



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Holborn Properties Limited v Davani Group Limited (Environment & Land
Case 8 of 2022) [2023] KEELC 577 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 577 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 8 OF 2022
MAO ODENY, J
FEBRUARY 10, 2023**

BETWEEN

HOLBORN PROPERTIES LIMITED PLAINTIFF

AND

DAVANI GROUP LIMITED DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 10th March 2022 by the Defendant/Applicant seeking the following orders; -
 - a. This honourable court be pleased and do hereby strike out and/or dismiss the suit and pleadings thereof
 - b. Any other relief which this honourable court deems fit and just to grant.
 - c. The costs of this application be provided for.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.

Defendant/Applicant's Submissions

3. The application is premised on the sworn affidavit of David Njane the Managing director of the Applicant who deponed that the Applicant entered into a sale agreement dated 30th May 2016 with the Plaintiff for the purchase of Watamu Bay Hotel constructed on land titles Nos. Chembe/Kibabamshe/279, 394, 396,401, 425,428, 637 and 638.
4. That the Applicant further purchased property title No. Chembe/Kibabamshe/423 situated just after the hotel compound and that under clause 19 of the sale agreement it provided for an arbitration in the event of a dispute between the parties. He further deponed that the total amount payable for the



suit properties is Kshs. 67,000,000/- to which the Applicant has paid a total of USD. 6,542,500 with an outstanding balance of USD 357,500.

5. Mr. David Njane further stated that the parties herein signed a Deed of Acknowledgment and undertaking dated 9th April 2020 which dictated that the outstanding balance was USD 925,000 which he avers was a mistake as the outstanding balance is USD 357, 5000. He further stated that the said balance was to be settled within four years of signing of the deed on or before 31st July 2024 thus the demand for payment and the subsequent suit is premature.
6. In addition, the applicant stated that the court lacks jurisdiction to adjudicate this matter without first reference to arbitration as contained in the sale agreement dated 30th May 2016.

Plaintiff/Respondent's Case

7. The Plaintiff/Respondent filed a replying affidavit dated 19th April 2022 sworn by Sofia Abdillahi Chacha a director of the Plaintiff Company and deponed that Mr. David Njane has no authority from the Applicant to swear the affidavit as no written authority to appear, plead or act on behalf of the Applicant has been produced before court.
8. Ms. Sofia Chacha further stated that the dispute in question is not within the ambit of clause 19 of the sale agreement and the rights and remedies of the parties provided for in the sale agreement are cumulative and not exclusive of any rights or remedies provided by law. Further, the Deed of Acknowledgement and Undertaking was duly executed by the Applicant in presence of their lawyer.
9. It was the Respondent's case that to facilitate the completion of the transfer of Title Nos. Chembe/Kibabamshe/379, 394, 401, 425, 428, 396, 637 and 638 to the Applicant and registration of the bank facility, the Applicant was to pay to the Plaintiff the sum of USD 925,000 foR over a period of four years from 30th July 2021 and the last payment being on or before 31st July 2024. It was further her case that the Applicant has not made any instalment to the Plaintiff and thus the full sum of USD 925,000 has become due.

Defendant Applicant's Submissions

10. Counsel for the Applicant identified the following issues for determination:
 - a. Whether the dispute before court is covered or contemplated under the arbitration clause 19 of the Agreement for Sale dated 30th May 2016?
 - b. Whether this Honourable Court has jurisdiction to determine the dispute herein in the event that the arbitration clause 19 of the Agreement for Sale dated 30th May 2016 is not applicable?
 - c. Whether the application is incompetent for having been filed in contravention of Section 6(1) of the *Arbitration Act*, 1995?
 - d. Whether the arbitration clause does oust the jurisdiction of this honourable court to hear the dispute herein?
 - e. Whether striking out of the suit as sought is beyond the ambit of section 6 of the *Arbitration Act*, 1995/Remedies available?
11. On the first issue as to whether the dispute herein is covered under the arbitration clause, counsel submitted that the Deed of Acknowledgment and Undertaking dated 8th April 2020 which forms the basis of the Plaintiff's claim herein can best be described as an addendum to the original Agreement



