REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 33 OF 2017

CHINA ZHONGXING CONSTRUCTION COMPANY LTD.....PLAINTIFF/APPLICANT

-VERSUS-

OAKPARK APARTMENTS MOMBASA LTD.....DEFENDANT/RESPONDENT

RULING

1. The application before me is a Chamber Summons dated 26th October, 2020 brought under the provisions of Sections 7, 36, and 37 of the Arbitration Act, 1995 and Rule 4 of the Arbitration Rules. The plaintiff seeks the following orders -

(i) Spent;

(ii) That pending the enforcement of the award herein this Honourable Court be pleased to issue an order of injunction restraining the defendant and/or its servants and/or its agents from transferring the suit property known as LR No. MN/1/3595 SHANZU MOMBASA pending the hearing and determination of this application;

(iii) That judgment be entered against the defendant/respondent according to the Arbitral Award dated 22nd June, 2020 and filed in these proceedings for enforcement; and

(iv) That costs of these application (sic) and the proceedings herein be borne by the respondent.

2. The application is supported by an affidavit sworn on 26th October, 2020 and filed on 29th October, 2020 by Xu Jiansheng, the Managing Director of the plaintiff herein.

3. On 9th December, 2020, the plaintiff filed a Notice of Motion application dated 7th December, 2020 brought under the provisions of Section 99 of the Civil Procedure Act and all enabling provisions of the law. The plaintiff seeks the following orders-

(i) Spent; and

(ii) That this Honourable Court be pleased to amend the order issued by the Honourable Justice Njoki Mwangi on 17th November, 2020 by correcting the suit property from LR No. MN/1/3595 SHANZU MOMBASA to LR No. MN/1/3854 SHANZU.

4. The application has been brought on the grounds on the face of it and the affidavit sworn on 7th December, 2020 by Cain Mingo, an Advocate of the High Court of Kenya practicing in the law firm of Conrad Maloba & Associates.

5. In opposition to the applications dated 26th October, 2020 and 7th December, 2020, the defendant filed a replying affidavit sworn on 16th December, 2020 by Yesse Achoki Oenga, the director of the defendant herein.

6. The application was canvassed by way of written submissions. The plaintiff's submissions were filed on 9th February, 2021 by the law firm of Conrad Maloba & Associates Advocates, while the defendant's submissions were filed on 12th February, 2021 by the law firm of Kosgey & Masese Advocates.

7. Mr. Mingo, learned Counsel for the plaintiff submitted that the plaintiff entered into a contract on 20th February, 2008 for the construction

of a residential complex comprising 50 apartments at the defendant's premises known as LR No. MN/1/3854 SHANZU, MOMBASA. He indicated that thereafter, a dispute arose and the parties were engaged in arbitration proceedings before Mr. Stanley Kebathi, sole Arbitrator, and an award dated 22nd June, 2020 was delivered by the said Arbitrator in favour of the plaintiff in the sum of Kshs. 69,435,619.53. He stated that the defendant had refused to pay the said sum and that since costs had not been agreed on, the same had been referred to the Arbitrator for taxation.

8. It was contended by Mr. Mingo that the documents attached to the defendant's replying affidavit did not meet the threshold provided under Sections 107 and 108 of the Evidence Act. He submitted that the defendant had demonstrated bad faith by failing to disclose material facts to this Court, particularly, by listing apartments that had already been sold, by deliberately failing to disclose apartments that are yet to be sold, by attaching certificates of titles that are not legible and by producing old documents which cannot be relied on, with the intent to obstruct the execution of the decree that may be passed against it.

9. He was of the view that this Court cannot rely on the documents attached to the respondent's replying affidavit as they cannot be ascertained and they do not demonstrate the current status in relation to the subject property. He contended that from the respondent's actions, it is clear that it has no intention to pay the debt unless compelled by this Court. Mr. Mingo relied on the case of **Republic v Town Clerk of Webuye County Council & another** [2014] eKLR, where the Court held that a decree holder's right to enjoy fruits of his judgment must not be thwarted and when faced with such a scenario, the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights pursuant to the values of the Constitution particularized under Article 10. Further that the obligation of the Court is to do justice to the parties and to do so without delay under Article 159(2)(a) & (b) of the Constitution and that the applicant's right of access to justice is protected under Article 48 of the Constitution. Mr. Mingo submitted that the application dated 7th December, 2020 had not been disputed hence this Court should grant the orders sought herein.

