



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 82 OF 2015

DAMARIS WANJIRU NGANGAPLAINTIFF

VERSUS

LOISE NAISIAE LEIYAN1ST DEFENDANT

KENYA COMMERCIAL BANK LIMITED....INTERESTED PARTY

RULING

(suit by plaintiff claiming property sold to her by defendant; property under charge by interested party; arbitration clause in sale agreement; preliminary point raised that matter should be referred to arbitration; whether in the circumstances matter fit to be referred to arbitration; presence of third party not party to the arbitration agreement and not bound by it; held that dispute cannot be resolved in absence of third party; arbitration agreement rendered inoperable by presence of third party; preliminary objection dismissed).

1. This ruling is in respect of a preliminary objection raised by the defendant. The objection is as follows:-

- (i) That the agreement creative of the suit has an arbitral clause (Clause 22.1) as the forum and mode of dispute resolution;*
- (ii) That the defendant has entered appearance under protest. The defendant supremely objects to the suit as drawn and filed.*

2. Straight away it will be seen that the defendant's position over the dispute herein is that the plaintiff should not have filed this suit, but ought to have referred the dispute to arbitration, owing to an arbitral clause in their agreement.

A little background will put the issue into focus.

3. The case of the plaintiff is that vide an agreement dated 5 February 2014, the defendant sold to her the land parcel Miti Mingi/Mbaruk Block 8/2367 (Kianjoya D) together with all improvements therein at a consideration of Kshs. 5, 800,000/=. At the time of sale, the property was charged to Kenya Commercial Bank Limited (KCB) for financial facilities granted to the defendant. KCB was named in the heading of the suit as interested party. At the time of purchase, a house was being constructed which construction had stalled and the structure was wasting away.

4. The plaintiff has pleaded that it was a term of the agreement that the defendant was obliged to deliver to the plaintiff a discharge of charge, together with the original title deed before the completion date, which was 180 days from the date of the agreement. It is averred that the plaintiff did pay the full purchase price and has discharged all her obligations under the agreement. It is further averred that pursuant to the agreement, the plaintiff has taken possession of the property and has completed the developments thereupon at a considerable sum of money. It is pleaded that despite the plaintiff completing her obligations under the contract, the defendant has refused and/or neglected to perform her part; and has refused or neglected to clear the loan facility with KCB or cooperate with the plaintiff to enable KCB release the original title deed to herself or to the plaintiff.

5. It is the plaintiff's position that the defendant's willful refusal to complete the transaction despite having been fully paid the purchase price amounts to a breach of contract. The following particulars of breach of contract are pleaded being :-

- a) *Failing to clear the full amount of the loan.*
- b) *Refusing to tender completion documents under the agreement.*
- c) *Trying to sell the suit property to third parties.*
- d) *Refusing to collaborate with the plaintiff in the settlement of the account with the interested party to facilitate the release of the title documents.*

6. It is averred that the defendant's actions have deprived the plaintiff of her peaceful and quiet enjoyment of proprietary rights and are occasioning the plaintiff irreparable loss and damages.

In the suit, the plaintiff has sought the following orders :-

- a) *A permanent injunction restraining the defendant from selling the property to other third parties and/or in any way interfering with the suit property.*
- b) *An order for specific performance.*
- c) *A refund of any sum or excess incurred or likely to be incurred by the plaintiff in the completion of the agreement upon orders of the court.*
- d) *In the alternative refund of the equivalent of the current market value of the property at Kshs. 9 Million.*
- e) *Interest on (a), (b), (c), and (d) at court rates.*
- f) *Cost of the suit.*
- g) *Any other relief the Honourable Court may deem fit to grant.*

7. Additionally, the plaintiff has prayed for judgment against the Interested Party for :-

- h) *An order of disclosure of the status of the Loan account to the plaintiff to facilitate the plaintiff's clearance of the loan balance.*
- i) *An order restraining the withdrawal of the sums in the loan account by the first defendant (sic) by herself, her servants and or agents.*
- j) *An order for the transfer of the suit premises to the plaintiff upon the plaintiff's or first defendant;s (sic) settlement of the loan account.*

(k) *Any other relief that this Honourable Court may deem fit to grant.*

8. I must say at this stage, that I have found it curious that in the pleadings of the plaintiff, she has on numerous occasions referred to the defendant as "first defendant", yet in the heading of her case, there is only one defendant and KCB is described in the heading as interested party. It is also a curious pleading to seek orders against a party introduced into a suit as "interested party". I want to save this point for now, and come back to it later, for it has some significance to my final finding.