- for Sale dated 30th May 2016 which contains an arbitration clause, and which clause has never been deleted/removed, amended or voided, and hence still applicable.
12. It was counsel's submission that the Deed cannot be divorced from the original agreement since all the rights and obligations created under it emanate from the original agreement for sale of the properties. That the impugned Deed could not have existed without the original Agreement for Sale dated 30th May 2016 and that the Deed itself makes reference to the original Agreement and it was for purposes of enforcing the rights and obligations of parties under the Agreement.
 13. Counsel therefore submitted that this court lacks jurisdiction to adjudicate this matter without first reference to arbitration as contained in the Agreement for Sale dated 30th May 2016 and even if the Plaintiff was to insist that the deed was totally independent of the agreement for sale, the court would still not have jurisdiction to hear this matter as the dispute would automatically metamorphosize in to a purely commercial dispute.
 14. Counsel relied on the case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others* [2017] eKLR and submitted that the Environment and Land Court has no jurisdiction on commercial disputes and hence should strike out this suit.
 15. On the issue as to whether the application is incompetent for having been filed in contravention of Section 6(1) of the *Arbitration Act*, 1995, Mr. Makhoha submitted that the Section was interpreted to mean that an application for stay and referral to Arbitration could only be filed before or at the time of filing the Memorandum of Appearance at latest, unless the Applicant does file it without unreasonable delay which delay is satisfactorily explained.
 16. Counsel relied on the cases of *Charles Njogu Lofty v Bedouin Enterprises Ltd* [2005] eKLR, *Eunice Soko Mlagui v Suresh Parmar & Others* [2017] eKLR, and *Burn manufacturing USA LLC V Sage South Africa (PTY) Limited* [2020] eKLR and submitted that a party is only considered as having waived its right to refer the dispute to arbitration after filing a defence, not after entering appearance.
 17. Counsel submitted that the Defendant/Applicant is yet to file a Defence and therefore the objection that it has waived its right to refer the dispute to arbitration is without merit and as such should be rejected.
 18. Counsel relied on the Court of Appeal case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR where the court stated a court of law cannot re-write a contract between the parties as the parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.
 19. Mr. Makhoha submitted that the court can only intervene in terms of interim measures as contemplated by Section 7(1) of the *Arbitration Act*, 1995 and that no reason has been demonstrated as to why this dispute should not be referred to arbitration and that there is no challenge to the validity of the arbitration clause.
 20. Consequently, counsel submitted that the court may exercise its discretion to either transfer the matter to the High Court, refer it to arbitration or strike the suit out or dismiss it with costs to the Applicant and urged the court to strike out the suit, or grant any order that it deems fit to grant, including staying the suit and referring the dispute for arbitration.

Plaintiff/Respeondent's Submissions

21. Counsel gave an elaborate background to the case and the dispute arising from the agreement dated 31st May 2016 together with the Deed of Acknowledgment and submitted that the dispute in question



