James & Catherine Holdings Ltd v Thika Greens Ltd & another (Environment & Land Case E003 of 2024) [2024] KEELC 1690 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1690 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE E003 OF 2024

LN GACHERU, J

MARCH 20, 2024

BETWEEN

JAMES & CATHERINE HOLDINGS LTD ..... PLAINTIFF

AND

THIKA GREENS LTD ..... 1ST DEFENDANT

EQUITY INVESTMENT COOPERATIVE SOCIETY LTD ..... 2ND DEFENDANT

RULING

1. The Plaintiff/Respondent herein filed this suit on 5th February 2024, and sought for various prayers against the Defendants herein. Among the prayers sought is a declaration that the Plaintiff is not in breach of contract, and an order for specific performance of the Sale Agreement dated 20th June 2019.

2. Simultaneously, the Plaintiff/Respondent filed a Notice of Motion Application dated 2nd February 2024, wherein it sought for restraining orders against the Defendants herein to restrain them from cancelling the Sale Agreement dated 20th June 2019, trespassing, and or interfering with the Plaintiffs possession of the suit land LR No 10744/2 Thika, within Thika Greens Estate, Muranga County.

3. In response to the above Notice of Motion Application, the 2nd Defendant/Applicant herein filed a Chamber Summons Application dated 16th February 2024, brought under Section 6 of the *Arbitration Act* (CAP 49), and sought for these orders;

    1. That this Court has no jurisdiction to hear and determine the matter.

    2. That the claim as filed offends Clause J of the Special Conditions of the Sale Agreement dated 20th June 2019, which provides that ALL disputes should be resolved by way of Arbitration.

    3. That the proceedings should be stayed and parties referred to Arbitration in terms of the Sale Agreement dated 20th June, 2019.

4. That costs of this Application and the suit should be borne by the Plaintiff".

4. The said Chamber Summons Application is supported by the grounds stated thereon and on the Supporting Affidavit of Nelly Gathungu, sworn on 16th February 2024.

5. The 2nd Defendant/Applicant contended that the 1st Defendant herein as the Vendor, the 2nd Defendant as the Beneficial Owner, and the Plaintiff as the Purchaser, executed a contract for sale of "premises Number 38 on property LR No.10744/2 Thika" on 20th June 2019, out of which a dispute later arose occasioned by the Plaintiff's failure to render the full purchase price as contracted.

6. The 2nd Defendant/Applicant averred that the Plaintiff/Respondent then initiated the current suit without exhausting the requirement set out in Clause J of the aforesaid contract requiring the parties to refer all claims and disputes to Arbitration.

7. The Applicant further contended that parties are bound by their agreement and the Court cannot play the role of re-writing what parties have covenanted among themselves. Further, that the Plaintiff/ Respondent had not approached the Court under Section 7 of the *Arbitration Act* seeking interim measures pending arbitral proceedings, therefore, the current suit is incompetent.

8. The Plaintiff/Respondent opposed the instant Chamber Summons Application through the Replying Affidavit of James Mutitu Mworia, sworn on 21st February 2024, wherein he averred that the Arbitral Clause referred to by the 2nd Defendant/Applicant does not limit the jurisdiction of the Court as set out in Article 162 of *the Constitution*. Further, that Arbitration is an Alternative Dispute Resolution (ADR) mechanism as provided under Article 159 of *the Constitution*.

9. It was the Plaintiff/Respondent averments that as the beneficial owner of LR No.10744/2 Thika, which hosts a mansion with three (3) floors, it would suffer prejudice and be left without recourse should the Court grant the orders to strike out the suit as prayed by the- 2nd Defendant/ Applicant.

10. The Plaintiff/ Respondent further averred that it is only fair and for the interest of justice to dismiss the instant Chamber Summons Application, and allow the Plaintiff's Application dated 2nd February 2024, to proceed for hearing.

11. This Application was canvassed by way of written submissions. The 2nd Defendant/Applicant filed it's written submissions on 27th February 2024, through Kimani& Michuki & Co. Advocates, and urged the court to allow its Application since the court has no jurisdiction to hear and determine this matter.

12. It was the 2nd Defendant/ Applicant's submissions that the Plaintiff/Respondent paid a deposit of Kshs.5,832,260/=, but failed to clear the balance of the purchase price totaling to Kshs.3,192,060/= within 12 months from June 2019, as contracted. Further, that the Plaintiff/Respondent made another payment of Ksh.350,000/=, on 25th February 2021, bringing the total payment to Ksh.6,182,260/=, out of the entire purchase price of Kshs.9,024,320/=

13. The Applicant further submitted that upon the Plaintiff/Respondent's failure to pay the balance of the purchase price, Clause A of the contract was brought into operation which provides that in the event the Purchaser is unable to clear the balance, the 2nd Defendant/Applicant herein would issue a completion notice and upon the lapse of 21 days from the date of aforesaid notice, the Purchaser would forfeit a sum equal to 10 percent of the purchase price to the Applicant as liquidated damages and would have no further claim with regard to the suit property.

