REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MISCELLANEOUS APPLICATION NO. 1109 OF 2020

KILIMANJARO CONSTRUCTION LIMITED.....APPLICANT

VERSUS

CYTTON INVESTMENT PARTNERS THREE LLP.....RESPONDENT

RULING

1. The application for consideration is the Applicant's Notice of Motion dated 29th September, 2020 brought under **Article 159(2)** of the **Constitution of Kenya 2010, Sections IA, IB** and **3A** of the **Civil Procedure Act Cap 21** of the Laws of Kenya**, Section 7** of the **Arbitration Act,** No. 4 of 1995, **Order 51** of the **Civil Procedure Rules 2010** and all enabling provisions of the law. The Application seeks the following three main orders:

> **a)** ***THAT pending the hearing and determination of the arbitration proceedings between the parties herein, a temporary injunction do issue barring the Respondent whether acting by themselves, their servants agents or in conjunction or association with any other person howsoever from selling, offering for sale, or transferring Villa No. 6 at Amara Ridge Villas on L.R NO. 10051, Forest Edge Road, Karen;***
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> **b)** ***THAT IN THE ALTERNATIVE the Respondent be directed to deposit in court, or in the joint account of the advocates of both parties, the sum of Kshs. 33,328,744.55/= together with interest as security for the amount in dispute pending the hearing and determination of the arbitration proceedings.***
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> **c)** ***THAT the costs of this Application be provided for.***

2. The application is based on the grounds on the face of it and supported by the Affidavit of the Applicant's Director **ARVIND PATEL** sworn on even date. He averred that the Respondent engaged the Applicant as the main contractor to undertake construction of Amara Ridge Villas on L.R No. 10051, Forest Edge Road, Karen (hereinafter "**the project**"). The Applicant completed the project as agreed and handed over to the Respondent and a Final Certificate was issued by the project Architect on 6th December, 2019 for Kshs. 33,328,744.55/=. The Respondent prepared a final account and sent it to the Applicant, who signed and returned it to the Respondent for settlement.

3. He averred that the Respondent promised to pay the said amount within 21 days but has to date only paid a sum of Kshs. 3,000,000/= out of the agreed amount and the balance of Kshs. 33,328,744.55/= remains outstanding. He stated that there has arisen a dispute over the payment of the balance. That the Applicant has invoked the Arbitration clause as provided for in Clause 45.1 of the contract between the parties and a sole Arbitrator has been appointed to hear and determine the dispute.

4. It was deposed that the present application is made pursuant to **Section 7(1)** of the **Arbitration Act**, No. 4 of 1995 seeking an interim measure of protection pending the reference hearing and determination of the dispute through arbitration. It is contended that the outstanding sum of Kshs. 33,328,744.55/= continues to accrue interest by the day and is the subject of the Arbitration proceedings. The Applicant stated that it is aware that the Respondent has sold off all the units in the project except one which is Villa No. 6 at Amara Ridge Villas on L.R. No. 10051, Forest Edge Road, Karen, and is genuinely apprehensive that unless the prayers for interim measure are granted, the Respondent will sell of the remaining unit and leave the Applicant exposed in the event the arbitral tribunal finds in its favour.

5. Further, it was contended that having failed to meet its own payment timelines, the Applicant is apprehensive that the Respondent is not able to pay the balance and unless the Applicant's claim is secured, there is a danger that the Applicant may not be able to enforce any award in its favour from the arbitral tribunal. He stated that the Applicant is not aware of any other assets of the Respondent, save for the one remaining unit at the project which is the only security the Applicant has for the amount owed.

6. In the Applicant's view therefore, it is therefore in the interests of justice that the orders sought are granted, whether in terms of the main prayers or in the alternative prayers to ensure that it is not exposed to huge losses at the conclusion of the arbitral proceedings.

7. In response, the Respondent filed a Replying Affidavit sworn by its Statutory Manager **PATRICIA NJERI WANJAMA** on 21st November, 2020 in which it was averred that the only outstanding substantive order sought in the Applicant's application is prayer 3 thereunder.

8. She stated that on 23rd September, 2015, the parties hereto entered into an Agreement and Conditions of Contract for Building Works (hereinafter "**the contract**") in respect of the construction of a residential estate comprising ten villas and common facilities to be erected on L.R. No. 10051 situate in Karen, Nairobi known at Amara Ridge. She confirmed that the said contract was substantially performed and the development completed, with final accounts having been duly signed off between the parties and partial payment in respect of the Applicant's account having been made on or about 27th January, 2020.

