



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

HCCC 402 OF 2019

PATRICK MUSIMBA LTD.....1ST PLAINTIFF

EHM & EHM CONSULTING.....2ND PLAINTIFF

SAMURAI CONSULTANTS LTD.....3RD PLAINTIFF

VS

PREMIER PROPERTIES LTD.....DEFENDANT/RESPONDENT

SIMON KANURE KIBUREN T/A RESORERS

CONSULTING AUCTIONEERS.....1ST INTERESTED PARTY

DUNHILL CONSULTING LTD.....2ND INTERESTED PARTY

RULING

APPLICATION

By certificate of urgency of 18th January 2021, pursuant to this Court's Ruling of 29th November 2019, the matter was referred to Arbitration.

The Applicants applied before the Arbitrator against the Respondent seeking the production of CCTV footage of the Access Gate, Ground Floor, 4th Floor & 6th Floor. It was discovered that CCTV footages were controlled by 2nd Interested Party who was sub contracted by Western Heights Management Ltd to manage the premises. The 2nd interested party was/is not a party to the Arbitration as it was not covered by the Arbitration Clause and hence the Arbitrator could not grant orders against the 2nd interested party due to lack of jurisdiction. The Arbitrator dismissed the application.

The Applicants stated that they have evidence that the 2nd interested Party holds vital CCTV footages sought and a report prepared by SecurKenya (A security firm manning the premises) which detail the events of the material subject to the Arbitration.

The Applicants sought stay of Arbitration proceedings scheduled for 25th -26th January 2021 pending hearing and determination of the instant application. The Applicants annexed to their application the Arbitrator's Interim Award of 2nd December 2020 where the issue of grant of orders to obtain the CCTV footage was dismissed.

The Applicants submitted and relied on Section 4, 7 & 12 of Arbitration Act. The Applicant was/is of the view that this Court is clothed with requisite jurisdiction by Section 7 of Arbitration Act to consider the instant application.

The Applicant relied on the following cases to fortify the position in relation to grant of interim orders;

a) *Alison Jean Louis vs Rama Homes Ltd [2020]e KLR*

b) *Safaricom Ltd vs Oceanview Beach Hotel Ltd[2010] eKLR*

c) *NCC Int'l AB vs Alliance Concrete Singapore Pte Ltd [2008]*

On whether this Court can/could stay the Arbitration proceedings, the Applicants made reference to the case of ; *UAP Provincial Insurance Co Ltd vs Joseph Muriuki Kenyatti & Anor [1998] eKLR*. 2nd interested Party submitted that the issue of CCTV footages had initially been addressed by the Court and the party that held the CCTV footages could not be determined at the Interlocutory stage but during hearing. The 2nd Interested party was/is not in custody of the CCTV footages and could not be compelled to produce such evidence as **Section 109 of Evidence Act** provides that the burden of proof lies with the party that is seized with such information.

1st interested Party Auctioneer, deposed that although he obtained Court order to levy distress against the Plaintiffs, the orders had errors of names/parties and therefore returned to Court, *CM Court in Misc C.A. 870 of 2019* for rectification and had to serve all parties, the distress for rent was not carried out.

2nd interested Party relied on the case of *Eric V.J Makokha & Others vs Lawrence Saqini & Others Civil Application Nai 20 of 1994* quoted in *James Titus Kisa vs Said Majid Said [2013] eKLR* which posited that a Court should not grant orders that are unenforceable.

The Respondent, a developer, submitted that this Court issued the following pertinent order among others;

“That with regard to CCTV preservation and production at the hearing, it is not abundantly clear to this Court who is responsible for CCTV coverage in the respective units and/or Public hallways and Parking area. All the Court can order is that each party to preserve relevant evidence to be produced at the hearing.”

It was not abundantly clear who was in charge of the CCTV infrastructure and in possession of CCTV footage and therefore, it would be impossible for the Respondent to be compelled to avail and/or produce evidence in this Court it has never had. Secondly, the orders by the Court preservation of evidence were spent as the timeline of 2 months lapsed.

Such orders to have a party surrender CCTV footage cannot be enforced to a 3rd Party who is not party to these Proceedings and such substantive orders cannot be granted without granting the intended 3rd Party a hearing or consenting to submit to the Arbitral Tribunal.

DETERMINATION

The Court has considered the pleadings submissions and the instant application, the issue (s) are this Court granting under Section 7 Arbitration Act; the procurement and preservation of CCTV footage to be presented as evidence at the Arbitral Tribunal and the Court to stay proceedings Arbitral Proceedings until the instant application is heard and determined.

These proceedings commenced in Court on 12th November 2019, the parties through Counsel submitted at length and when the issue of Court's jurisdiction was raised based on Clause 1.2 regarding the choice of forum of dispute resolution by the Parties, Plaintiffs and 2nd interested party is arbitration, the Court halted the proceedings.

The Court granted orders by virtue of Section 7 of Arbitration Act, to preserve and protect the subject matter pending hearing before the Arbitration Tribunal.

This Court ordered each party to preserve evidence to be presented during the hearing. The grant of this order bound all parties and not specifically in relation to CCTV footage only.

It is submitted by parties that Arbitral Tribunal was appointed and Arbitration proceeding commenced. The Applicants raised the issue of protection and production of the CCTV Footage before the Arbitral Tribunal which by Ruling of 2nd December 2020 declined to grant as the 3rd party is not party to Arbitral proceedings.

The parties raised and addressed the same issue before the Arbitral Tribunal and by Ruling of 2nd December 2020, declined to grant such order as the intended 3rd Party alleged to be in possession of the CCTV footage is not party to Arbitration proceedings.

Section 7 of Arbitration Act provides;

“(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.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.”

This Court already issued interim orders to preserve the substantive dispute for hearing and determination by Arbitral Tribunal. The Arbitration proceedings are ongoing. The Application to procure CCTV footage was made in this Court and the Court granted interim orders to the effect that each party preserves evidence and presents at the Arbitration proceedings. That application is spent before this Court to reopen it is to have another bite at the cherry.

Secondly, this Court is divested of jurisdiction to conduct proceedings with a view to inquire the party that is in possession of CCTV footage as the matter is before the Arbitral Tribunal and any evidence procured ought to be produced and presented before the Arbitral Tribunal and not to this Court.

Thirdly, the inquiry as to the intended 3rd Party who is possession of CCTV footage in this Court is futile as such evidence cannot be legally imported/imposed on the Arbitral Tribunal where the dispute is being heard to be determined.

Fourthly, for the Intended 3rd Party to be disclosed and confirmed as being in possession of CCTV footage first, the party should be summoned and be accorded a fair hearing before substantive orders are granted. The party(parties) are not compellable witnesses as the contents of Affidavits have not been verified through oral evidence to test veracity of such evidence and rely on it as fact.

There is no legal basis under Section 7 of Arbitration Act to stay /stop Arbitration Proceedings. The Arbitration proceedings shall proceed as scheduled as it is the parties chosen forum for dispute resolution.

This Court finds for the above reasons that there are no Section 7 of Arbitration Act remedies available at this stage.

By virtue of **Section 7 (2) Arbitration Act**, the Arbitrator’s finding of fact that the CCTV footage may be with a 3rd party not party to the instant Arbitral proceedings is upheld.

DELIVERED SIGNED& DATED IN OPEN COURT ON 19th MARCH 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. NYARUMBO FOR THE DEFENDANT

MR. OMAMO H/B MR. KIMANTHI FOR PLAINTIFF

MR. MAKORI FOR MR. THOU FOR 1ST & 2ND INTERSTED PARTY