



REPUBLIC OF KENYA



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**Njenga v Nyumbani Concepts Limited & another (Environment & Land
Case E037 of 2022) [2023] KEELC 774 (KLR) (13 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 774 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E037 OF 2022**

JG KEMEI, J

FEBRUARY 13, 2023

BETWEEN

MONICA NJERI NJENGA PLAINTIFF

AND

NYUMBANI CONCEPTS LIMITED 1ST DEFENDANT

MBERIA MERCY KENDI T/A MBERIA & PARTNERS

ADVOCATES 2ND DEFENDANT

RULING

1. The Plaintiff filed suit against the Defendants on 31/4/2022 (?) seeking the following orders;
 - a. A declaration that Clause 4 of the agreement and the entire agreement is unconscionable oppressive unreasonable and illegal.
 - b. An order for the rescission of the agreement for sale of Karai/Karai/2840 dated the 9/3/2020.
 - c. An order directing the Defendant to give vacant possession of the suit property to the plaintiff.
 - d. A permanent injunction be and is hereby made against the Defendant prohibiting them from interfering with alienating occupying leasing offering for sale building or in any manner dealing in the suit property.
 - e. An award of nominal damages to be assessed by the Court for the Defendant's legal breaches.
 - f. Costs of the suit.
2. It was the Plaintiff's case that at all material times relevant to the suit she was the owner of the suit land. The 1st Defendant initiated a housing project involving the suit land and other surrounding properties. That she entered into an agreement of sale whose terms were that she would be paid Kshs 2 Million prior to the project and a further entitlement of two 3 bedroom housing units to be constructed on



- the land. That she proceeded on the instructions of the 1st Defendant to execute the said agreement before the 2nd Defendant. That she relied on the representations made by the 1st Defendant assisted by the 2nd Defendant and proceeded to execute the agreement however she was later directed to Clause 4 of the said agreement which states that the sum of Kshs 2 Million would be paid at an unspecified date contrary to the agreement that she had with the 1st Defendant. She has pleaded particulars of misrepresentation and unconscionability on the part of the 1st and 2nd Defendants and sought special damages in the sum of Kshs 100,000/- being the destruction of the maize plantation on her land.
3. Simultaneously she filed a Notice of Motion dated the 22/3/2022 seeking inter alia the following orders;
 - a. That this application be certified urgent and heard *ex parte* in the first instance.
 - b. That an order be and is hereby issued preserving the subject property Title Number Karai/Karai/2840, which is the subject of the intended arbitration proceedings, by restraining any dealings involving the land and maintaining its status quo.
 - c. That an order of temporary injunction be and is hereby issued restraining the Respondents from alienating, dealing in, dissipating, offering for sale, advertising, negotiating, or in any other way interfering with property Title Number Karai/Karai/2840, which is the subject of the arbitration proceedings.
 - d. That the defendants/respondents be and are hereby restrained from dealing in any manner prejudicial to the Plaintiff/Applicant's interest in respect of Property Title Number Karai/Karai/2840, which is the subject of the arbitration proceedings pending the hearing and determination of the Arbitration proceedings.
 - e. That an urgent hearing date be set for inter-parties hearing of this Application.
 - f. That costs of the application be awarded to the applicant.
 4. The Application is premised on the grounds set out thereat and the Supporting Affidavit of the Applicant sworn on even date. She averred that the 1st Defendant initiated a housing project involving her land and others in the surrounding area. She then entered into an agreement with the 1st Defendant to sell her land at the sum of Kshs 2 Million and in addition would be entitled to 2 three-bedroom houses from the project. It was her averment that through misrepresentation and fraud she was induced by the 1st Defendant to execute an agreement different from what had been discussed with the 1st Defendant so much so that Clause 4 of the agreement provided that the consideration would be paid on completion date which was the date of the transfer of the two 3-bedroom units erected on the property contrary to the earlier negotiations that stated prior to the construction of the apartments. That she relied on the promises and representations given to her by the 1st Defendant at the time of entering the agreement. In addition, she stated that the 1st Defendant took advantage of and manipulated her into signing an agreement that was contrary to the agreement they had leading to an unconscionable illegal and one-sided agreement that exposes her interest in her property. That because of the facts aforesaid she is keen in rescinding the agreement.
 5. In addition, she stated that the Defendants vandalized her maize crop on the suit land after the execution of the agreement and avowed that the subject matter of the suit is under extreme threat unless the Court issues the orders sought as the title is in the hands of the 1st Defendant whom she is apprehensive might transfer the title to its name. She urged the Court to issue preservative orders over the suit property.