14. It was the 2nd Defendant/Applicant's further submissions that it issued a completion notice to the Plaintiff/Respondent herein dated 12th SEPTEMBER 2022, and the same lapsed after 21 days without

any response from the Plaintiff/Respondent. Consequently, the Applicant issued a cancellation notice dated 23rd August 2023, to the Plaintiff/Respondent herein.

15. Further, the Applicant submitted that there is a dispute between the 2nd Defendant/ Applicant and the Plaintiff/Respondent, and Clause J of the aforesaid contract provides for dispute resolution through arbitration. Therefore, in the circumstances, the Plaintiff/ Respondent has approached the Court outside the procedure laid down for dispute resolution in the contract.

16. Consequently, the 2nd Defendant/ Applicant isolated one issue for determination as follows;

    a. Whether the Court has jurisdiction to entertain the Plaintiff's Application and the suit by virtue of Clause J on special conditions of the sale agreement dated 20th June 2019.

17. Reliance was placed in the case of Nyutu Agrovet Ltd Vs Airtel Networks Ltd (2015), wherein the court held that Courts of Law have no business remaking parties' contracts. The court held as follows;

> " Matters governed by the Act are the ones touching on the formation of arbitration agreements, which are contracts between the parties voluntarily executed, which the court cannot remake for them; determining arbitrators; going for the arbitration itself; the issuance of the award so on and so forth.
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> "Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporated the Arbitration agreement into their contract and at times even include the finality clause as was the case here. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treat with deference is all about."

18. The 2nd Defendant/ Applicant further submitted that in the current suit the Plaintiff/Respondent has not invoked the provisions of Section 7 of the *Arbitration Act*, which provides for interim measures, but has sought for orders under the Civil Procedure Rules. It was submitted that interim measures under Section 7 of the *Arbitration Act*, are by nature different from injunctions as was held in the case of Simon Karanja Ngugi Vs Margaret Wanjiru Kihanya [2021]e KLR., where the court held as follows;

> " I note that the applicant approached the court under the Civil Procedure Rules as opposed to section 7 of the *Arbitration Act*. It's not clear why the applicant invoked the Civil Procedure Rules in the circumstances of this case, yet the applicability of the Civil Procedure Rules has been the subject of numerous court decisions. In Anne Mumbi Hinga v Victoria Njoki Gathara (Supra) the Court of Appeal observed that: -
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> > "...All the provisions including the *Civil Procedure Act* and Rules do not apply to arbitral proceedings because Section 10 of the *Arbitration Act* makes the *Arbitration Act* a complete code and Rule 11 of the Arbitration Rules cannot override Section 10 of the *Arbitration Act*..."
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> "A reading of the cited provisions of the *Arbitration Act* leaves no doubt that the provisions of the Civil Procedure Rules cited by the applicant are inapplicable. This being the position, I find and hold that the applicant's application is fatally incompetent for offending the express provisions of the *Arbitration Act*. On this ground alone, the application is dismissed with costs to the defendant."

19. In conclusion, the 2nd Defendant/ Applicant submitted that at the present stage of the proceedings, the responsibility of the Court is not to assess the merits of the case, but only to find out if an Arbitration Clause exists, as was held in the case of Blue Limited Vs Jaribu Credit Traders Ltd Nairobi (Milimani) HCCS No.157 of 2008 and in the case of Kenya Pipeline company Ltd Vs Datalogix Ltd & Another Naiorbi HCCC No. 490 of 4004 [2008] 2 EA 193 where the court held that;

> " It is clear from the reading of Section 6(1) of the *Arbitration Act* that the decision to refer the matter to arbitration is left to the discretion of the court and the court must give effect to the terms of a contract which provides for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give effect, the wishes of the parties and their contractual relationship. Arbitration, I reckon is a modern way of resolving disputes quicker, amicably and in a friendly environment and manner. It is for that reason that the court would always endeavour to encourage parties to resolve their disputes through arbitration. It is against public policy to deprive parties of that choice and hinder their attempt to resolve their dispute through arbitration mechanism. Our system of law and dispute resolution should not countenance the existence and continuation of two parallel processes in respect of the determination of an issue arising between the same parties or parties claiming under them over the same subject matter."