10. Mr. Masese, Learned Counsel for the defendant submitted that the application herein cannot be granted since the plaintiff seeks to injunct the defendant from transferring the property known as LR No. MN/I/3854 Shanzu, which does not belong to the defendant thus it would amount to an exercise in futility for this Court to issue an order against a party restraining it from dealing with a property over which it does not enjoy proprietary rights and interests. He further submitted that pursuant to the provisions of Section 107 of the Evidence Act, the party that seeks to persuade the Court to issue such orders is obligated by the said Section to place material before the Honourable Court that will satisfy the Court that such a party is entitled to the orders sought. He stated that in this case, the plaintiff had failed to discharge the said burden.

11. The defendant's Counsel stated that the defendant entered into a contract with the plaintiff for the construction of 50 apartments together with all the appurtenant facilities and usual conveniences on all that parcel of land known as L.R No. 3854/1/MN (original number 1080/2) at a sum of Kshs. 420,397,792.00 and in order to secure the financing of the construction of the aforesaid apartments, the defendant charged the suit property in favour of East Africa Development Bank (EADB), which in turn advanced to the defendant a loan facility of US Dollars 4 Million, which proceeds were used to pay the plaintiff's interim payment certificates number 1 to 21.

12. It was submitted by Mr. Masese that the defendant proposed to repay its loan with EADB by disposing of the fifty apartments to various purchasers. He indicated that forty-five (45) apartments had been sold, leaving five (5) apartments which were still charged to EADB to secure the balance due and owing to them. He submitted that having already sold a substantial interest to third parties, twenty-seven (27) of whom are already registered against the Title and 17 of whom partial discharges have already been issued, bringing the total of discharged apartments to 44 out of 50, the defendant was not currently the owner of the property that the plaintiff seeks to restrain it from transferring.

13. Mr. Masese contended that were the Court to issue the orders sought, it would amount to restraining third parties who are not parties to this suit from dealing with their properties which amounts to a violation of the cardinal principles of natural justice that no parties should be condemned unheard.

ANALYSIS AND DETERMINATION.

14. This Court has considered the applications filed herein, the affidavits filed in support thereof, the replying affidavit by the respondent and the rival submissions by Counsel for the parties. The issue that arises for determination is whether the applications dated 26th October, 2020 and 7th December, 2020 are merited.

15. In the affidavit filed by the applicant in support of the application dated 26th October, 2020, it deposed that on 20th February, 2008, the applicant entered into a contract with the respondent herein for the construction of a residential complex comprising of 50 apartments at the respondent's premises known as LR No. MN/1/3854 SHANZU MOMBASA. It averred that a dispute arose thereafter and the parties engaged in arbitration proceedings which culminated into an award dated 22nd June, 2020 that was delivered in favour of the applicant in the sum of Kshs. 69,435,619.53. It was deposed that the respondent had refused to pay the said sum and that since the parties had not been able to agree on costs, the same had been referred to the Arbitrator for taxation.

16. It was deposed by the applicant that the respondent had not applied to set aside the said award as provided under Section 35 of the Arbitration Act and the applicant was apprehensive that the respondent's directors were intent to transfer the suit property. The applicant therefore sought to secure itself against any attempt on the part of the respondent to defeat the execution of the decree.

17. In the affidavit filed by the applicant in support of the application dated 7th December, 2020, it deposed that on 26th October, 2020, the applicant herein filed a Notice of Motion application seeking that pending the enforcement of the arbitral award dated 22nd June, 2020, this Court be pleased to issue injunctive orders against the respondent in respect of the suit property known as LR. No. MN/1/3595 SHANZU MOMBASA pending the hearing and determination of the said application and that judgment be entered against the respondent according to the arbitral award.