9. She further confirmed that the matter was referred to Arbitration by the Applicant on the strength of a perceived dispute as to the non-payment of a certified amount. She averred that by way of an Application dated 24th July, 2020, the Respondent sought, before the Tribunal, Orders that the Arbitral proceedings be declared premature and that the Tribunal lacks jurisdiction to proceed with the matter which Application is still pending before the Arbitral tribunal. Further, she contended that contrary to the averments in Mr. Patel's Affidavit, the Applicant cannot seek interim measures of protection under the Arbitration Act, 1995 as it has purportedly done, when there is still a live issue of jurisdiction pending before the Arbitral Tribunal.

10. Further, it was contended that prayer 3 of the Application has been overtaken by events as the Lease in respect of Villa No. 6 was already granted to a third party and registered against the Title and as such there is nothing left as the subject matter of the injunctive orders sought and proprietary rights in respect of the said Villa No. 6 and a copy of the registered Lease was annexed to that effect. It was also averred that, in any event the Applicant has failed to demonstrate the nature of legal right or interest it would have in the said Villa that would warrant the granting of any injunction by this Honourable Court. In the Respondent's view, granting of the injunction as sought by the Applicant would infringe upon innocent third party rights.

11. Additionally, it was deposed that as far as the Applicant's prayer for payment of the entire sum as security is concerned, the Applicant has failed to lay out any or any sufficient basis for the same, and payment of the entire sum as security would in any event amount to a pre-emptive determination of the perceived dispute between the parties (as presently before the Arbitrator). She thus urged that the Application dated 29th September, 2020 be dismissed with costs for lack of merit.

12. In rebuttal, the Applicant filed a Supplementary Affidavit sworn by its Director **ARVIND PATEL** on 12th November, 2020. He confirmed that the Arbitral Tribunal is now properly seized of the matter and has already ruled on the Respondent's challenge on its jurisdiction as per the annexed copy of the Ruling. He also confirmed that the said Villa No. 6 was sold to a third party through a lease dated 13th August, 2020 and registered as IR No. 2209 19/1 on 6th October, 2020 for a sum of Kshs. 100,769,460/= during the course of the proceedings before the Arbitral Tribunal.

13. He averred that with the Villa having been sold and the Applicant herein still unpaid, the Applicant herein may be left with a paper judgment and may not be able to enforce its claim by reason of the fraudulent actions of the Respondents. He stated that as such, it is in the interest of justice that the orders sought herein are granted.

Submissions

14. This Application was canvassed by way of written submissions. In its written submissions dated 16th April, 2021 filed through the firm of Were and Oonge Advocates, the Applicant submitted that the current Application is primarily based on **Section 7(1)** of the **Arbitration Act** which empowers this court to grant an interim measure of protection before or during arbitral proceedings at the request of a party to an arbitration agreement. The Applicant reiterated that it is apprehensive that the Respondent is not able to pay the outstanding sum due to the fact that the Respondent was unable to meet its own deadlines that it gave for the payment of the sums. It submitted that moreover, the Respondent has not tendered any logical explanation for the failure to settle the sums owed, despite admitting that indeed the amount is due and owing.

15. The Applicant submitted that its fear is that the arbitration proceedings will be rendered an academic exercise if the Arbitral Tribunal rules in its favour but there is nothing for to execute. It argued that even more concerning to it, is the fact that the one remaining villa, which it sought to restrain the Respondent from selling, was sold and transferred to a third party during the pendency of this Application and the Arbitral proceedings. In its view, this was clearly meant to defeat any orders that would have been given by this court with regards to the current application.

16. The Applicant cited the case of **China Zhongxing Construction Company Ltd v Eden Development Limited (K) [2020] eKLR,** where the court, faced with an identical scenario to the one before this court, granted interim measures of protection.

17. The Applicant also relied on the Court of Appeal decision in the case of **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others (2010) eKLR,** where the court outlined the factors to be considered before the granting the interim measure of protection.