20. The Plaintiff/ Applicant filed its written submissions through J.M Njengo & Co Advocates, on 26th February 2024, and urged the court to find and hold that it has jurisdiction to determine the matter, and thus dismiss the 2nd Defendant/Applicant's Application with costs. It was submitted that the instant Application represents the Applicant's reaction to the Plaintiff/Respondent's suit staking claim to the suit property.

21. Further, that the 2nd Defendant/ Applicant erected not to respond to the Plaintiff's Application filed before this Court through a Replying Affidavit and opted to file the current Application. The Plaintiff/ Respondent submitted that the arbitral Clause cited by the 2nd Defendant/Applicant does not limit this Court's jurisdiction, considering the nature of the present matter.

22. Further, the Plaintiff/Respondent acknowledged that on 20th June 2019, it executed an Agreement for sale of Plot No. 38, LR 10774/2, with the Defendants herein whereby, the total purchase price was Kshs. 9,024,320/=, and the Plaintiff/Respondent paid Kshs.5,832,260/=, as deposit, and the balance of the purchase price was to be deposited in the Applicant's account within twelve (12) months, from the date of execution of the aforesaid agreement. That following the said agreement, the Defendants gave possession of the suit property to the Plaintiff/Respondent.

23. The Plaintiff/Respondent further submitted that on 15th January 2020, during which time full payment of the agreed purchase price had not been rendered, the Defendants herein executed "an Authorization to Construct Form" that granted the Plaintiff/Respondent the authority to construct a house on the suit property.

24. It was further submitted that acting on the aforesaid Authorization to Construct Form, the Plaintiff/ Respondent, went ahead and constructed a three-storey bungalow valued at Kshs.39,500,000/=, on the suit land. Further, it was submitted that the parties agreed vide an Engagement Letter dated 13th July 2021, that once construction of the aforesaid house was complete, the same would be sold off and the proceeds thereof held by the Law Firm of M/S Kimani & Michuki Co. Advocates.

25. The Plaintiff/Respondent also submitted that despite making periodic payment to the 2nd Defendant/ Applicant herein as agreed, the Applicant has refused to accept the balance of the purchase price and

has issued a Rescission Notice dated 8th January 2024, alleging that the Plaintiff/Respondent has failed to pay the balance of the purchase price.

26. The Plaintiff/Respondent identified three issues for determination as follows; -

(i) Whether this Honourable Court has Jurisdiction to hear this matter?

(ii) Does an Arbitral Clause oust the jurisdiction of this Court?

(iii) What are the available interim reliefs in light of the existence of an Arbitral Clause?

27. Reliance was placed on the provisions of Article 162(2)(b) of *the Constitution* of Kenya and Section 13(2) of the Environment and *Land Act*, wherein it was submitted that this Court is vested with jurisdiction to determine this matter. It was further submitted that Section 7 of the *Arbitration Act*, which was cited in support of the proposition that parties subject to an arbitration agreement are entitled to seek interim orders from this Court since the mention thereon is High Court and this Court is a Court of coordinate jurisdiction with the High Court, and therefore, this court can issue the interim orders as sought.

28. On the question of the Court's jurisdiction, the Plaintiff/Respondent relied on the case of "Owners of Motor Vessel "Lilian S" Vs Caltex Oil (Kenya) Ltd (1989)e KLR; County Government of Migori Vs INB Management IT Consultant Ltd (2019)e KLR and the case of Hon Lady Justice Kaplana H Rawal Vs Judicial Service Commission and Others Civil Application No. 11 of 2016., wherein the court cited the decision in Ocheja Immanuel Dangama vs Hon. Atoi Aidoko Aliaswan and 4 Others the court held as follows;

> " ....it is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity, dead on arrival, and of no legal effect whatever that is why an issue of jurisdiction is granted and fundamental in adjudication and has to be dealt with first and foremost...."

29. On the issue whether an arbitral clause operates as an ouster of the Court's jurisdiction, the Plaintiff/Respondent was categorical that pursuant to Articles 159 and 162 of *the Constitution* of Kenya, arbitration is an alternative means of dispute resolution and was not intended to limit the role of Court as a source of legal remedies. The Court was referred to the decisions in the cases of Austin V Attorney-General, Case No.1982 of 2003 (High Court of Barbados) and Harrikison Vs Attorney-General of Trinidad and Tobado, Civil Appeal No. 59 of 175.

30. On the issue whether the Court should stay the current proceedings and refer the matter to arbitration, the Plaintiff/Respondent, citing Section 10 of the *Arbitration Act*, submitted that the arbitral clause relied upon by the 2nd Defendant/Applicant is inoperative and incapable of being performed due to variation of contract occasioned by the 2nd Defendant/Applicant herein namely, by granting the Plaintiff/Respondent the authority to assume possession of the suit land, and carry out construction thereon contrary to the terms of the contract which provided that the Plaintiff/Respondent would assume possession of the suit property upon full payment of the purchase price.

