IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

COMM. CASE NO. E258 OF 2020

BETWEEN

JAGJIT SINGH LIDDAR.....PLAINTIFF

AND

JASDIPT SINGH NANDRA.....1ST DEFENDANT

PARAMJEET SINGH BAMBRAH.....2ND DEFENDANT

GURVINDER SINGH NANDHARA.....3RD DEFENDANT

RULING

Introduction and Background

1. The Plaintiff has filed the Notice of Motion dated 23rd July 2020 made, inter alia, under **section 7** of the ***Arbitration Act*** and **Rule 2** of the ***Arbitration Rules 1997*** seeking the following orders:

> *1) Spent**
>
> *2) Spent**
>
> *3) THAT an order for injunction do issue restraining the Defendant/Respondents by themselves, their servants, agents or any one of them from interfering with the units in the building erected on the property known as L.R. No. 4857/85 in Kileleshwa either by sale, offering for sale, auction, sale by private treaty, transfer or disposal by any means whatsoever and howsoever pending the hearing and determination of the Arbitration proceedings and or this suit;*
>
> *4) THAT an Order directing the Defendant/Respondents herein to deposit any proceeds of the rent received for any of the units leased out by either one of them, their servants or agents to 3rd Parties;*
>
> *5) THAT the costs of occasioned by this application be borne by the Defendant/ Respondents.*
>
> *6) THAT this Honourable Court be pleased to grant any further orders as it may deem fit to meet the ends of justice*

2. The application is supported by grounds on its face together with the Plaintiff's affidavits sworn on 23rd July 2020, 9th June 2021 and 29th July 2021. It is opposed by the Defendants through the Grounds of Opposition dated 13th August 2020 together with the replying affidavit and the further affidavit of the 3rd Defendant sworn on 31st August 2020 and 29th July 2021 respectively. The Respondents have also filed written submissions in support of their position.

3. At the centre of the dispute herein is a Joint Venture Agreement dated 1st January 2011 ("the JVA") between the parties for the design, construction, development and supervision to completion of 12 ultra-modern dwelling units which were to be erected on the property known as L.R 4857/85 in Kileleshwa ("the suit property"). The JVA provided that a company, *Aspire Holdings Limited*, was to be incorporated with an initial share capital of KES. 100,000.00 made up of 100 shares of KES. 1000.00. The Plaintiff's was to contribute the suit property which

he owned while the Defendants were to finance the development. The JVA also provided that once the development was complete and the units were ready, they would be divided proportionately between the parties with the Plaintiff receiving at least 50% of the units.

4. The Plaintiff claims that the Defendants, in breach of the terms of the JVA, failed to provide financing of the development thus forcing him to inject KES. 8,000,000.00 over and above his agreed contribution in the form of land. He also claims that he was forced to take out a banking facility to finance the construction. Despite injecting the additional funds to complete the project, the Plaintiff claims that the Defendants have failed to complete and deliver to him his units causing him loss of use and profit over his units.

5. The Plaintiff contends that breaches by the Defendants constitute a dispute under the JVA. Consequently, he has issued a dispute notice under clause 20.2 of the JVA and has requested the Chartered Institute of Arbitrators to appoint an Arbitrator. The Plaintiff has thus filed the instant application seeking interim relief pending hearing and determination of the arbitration proceedings.

The Application

6. In the application and depositions, the Plaintiff states that the Defendants have only completed the units allotted to them upon completion of the development and are in the process of leasing out and or disposing of them to third parties to his detriment. He contends that he is entitled to damages for the loss of profit and use of his units as a result of their breach and to compensation for the additional amount he injected into the development which amounts when awarded will be equivalent to the units the Defendants were entitled under the JVA.

7. The Plaintiff's case is that if the units are not preserved pending the hearing and determination of the arbitral proceedings, the Defendants will not be in a position to fully satisfy the award in his favour as they do not have any other known assets. He submits that if the orders sought are not granted, he shall continue to suffer immense losses and damage.

The Defendants' Reply

8. Although the Defendants acknowledge the existence of the arbitral proceedings, they oppose the application. They state that Plaintiff has not established a prima facie case with any probability of success or shown that he will suffer irreparable harm which would not adequately be compensated by an award of damages should the injunction not be granted. They contend that the Plaintiff is not entitled to equitable relief as he is deliberately withholding crucial facts and information from Court.

9. The Defendants deny that they have sold most of their units as such the court cannot grant injunctive orders. They further state that the JVA has been amended several times by the parties in a manner affecting the timelines and financial obligations of the parties hence the original JVA cannot be enforced as it is. They point out that although the JVA had allocated the Plaintiff six (6) units, he now has eight (8) units in line with the amended Building Plan mutually agreed upon in the year 2015.

10. The Defendants further submit that the Plaintiff has quantified his claim at KES. 8,000,000.00 and yet he wants to injunct the Defendants from dealing with their share of eight (8) apartments valued in the year 2017 at KES. 192,000, 000.00 which is inequitable. They state that the Plaintiff is the party solely responsible for not taking possession of the units allocated to him which have been certified as fit for occupation by the relevant bodies.

11. The Defendants complain that the Plaintiff has not exhausted the comprehensive dispute resolution process in Clauses 20.2.2, 20.2.3 and 20.4.4 of the JVA before commencing arbitration as such the Court cannot issue an injunction on the basis of a flawed and a pre- mature process.