- is not within the ambit of Clause 19 of the Agreement for Sale and that the rights and remedies of the parties provided for in the sale Agreement are cumulative and not exclusive of any rights or remedies provided for by law.
22. Mr. Binyenya also submitted that the sale Agreement is to be interpreted in accordance with the Laws of Kenya and the Parties submitted to the jurisdiction of the Courts of Kenya.
 23. Counsel listed the following issues for determination:
 - a. Whether as contained in Paragraph 7 of the Supplementary Affidavit Ms. Sophia Abdillahi Chacha had no authority to swear the Replying Affidavit?
 - b. Whether or not the Application offends the mandatory provisions of Section 6 (1) of the Arbitration Act, 1995; Section 5 of the Civil Procedure Act, Cap 21 of the Laws of Kenya; and Section 13 (1) of the Environment and Land Court Act, 2011?
 - c. Whether or not the Application has merit?
 24. Counsel submitted that the Plaintiff's Board of Directors' Resolution dated the 9th February 2022 is in the Plaintiff's List of Documents which shows that Ms. Sophia Abdillahi Chacha who is a shareholder and director of the Plaintiff was duly authorized and thus competent to swear the Replying Affidavit.
 25. Mr. Binyenya submitted that a resolution by the board of directors of a company may be filed at any time before the suit is fixed for hearing and that its absence is not fatal to the suit and relied on the case of Joseph Kipngetch Korir V Litein Tea Factory limited & Another [2016] eKLR, Leo Investment Ltd V Trident Insurance Co. Ltd and Arthi Highway Developers Limited V West End Butchery Ltd & 6 Others [2016] eKLR.
 26. Counsel further submitted that the firm of Mutua, Nyongesa & Muthoka advocates entered a non-conditional appearance for the Applicant thus submitting to the jurisdiction of this court and was not in compliance with Section 6 (1) of the Arbitration Act. Further, that an arbitration clause or arbitration agreement in a contract is not an impediment to resolving disputes in court until a party objects and cited the case of Rawal V Mombasa Hardware Ltd [1968] E.A 398.
 27. It was counsel's submission that where a party disputes the jurisdiction of the Court based on an exclusive jurisdiction clause, it must indicate its disapproval at the time of entering appearance by filing a conditional appearance or an appearance under protest.
 28. Counsel further submitted that the Applicant had until close of business on the 15th March 2022 to file an application for stay of proceedings in this suit and refer the parties to arbitration and that striking out this suit as sought by the Applicant is beyond the ambit of Section 6 of the Arbitration Act, 1995.
 29. Mr. Binyenya therefore submitted that the powers of a court to strike out pleadings are discretionary and should be exercised cautiously and relied on the cases of D.T Dobie & Company (Kenya) Limited V Joseph Mbaria Muchina & Another [1980] eKLR, Peter Muema Kahoro & Another V Benson Maina Githethuki [2006] HCCC and China Sichuan Corporation for International Techno-Economic Co-operative (Sietco) V Kigwe Complex Limited [2013] eKLR and urged the court to dismiss the application with costs.

Analysis and Determination

30. The issues for determination in this case are as to whether the Plaintiff's representative had authority to swear a replying affidavit, whether this court has jurisdiction to hear and determine this suit, and whether the application to strike out the suit has merit.



31. It is on record in the Plaintiff's list of documents that the Plaintiff's Board of Directors' issued a Resolution dated the 9th February 2022 authorizing Ms. Sophia Abdillahi Chacha who is a shareholder and director of the Plaintiff to swear a Replying Affidavit hence the same is competent.
32. It is also trite that failure to file authority to act is not fatal to the suit and can be filed at any time before the suit is heard as was held in the cases of *Leo Investments Ltd v Trident Insurance Company Ltd* (supra) Odunga, J was in agreement with the decision of Kimaru J in the case of *Republic v Registrar General and 13 Others* Misc. Application No. 67 of 2005 [2005] eKLR where the court stated: -
- “Such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit.”
33. I therefore find that the issue of the Respondent not having authority to swear a replying affidavit is a non-issue as the board resolution was filed in court and even if it had not been filed, a party can file the same before the case is set down for hearing.
34. On the issue whether this court has jurisdiction to hear and determine this suit, Article 162(2) of the *Constitution* provides that Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of, and title to land. Article 162(3) provides that Parliament shall determine the jurisdiction and functions of the Courts contemplated in Article 162(2). It was on the basis of this provision that Parliament enacted the *Environment and Land Court Act*, No. 19 of 2011, which came into effect on 30th August 2011. The object of the Act is stated as follows:
- “An Act of Parliament to give effect to Article 162(2)(b) of the *Constitution* ; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and to make provision for its jurisdiction, functions and powers, and for connected purposes”
35. Section 13 of the ELC Act provides that:
- 13.
- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162
- (2) (b) of the *Constitution* , the Court shall have power to hear and determine disputes?
- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and



e. any other dispute relating to environment and land.