31. Further, the Plaintiff/Respondent submitted that the Court ought to intervene and issue interim orders to protect its interest in the suit property which is being interfered with by the Applicant.

32. The above are the argument for and against the instant Chamber Summons Application, which this court has carefully considered, together with the written submissions and cited authorities. This court finds the issue for determination is whether the instant Chamber Summons Application is merited.

33. There is no doubt that in bringing this instant Application, the 2nd Defendant/Applicant is questioning the Jurisdiction of this court. Further, there is no doubt that jurisdiction is everything and without it, the court has no option but to down its tools. See the case of Owners of Motor Vessel "Lilian S" – Versus - Caltex Oil (Kenya) Limited (1989) IKLR, where the Court held:

> " Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given".

34. There is no doubt that in the instant suit, all the parties admit that an arbitration clause exists and is contained in the governing contract executed on 20th June 2019. The Plaintiff/Respondent, has however, argued that the said arbitration clause became inoperative owing to variation of a contractual term by the 2nd Defendant/ Applicant; Moreover, that the aforesaid arbitral clause does not oust the jurisdiction of the Court as set out under Article 162(2)(b) of *the Constitution*.

35. In the case of National Bank of Kenya Ltd versus Pipeplastic SamKolit (K) Ltd & Anor [2000] eKLR, the Court held as follows:

> " A court of law cannot rewrite 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..."

36. Further, Sections 3(1) of the *Arbitration Act* defines an "Arbitration Agreement" as follows:

> " Arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".

37. The Court of Appeal in the case of Shell Limited v Kobil Petroleum Limited Civil Appeal (Nairobi) No 57 of 2006, held as follows:

> " Arbitration is one of several dispute resolution methods that parties may choose to adopt outside the courts of this country. The parties may either opt for it in the course of litigation under Order XLV of the Civil Procedure Rules or provide for it in contractual obligations, in which event the *Arbitration Act*, No. 4 1995 (the Act) would apply and the courts take a back seat."

38. Again in the case of James Heather – Hayes Vs African Medical and Research Foundation (AMREF) [2014] eKLR, the Court held that: "it would be unnatural to oust arbitration, an internationally recognized practice of Alternative Dispute Resolution". And further, in the case of Kamconsult Ltd Vs Telkom Kenya Ltd & Another [2016] eKLR, the Court held as follows:

> " Certainly, I do not agree that the *Civil Procedure Act* applies to arbitral proceedings, even as the issue has not been fully ventilated before us. However, much as I am not yet ready to pronounce that the *Arbitration Act* is a complete code excluding any other law applicable in civil-like litigation, I do not see where the *Civil Procedure Act* applies in this matter...."

39. Further, the Court in the case of Goodison Sixty-One School Limited Vs Symbion Kenya Limited [2017] eKLR, distinguished between Court-Annexed Arbitration pursuant to Order 46 of the Civil Procedure Rules and arbitration governed by the *Arbitration Act*, in the following terms:

> " Arbitration that is wholly consensual at inception proceeds under the *Arbitration Act*. Such arbitration emanates from an arbitration agreement entered into in a contract or other writing by the parties in terms of section 4, signifying the clear intent of the parties' to resolve their dispute through arbitration. It also signifies the parties' intent that should any legal proceedings be commenced in court by any of the parties the proceedings should be stayed by the court to enable arbitration to proceed as provided under Section 6 of the Act. The Act provides for both the substantive and procedural law for the arbitration. Further, section 10 has the all-important provision that:
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> "Except as provided in this Act, no court shall intervene in matters governed by this Act"
>
> The clear intention of the statute is that the court is to be involved in a consensual arbitration only under the limited circumstances prescribed in the Act or the Rules made under the Act."

40. It is evident that the parties herein on their own volition and is contained in the sale agreement agreed to submit themselves to arbitration as submitted by the 2nd Defendant Applicant, in the case of Nyutu Agrovet Limited v. Airtel Networks Limited Civil Appeal (Application) No.61 of 2012; [2015] eKLR, the Court of Appeal held as follows:

> "My view is that the principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts, for determination by a body put forth by themselves, and adding to all that as in this case, that the arbitrator's award shall be final, it can be taken that as long as the given award subsists, it is theirs. But in the event, it is set aside as was the case here, that decision of the High Court final remains their own. None of the parties can take steps to go on appeal against the setting aside ruling. It is final and the parties who so agreed must live with it unless, of course, they agree to go for fresh arbitration. The High Court decision is final and must be considered and respected to be so because the parties voluntarily chose it to be so. They put that in their agreement. They desired limited participation by the courts in their affairs and that has been achieved."

