



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 144 OF 2019

KENNETH KINOTI MURIUKI.....1ST PLAINTIFF

NANCY MUTHONI WAMAE.....2ND PLAINTIFF

JOHNSON IRERI KINYUA.....3RD PLAINTIFF

CAROLINE KAMAR.....4TH PLAINTIFF

SIMON NABISWA MASIBO

PENINA KINYA AMASIBO.....5TH PLAINTIFF

VERSUS

DINARA DEVELOPERS LIMITED.....1ST DEFENDANT/OBJECTOR

ANDREW KAMAU MUHIU.....2ND DEFENDANT/OBJECTOR

RULING

The **Notice of Preliminary Objection** dated 2nd July 2020 was filed by the Defendants/ Objectors herein on the grounds that;

1. **This Court lacks jurisdiction to hear and determine this suit .**
2. **The suit is frivolous , vexatious , bad in law and an abuse of the Court process**

On 4th July 2020, the Court directed that the Preliminary Objection be canvassed by way of written submissions. In compliance with the Court's directives, the Defendants/ Objector through the **Law Firm of Njeri & Partners** filed their written submissions dated 16th July 2020, and submitted that the Plaintiffs bypassed the provided means of **Dispute Resolution** Mechanism and did not exhaust the available remedies that are expressly provided by the agreement for sale.

It was their submissions that the suit is premised on the Agreement for Sale and the said agreement under Clause J of the Special Conditions provides for Arbitration as the **Dispute Resolution** Mode. The Defendants/ Objectors urged the Court to respect the intention of the parties as the parties entered into the said sale agreement freely and opted to oust other means of dispute resolution. They relied on the case of **Benard Murage ...Vs... Fineserve Africa Limited & 3 others (2015) eklr** where the Court held that;

“where there exists an alternative remedy through a statutory law, then it is desirable that such a statutory remedy be pursued first.”

They further relied on the case of **Dock Workers Union Limited...Vs... Messina Kenya Limited (2018)eklr** where the Court of Appeal held that;

“ ... it is clear from the above that the appellant's claim which was based on a contract of employment ought to have been resolved in the first instance in accordance with the parties 'arbitration agreement . There was no logic justification in invoking the provisions of the Constitution in order to circumvent the Arbitration Agreement.”

It was further submitted that **Section 10 of the Act** prohibits the Court's intervention in the matters governed by the Act. That the Court cannot be called upon to rewrite the Contract for the parties.

It was further submitted that the Plaintiffs initiated Court proceedings yet they had accepted to submit to Arbitration and therefore the suit is **an abuse of the Court process** and a waste of the Court's time. That the suit is frivolous vexatious and bad in law. Further that the Court lacks jurisdiction and it was urged to uphold the Preliminary Objection.

The Plaintiffs/ Respondents through the **Law Firm of Sheikh & Company Advocates** submitted that the Preliminary Objection raised is improper. That the inference of the Court is only to strongly advocate for reference to arbitration where the said arbitration would dispose the suit in it is entirely, especially where the parties included such a clause in their agreement. That in the claim, that the Objectors/ Defendants made a defence is misleading as their submissions disclose apparent lack of defence on record and the Defendants cannot allege to rely on the same where it is non-existent. It was submitted that there was an acknowledgement of debt and the raising of a Preliminary Objection is **ill timed, malicious and deliberately attempt** to derail issues.

The Court has carefully read and considered the pleadings of the parties the annexures thereto together with the rival written submissions and renders itself as follows:-

A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696* to mean:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Further Sir *Charles Nabbold, JA* stated that:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

Having given the description of a **Preliminary Objection**, it is evident that a **Preliminary Objection** raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.

In the case of *Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No. 22 of 1999*, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

Further a **Preliminary Objection** must stem from the pleadings and should raise pure point of law. See the case of *Avtar Singh Bhamra & Another...Vs....Oriental Commercial Bank, Kisumu HCCC No.53 of 2004*, where the court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

Does the Objection raise herein by the Defendants amounts to a Preliminary Objection? In the case of *Oraro...Vs...Mbaja (2005) 1KLR 141*, where the Court held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

In the instant **Preliminary Objection**, the Defendants/Objector have averred that the Court lacks Jurisdiction to deal with the instant suit as the suit is premised on the grounds that the Plaintiffs by-passed the alternative means of **dispute resolution** as provided for in their sale agreement. That they did not exhaust the available remedies as the parties had agreed to refer any dispute to Arbitration.

The issue of whether or not the parties agreed that any dispute that arises must be referred to Arbitration goes to the Jurisdiction of this Court. That issue does not require the ascertaining of the facts or probing of evidence as the Court will only need to determine whether there is such an agreement.