9. Together with the plaint, the plaintiff filed an application dated 19 March 2015 seeking three substantive orders. The first is an order of injunction to stop the defendant from interfering with the plaintiff's possession of the property; the second is for an order to restrain any withdrawal of money or any dealing with the money held in the loan account; the third is for an order mandating the interested party to disclose to the plaintiff the amount and loan balance in the loan account. The applicant appeared before me ex-parte, and I gave orders of injunction as prayed and further directed the interested party to furnish the plaintiff with the full details and statements of the loan account.

10. Before the inter-partes hearing of that application, the defendant entered appearance under protest and simultaneously filed the notice of preliminary objection, in the terms outlined at the beginning of this ruling. KCB also appointed counsel to act for her in the matter. When the application came up for inter partes hearing, I took cognizance of the preliminary objection and directed that it be disposed of first. I further directed counsels to file written submissions towards the preliminary objection.

11. In their submissions, counsels for the defendant, Messrs Ochieng, Onyango, Kibet & Ohaga Advocates, submitted inter alia, that the agreement of the parties has an arbitral clause. It was submitted that this is binding on the parties and that the defendant has not waived her right to insist on arbitration. Counsels referred to the case of ***Julius Macharia Mwangi vs Githambo Tea Factory & Another (2015) eKLR***.

12. Ms. Mugweru for the plaintiff did not dispute that the agreement has an arbitral clause. She further submitted that the parties did attempt some arbitration, whereby the defendant agreed and committed herself in writing to deliver the title document to the suit property within 60 days. She referred to a document in the supporting affidavit. She also pointed out that KCB is not a party to the agreement binding the plaintiff and defendant to arbitration. She submitted that the presence of the interested party is not superfluous as they hold the original title to the suit property by virtue of being chargees and further hold the loan account under which the suit property was charged. She submitted that the interested party is not bound by the arbitral clause and has not consented to arbitration. She relied on the holding in the case of ***Eunice Soko Mlagui vs Suresh Parmar (2013) eKLR***. She was of the view that the case of ***Julius Macharia Mwangi vs Githambo Tea Factory*** is distinguishable from the facts of this case. She was also of the opinion that there is no dispute to refer to arbitration as the defendant has been paid the full purchase price and all there is, is for the defendant to discharge the title documents and release the same to the plaintiff. In her view, there was no real dispute to refer to arbitration as envisaged by Section 6 of the Arbitration Act. She relied on the court of appeal decision in the case of ***UAP Provincial Insurance Company Limited vs Michael John Beckett, Court of Appeal at Nairobi, Civil Appeal No 26 of 2007***.

I did not see any submissions on the part of the interested party.

13. I have considered the matter. The core complaint raised in the preliminary objection is that the plaintiff ought to have referred the matter to arbitration as there is an arbitral clause in the agreement. It is therefore necessary to have a close examination of this clause. The same is noted as Clause No. 22 in the agreement and is drawn as follows:-

22. Arbitration

22.1 Any dispute arising between the parties hereto and all claims or matters in such dispute not otherwise mutually settled between the parties shall be referred to arbitration by single arbitrator to appointed (sic) by agreement between the parties or in default of such

agreement within fourteen (24) days of the notification of such dispute by either party to the other upon application by either party to the Chairman for the time being of Chartered Institute of Arbitrators (Kenya Branch).