41. The 2nd Defendant/ Applicant herein while urging the court to refer the dispute between it and the Plaintiff/Respondent for Arbitration has averred and submitted that it issued cancellation notices dated 12th September 2022 and 23rd August 2023, wherein it informed the Plaintiff/Respondent that any interest or claim held by the latter in the suit premises was extinguished. It is clear that the substratum of the dispute is in danger of being dissipated by the 2nd Defendant/Applicant even as it seeks to have the suit referred for Arbitration. In the case of Cigna International Health Services v Manish Dhansukh Vaghella & another [2019] eKLR, the Court cited the holding of the court in Attorney General v Chief Magistrate as follows:

> " Where the Court has found that there are issues in the suit which deserve further investigations, the Court is enjoined to preserve the substratum of the suit so that at the conclusion of the case, its decision will not be merely an academic exercise. The Court therefore has a duty to ensure that its proceedings are geared towards the achievement of a meaningful determination otherwise litigants who come to Court to seek redress therefrom

will lose faith in the judicial system if the Courts cannot, during the pendency of the dispute preserve the subject of litigation."

42. . However, the Court only issue the orders of preservation if it is moved accordingly. The Court ought to have been moved under Sections 7 of the *Arbitration Act*.

43. The Plaintiff/Respondent has implored the Court to come to its rescue as the 2nd Defendant/ Applicant is in the process of disposing off the suit land together with the three storey mansion put up by the Plaintiff/Respondent at the cost of Kshs.39,500,000/=. However, the mandate of the Court to grant interim measures pending arbitration has not been invoked by the Plaintiff/Respondent, as provided by section 7 of the *Arbitration Act* referred to above. Rather the Plaintiff's suit seeks for injunctive Orders under the *Civil Procedure Act*.

44. This court will be guided by the holding in the case of Speaker of the National Assembly v Karume [2008] 1 KLR 425, where the Court held as follows:

> " Where there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or the Act of Parliament, that procedure should be followed".

45. Similarly, in the case of Rich Productions Ltd v Kenya Pipeline Company Ltd & Another Petition No.173/2014, the Court held as follows:

> " The reason why *the Constitution* and the law establish different institutions and mechanisms for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with technical competence and the jurisdiction to deal with them. While the court retains the inherent and wide jurisdiction under Article 165 of *the Constitution* to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before court seek to avoid mechanisms and process provided by law, and convert the issued in dispute into constitutional issues when it is not."

46. Further, in the case of Mutanga Tea and Coffee Company Ltd Vs Shikara Ltd & Another [2015]e KLR, the Court of Appeal declared as follows:

> " This court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribe for resolution of particular disputes (Speaker of the National Assembly v Karume) (supra).... See also Kones v Republic & Another Exparte Kimani Wanyoike & 4 others [2008] e KLR 296, it is apparent that in the above cited cases the court was speaking on issues of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by *the Constitution* or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court."

47. Given that the sale agreement binding the parties herein contains an arbitration clause, and given that parties are bound by their agreement, this court finds that the Plaintiff/ Applicant brought the suit to court prematurely without exhausting the available mechanism for dispute resolution as provided in the existing binding sale agreement.

48. In view of the foregoing, the Court finds and holds that a valid Arbitration Agreement exists between the parties herein precluding the intervention of this Court in the dispute between the parties, save for grant of interim measures pending arbitration as provided under Section 7 of the *Arbitration Act*.

49. For the above reasons, this court finds that it has no jurisdiction to hear at determine this matter. The parties should submit themselves for arbitration as stipulated in Clause J of the special conditions of the Sale Agreement dated 20th June 2019.

50. Consequently, this court finds and holds that the Chamber Summons Application dated 16th February 2024, is merited and the same is allowed in terms of prayers No. 1, 2 and 3 of the said Application. Further, the 2nd Defendant/Applicant is entitled to costs of this Application. The Court has no jurisdiction and thus it downs its tools.

    It is so ordered.

DATED,SIGNED, AND DELIVERED VIRTUALLY AT MURANGA THIS 20TH DAY OF MARCH 2024.

L.Gacheru

Judge.

Delivered online in the presence of.

Mr Njengo for the Plaintiff/Respondent

Absent for the 1st Defendant

Mr Gakungu for the 2nd Defendant/ Applicant

Joel Njono - Court Assistant.

L.Gacheru

Judge

20/3/2024