18. The applicant averred that on 17th November, 2020, the Court granted prayer 2 of the application which contained an erroneous entry on the reference of the suit property as L.R No. MN/1/3595 SHANZU MOMBASA instead of L.R No. MN/1/3854 SHANZU MOMBASA thus a formal order that was subsequently extracted indicated the suit property with the wrong reference number. It was stated by the applicant that it sought to amend the order so as to have the property correctly indicated as L.R No. MN/1/3854 SHANZU instead of L.R No. MN/1/3595 SHANZU MOMBASA, since if the orders sought were not granted, the applicant would suffer irreparable loss that cannot be compensated by way of damages.

19. The respondent in its replying affidavit in response to the applications deposed that the respondent entered into a contract dated 20th February, 2008 for the construction of 50 apartments on all that parcel of land known as L.R No. 3854/1/MN (original number 1080/2) Mombasa North at a sum of Kshs. 420,397,792.00 and in order to secure the financing of the said fifty (50) apartments, the respondent charged all the suit property in favour of East Africa Development Bank, which in turn advanced to the respondent a loan facility of US Dollars 4 Million, which proceeds were used to pay the applicant's interim payment certificates number 1 to 21.

20. The respondent averred that it proposed to pay the facility advanced to it by disposing of the fifty (50) apartments to various purchasers and applying the sale proceeds to settle the amounts due. That Kamotho, Maiyo & Mbatia Advocates who were instructed by EADB prepared partial discharges of charges in respect of all apartments that had been sold and the purchase price received. The respondent deposed that the said bank would only execute a partial discharge of charge to facilitate the registration of a long term assignable lease (Title), for an apartment in favour of a purchaser contracting with the respondent against receipt of the sale proceeds of an apartment.

21. The respondent further averred that it had already sold and received sale proceeds from various purchasers in respect of forty-five (45) apartments leaving only five (5) apartments that are yet to be sold. The respondent averred that the injunction order issued against the respondent was issued in excess of jurisdiction of various apartments situate on the suit property that had already been disposed of and that those that remain are still charged to EADB, to secure settlement of the loan of Kshs. 67,143,702.00 due and owing to them.

22. It was stated by the respondent that the amounts found to be due and owing to the applicant if at all, could only be settled by way of attachment of the unsold apartments after the respondent's financier recovers its dues and discharges the remaining properties since the respondent is currently not the owner of the suit property.

23. It is worth noting that when the application dated 26th October, 2020 came up for *inter partes* hearing on 16th November, 2020, this Court granted prayer No. 2, which is, that pending the enforcement of the award herein, this honourable Court do issue an order of injunction restraining the defendant and/or its servants and/or its agents from transferring the suit property known as LR NO. MN/1/3595 SHANZU MOMBASA pending the hearing and determination of the application. The Court directed that prayer No. 3 in the said application would be heard on 7th December, 2020.

24. From the record, it is evident that there is no application seeking to set aside and/or vary the orders issued on 16th November, 2020, neither is there any indication that an appeal has been lodged at the Court of Appeal against the said decision. This Court therefore has no basis, reason and/or justification to belabor on the issue of whether or not the applicant herein has satisfied the conditions to warrant the grant of an order of injunction. The application for an injunction was not opposed despite service of a hearing notice. The applicant's Counsel filed an affidavit of service to confirm that the Counsel for the respondent was served with a hearing notice

25. The application dated 7th December, 2020 is simply seeking to correct the suit property from LR No. MN/1/3595 SHANZU MOMBASA to L.R No. MN/1/3854 SHANZU in the order that was issued by this Court on 17th November, 2020. That is a matter which is not disputed by the respondent herein. The said order was however granted as per the prayer sought by the applicant. The mistake in citing the wrong reference number was made by the applicant's Counsel in the drafting of the said prayer. It is evident that the supporting affidavit sworn in support of the application dated 26th October, 2020 refers to L.R No. MN/1/3854 SHANZU. I have gone through the Court record and I note that the pleadings therein also refer to the suit property as L.R No. MN/1/3854 SHANZU. In light of the foregoing, the application dated 7th December, 2020 is hereby allowed as prayed.