22.2 Every award made under clause 22.1 above shall be subject to and in accordance with the provisions of Arbitration Act 1995 (Act No. 4 of 1995) or other Act or Acts for the time being in force in Kenya in relation to arbitration.

22.3 To the extent permissible by law the determination of the Arbitrator shall be final and binding upon the parties and they hereby agree to be so bound by the decision of such arbitrator.

14. The presence of the arbitral clause is not disputed. It will however be seen that the argument of the plaintiff in justifying her filing of the dispute in court and not referring the matter to arbitration, is twofold. The first is that there is another party to these proceedings, not bound by the arbitration clause. The second argument is that there is no real dispute to refer to arbitration.

15. The operative law is the Arbitration Act particularly Section 6 which provides as follows:-

6(1) A court before which proceedings are brought in a matter which is the subject of an Arbitral agreement shall, if a party so applies not later than the time when the 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 arbitral agreement is null and void, e or incapable of being performed;
or*

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

16. It will be seen from the above that the court is bound to refer the matter to arbitration unless the two circumstances above exist. It is important that I proceed to examine whether the exceptions exist in the circumstances of this case and I choose to start with the second exception.

(i) Is there in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration ?

17. Ms. Mugweru argued that there is in fact no dispute to be referred to arbitration. She seemed to suggest that arbitration has already been tried and an agreement reached subsequent to the same. She referred to the annexure DWN 7 b in the supporting affidavit of the plaintiff. I have looked at that annexure. It is a letter dated 26 August 2014 written by the defendant to the plaintiff and states as follows :-

*"Following the agreement between you and I and witnesses by the MP, Nakuru West and Country Director (Humanity Without Borders Inc), I am ready and willing to complete the transaction and have the Title documents and Discharge of Charge released to you. However, I am not able to secure the discharge of the Title from the Bank since the loan has not been fully paid. My request to you is release and pay the sum of Kshs. 520,334/= and deposit to my loan account No. 11***, Kenya Commercial Bank Ltd- Nakuru Branch.*

I promise to deliver the title document of Miti Mingi/Mbaruk Block 8/2367 within sixty days (60) days from the date you make the payment to the bank of the money held by you.

Kindly confirm once you have deposited the money so that I can pay the difference and start the process of applying for the release of the title.

Yours Faithfully,

Loise Naisiae Leiyan."

18. Clearly, it seems that the vendor did not accede to the above hence this suit. But does the above meeting with the Member of Parliament (M.P) and the above letter mean that there is no dispute ?

19. Ms. Mugweru relied on the case of **UAP vs Beckett** to support her contention that there was no dispute given the letter of the defendant. In the UAP case, the dispute revolved around insurance compensation for a motor vehicle that was comprehensively insured. After a tussle, an agreement appeared to have been reached for the insurer to pay a sum of Kshs. 6,000,000/=. The court was of the view that because this was admitted, there was no issue to refer to arbitration and the matter could proceed in court. If I got Ms. Mugweru right, I think her view is that the defendant's letter means that there is no dispute as she admitted the claim of the plaintiff. It is tempting to hold that the letter of the defendant is an admission and therefore there is nothing to refer to arbitration. But without the benefit of what she intends to file in the proceedings, I hesitate to hold that there is no dispute. In the agreement, the deal was for the plaintiff to pay for, and for the defendant, to transfer the suit property. The fact that the defendant has not transferred the property to the plaintiff means that there is an issue as to whether or not she is bound to do so. That is a dispute. If the parties had performed their parts of the agreement as contracted, then there would be no dispute, or if there was a difference between the two persons, not connected to the sale transaction, then we would say that such dispute is outside the ambit of the contract and therefore not captured by the arbitration clause. But there is an issue as to whether the plaintiff and defendant have carried out their obligations under the contract, and in my view, such issue arises from the performance of the agreement itself and is therefore within the ambit of the arbitration clause agreed by the parties.

