



Obiero v Cytonn Integrated Project LLP & another (Environment & Land Case E015 of 2022) [2024] KEELC 1481 (KLR) (13 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1481 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E015 OF 2022**

**JG KEMEI, J
MARCH 13, 2024**

BETWEEN

PAUL OMONDI OBIERO PLAINTIFF

AND

CYTONN INTEGRATED PROJECT LLP 1ST DEFENDANT

ORARO & COMPANY ADVOCATES 2ND DEFENDANT

RULING

1. By way of Notice of Motion dated 7/11/2022 the 1st Defendant/Applicant seeks in the main, stay of proceedings pending the hearing and determination of the ongoing arbitration proceedings.
2. The Application is based on the grounds on its face which are reiterated in the Supporting Affidavit of even date sworn by Lilian Maina, the 1st Defendant's Counsel. She averred that the gist of this suit is the Agreement for Sale between the Plaintiff and 1st Defendant dated 1/9/2016 of an apartment known as No. B804, Block BM - The Alma Ruaka. That clause 20 of the Agreement for Sale provided for resolution of disputes through arbitration and the parties have duly filed their pleadings before the appointed arbitrator. That with the ongoing arbitration proceedings, there is an apparent risk of parallel proceedings contrary to the doctrine of sub judice. That it is just to promote efficacious resolution of the dispute in line with Article 159 (2) (c) *Constitution* of Kenya and Section 6 of the *Arbitration Act* hence the Application.
3. In opposing the Application, the Plaintiff's Counsel Dominic Ogega Mwale filed his Replying Affidavit sworn on 13/2/2023. He deponed that the instant suit was filed to seek injunctive reliefs to protect the substratum of the parties' contract. That the instant Application is a delaying tactic designed to waste the Court's time and is likely to be overtaken by events as the arbitrator is already preparing his award for delivery. Further that an arbitration clause does not act as an absolute bar to invoke the Court's jurisdiction. He urged the Court to strike out the Application with costs.



4. The 2nd Defendant did not file any response. On 3/5/2023 directions were taken to canvass the Application by way of written submissions.
5. The 1st Defendant through the firm of KN Law LLP filed submissions dated 19/5/2023. Reiterating the contents of the Application, the 1st Defendant relied on the Court of Appeal Case of *Eunice Soko Mlagui v Suresh Parmar & 4 Others* [2017]eKLR where the Court affirmed that the law disapproves concurrent proceedings before two or more forums. That the 1st Defendant having demonstrated that there are ongoing arbitral proceedings, the Application ought to be granted as prayed.
6. On the other hand, the firm of Mwale Law Advocates LLP filed submissions dated 30/5/2023 on behalf of the Plaintiff. Two issues were drawn for determination; whether the instant Application complies with the *Arbitration Act* and whether it is merited. Both issues were answered in the negative as the Application was said to be contrary to Rule 2 of the Arbitration Rules which provides that such an Application should be by way of Chamber Summons. The Court of Appeal decision in *Scope Telemantics International Sales Ltd v Stoic Company Ltd* NRB Civil Appeal No 285 of 2015 [2017] eKLR was cited in support of that proposition. Secondly that the Plaintiff sought other remedies including special damages and that the sale agreement under Clause 17.2 and 17.3 provide a leeway to pursue such remedies. Further that the claim against the 2nd Defendant cannot be subjected to arbitration since the 2nd Defendant was not a party to the agreement for sale and therefore a stranger to arbitration.
7. The sole issue for determination is whether the Application is merited.
8. The guiding law in an Application of this nature is anchored in Section 6 of the *Arbitration Act* that;
“Stay of legal proceedings
 - (1) 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.
 - (2) Proceedings before the Court shall not be continued after an Application under subsection (1) has been made and the matter remains undetermined.
 - (3) If the Court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.”
9. The Applicant urges this Court to stay the instant proceedings to pave way for arbitration proceedings. It is not in dispute that the arbitration proceedings have already commenced and directions therein given in light of a copy of the Arbitrator’s directions dated 18/10/2022 and DOM-1 dated 6/2/2023. The Application was filed on 11/11/2022. That is a period of over 9 months later contrary to the above provision which contemplates contemporaneous filing of such an Application upon entering



appearance. Moreover, it is not clear what the prayers herein are intended to achieve noting that over a year ago, the arbitrator had communicated that he was retiring to make his award and render it on notice.

10. The Plaintiff rightly submitted that the instant suit also seeks remedies against the 2nd Respondent who is not a party to the arbitration agreement and therefore a stranger to the arbitration proceedings. A glean of the Plaint confirms that the Plaintiff seeks special damages in the sum of Kshs 525,246/- against the 2nd Respondent.
11. In the end the Court finds that the Application is overtaken by events coming after the arbitration proceedings have commenced and perhaps completed; the Applicant disregarded the provisions of the law with respect to the filing of the Application that is by way of Chamber Summons and not a Notice of Motion as is the instant application; the Application is brought way after 9 months after filing the suit contrary to the law which requires that the same be filed contemporaneously with a defence. In conclusion the Application serves no purposes given the evidence led herein that the arbitration process is concluded.
12. The upshot is that the Application is without merit. It is dismissed with costs being in favour of the Plaintiff.
13. Orders accordingly

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 13TH DAY OF MARCH, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff - Absent

Mrs. Muriithi HB Mr. Mweke for the 1st Defendant/Applicant

2nd Defendant - Absent

Court Assistants – Phyllis/Oliver

