



REPUBLIC OF KENYA



KENYA LAW

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Stepping Stones Preparatory School Company Limited v Ngugi & 3 others (Environment and Land Appeal E066 of 2021) [2024] KEELC 1735 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1735 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E066 OF 2021**

JG KEMEI, J

MARCH 20, 2024

BETWEEN

**STEPPING STONES PREPARATORY SCHOOL COMPANY
LIMITED APPELLANT**

AND

**DAVID NJEHIAH NGUGI 1ST RESPONDENT
JANE NYAMBURA KARACHI 2ND RESPONDENT
REGISTRAR, THIKA 3RD RESPONDENT
NATIONAL LAND COMMISSION 4TH RESPONDENT**

(Being an appeal against the Ruling and Orders of the Chief Magistrate Court at Thika by Hon Ben M Ekhubi in MCELC EO23 of 2021 delivered on the 5/8/2021)

RULING

Introduction

1. The subject of this Ruling is an interlocutory appeal filed by the Appellant against the trial Court's Ruling in Thika MCL&E Case No. E023 of 2021 delivered on 5/8/2021. The Appellant (Plaintiff in the trial Court) filed its Memorandum of appeal dated 5/9/2021 on grounds That;
 - a. The Learned Magistrate erred in both law and fact by staying the Appellant's suit under Section 6 of the [Arbitration Act](#) in a matter which is not subject of Arbitration proceedings.
 - b. The Learned Magistrate erred in both law and fact by staying the Appellant's suit under Section 6 of the [Arbitration Act](#) when there is not in fact any dispute between the parties with regard to matters agreed to be referred to arbitration.



- c. The Learned Magistrate erred in both law and fact by failing to find that the Appellant had not entered into any agreement with the Land Registrar and the National Land Commission (3rd and 4th Respondents herein) and were therefore not bound by any arbitration clause.
 - d. The Learned Magistrate erred in both law and fact by staying the Appellant's suit under Section 6 of the [Arbitration Act](#) on the basis of an arbitration clause incapable of being performed.
 - e. The Learned Magistrate erred in both law and fact by failing to find that the Appellant has sought substantive orders against the Land Registrar and the National Land Commission (3rd and 4th Respondents) and who cannot be bound by any orders emanating from the arbitration proceedings.
 - f. The Learned Judge (sic) erred in both law and fact by allowing the 1st and 2nd Respondent's Application for stay under Section 6 of the [Arbitration Act](#) despite the fact that the same was filed after the Applicants (1st and 2nd Respondents herein) had entered appearance.
 - g. The Learned Judge (sic) erred in both law and fact by allowing the 1st and 2nd Respondent's Application for stay under Section 6 of the [Arbitration Act](#) despite the fact that the Applicants (1st and 2nd Respondents herein) had acquiesced themselves to the jurisdiction of the Court.
2. The Appellant prays that its appeal be allowed, the impugned Ruling be set aside and the suit be remitted for hearing and determination.
 3. In its Application dated 14/4/2021 giving rise to the impugned Ruling, the 1st and 2nd Respondents sought stay of proceedings pending reference of the dispute between them and the Appellant to arbitration. The grounds of the motion were that there was a dispute between the parties and vide an agreement dated 13/3/2019, and under clause 15 thereof the agreed dispute resolution mechanism was by way of arbitration. That the resolution of the dispute by an arbitrator would conclusively resolve the dispute before Court in its entirety.
 4. Objecting to the motion, the Appellant filed its grounds of opposition dated 11/5/2021 and stated that the 1st and 2nd Respondents by filing memorandum of appearance dated 12/4/2021 had already submitted themselves to the jurisdiction of the Court; the 3rd and 4th Respondents against whom substantive orders have been sought are not party to the sale agreement and that the central issue in the dispute is whether or not the suit land is a public land as pronounced by the 4th Respondent.
 5. Resisting the Appellant's claim, the 1st and 2nd Respondents filed a Memorandum of Appearance dated 12/4/2021 and simultaneously an application dated 14/4/2021 seeking in the main stay of proceedings to refer the dispute to arbitration. The Respondents contended that the sale agreement dated 13/3/2019 provided an alternative mechanism to resolve any dispute that might arise between the parties.
 6. The Appellant opposed the motion through its grounds of opposition dated 11/5/2021. It maintained that the 1st and 2nd Respondents have forfeited their right to pursue arbitration since they had filed their memorandum of appearance; that the 3rd and 4th Respondents whom substantive orders are being sought against are not parties to the sale agreement and that the jurisdiction of the Court has been improperly invoked despite clause 15 of the sale agreement. That the central issue for determination is whether the suit land is public land as initially pronounced by the 4th Respondent and such cannot be subject of arbitration.
 7. The application was canvassed by way of written submissions which the trial Court duly considered and rendered its Ruling on 5/8/2021. The learned Magistrate affirmed clause 15 of the sale agreement



referring any dispute to arbitration and recognizing Article 159 (2) (c) Constitution of Kenya allowed the application as prayed. That Ruling is the subject of this appeal.