6. Further that she had notified the Defendants of her intention to invoke the arbitration Clause and have the dispute be determined through arbitration in accordance with the arbitral Clause in the agreement for sale.
7. The Application is opposed by the 2nd Respondent vide her Replying Affidavit sworn on the 13/4/2022. She conceded drawing the agreement of sale between the Applicant and the 1st Defendant in respect to the suit land which was executed by the Applicant upon reading and understanding the contents thereof. She avowed that at no point did she assure the Applicant that her interest were adequately protected and in any event the Applicant had the option of seeking independent legal advise on the agreement to secure her interests. She was of the opinion that the suit against her is frivolous vexatious and an abuse of the process of the Court.

The Chamber Summons dated 20/4/2022

8. The 1st Defendant filed a Chamber Summons dated the 20/4/2022 seeking orders that there be stay of all the proceedings pending arbitration; the dispute between the plaintiff and the 1st Defendant be referred to arbitration and that the costs of the Application be awarded to the 1st Defendant.
9. The Application is supported by the grounds thereto and the Affidavit of Joseph Nderitu, the director of the Applicant. Referring to the Applicant's Application dated the 22/3/2022, the deponent affirmed the undertakings/agreement between the Plaintiff and the 1st Defendant whose terms are contained in the agreement dated the 9/3/2020. That the said agreement provided under Clause 22 for dispute resolution mechanism through arbitration. That now that a dispute has arisen with respect to the rights and obligation of the parties it is necessary that the same is referred to arbitration in accordance with the agreement of the parties. Equally that this Court is enjoined by the provisions of Article 159(2) (c) to promote and embrace alternative dispute resolution mechanism, one of which is arbitration. That in that regard Section 6 of the Arbitration Act enjoins the Court to stay the proceedings and refer the matter for arbitration as there is a valid arbitration agreement between the parties.
10. In a further Affidavit dated the 24/6/2022 Joseph Nderitu averred that the suit land is now registered in the name of the 1st Defendant as per the copy of title annexed and registered on the 1/4/2022. Further that the 1st Defendant has subdivided the said property into plots and sold to third parties in line with its business model of buying and selling land and if the Court injuncts it will prejudice its business. That the plaintiff has not come to Court in good faith and only seeks to frustrate the 1st Defendant.
11. Further, that the plaintiff is not opposed to the Application having acknowledged the dispute and that it should be referred to arbitration in her Affidavit.
12. In a rejoinder vide Replying Affidavit dated the 23/5/2022, the Applicant was of the opinion that stay of the proceedings is totally unnecessary given that the dispute can be resolved through arbitration. That the Court has power to grant interim measures of protection of the suit land which measures include restraining orders pending the hearing and determination of the arbitral proceedings.
13. The Applicant filed written submissions through the law firm of CR Advocates LLP on the 16/5/2022 while the 1st Defendant filed theirs through the law firm of H Kago & Co Advocates on the 2/8/2022.
14. Despite the directions of the Court the 2nd Defendant failed to file written submissions.
15. I have read and considered the submissions of the parties in entirety.



16. The issues for determination are as follows; whether the dispute should be referred to arbitration; if yes whether the suit should be stayed pending the conclusion of the arbitral proceedings; whether the Court should issue interim measures of protection in respect to the suit land.
17. It is not in dispute that the Applicant and the 1st Defendant entered into an agreement of sale dated the 9/3/2020 with respect to the suit land. Clause No B of the said agreement stated as follows;
- “The Vendor (Plaintiff) has agreed to transfer the suit land to the purchaser (1st Defendant) in exchange for two 3 bedroom housing units to be erected on the land by the purchaser and a further Kshs 2 Million (Kshs 2.0 M) payable by the purchaser upon completion and successful sale of a third housing unit to be erected on the said property.”
18. Under the agreement completion date was stated to be the date of transfer of the two 3 bedroomed unit to the Plaintiff to be erected on the suit land. The transfer of the two units were to be transferred and the cash paid to the Plaintiff upon the completion and successful sale of a third housing unit to be erected on the land.
19. Clause 5 of the said agreement stated as follows;
- “The property was sold with vacant possession as at the date of completion and no title over the property shall pass to the purchaser prior to completion save however that the purchaser shall have beneficial ownership over the said property and the vendor shall grant the purchaser full access to the property upon execution of the agreement for purposes of carrying ground breaking works preparing the site and undertaking construction of the housing units.”
20. Parties agreed on arbitration as the fora for dispute resolution. The Clause is fashioned as follows;
- “Should any dispute arise between the parties hereto 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 negotiation.
- 22.2 Should such negotiations fail to achieve a resolution within Fifteen (15) days, either party may declare a dispute by written notification to the other, whereupon such dispute shall be referred the arbitration under the following terms:-
- a. such arbitration shall be resolved under the provisions of the *Arbitration Act, 1995* Laws of Kenya (as amended from time to time);
 - b. the tribunal shall consist of one arbitrator to be agreed upon between the parties failing which such arbitrator shall be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators (Kenya Chapter) upon the Application of any party;
 - c. the place and seat of arbitration shall be Nairobi 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 any party



may apply to a Court of competent jurisdiction for enforcement of such award;