20. Neither can I agree with Ms. Mugweru that the appearance of the parties before the MP and other persons, was an arbitration. That at best was mediation. The arbitration clause of the parties provides that the arbitration is to be by a person agreed by the parties, and in default of agreement, the arbitrator is to be appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch). I have seen no evidence that the parties referred the dispute to the MP by agreement, in express execution of Clause 22.1 of the agreement. When parties refer a matter to an arbitrator, it must be clear that they are making reference to arbitration, through the arbitration clause. There should be no room for assumptions. There is nothing displayed to me showing me that the parties were referring the matter to the MP in execution of the arbitration clause. I cannot therefore assume that the appearance of the parties before the MP was an arbitration. Neither have I been shown any decision made by the MP which may pass for an arbitration award. In brief, the parties had not prior to the filing of this suit referred the matter to arbitration and clearly there is a dispute arising out of the contract of the parties.

21. This matter is therefore not caught up by the exception in Section 6(1) (b).

(ii) Is the arbitral agreement null and void, inoperative or incapable of being performed ?

22. I have no material before me to hold that the arbitral agreement is null and void. But is it inoperative or incapable of being performed ?

23. Ms. Mugweru submitted that the presence of KCB in these proceedings makes the matter not referable to arbitration. I have looked at the case of **Eunice Soko Mlagui vs Suresh Parmar** relied upon by counsel. The case therein involved four defendants but only two were parties to the arbitration clause. Among the reasons given for denying reference to arbitration was that since two of the parties are not bound by the arbitration clause, the matter could not be referred to arbitration.

24. In this case, the plaintiff has sued not only the vendor but also KCB. I mentioned earlier that I found the description of the parties rather ambiguous. On one hand, the vendor is named in the heading of the suit as the only defendant, but variously described in the plaint as first defendant, suggesting that there

ought to be a second or other defendants. KCB is described in the heading of the suit as interested party, but when one looks at the description of KCB in paragraph 3 of the plaint, it is said that KCB is the second defendant. It will also be noted that there are orders specifically sought against KCB, one being the transfer of the suit property to the plaintiff. It is unusual, if not out rightly improper, for a plaintiff to seek orders against a party, described as interested party. If a litigant wants orders against any person, then such person needs to be defendant, so that they may lodge their objection to the claim of the plaintiff, or concede to it if they so wish. The plaint could have been drawn in much better fashion especially given that it was drawn by counsel and not by the litigant in person. I find difficulty construing KCB as interested party. They can only be deemed as defendant since there are specific prayers sought against them. It would be wise for counsel for the plaintiff to heed my sentiments and effect the necessary amendments.

25. The pleadings, aside, the presence of KCB and their significance to the ultimate prayers sought by the plaintiff cannot be ignored. The plaintiff will never have the property transferred to her if KCB declines to register a discharge of charge over the property. Their continued interest in the property is not known at the moment. It is also not known whether the loan account is cleared or not. It is apparent to me that the dispute arising from performance of the agreement does not only involve the two parties to it. KCB is a necessary party to the dispute but it is not a party to the agreement between vendor and purchaser. KCB cannot therefore be compelled to go before the arbitrator and it cannot be bound by the award for it is not a party to the arbitral agreement. Given the presence of KCB in the dispute, and her central part in whether or not the property ought to be transferred to the plaintiff, I am of the opinion that the arbitral agreement cannot be performed. Clearly the arbitrator cannot make an order compelling KCB to discharge the charge, or to transfer the property to the plaintiff, which is what the plaintiff ultimately wants. It will therefore be futile to refer the matter to arbitration since a key issue will not be determined through the said proceedings. The dispute has morphed into one that renders the arbitral clause inoperative. The only avenue to have the dispute settled once and for all remains the court.

26. For the above reasons, I dismiss the preliminary objection with costs. I direct that the matter do proceed before this court for the determination of all questions.

It is so ordered.

Dated, signed and delivered in open court at Nakuru this 7th July 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

No Appearance for M/s Mugweru & Co for plaintiff

N/A for M/s Ochieng Onyango, Kibet & Ohaga Advocates for defendant.

N/A for M/s Mburu Maina & Co for interested party

Janet : CA

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU