



**Hosein (Suing by Power of Attorney No. REG/SPA/V902RID1YJ Donated by her to Tariq Noor Hosein & Farah Noor Hosein)] & 2 others v Ahmed & 10 others (Environment & Land Case 11 of 2023) [2024] KEELC 876 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 876 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 11 OF 2023  
MD MWANGI, J  
FEBRUARY 22, 2024**

**BETWEEN**

**SHAMIN AKHTER HOSEIN [SUING BY POWER OF ATTORNEY NO. REG/SPA/V902RID1YJ DONATED BY HER TO TARIQ NOOR HOSEIN & FARAH NOOR HOSEIN] ..... 1<sup>ST</sup> PLAINTIFF**

**FARRAH NOOR HOSEIN [SUING BY POWER OF ATTORNEY NO. REG/SPA/V902RID1YJ DONATED BY HER BY 1ST PLAINTIFF] ..... 2<sup>ND</sup> PLAINTIFF**

**TARIQ NOOR HOSEIN [SUING BY POWER OF ATTORNEY NO. REG/SPA/V902RID1YJ DONATED TO HIM BY THE 1ST PLAINTIFF] ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**TARIQ NAZIR AHMED ..... 1<sup>ST</sup> DEFENDANT**

**IDRATA DEVELOPERS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**MAURICE OTIENO OMUGA ..... 3<sup>RD</sup> DEFENDANT**

**ARBORETUM MANOR MANAGEMENT LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**ADIL WARIS ..... 5<sup>TH</sup> DEFENDANT**

**CALEB OMBURO ..... 6<sup>TH</sup> DEFENDANT**

**EDGE ADVANTAGE LIMITED ..... 7<sup>TH</sup> DEFENDANT**

**OMUMA INVESTMENTS LIMITED ..... 8<sup>TH</sup> DEFENDANT**

**CAROLINE WANJIKU SARONI ..... 9<sup>TH</sup> DEFENDANT**

**SAMUEL ODHIAMBO ORIARO ..... 10<sup>TH</sup> DEFENDANT**

**CHIEF LANDS REGISTRAR ..... 11<sup>TH</sup> DEFENDANT**



## RULING

(In regard to the three applications seeking to refer this matter to arbitration)

### Background

1. This ruling is in respect of 3 applications by the Respondents herein all seeking to have this matter referred to arbitration. The 1<sup>st</sup> application is by the 1<sup>st</sup>, 2<sup>nd</sup> & 4<sup>th</sup> Defendants herein dated 17<sup>th</sup> January, 2024. It is brought under the provisions of Sections 6 and 10 of the *Arbitration Act* and rule 2 of the *Arbitration Rules, 1997* as well as Order 40 rule 7 of the *Civil Procedure Rules, 2010*.
2. The Applicants submit that the agreement between the Plaintiffs and the 2<sup>nd</sup> Defendant herein was a Joint Venture Agreement (hereinafter referred to as ‘the JVA’) that contained an arbitration clause. The Advocate for the Applicants, Mr. Litoro invited the court to look into the clause and find that it provided that any dispute between the parties touching on or concerning the JVA shall be referred to arbitration. The clause is Clause 16 of the JVA. The leases too subsequently entered into by the purchasers of the apartments also have arbitration clauses.
3. Counsel submitted that the parties expressly and mutually agreed to oust the jurisdiction of the court in their own agreements. The Court therefore lacks the jurisdiction to hear and or entertain this matter. The Court can only intervene minimally and as permitted by the *Arbitration Act*.
4. Mr. Sore, Advocate for the 6<sup>th</sup> and 9<sup>th</sup> Defendants associated with the submissions by Mr. Litoro adding that the JVA is indeed disclosed by the Plaintiffs in their plaint. It is in the JVA where the arbitration clause is.
5. In responding to the Plaintiff’s argument that they would be entitled to interim measures of protection. Mr. Sore submitted that, interim measures of protection would only issue where they have been prayed for by way of an application and in accordance with the *Arbitration Act*. He pointed out that the Plaintiffs had not made any such application before the court. The Plaintiffs were attempting to amend their Notice of Motion application dated 15<sup>th</sup> December, 2023 and convert it into an application for interim measures of protection through their replying affidavit.
6. It was Mr. Sore’s further submissions that even the question of whether the arbitration clause in the JVA was voidable or not is an issue to be determined by the Arbitral Tribunal.
7. Mr. Eredi, Advocate for the 5<sup>th</sup> Defendant in arguing his application dated 19<sup>th</sup> January, 2024 associated himself with the submissions of Mr. Litoro and Mr. Sore. He submitted on the competence – competence Principle which gives the Arbitral Tribunal the authority to adjudicate on the competence of an arbitral agreement.
8. Mr. Wakla, Advocate for the 3<sup>rd</sup> and 8<sup>th</sup> Defendants supported the 3 applications and the arguments by Mr. Litoro, Mr. Sore and Mr. Eredi. He submitted that the foundation of the relationship between the Plaintiffs and the 2<sup>nd</sup> Defendant was the JVA. That is a fact acknowledged by the Plaintiffs who have relied on the JVA and placed it before the Court. Clause 16 of the JVA was clear that the parties had agreed on the mode of dispute resolution in case of a dispute to be arbitration.
9. Counsel submitted that Courts were prohibited by the statute from interfering with matters arbitration.