18. Guided by the above holding, the Applicant submitted that there is no doubt that the subject matter of arbitration, being the sum of Kshs. 33,328,744.55 owed to the Applicant is under threat going by the Respondent's conduct. In the Applicant's, it is clear that the Respondent does not intend to pay the outstanding amount at all, however, all is not lost, since this court is empowered to make other alternative orders to meet the ends of justice. It submitted that interim measures of protection d,o take different forms, depending on the circumstances of each case as was stated in the case of **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others (Supra).**

19. The Applicant further noted that however, the circumstances of the current case are such that, the main prayer, being an order to restrain the Respondent from selling or transferring the Villa No. 6 has been overtaken by events owing to the fact that the Respondent sold and

transferred the unit while the present application was pending. The Applicant stated that the only option left therefore is to pursue Prayer 4 of the Application. It is the Applicant's submission that if the said prayer is not granted, the Applicant will be left exposed and the arbitral proceedings may very well be an exercise in futility.

20. Finally, the Applicant urged the court to note that it is also incurring further costs before the arbitral tribunal, hence the sums owed will be higher in the likely event the Applicant succeeds before the Tribunal. The Applicant thus prayed that its application be allowed in terms of Prayer Number 4.

21. On its part, the Respondent in its written submissions dated 20th April, 2021, filed through the firm of Oraro and Company Advocates, formulated three issues for determination namely: *whether the Applicant has met the threshold for the grant of injunctive orders; Whether the Applicant is entitled to an order for security of the claim; and who should bear the costs of the Application.*

22. The submissions made in respect to whether the Applicant has met the threshold for the grant of injunctive orders have been considered in this application. However, a determination in that regard has been rendered moot or is overtaken by events since the subject matter namely Villa No. 6, has since been sold and registered in the name of a third party. The Applicant has acknowledged this fact and is thus only pursuing prayer 4 of the application.

23. On the second issue of whether the Applicant is entitled to an order for security of the claim. The Respondent submitted that it is trite law that in matters Arbitration, the Court will only intervene in the limited manner set out set out under the **Arbitration Act, 1995**. It submitted that under the said Act, there is no provision that allows a party to approach Court for security of the entire claim pending for determination before the Arbitral Tribunal, for the simple reason that such an approach would be pre-emptive of the Tribunal's determination and would be an egregious usurpation of the Tribunal's jurisdiction, role and function. It submitted that the substantive claim is still pending for determination before the Arbitral Tribunal, with the parties having presented their respective cases and as such, to order the Respondent to offer security for the entire claim would leave nothing for determination by the Arbitral Tribunal.

24. Further, it was submitted that a mere apprehension that the Respondent would not settle the eventual award is not only presumptive of an Award being issued in favour of the Applicant, but is clearly not enough to warrant the issuance of the Orders sought and in any event there is no provision under the Arbitration Act that empowers this Court to issue such an Order. It was contended that issuing the order would be akin to attachment before Judgment. That as a general rule, courts are required to adopt restraint before issuing pre-emptive orders of attachment before judgment as the same may be considered to effectively determine the matters at hand without giving the adverse party an opportunity to be heard.

25. It was further argued that pursuant to the holding of the court in **Kuria Kanyoko t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu & Others (1988) 2 KAR 126,** where an Applicant seeks to have an adverse order as against a party, demonstrable evidence as to the Respondent's risk of absconding or clear proof of mischief needs to be adduced. It argued that this position is also consistent with the finding and determination of this court in **Shivam Enterprises Limited vs. Jivaykumar Tulsidas Patel t/a Hytech Investment [2006] eKLR** wherein the court stated, *inter alia*, that a party would need to meet that high standard of proof before a party is ordered to supply security for the amount claimed. Further reliance was also placed on the case of **Freight Forwarders Kenya Limited v Aya Investment Uganda Limited [2013] eKLR** and **FTG Holland v Afapack Enterprises Limited & Another (2016).**

26. The Respondent submitted that a review of the pleadings as well as the factual circumstances of the case indicate that it is an established venture in Kenya and it holds an array of investments within the Kenyan Market and shows no signs of absconding. It argued that none of this are indicative of a person who would in effect frustrate the Applicant's right to effect a decree against them should an adverse ruling be obtained against them.

27. As to who should bear the costs of the Application, the Respondent submitted that it is trite law that costs follow the event which position is consistent with the finding and determination of the court in **Venerable Professor Ndungu Ikenye (Suing for and on behalf of aggrieved residents of Maki and Jogoo Estates within Thika) v Kenya Towers Limited & another [2020] eKLR.** It therefore urged that the Applicant's Application dated 29th September, 2020 be dismissed with costs.