36. The Applicant has challenged the jurisdiction of this court on two fronts, that the parties are bound by the arbitration clause in the sale agreement and that if the arbitration clause does not hold, the matter falls squarely under commercial disputes.
37. In addressing the first ambit, I am of the view that Article 162 (2) (d) anticipated this position by providing for contracts. The matter in question here is about a contract between the parties and its enforceability and therefore well within the jurisdiction of this court.
38. However, where there is an arbitration clause within an agreement between the parties, then the parties should subject themselves through arbitration unless the clause is null and void or illegal but such does not invalidate the arbitration clause as was held in the case of *Kenya Airports Parking Services Ltd & Another -v- Municipal Council of Mombasa* 2010 eKLR where the court stated –
- “it is in this courts view that where there exists an agreement with an arbitration clause, under the principle of separability of the arbitration clause, if a party to the agreement is of the opinion that the agreement is unlawfully and therefore invalid, such view does not invalidate the arbitration clause in the agreement.”
39. In this case there is no allegation of illegality of unlawfulness of the arbitration. What is in question is that the Plaintiff should have at the first instance referred the matter to arbitration.
40. Similarly, Section 6(1) of the *Arbitration Act* obliges courts to give effect to arbitration where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice and it is trite that courts cannot re write contracts for parties. Courts only enforce what parties have agreed upon.
41. The Plaintiff elected to come to court and the Defendant has invoked the arbitration clause in the agreement, and has moved this court after entry of a Memorandum of Appearance as provided for by procedure.
42. It is not disputed that there is an and that the balance was to be settled within four years of signing of the deed on or before 31st July 2024 the agreement and the deed is still subsisting. This makes the demand by the Plaintiff for payment premature and that is why the Plaintiff should have gone the arbitration way which is binding on both parties.
43. Parties enter into contracts or agreements where terms and conditions are binding on them. There would be no need of entering into beautifully written contracts with arbitration clauses on dispute resolution if the same will not be adhered to.
44. In the case of *International Consultancy Company Ltd (suing by a Power of Attorney No. P/A 65175/1 of Apexvision Limited v Telkom Kenya & Another* [2019] eKLR the court held that:
- “I further find that the defendants herein took the earliest opportunity, upon becoming aware of the filing the case, to seek the reference of the dispute to arbitration. My take therefore is that the issue of the reference being overtaken by events does not arise. Needless to say, the parties herein, under Clause 24 of the said Agreement chose to bind themselves to the arbitration clause and this court cannot therefore be seen to remove them from the terms of their agreement by determining this case as to do so would be tantamount to rewriting the agreement between the parties”



45. Counsel for the Respondent submitted that the Applicant had submitted itself to the jurisdiction of the court by filing a Memorandum of Appearance and it is also admitted that the Applicant had not filed any defence to the claim. The Applicant took the earliest opportunity to raise the issue of the arbitration clause therefore it did not lose its right to refer the matter to arbitration as per clause 9 of the agreement.
46. In the case of *[Burn Manufacturing USA LLC v Sage South Africa \(PTY\) Limited](#)* [2020] eKLR the court held that:
- “I find that the parties herein having voluntarily agreed to subject their disputes to arbitration, cannot be seen to run away from the terms of their agreement. Needless to say, it is trite that parties are bound by the terms of their agreement.
- For the reasons that I have stated in this ruling, I find that the application dated 27th January 2020 is merited and I therefore allow it and order that there shall be a stay of these proceedings pending referral, hearing and determination of the dispute through the structured dispute resolution mechanism envisaged under Clause 12 of the Agreement dated 29th May 2017.”
47. The parties cannot run away from the dispute resolution of their choice which is contained in clause 9 of the sale agreement. The Applicant has sought for striking out, transfer to the High court on the premise that this is a commercial dispute or referral to arbitration.
48. Having found that the parties were bound by an arbitration clause for dispute resolution, it will only be prudent and just to stay these proceedings pending referral, hearing and determination of the dispute through the structured dispute resolution mechanism envisaged under Clause 9 of the Agreement dated 30th May 2016.
49. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 10TH DAY OF FEBRUARY 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the *[Civil Procedure Rules](#)*.