12. The Defendants reiterate that the Plaintiff's units are intact but that he has refused to take up possession. They state that they have already sold two units, leased two other units and are living in one unit, thus the Court cannot then be asked to injunct purchasers who are not before this Court and who were and are admittedly known to the Plaintiff but have been deliberately left out of these proceedings.

Analysis and Determination

13. What the Plaintiff seeks is an injunction within the rubric of an interim measure of protection pending hearing and determination of the arbitration proceedings. The power of the court to grant interim orders of protection is grounded in **section 7** of the ***Arbitration Act*** which provides as follows:

> *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.*
>
> *(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.*

14. In ***Safaricom Limited v Ocean View Beach Hotel Limited & 2 others*** **Civil Application No. NAI 327 of 2009 [2010] eKLR** the Court of Appeal outlined the principles governing the grant of interim measures of protection. Nyamu JA., summarized the principles as follows;

> *By determining the matters on the basis of the [GIELLA] principles the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to*

maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names. In the case of Kenya, the Arbitration Act is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as "interim measures of protection" under section 7 of the Arbitration Act. On the other hand, in the English version of the ICC Rules for example, they are known as "interim conservatory measures". Whatever their description however, they are intended in principle to operate as "holding" orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation.

. . .. . .

An interim measure of protection such as that sought in the matter before us is supposed to be issued by the court under section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for the grant of injunctions as the High Court purported to do in this matter.

To illustrate the point Article 26-3 of the UNICTRAL Arbitration rules states:-

"A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement."

Section 7 of the Arbitration Act is modeled on this. However, in the matter before us and with due respect, the Commercial Court (Koome, J.) contravened the above principles by firstly either declining to issue any measure of protection or granting such a measure. The Court also failed to correctly address the principles for the issue of any such measures and worse still, the supreme court took over the subject matter altogether and ruled on the merits of the subject matter of the arbitration thereby prejudicing the outcome of the arbitration. This explains why in the special circumstances of this matter, this Court must take extraordinary measures to rectify an extraordinary illegality. 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:-

1. The existence of an arbitration agreement.

2. Whether the subject matter of arbitration is under threat.

3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.

4. 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. [Emphasis mine]

15. Based on these principles, I now turn to determine whether the Plaintiff has made out a case for a grant of an interim order of protection in the nature of an injunction. The parties agree that the JVA contains an arbitration agreement and that the Plaintiff has already instituted arbitration proceedings. The Defendants attempted to impugn the enforceability of the arbitration agreement and the jurisdiction of the arbitral tribunal stating that the Plaintiff failed to exhaust the dispute resolution procedure provided for in the arbitration clause. These issues, I hold, are matters for the arbitral tribunal to determine (see ***Safaricom Limited v Ocean View Beach Hotel Limited & 2 others*** **(Supra)**). At this point and to determine the Plaintiff's application, it is sufficient that the existence of the arbitration agreement is admitted.

16. Is the subject matter of arbitration under threat? The Plaintiff's case it that he may not be in a position to recover the funds he has put into the development of the suit property as the Defendants are in the process of and have disposed of some units from the development which is in dispute. The Defendants concede that they have leased and sold some of their allotted units and that this information is well known to the Plaintiff. They aver that Plaintiffs units are not under any threat and that it is the Plaintiff who has declined to meet to asses and agree on the additional contribution required from him to meet his 50% threshold in accordance with the JVA and to have the final cost summary for the project taken and hand over done as appropriate. They also question the logic of restraining them from using their portion of the development when the value of the same is way higher than the amount claimed by the Plaintiff.

17. In resolving this matter, I am aware that the dispute is pending arbitration and the court is required to exercise great circumspection in commenting on the matters in dispute. However, based on the material before the court, I do not see how Plaintiff's units are threatened as he is still entitled to his full share of the development which the Defendants concede. I do not think that under the circumstances, it will be proper to restrain the Defendants from dealing with their units in development. However, I note that the Defendants are willing to furnish the unit in which they are living in as security pending hearing and determination of the arbitration proceedings.

18. The development appears to be nearing completion and based on the value of the apartment units provided by the Defendants as against the Plaintiff's claim, I am inclined to issue an order on the terms proposed by the Defendants. Since the Plaintiff's claim is for damages, loss of use and profits, I think what has been offered by the Defendant is sufficient security for his claim. I do not see any reason why the Defendants should be ordered to deposit any proceeds from the rent received for any of the units leased out.

Disposition

19. For the reasons I have stated above, the Plaintiff's Notice of Motion dated 23rd July 2020 partly succeeds to the extent that the court

issues the following orders THAT:

1) The Defendants/Respondents are directed to provide an undertaking not to sell, dispose or otherwise deal with ONE UNIT in their possession in the building erected on the property known as L.R. No. 4857/85 in Kileleshwa pending the hearing and determination of the Arbitration proceedings between the Plaintiff and the Defendants or until further orders of the arbitral tribunal within fourteen (14) days from the date hereof.

2) There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF AUGUST 2021.

D. S. MAJANJA

JUDGE

Ms Misere instructed by Oluoch –Olunya and Associates Advocates for the Plaintiff.

Mr Okeyo instructed by Otieno-Okeyo and Company Advocates for the Defendants