendum thereto by a letter dated 19th October, 2015. The plaintiff averred that as a result of the defendant's breach of the said agreement for sale, it had suffered loss a rising from the diminution of the fair market value of the portion of land that remained in its name after the defendant acquired the suit property. The plaintiff averred further and in the alternative that by its failure to fulfill its part of the agreement, the defendant had repudiated the said agreement which repudiation the plaintiff had

accepted and as such the plaintiff had been discharged from its obligation to give the defendant vacant possession of the suit property. The plaintiff averred further in the alternative that it was entitled to damages as a result of the defendant's breach of the said agreement for sale. It was on account of the foregoing that the plaintiff sought the reliefs set out in its plaint the particulars of which I have set out herein earlier.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 30th November, 2015 under certificate of urgency seeking a temporary injunction to restrain the defendant from developing, building on, constructing on or carrying out excavation on or interfering with the plaintiff's possession, occupation, user, rights of egress and ingress, quiet possession and enjoyment of the suit property pending the hearing and determination of the suit. The application came up for hearing ex parte on 2nd December, 2015 when the orders sought were granted on a temporary basis pending the hearing of the application inter partes.

The defendant was served with Summons to Enter Appearance and it appointed the firm of Ochieng', Onyango, Kibet and Ohaga Advocates to act for it. The said firm of advocates filed a notice of appointment of advocates on 9th December, 2015. On 17th December, 2015, the defendant brought an application under section 6 of the Arbitration Act, 1995 and Rule 2 of the Arbitration Rules, 1997 seeking the following orders:

1. That the court be pleased to set aside the ex parte orders issued on 2nd December, 2015.

2. That the court be pleased to stay legal proceedings herein pending reference of this matter to arbitration.

This is the application which is before me for determination. The application was brought on the grounds that the plaintiff and the defendant entered into an agreement for sale date 1st March, 2010 which contained an arbitration clause which provided that any dispute, controversy or claim a rising out of or relating to the agreement or breach, termination or invalidity thereof would be referred to arbitration by a single arbitrator. The defendant has contended that a dispute has a risen between the parties as to their respective obligations under the agreement which dispute should be determined by an arbitrator pursuant to clause 20 of the agreement aforesaid. The defendant has contended that this suit was instituted contrary to clause 20 of the said agreement and should be stayed so that the dispute between the parties can be referred to an arbitrator.

The application was opposed by the plaintiff through a replying affidavit sworn by Leonard Oliver Kibinge on 27th January, 2016. The plaintiff has contended that the defendant entered into the agreement for sale of the suit property without an intention to fulfill its obligations and as such it committed an act of fraud against the plaintiff which cannot be remedied in arbitration proceedings. The plaintiff has contended further that following the defendant's breach of the agreement for sale the same was rescinded by the plaintiff. The plaintiff has contended that the said rescission terminated the arbitration agreement. There is therefore no arbitration agreement in force to justify the stay sought by the defendant. The plaintiff has contended further that the reliefs sought by the plaintiff in the plaint would require cancellation of titles and as such the dispute is not appropriate for arbitration. The plaintiff has contended further that under section 39 of the Land Act, 2012, an order for rescission can only be granted by the court. The plaintiff has contended that the said provision of the Land Act has ousted the jurisdiction of the arbitrator. The plaintiff has contended further that most of the issues that have been raised in the present suit are outside the ambit of the arbitration agreement between the parties.

The application was argued by way of written submissions. I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the plaintiff's replying affidavit in opposition to the application. Finally, I have considered the submissions by the advocates for the parties together with the authorities cited in support thereof. The issues that arise for determination in the present application are; whether the defendant's application was brought within the time prescribed under section 6(1) of the Arbitration Act, 1995, whether the arbitration agreement has been rendered inoperative

by section 39 of the Land Act, 2012, whether the arbitration agreement has been rescinded and as such cannot be enforced and whether there is a dispute between the parties which should be referred to arbitration.

Section 6(1) of the Arbitration Act,1995 under which the defendant's application was brought provides as follows;

> *"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*
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> *(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration".*

According to the foregoing provisions of the Arbitration Act, the defendant was supposed to bring the present application not later than the time of entering appearance or acknowledging the plaintiff's claim. The defendant did not enter appearance. As I have stated earlier, the defendant's advocates filed a notice of appointment of advocates on 9th December, 2015. It is not in dispute that the application herein was not filed until a week later on 17th December, 2015. I am in agreement with the defendant's contention that the application was filed outside the time prescribed under section 6(1) of the Arbitration Act. The question which I need to answer is whether I can waive or overlook non-compliance with the time limit for bringing the stay application prescribed in section 6(1) of the Arbitration Act. The Arbitration Act has not given the court power to extend the said time limit or to overlook or waive the same. The line of authorities cited by the plaintiff show that that provision of the Arbitration Act is not permissive but mandatory.

In the Court of Appeal case of Charles Njogu Lofty vs. Bedouin Enterprises Limited [2005] eKLR, the court stated that:

> *"The learned Judge had there held that:-*
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> *"In my view, section 6(1) of the Arbitration Act, 1995, which court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance. It seems that the object of section 6(1) of the Arbitration Act, 1995, was, inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings.*
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> *Section 6(1) of the Arbitration Act, Cap 49 (now repealed) allowed applications for stay of proceedings to be made at any time after the applicant has entered appearance. Section 6(1) of the Arbitration Act, 1995, has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance. That is the only aspect of the law that has been changed".*
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> *We respectfully agree with these views so that even if the conditions set out in paragraphs (a) and (b) of section 6 (1) are satisfied the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering an appearance, or if no appearance is entered, at the time of filing any pleading or at the time of taking any step in the proceedings."*

In the case of TM AM Construction (Africa) Group vs Attorney General[2001] eKLR , Mbaluto J. stated that:

"Applying the decision of the Court of Appeal as stated above to the circumstances of this case, I find that the Attorney-General was obliged to apply for a stay '***not later than the time when he entered appearance***'. Accordingly, by filing appearance on 15.3.2001 and waiting for some 41 days before applying for stay of the proceedings, the Attorney-General lost its right to rely on the arbitration clause. For that reason, the application is clearly untenable and cannot possibly succeed".

Gikonyo J. reached the same decision in the case of, Diocese of Marsabit Registered Trustees vs. Technotrade Pavillion Limited[2014]eKLR. The judge stated that:

> *"The court too takes the same view but I should add that, the requirement in section 6(1) of the Arbitration Act is not a mere technicality which can be diminished by Article 159(2) (d) of the Constitution as claimed by the Applicant. It is a substantial legal matter which aims at promoting and attaining efficacious resolution of disputes through arbitration by providing for stay of proceedings but only where a party desirous of taking advantage of an arbitration clause in a contract has applied promptly for stay of proceedings and made a request to have the matter referred to arbitration. Needless to state that arbitration falls in the alternative forms of dispute resolutions which under Article 159(2) (c) of the Constitution should be promoted by courts except in so far as they are not inconsistent with any written law. By these provisions of the Constitution and the fact that the process of arbitration is largely consensual, a party who fails to adhere to the law such as section 6(1) of the Arbitration Act forfeits his right to apply for and have the proceedings stayed or matter referred to arbitration. And for all purposes, such is an indolent party who should not be allowed to circumvent the desire and right of the other party from availing itself of the judicial process of the court.With that understanding, a delay of fourteen (14) days becomes unreasonable in the eyes of the law and the circumstances of the case. On that ground alone, the application herein having been made fourteen days after the filing of appearance, should fail."*

It is my finding from the foregoing that the defendant's application is incompetent the same having been filed outside the time limit provided under the Arbitration Act, 1995. That finding would have been sufficient to dispose of the defendant's application. The application was opposed also on other grounds which I wish to consider. The plaintiff has contended that the arbitration clause in the agreement for sale dated 1st March, 2010 is inoperative by virtue of section 39 of the Land Act, 2012 as read with sections 40 and 41 of the said Act. The plaintiff has contended that since it has sought possession of the suit property from the defendants and the procedure for obtaining possession is only through the court, an arbitrator has no jurisdiction on the matter. I find no merit in this argument. To start with, the Land Act, 2012 came into operation on 2nd May, 2012. There is no indication in the Act that sections 39, 40 and 41 thereof have retrospective operation. The plaintiff cannot therefore call into its aid the provisions of section 39 of the said Act to invalidate an arbitration agreement that it entered into on 1st March, 2010. Secondly, there is nothing in sections 39, 40 and 41 of the Land Act which is inconsistent with the arbitration clause in the agreement dated 1st March, 2010. I am in agreement with the submission by the defendant that sub-section 2 of section 40 of the Land Act which the plaintiff has relied on to buttress its argument is limited to section 40 of the Act and does not extend to section 39 thereof. I cannot therefore see anything in sections 39, 40 and 41 of the Land Act which can render the arbitration agreement between the plaintiff and the defendant inoperative. Where parties are permitted by law to approach the court for a remedy in the event of a dispute, there is nothing stopping such parties from adopting an alternative form of dispute resolution. Section 20 of the Environment and Land Act aptly captures this position.

The plaintiff has also contended that no dispute has arisen between it and the defendant which can be referred to an arbitrator. Again, I find no merit in this contention. The plaintiff filed this suit contending that the defendant has breached the terms of the agreement for sale dated 1st March, 2010 together with the addendum thereto. The plaintiff has accused the defendant of failure to fulfill its obligations under the said agreement. The plaintiff has sought various reliefs against the defendant which includes the cancellation of the title of the suit property in the name of the defendant which it has claimed was acquired by the defendant through fraud and misrepresentation. I am satisfied that a dispute has arisen

between the parties within the meaning of clause 20 of the agreement for sale dated 1st March, 2010 which should have been referred to arbitration in accordance with the parties' agreement.

In conclusion, it is my finding that the defendant's application was well founded and this court would not have hesitated to allow the same should it have been brought within the time specified in section 6(1) of the Arbitration Act. The application fails solely for having been filed out of time.

For the foregoing reasons, I find the Notice of Motion application dated 16thDecember, 2015 incompetent. The same is dismissed with costs to the plaintiff.

Delivered and Dated at Nairobi this 8thday of December, 2017

S. OKONG'O

JUDGE

Ruling delivered in open court in presence of:

Ms. Macharia h/b for Ms. Warui for the Plaintiff

Ms. Leila h/b for Ohaga for the Defendant

Catherine Court Assistant