8. On 16/3/2023 directions were taken and parties agreed to canvass the appeal by way of written submissions.
9. The Appellant through the firm of Okubasu, Munene & Kazungu Advocates LLP filed submissions dated 20/3/2023.
10. A singular issue was drawn for determination to wit whether or not the Hon Magistrate understood the implications of Section 6 of the Arbitration Act (AA). Reliance was placed on Section 6 of the AA to argue that the suit before Court included third parties (3rd and 4th Respondents) who were not party of the sale agreement and therefore some of the orders sought against them are not in the purview of arbitration. That upon the 1st and 2nd Respondents entering appearance in the suit and therefore submitting themselves to this Court's jurisdiction, they forfeited their rights to invoke the arbitration clause.
11. The 1st and 2nd Respondents through the firm of R.W Chege & Co. Advocates filed submissions dated 23/4/2023. They submitted that the Appellant did not object to their motion in the trial Court by way of Replying affidavit and therefore their application dated 14/4/2021 is admitted. Reiterating clause 15 of the sale agreement and section 6 of AA, the Respondents argued that the Appellant's move to file the instant suit is misguided since the decisions on whether or not there is a breach of agreement, will inform the decision on whether or not to cancel the Appellant's title and it is at that point when the land registrar may be involved.

Analysis & determination

12. As a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the Civil Procedure Act which espouses the role of a first Appellate Court which is to:

“... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.”

13. The germane issue for determination is whether the appeal is merited.
14. To place the appeal in context, a brief summary of the case at the trial Court is necessary. Vide its plaint dated 31/1/2021, the Appellant averred that it entered into a sale agreement dated 13/3/2019 with the 1st and 2nd Respondents for the purchase of land known as Thika Municipality Block 19/1991 (hereinafter referred to as the suit land) at a consideration of Kshs. 17.2M. That the 1st and 2nd Respondents are the registered owners of the suit land and to that end they received a deposit of Kshs. 3.6M from the Appellant and the balance thereto was to be paid by a financial institution on its behalf. That the Appellant purchased the suit land but its plans did not succeed as the Appellant's construction approvals were declined by Kiambu county government on the basis that the suit land is public land.
15. Displeased with the turn of events, the Appellant filed its suit for breach of contract and misrepresentation by the Respondents. Inter alia, the Appellant sought the following prayers;



- a. An order rescinding the contract dated 13th March, 2019 and subsequent addendums thereof between the Plaintiff and the 1st and the 2nd Defendants.
 - b. A refund of Kshs. 3,600,000.00 to the Plaintiff by the 1st and the 2nd Defendants being the deposit paid by the Plaintiff towards the purchase price.
 - c. Special damages of Kshs. 946,250.00.
 - d. Interests on (b) and (c) above
 - e. An order to rescind, annul or revoke the transfer and registration of Thika Municipality Block 19/1991 registered in the name of the Plaintiff.
 - f. The Land Registrar Thika, the 3rd Defendant herein, be ordered to reverse, delete, cancel and/or remove the name of the Plaintiff from the proprietorship section of land parcel number Thika Municipality Block 19/1991 and that the name of the 1st and the 2nd Defendants be restored, reinserted, re-entered and/or indicated as the proprietor of land parcel No. Thika Municipality Block 19/1991 and a title deed be duly issued to the 1st and the 2nd Defendants.
 - g. In default of No. (f) above, the Deputy Registrar is hereby directed to so execute all the appropriate and necessary documents to effect transfer of land parcel number Thika Municipality Block 19/1991 to the 1st and 2nd Defendants.
 - h. Costs of this suit and interest thereon.
 - i. Such other or further reliefs as this Honourable Court may deem fit and proper.”
16. It is not in dispute that the Appellant and the 1st and 2nd Respondents entered into an agreement for sale dated the 13/3/2019 for the sale and purchase of the suit land for which the parties laid out therein comprehensive covenants and obligations which they agreed to be bound by. One of the said covenants is clause No 15 on arbitration which states as follows;
- “Should any dispute arise between the parties with regard to the interpretation, rights, obligations and/or implementation of any one or more of the provisions of this agreement, the parties shall in the first instance attempt to resolve such dispute by amicable negotiations. Should such negotiations fail to achieve a resolution within fifteen (15) days, either party may declare a dispute by written notification of the other, whereupon such dispute shall be referred to arbitration under the following terms:-
- a. Such arbitration shall be resolved in accordance with the provisions of the Kenyan [Arbitration Act](#) 1995 (as amended from time to time).
 - b. The tribunal shall consist of one arbitrator to be agreed upon between the parties failing which such arbitration shall be appointed by the chairman for the time being of Chartered Institute of Arbitrators of Kenya upon the application of either party;
 - c. The place and seat of arbitration shall be either Nairobi or Thika and the language of arbitration shall be English;
 - d. The award of the arbitration tribunal shall be final and binding upon the parties to the extent permitted by law and wither party may apply to a Court of competent jurisdiction for enforcement of such award; and



- e. Notwithstanding the above provisions of this clause, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from any Court of competent jurisdiction pending the final decision or award of the arbitrator.

Each of the parties hereby agrees and confirms for the purposes of Law of Contract Act (Chapter 23, Laws of Kenya) that they have executed this agreement with the intention to bind themselves to the provisions of this agreement”

17. The parties agreed to refer any dispute that may arise with regard to the interpretation, rights obligations and or implementation of the said agreement to arbitration. Section 6 (1) of the AA empowers this Court to stay proceedings in favour of referring the matter to arbitration. It states 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
b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”

18. The cause of action of the Appellant is captured in para 12 of the Plaintiff which is expressed as a breach of the contractual obligations in the agreement of sale aforesaid and because of the said breach sought that the agreement be rescinded. The agreement of sale provides for warranties of title and remedies for breach/default of contract as provided for under the Law Society of Kenya terms and conditions of sale. The Appellant went ahead to enumerate particulars of breach and misrepresentation by the 1st and 2nd Respondents. The Court finds that the core (subject matter) of its suit in the trial Court was premised on the agreement of sale, a dispute that forms part of the disputes contemplated under the arbitration clause and agreed to refer it to arbitration for resolution.

19. The Appellant has argued that the 3rd and 4th Respondents not being parties to the agreement disentitles the arbitral forum from entertaining the matter. I do not agree with the Appellants on this one. My reading of the plaintiff and particularly the prayers sought therein is that the Appellants are alleging breach of contract and seek to rescind the contract all together with the consequence that the title already transferred to its name is reverted to the 1st and 2nd Respondents and further that inter alia the sum of Kshs 3.6 Million being deposit paid to the 1st and 2nd Respondents be refunded. Prayers f and g of the plaintiff seek for enforcement of the orders of the Court/arbitrator. In my view there are no rights obligations flowing from the 3rd and 4th Respondents to the Appellants. They have been enjoined to enforce the orders of the Court. Once the award is made and adopted by the Court there is nothing to prevent the Applicant from extracting the orders and serving upon the 3rd Respondent for enforcement. With regards to the 4th Respondent the cause of action is not discernible from the pleadings.

20. The next issue is whether the Court in granting the orders of stay of proceedings considered the import of the provisions of section 6 (1) of the AA. That the 1st and 2nd Respondents forfeited their right to arbitration when they filed a memorandum of appearance and thereafter submitted themselves to the jurisdiction of the Court. The wording of section 6(1) above is that the party making the application does so not later than the time when the party enters appearance or otherwise acknowledge the claim. A perusal of the trial Court record shows that the suit was filed on the 31/1/2021. On



the 12/4/21 the 1st and 2nd Respondents filed a memorandum of appearance and on the 14/4/21 filed the application seeking stay of proceedings pending the reference of the case to arbitration. The Respondents did not file a defence hence did not submit to the jurisdiction of the Court. I find that the Court proceeded properly by staying the proceedings to allow the parties to approach the arbitral forum for dispute resolution. I therefore concur with the decision of the Court cited above and I find no reason advanced by the Appellants to disentitle the 1st and the 2nd Respondents the right to refer the matter to arbitration. Further more it is now a constitutional tenet to embrace and deploy other forms of alternative dispute resolution and in this case the parties having agreed to refer their dispute to arbitration, their choice to an arbitration as a form of dispute resolution ought to be respected and upheld and not be saddled by procedural strictures.

21. Having considered the grounds of appeal, the written submissions and all the material placed before me I find that the appeal is unmerited.
22. It is dismissed with costs to the 1st and 2nd Respondents.
23. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 20TH DAY OF MARCH, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms Muthama HB Kazungu for Appellant

Ms. Chege for 1st and 2nd Respondents

3rd and 4th Respondents – Absent but served

Court Assistant – Phyllis / Oliver

