



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND AT KISII**

**CASE NO. 19 OF 2016**

**ALDUCHIRA COMPANY LIMITED.....1<sup>ST</sup> PLAINTIFF**

**DUNCAN MOGAKA MICHIRA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ALFRED MOFFARD OMUNDI MICHIRA.....1<sup>ST</sup> DEFENDANT**

**MARY KWAMBOKA OMUNDI.....2<sup>ND</sup> DEFENDANT**

**JANE GESARE AMINGA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The plaintiffs by a plaint dated 29<sup>th</sup> January 2016 filed in court on 1<sup>st</sup> February 2016 seeks against the defendants jointly and severally the following reliefs:-

**(a) An order of a permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants from running the affairs of the 1<sup>st</sup> plaintiff without concurrence and consent of the majority shareholders of the 1<sup>st</sup> plaintiff.**

**(b) An order of a mandatory injunction directed at the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to provide true and accurate accounts of the 1<sup>st</sup> plaintiff company to the 2<sup>nd</sup> plaintiff for the years 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014 and 2015.**

**(c) An order annulling the transfer of title numbers Wanjare/Bogiakumu/ 2636 to Isaac Moracha Ongwacho and the subdivision Nyaribari Chache/B/B/Boburia 3370 and reverting the same to the proprietorship of the 1<sup>st</sup> plaintiff.**

**(d) An order directing the assets and liabilities of the 1<sup>st</sup> plaintiff be determined as at 2005 and be shared in terms of the provisions of the memorandum and articles of association of the plaintiff company.**

**(e) Costs of the suit.**

2. The 1<sup>st</sup> defendant upon being served with summons filed a memorandum of appearance dated 8<sup>th</sup> February 2016 on 16<sup>th</sup> February 2016 and simultaneously also filed a chamber summons application under Order 1 Rule 13, Order 4 Rule 1 (2), (3), (4) and (6) of the Civil Procedure rules and Section 6 of

the Arbitration Act, 1995. By the application the 1<sup>st</sup> defendant prays that the 1<sup>st</sup> plaintiff's plaint/name be struck out with costs to be borne by the 2<sup>nd</sup> defendant for want of written authority. In the alternative the 1<sup>st</sup> defendant prays that the instant suit be stayed pending arbitration as the 1<sup>st</sup> plaintiff's Articles of Association provided for arbitration in the event of any disputes under clause 30 of the Company's Articles of Association. The 1<sup>st</sup> defendant relying on the said clause 30 of the Articles of Association contends that the dispute between the parties who are all directors and/or shareholders of the 1<sup>st</sup> plaintiff company ought to be referred to arbitration in accordance thereof.

3. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants likewise entered a memorandum of appearance dated 12<sup>th</sup> February 2016 filed in court on 17<sup>th</sup> February 2016 and on the same date filed a notice of motion dated 12<sup>th</sup> February 2016 made under Section 6 (1) of the Arbitration Act, 1995 and Section 3A of the Civil Procedure Act. By the application the 2<sup>nd</sup> and 3<sup>rd</sup> defendants seek an order that this suit and proceedings be stayed and the same be referred to arbitration under the Arbitration Act on the basis that the Memorandum and Articles of Association of the 1<sup>st</sup> plaintiff provide a dispute resolution mechanism through arbitration. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants aver that the filing of the present suit before seeking arbitration of the dispute through arbitration as provided under the articles of association of the 1<sup>st</sup> plaintiff company is premature and unprocedural and as such the suit ought to be stayed to allow for arbitration to take place.

4. The plaintiffs filed grounds of opposition dated 29<sup>th</sup> March 2016 to the 1<sup>st</sup> defendant application and sets out the following grounds in opposition:-

**1. The application is ill conceived, bad in law, frivolous, vexatious and otherwise amounts to an abuse of court process.**

**2. The application of arbitration is not made in good faith as the 1<sup>st</sup> defendant has not demonstrated what efforts he has made since the filing of this suit to pursue the issue of arbitration with the rest of the directors of the 1<sup>st</sup> plaintiff.**

**3. The application is without merit and should be dismissed with costs to the plaintiffs.**

**4. The applicant is tainted with unclear hands and he is therefore not entitled to the equitable remedies of this honourable court.**

On 19<sup>th</sup> April 2016 the court gave direction for both applications by the defendants to be heard together and the same to be argued by way of written submissions. The 1<sup>st</sup> defendant filed his submissions on 7<sup>th</sup> June 2016 while both the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and plaintiff filed their respective submissions on 17<sup>th</sup> June, 2016.