The Court finds and holds that the Notice of **Preliminary Objection** as raised by the Defendants/ Objectors meets the test of what amounts to a **Preliminary Objection**. It raises pure points of law and can be determined without ascertainment of facts from elsewhere.

This Court finds and holds that the **Notice of Preliminary Objection** as filed by the Defendant/ Objector is a proper Preliminary Objection as per the *Mukisa Biscuits case (supra)*.

Secondly, is the Preliminary objection herein merit?

The Objection hinges on the fact that the suit is premised on the sale agreement that have an arbitration clause. The Court has gone through the said sale agreements which contains an Arbitration clause that provides;

“All claims and disputes whatsoever arising under this Agreement shall be referred to arbitration in accordance with the provisions of Arbitration Act of Kenya.....”

Section 6 of **Arbitration Act** states as follows:

6. (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.

From the sale agreement, the Arbitration clause provides that all claims and disputes whatsoever ought to be referred to Arbitration. The basis of this suit is the alleged breach by the Defendants/Objectors and their agents to grant lease of the Maisonettes as per the sale agreement. Therefore, the instant dispute falls under the realm of **Clause J on Arbitration** of the said Agreement.

Parties are bound by their terms of Contract and the Court cannot rewrite the said Contract. The said agreement between the parties provided for the Arbitration of disputes and the same ought to be guided by the provisions of Arbitration Act.

Section 6 of the said Act requires the Court to stay the proceedings and refer the matter for Arbitration. The Court has no other option, but to comply with the provision of the law. See the case of **Yes Housing Co-operative Society Limited ...Vs... Kenneth Onsare Maina [2020] eKLR** where the Court held that;

Before concluding this issue Article 159(2)(c) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

37. It follows that this Court is not just under a duty to enforce a contractual clause binding the parties to refer their disputes to arbitration but is under a Constitutional obligation to promote that mode of dispute resolution. In my view it would amount to an abdication of its judicial duty if the court were to shirk that duty and decline to refer a matter to arbitration simply because a party believes that the applicant's case is unmerited and is bound to fail. Whether or not the case is unmerited is for the arbitrator to determine. In this case, it was an express term of the said agreement that if the Vendor fails to comply with the obligations under the Agreement, the Purchaser shall without prejudice to its rights and remedies rescind the said Agreement and the Vendor shall forthwith refund the Deposit to the Purchaser with interest. In this case it is clear that the Vendor has failed, as a result, of the decision in Machakos Succession Cause No. 54 of 2010, to fulfil his obligations under the Sale Agreement. It is that failure or inability on the part of the Defendant that gave rise to the dispute and provoked this suit.

38. Under section 12(4) of the Arbitration Act, where parties fail to reach an agreement as provided for in the arbitration clause mandating that the dispute be referred to arbitration, the High Court is given jurisdiction, upon application by any party, to give effect to the agreement referring the dispute to arbitration. In the present application I hold that the defendant is entitled to have the dispute with the plaintiff determined by arbitration pursuant to the said clause 15 of the Agreement and I therefore direct that all further proceedings in this case are hereby stayed and the dispute herein is hereby referred to Arbitration. The parties do agree on a single arbitrator to determine the dispute between themselves within thirty (30) days or where they fail the arbitrator be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators Kenya Chapter upon the application of either party. The dispute shall be determined by arbitration within sixty (60) days from the date of appointment of the said arbitrator.

Further in the case of **County Government of Kirinyaga ...Vs... African Banking Corporation Ltd [2020] eKLR** the Court held that;

“The clear intentions of the parties was that if any dispute arises they oust the jurisdiction of the court and have preference to have the dispute settled through arbitration. This in line with Judicial Authority, under Article 159(2)(c) of the Constitution which states.

“In exercising Judicial authority courts and Tribunals shall be guided by the following principles –

“alternative forms of dispute resolution including reconciliation, mediation, arbitration ----- shall be promoted”

The Upshot of the foregoing is that the **Notice of Preliminary Objection** dated **2nd July 2020** by the Defendants/Objectors is found **merited** and the said Preliminary Objection is upheld entirely with cost to the Defendants/Objectors. This Court lacks jurisdiction and consequently downs its tool and the suit is struck out entirely as this Court lacks Jurisdiction.

It is so ordered.

Dated, signed and Delivered at Thika this 17th day of December 2020

L. GACHERU

17/12/2020

JUDGE

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Ndungu for the Plaintiffs

No Appearance for the Defendants/Objectors

L. GACHERU

17/12/2020

JUDGE