- e. notwithstanding the above provisions of this Clause, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures or orders from any Court of competent jurisdiction pending the final decision or award of the arbitrator;
- f. each of the parties irrevocably waives any immunity in respect of its obligations under this Agreement that it may acquire from the jurisdiction of any Court or any legal or arbitral process for any reason including, but not limited to, the service of notice, attachment prior to judgment or attachment in aid of execution.

21. Section 6 of the [Arbitration Act](#) provides as follows;

“6. 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.”

22. As highlighted in para 20 of this Ruling the parties elected arbitration as their dispute resolution mechanism of choice. Para 16 of the Supporting Affidavit of the Applicant states that she has invoked the arbitration Clause by intimating the same to the 1st Respondent vide her advocates’ letter dated the 22/3/22. The 1st Respondent on the other hand has no objection to the matter being referred to arbitration in accordance with the agreement of sale hence the filing of the Chamber Summons Dated the 26/4/2022. It is instructive to note that parties are agreeable to arbitration and they ought to so proceed as per Clause 16 of the agreement of sale.

23. In that respect I find nothing to suggest that the arbitral agreement is null and void, inoperative or incapable of being performed.



24. I have read and considered the Pleadings on record being the Plaintiff, the Notice of Motion and the Supporting Affidavits, the rival Affidavits and it is clear that there is indeed a dispute between the parties. The Applicant avers that the 1st Defendant induced her to enter into an agreement whose terms are far different and varied from what she eventually executed and contained in the agreement of sale dated the 9/3/2020. For example, she avers that she was to be paid Kshs 2 Million prior to the commencement of the project and that so far she has received only 1.5 Million against her wish to rescind the contract. On the other hand the 1st Respondent has admitted registering the land in its name and disposing the resultant subdivisions to third parties. Clearly there is a contest/controversy between the parties as to the interpretation of the contract and I need not say much so as not to prejudice the arbitration of the dispute suffice to state that indeed there is a dispute between the parties that should be referred to arbitration.
25. As to whether the Court should grant interim measures, parties agreed to seek preliminary injunctive relief or interim or conservatory measures from the Court pending the final decision or award of the arbitrator.
26. Section 7 *Arbitration Act* which states;
- “7. Interim measures by Court
- (1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”
27. The purpose of interim measures was captured by the Court of Appeal in the case of *Safaricom Vs Ocean View Beach Limited & 2 Others* (2010) as follows;
- “Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the Court must take into account before issuing the interim measures of protection are:-
- a. The existence of an arbitration agreement.
- b. Whether the subject matter of arbitration is under threat.
- c. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the Application?
- d. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal’s decision making power as intended by the parties?”
28. For starters the presence of an arbitration Clause in the agreement of sale is prima facie evidence that the parties have exercised their free will to choose the dispute resolution for their grievances, a position that must be respected. Secondly the subject matter of the arbitration is the suit land. Affidavit evidence was led by the 1st Defendant that it has registered the suit land in its name, subdivided the same and is in the



process of disposing the sub plots to third parties in line with its business model. There was no mention of construction of a housing project and in my humble view this is a variation of the agreement of the parties as captured in the agreement dated the 9/3/2022. That said, it is the view of the Court that if the 1st Defendant is allowed to proceed to sell the sub plots then there will be no substratum left by the time the arbitral proceedings are concluded, a position that risks the said proceedings from being an academic exercise.

29. In the upshot I find that granting interim measures of protection in terms of the prayers sought in the Application dated the 22/3/2022 is justiciable in the circumstances of this case.
30. Final orders and disposal;
 - a. The Applicant's Application dated the 22/3/2022 be and is hereby allowed.
 - b. The 1st Respondent's Application dated the 20/4/2022 be and is hereby allowed.
 - c. This suit be and is hereby stayed pending the conclusion of arbitral proceedings.
 - d. The arbitral proceedings to be commenced in terms of the agreement of sale dated the 9/3/2020 within a period of 45 days from the date of this Ruling, in default the orders with respect to interim measures shall automatically lapse.
 - e. Each party to bear the costs of their Applications.
31. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 13TH DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff – Absent

Wamunyolo for 1st Defendant / Applicant

2nd Defendant - Absent

Court Assistant – Esther / Kevin