Analysis and Determination

28. I have carefullyappraised myself with the Applicant's application, the Affidavit in support, the Replying Affidavit by the Respondent and the respective rival submissions. The only issue that arises for determination is whether the Applicant has met the threshold for the grant of an interim measure of protection in the form of an order directing the Respondent to deposit the sum of Kshs. 33,328,744.55/= together with interest in court or in a joint account of the advocates of both parties, as security for the amount in dispute.

29. Section 7 of the Arbitration Act empowers this court to issue an interim order of protection to preserve assets or in some way maintain the *status quo* while parties await the outcome of the arbitral proceedings. The said Section 7 of the Act stipulates thus:

> ***"(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."***

30. The Court of Appeal in the case of **Safaricom Limited v Ocean View Beach Hotel Ltd & 2 others (supra),** laid down the factors to be considered before granting an interim measure of protection 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:-***
>
> ***i. The existence of an arbitration agreement.***
>
> ***ii. Whether the subject matter of arbitration is under threat.***
>
> ***iii. In the special circumstances, which is the appropriate measure of protection after an assessment of the merits of the application?***
>
> ***iv. For what period must the measure be given especially if requested for before commencement of the arbitration so as to avoid encroaching on the tribunal's decision –making power as intended by the parties?"***

31. In this case, it is not in dispute that the parties herein entered into a contract for the construction of a residential estate known as Amara Ridge Villas on L.R No. 10051, Forest Edge Road, Karen Nairobi which contract contained an arbitration clause at Clause 45.1 thereof.

32. Is the subject matter of the arbitration dispute under threat of dissipation? The Applicant averred that the Respondent has not performed part of its obligations under the said contract as it is still owed the sum of Kshs. 33,328,744.55 and the same is under threat in view of the Respondent's conduct. The Respondent has not denied that it still owes the Applicant as only partial payment has been made to it. The Respondent however avers that the Applicant has failed to lay out any or any sufficient basis for to require it to pay the entire sum as security and that in any event, the same would amount to a pre-emptive determination of the perceived dispute between the parties.

33. Notably however, under **Order 39 Rule 2** of the **Civil Procedure Rules** this court is empowered to make an order for attachment before judgment although this power must be exercised cautiously. The remedy is designed to guarantee a party who subsequently succeeds in a case of enjoying the fruits of its judgment or conversely, to prevent a party against whom judgment may be entered against from avoiding it by concealing or disposing of property. The said provision states as follows in this regard;

> ***"Where the Defendant fails to show such cause, the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit or make such order as it thinks fit in regard to the sum which may have been paid by the Defendant"***

34. The factors to be considered before making an order for attachment before judgment were set out in the case of **Kuria Kanyoko t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu & Others [1988] 2 KAR 126**, where the court held thus;

> ***"The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by order 38 Rules 5 (currently order 39) namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him."***

35. It follows therefore that for an order of attachment before judgment to be granted, a party must satisfy the following conditions;

> ***i. That the Defendant is about to dispose of his property or remove it from the jurisdiction of the court; and***
>
> ***ii. That the Defendant intends to obstruct or delay any decree that may be passed against him.***

36. What this court has to consider at this juncture is whether the Applicant has provided sufficient material to demonstrate that the Respondent has handled its property or funds in a manner that suggests that it intends to obstruct or delay any decree that may be passed against it. I have perused the documents provided by the Applicant in support of its application herein namely copies of an email from the Respondent promising to pay, the subject contract, the final account, demand for payment and the Applicant's statement of the mount and interest accrued.

37. In my considered view, whereas these documents confirm that indeed there is still some amount owing to the Applicant, there is nothing on the same to support the prayer for attachment of the Respondent's funds. The Applicant has not demonstrated that the Respondent will be unable to honour any decree that may be passed against it by the arbitral tribunal.

Disposition

38. Accordingly, I find that the Applicant's application dated 29th September, 2020 lacks merit and is therefore dismissed. The costs of the application shall abide the outcome of the arbitral proceedings.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *No appearance for counsel for the Applicant.*

2. *Ms. Okuta h/b for Mr. Mbaluto for the Respondent.*