10. Mr. Okuto, Advocate for the 7<sup>th</sup> & 10 Defendants supported the applications by the parties. It was his submission that Section 17 of the Arbitration Act vested on the Arbitral Tribunal powers to decide on its own jurisdiction. He therefore urged the court to discharge the interim orders and refer the matter to arbitration.
11. Mr. Katiku, Advocate for the Plaintiffs in response to the various arguments in support of the applications stated that the Plaintiffs' suit was premised on fraud. He further submitted that Section 6 of the Arbitration Act made provisions on the circumstances when a Court may refuse to refer a matter to arbitration in spite of the existence of an arbitration clause.
12. It was the Plaintiffs' argument that only the dispute between the Land Owner and the Developer was subject to arbitration. Mr. Katiku reiterated that the Plaintiffs were not seeking the enforcement of the JVA. The dispute in this matter according to him was non-arbitrable.
13. Mr. Katiku further submitted that anyone who was not a party to the JVA could not invoke the arbitration clause. Finally, it was his argument that the Plaintiffs were questioning the leases; their validity having not signed them. Those were matters beyond arbitration.
14. In responding to Mr. Katiku, Mr. Litoro Advocate submitted that the other Defendants other than the 2<sup>nd</sup> Defendant were claiming through the 2<sup>nd</sup> Defendant. They were therefore covered under Section 3 of the Arbitration Act. Further, he reiterated that Clause 16 of the JVA contemplated any kind of dispute including incidental disputes. The subject matter of the JVA was land and the apartments. The leases are in respect of the apartments and therefore arise from the JVA and are on the land any way.
15. Mr. Sore and Mr. Eredi submitted that the Plaintiffs' suit as presented is grounded on the JVA. The Plaintiffs have admitted that fact at paragraph 26 of their plaint thereof.

### **Determination**

16. It is not in dispute that the JVA had an arbitration clause which is clause 16 thereof. The clause provides that:

“If any dispute, difference or questions shall arise between the parties hereto touching or concerning this agreement or as to any other matter in any way connected with or arising out of or in relation to the subject matter of this agreement and whether during the continuance of this agreement or upon or after its determination such dispute, difference or question whatsoever shall be referred to an arbitrator.”
17. Applications for stay of proceedings as the one before me are provided for under Section 6 of the Arbitration Act. In granting stay of proceedings, the Court must have regard to the following factors:
  - i. There must be in existence an arbitration agreement which is valid and enforceable.
  - ii. The Applicant for stay must be a party to the agreement or at least a party claiming through one who is a party to the arbitration agreement.
  - iii. The dispute which has arisen fall within the scope of the arbitration clause.
18. The issue then for determination is whether the Applicants herein have satisfied the above three conditions.
19. I noted earlier that there is no dispute that the JVA contains an arbitration clause which I have quoted hereinabove verbatim. The JVA between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant too is not in



contention. The Plaintiffs have not disputed that they willingly and freely entered into the JVA with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

20. So as regards the first condition, I do find that there is in existence a valid and enforceable arbitration agreement between the Plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
21. I must point out at this juncture that Kenya is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, popularly referred to as “the New York Convention”. As a signatory, Kenya like all other State Parties to the Convention undertakes to accept written arbitral agreements and to forward any dispute including an arbitration clause to arbitration when it is brought before its court.
22. Further, Article 159 of *the Constitution* enjoins courts in this country in exercising judicial authority to promote Alternative Dispute Resolution mechanisms which include, arbitration.
23. The second question that I need to address is whether the Applicants are parties to the agreement or at least claiming through a party (s) who is a party to the arbitration agreement.
24. The answer is rather obvious. It is in the affirmative. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are parties to the JVA. The other Applicants are purchasers of the apartments built and developed pursuant to the provisions of the JVA. The Purchasers purchased from or through the 2<sup>nd</sup> Defendant.
25. I will proceed to consider the 3<sup>rd</sup> condition i.e. whether the dispute herein falls within the scope of the arbitration clause.
26. The Plaintiffs instituted this suit by way of a Plaint dated 15<sup>th</sup> December, 2023. The Plaintiffs lay the basis of their suit at paragraph 17 of the Plaint where they aver that:

“On or about 25<sup>th</sup> July, 2012, the Plaintiffs and the 2<sup>nd</sup> Defendant, represented by the 1<sup>st</sup> Defendant and their Company by the name Choroko Ltd entered into a Joint Venture Agreement whose objective was the development of the suit property by erecting thereon of 16 Apartments.”
27. From the wordings of this paragraph, I agree with the Applicants and their Advocates to the extent that the Plaintiffs’ suit revolves around the JVA.
28. The Plaintiffs proceed at paragraph 18 of the Plaint to allege that the obligations under the JVA were not fulfilled rendering it void. The Plaintiffs further aver that they make reference to the JVA for the sole reason that it was used by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to commit acts of fraud and misrepresentation.
29. From the reading of the above allegations by the Plaintiffs, what comes out is that the Plaintiffs seek to challenge the validity of the JVA. Two issues arise from the Plaintiffs’ allegations, as follows;
  - a. Whether the parties fulfilled their obligations under the JVA, and
  - b. Whether the alleged non-performance of the agreement rendered it void.
30. The Plaintiffs again aver that at no time did they appoint the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants as their agents for purposes of sale of the apartments developed on the suit property. The 1<sup>st</sup> Plaintiff too asserts that she did not assign her proprietary rights in the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
31. What comes out of the allegations by the Plaintiffs in the plaint is that they are questioning not only the validity of the JVA but also the performance of the obligations therein as well as the meaning and tenor of the JVA in its totality.



32. All these in my considered views are matters that touch on, concern and are connected with or arise out of the JVA.
33. In their Complaint, the Plaintiffs have ingeniously pleaded fraud and even sought for cancellation of the registered leases and certificates of leases issued in favour of the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants. I consider this, as Justice Makhandia JA termed it in the case of *Kibos Distillers Ltd & 4 others vs Benson ambuti Atega & 3 others* (2020) eKLR, ‘the art and craft of drafting pleadings’ intended to ‘confer’ jurisdiction on the Court. Nonetheless, jurisdiction may not be conferred through the art and craft of drafting pleadings in a multifaceted way calculated to oust the jurisdiction of the Arbitral Tribunal.
34. I must remind the parties that they are bound by the terms of their contract. The Court of Appeal in the case of *Hesamuddin Gulambusein Pothiwalla Admin, Trustee and Executor of the Estate of Gulambusein & Ebrahim Pothiwalla v Kidogo Basi Housing Co-operative Society Ltd & 31 others* (Civil Appeal No 330 of 2003) held that:-
- “ A Court of Law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
35. The Parties in this case by their agreement chose to have all their disputes and differences resolved through arbitration. That denies the court the jurisdiction to entertain this matter. I therefore have no option but to stay any further proceedings in this matter and refer the matter to arbitration in terms of Clause 16 of the JVA.
36. Consequently, having found that this Court lacks jurisdiction to entertain this matter, it follows that it too did not have the jurisdiction to issue the interim orders that it did earlier on . The said interim orders are hereby vacated. The said orders were issued pursuant to an application for orders of interlocutory injunction by the Plaintiffs. It was not an application under Section 7 of the *Arbitration Act* for interim measures of protection.
37. The costs of the applications shall be in the cause.
- It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2024.**

**M.D. MWANGI**

**JUDGE.**

**In the virtual presence of:**

Mr. Sore for the 6<sup>th</sup> and 9<sup>th</sup> Respondents/Defendants

Mr. Litore for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants/Respondents

Mr. Eredi for the 5<sup>th</sup> Defendant/Respondent

Ms Okuto for the 7<sup>th</sup> and 10<sup>th</sup> Defendants/Respondents

Mr. Katiku for the Plaintiffs/Applicants.

No Appearance for the 11<sup>th</sup> Defendant

Court Assistant: Yvette



**M.D. MWANGI**  
**JUDGE**