5. I have reviewed the pleadings and the written submissions by the parties and the issue for determination is whether by virtue of the arbitration clause incorporated in the 1<sup>st</sup> plaintiff's Articles of Association, the court ought to stay these proceedings to allow arbitration to take place as envisaged under clause 30 of the Articles of Association of the 1<sup>st</sup> plaintiff company and/or whether the court should proceed to hear and determine the matter. The said clause 30 of the Articles of Association of the 1<sup>st</sup> plaintiff is in the following terms:-

**30. Whenever any difference arises between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand touching the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes or touching anything then or thereafter done, executed, omitted or suffered in pursuance of these Articles, or of the statutes or touching any breach, or alleged breach, of these articles, or any claim on account of any such breach, or alleged breached or otherwise relating to the premises, or to these Articles or to any statutes affecting the company, or to any of the affairs of the company, every such differences shall be referred to the decision of an arbitrator, to be**

**appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference.**

6. It is evident having regard to the above cited clause 30 of the Articles of Association of the 1<sup>st</sup> plaintiff company, that members of the company agreed to have any disputes and/or differences between members and/or the company referred to arbitration in terms thereof. The clause provided a dispute resolution mechanism and this constituted an agreement as between the parties. The plaintiff by the plaint claims that the 1<sup>st</sup> plaintiff owned several properties as set out under paragraph 7 of the plaint and further asserts that the 1<sup>st</sup> defendant in connivance with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants fraudulently dealt with the suit properties and caused the same to be sold and did not account for the proceeds of sale. The plaintiffs aver that the defendants used fake documents to transact the business of the company and that the defendants actions were in contravention of the **Companies Act**, Cap 486 Laws of Kenya and the Memorandum and Articles of Association of the 1<sup>st</sup> plaintiff's company. The plaintiffs want proper accounts and determination of assets and liabilities of the 1<sup>st</sup> plaintiff company to be undertaken by a joint auditor appointed by the parties. The nature of the dispute thus is such as article 30 of the Articles of Association provided would be referred to arbitration for resolution.

7. In the present matter there is no evidence tendered to show or demonstrate that the plaintiffs before they instituted the instant suit they by any overt act invited the defendants to have the dispute referred to arbitration in terms of Clause 30 of the Articles of Association. If the plaintiffs had initiated the process to have the matter referred to arbitration and the defendants failed to oblige there could perhaps have been a basis to institute the suit as the defendants may then have been taken to have waived their right to have the dispute arbitrated upon under the provisions of Clause 30 of the Articles of Association. The plaintiffs have argued that the defendants did not take any action to have the dispute referred to arbitration and thus should not seek stay of these proceedings pending arbitration. I find this argument in the circumstances of this case unsustainable. The plaintiffs were the complainants and in my view they had the duty and obligation to declare there was a dispute as envisaged under Clause 30 of the Articles of Association and in that regard require the defendants to submit to arbitration in terms thereof. The Memorandum and Articles of Association constitute a binding agreement between the parties and one of the agreements was that any disputes as between the parties was to be referred to arbitration and unless it was shown the defendants have waived their right to have the dispute arbitrated upon as agreed, this court lacks the jurisdiction to seize itself of the matter.

8. The plaintiff has referred the court to the decision in the case of **East African Power & Lighting Company Ltd –vs- Kilimanjaro Construction Ltd KLR [1983] 392** to support the submission that the defendants are not entitled to a stay of proceedings as they never put in motion any initiative to have the dispute referred to arbitration. The case related to an appeal from a Judge's refusal to stay proceedings pending arbitration. The judge in the High Court from where the appeal arose had declined to order stay of proceedings inter alia on the basis that the disputes were not covered by or within the scope of the agreement between the parties and hence in his view could not properly be referred to arbitration.

9. In my view whether or not proceedings can be stayed where an arbitration agreement is found to exist as in the present case is entirely dependent on whether the conditions set out under Section 6 (1) of the Arbitration Act are satisfied. Section 6 (1) provides thus:-

**6(1) If a party to an arbitration agreement or person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or against a party coming through or under him, in respect of a matter agreed to be referred:-**

**(a) Any party to those proceedings may at any time after appearances, and before delivering any pleadings, apply to that court to stay the proceedings; and**

**(b) That court, if it is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the**

**time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.**

10. As stated elsewhere in this ruling the plaintiffs have not demonstrated or shown that they made any attempt to initiate arbitration in terms of Clause 30 of the Articles of Association and that the defendants became obstructive and/or unco-operative. The defendants in accordance with Section 6 (1) of the Arbitration Act, upon being served entered appearance and at the same time applied for a stay of proceedings to enable the matter to be referred to arbitration in accordance with their agreement. The defendants did not deliver any further pleadings before making the instant applications. The court is satisfied the dispute fell within the matters that the parties agreed would be arbitrated under the arbitration agreement and is further satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement of the parties. The defendants have stated that they are ready to submit to arbitration in terms of arbitration agreement and there being no evidence to the contrary the court has no option but to respect the agreement of the parties as pertains to resolution of disputes arising between them.

11. The net result is that I find and hold that the 1<sup>st</sup> defendant's application dated 8<sup>th</sup> February 2016 and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants application dated 12<sup>th</sup> February 2016 have merit in as far as stay of these proceedings is concerned to enable arbitration to go as per the agreement of the parties. As I have held that this suit is prematurely brought before this court, I will not make any finding in regard to whether or not the 1<sup>st</sup> plaintiff's plaint/name ought to be struck out for want of written authority in instituting the suit. I will therefore grant the following orders in regard to the two applications by the defendants:-

**(a) That this suit and proceedings herein are ordered stayed.**

**(b) The matters in dispute between the parties are ordered to be referred to arbitration under the Arbitration Act in terms of Clause 30 of the Articles of Association of the 1<sup>st</sup> plaintiff company.**

**(c) Each party to bear their own costs of the applications.**

**Ruling dated, signed and delivered at Kisii this 7<sup>th</sup> day of October, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs

..... for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants

..... Court Assistant

**J. M. MUTUNGI**

**JUDGE**