26. Prayer No. 3 of the application dated 26th October, 2020 has been brought pursuant to the provisions of Sections 7, 36, and 37 of the Arbitration Act, No. 4 of 1995. Section 36 of the said Act provides as follows-

> ***"1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.***
>
> ***2) An international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.***
>
> ***3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish—***
>
> ***a) the original arbitral award or a duly certified copy of it; and***
>
> ***b) the original arbitration agreement or a duly certified copy of it.***
>
> ***4) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.***
>
> ***5) In this section. the expression "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to***

by Kenya on the 10th February, 1989, with a reciprocity reservation." (emphasis added).

27. Section 37 of the Arbitration Act No. 4 of 1995 on the other hand provides for grounds upon which the High Court may decline to recognize and/or enforce an arbitral award at the request of the party against as hereunder: -

> ***"1). The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only—***
>
> ***a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that—***
>
> ***(i) a party to the arbitration agreement was under some incapacity; or***
>
> ***(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;***
>
> ***(iii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or***
>
> ***(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or***
>
> ***(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or***
>
> ***(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or***
>
> ***(vii) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;***
>
> ***b) if the High Court finds that—***
>
> ***(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or***
>
> ***(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.***
>
> ***2). If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security."*** (emphasis added).

28. This Court has gone through the replying affidavit sworn on 16th December, 2020 and noted that the same does not challenge the arbitral award dated 22nd June, 2020. It focuses on opposing the grant of an order of injunction restraining the respondent and/or its servants and/or its agents from transferring the suit property known as to L.R No. MN/1/3854 SHANZU.

29. I have perused the Court record and have found that the applicant has complied with the conditions set out in Section 36(3) of the Arbitration Act and has furnished this Court a copy of the Final Award dated 22nd June, 2020. The applicant in this matter has presented this court with a domestic Arbitral Award. There are no grounds to vitiate the arbitral award as provided under Section 37 of the Arbitration Act. The respondent, Oakpark Apartments Mombasa Ltd, has not demonstrated that any of the grounds under Section 37 do exist to persuade this court to refuse to recognize and enforce the Arbitral Award.

30. The issues that have been brought up by the respondent in its affidavit about the apartments that have been sold and the ones that have not been sold was not an issue before the Arbitrator. The dispute that was before him was about the amount that had not been paid to the applicant for construction of the apartments as a whole and not for any specific apartment. This Court cannot retry issues that were not before the Arbitrator in the manner that the respondent seems to be asking this Court to do.

31. In the case of **Tanzania National Roads Agency v Kundan Singh Construction Limited** [2013] eKLR, the Court held *interalia*-

> ***"Recognition and enforcement of arbitral awards both domestic and foreign is automatic under the provisions of section 36 of the Arbitration Act. The conditions set under section 37 of the Act have not been met to warrant this court not to recognize and enforce the award."***

32. Courts will ordinarily recognize and enforce an arbitral award unless a party demonstrates that the award is affected by one or more of the prescribed grounds for refusal as set out in the under Section 37 of the Arbitration Act No. 4 of 1995. Pursuant to the provisions of Rules 6 and 7 of the Arbitration Rules, 1997, if no application to set aside an Arbitral Award has been made in accordance with the provisions of Section 35 of the said Act, the party filing the award may apply *ex-parte* by summons for leave to enforce the Award as a decree of the Court. In the present case, the Arbitral Award was delivered on 22nd June, 2020 and the application herein was filed on 29th October, 2020,

which is after the lapse of the three months provided by the law. Therefore, I am satisfied that the applicant has made out a case for the orders sought herein.

33. The upshot of prayer No. 3 of the application dated 26th October, 2020 is that-

(i) The Arbitral Award dated 29th June, 2020 issued by Mr. Stanley Kebathi, sole Arbitrator, filed in this Court on 29th October, 2020 is hereby recognized and adopted as a judgment of the Court;

(ii) Leave is hereby granted to the applicant to enforce the said award as a decree of the Court; and

(iii) Costs of the application shall be borne by the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 15TH DAY OF OCTOBER, 2021.

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 the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of-

Mr. Mingo for the applicant

No appearance for the respondent

Mr. Oliver Musundi – Court Assistant.