



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**COMMERCIAL & TAX DIVISION**

**HIGH COURT MISC APP E235 OF 2019**

**ALISON JEAN LOUIS.....PLAINTIFF**

**VERSUS**

**RAMA HOMES LIMITED.....DEFENDANT**

**RULING**

By an application under Certificate of Urgency filed on 21<sup>st</sup> June 2019, the Applicant sought that as the dispute awaits appointment of Arbitrator interim measures, **under Section 7 of Arbitration Act** be granted vide an application dated 17<sup>th</sup> June 2019 filed on 19<sup>th</sup> June 2019. The instant application is for summary judgment for a liquidated claim of Ksh 3,474,504/- which is undisputed by the Respondent/Defendant.

The Arbitration proceedings were to commence on 3<sup>rd</sup> October 2019 and the continuous presence of this matter in Court is causing the Applicant loss as the Respondent refused to release the money to the Applicant, whereas the Agreement between parties does not provide for interest for monies held.

The Plaintiff/Applicant's case is that by an Agreement for Sale, the Plaintiff entered with the Defendant/Respondent of 6<sup>th</sup> December 2017 she was to purchase an off plan building **Apartment No. 807** at Jumeirah Heights at Parklands for Ksh 12.5 million to be paid on agreed instalments.

On 29<sup>th</sup> March 2019, the Applicant visited the premises and found the building had deviated substantially in structure from the Architect's initial Plan. The Applicant found this deviation a fundamental breach of the contract and terminated the contract and sought refund of payments made. The Respondent agreed to refund subject to deductions of some contractual amounts. The same remains due and owing to date. Hence the application for summary judgment.

The Respondent by Replying Affidavit filed on 24<sup>th</sup> July 2019 responded as follows;

- a) The Applicant and Respondent entered into a contract for purchase of building Flat No 807 and the Applicant was to pay down payment/deposit Ksh 1,250,000 upon execution of the Agreement. Thereafter, the Applicant was to pay monthly instalments of Ksh 244,792/- monthly for 48 months.
- b) In default of payments by instalments the Purchaser was under 21 day notice to rectify the situation and pay up.
- c) The Applicant failed to pay instalments when due and owing, there are warning letters annexed to the Affidavit to confirm default.
- d) Finally the Respondent issued 21 day notice as per the annexed copy to the affidavit.
- e) The Applicant sought to renegotiate the contract instead of settling payment of instalments.
- f) The Respondent elected to rescind the contract as under Clause 8C of the Agreement and agreed to refund any due monies upon resale of the Apartment and deducting all necessary costs.
- g) Thereafter the Applicant declared a dispute and pursued Arbitration proceedings.

**DETERMINATION**

The Court considered the written submissions filed by Applicant on 31<sup>st</sup> July 2019 and Respondent's filed on 21<sup>st</sup> August 2019 and high lights made on 25<sup>th</sup> September 2019 and finds the issue for determination is;

a) Does this Court have jurisdiction to adjudicate on this dispute?

b) Can this Court grant summary Judgment under section 7 of the Arbitration Act 1995 as interim measure?

## ANALYSIS

The jurisdiction of this Court is prescribed under **Article 165 (3) COK 2010** unlimited jurisdiction in Civil and Criminal matters. However, where parties mutually agree and contract their own forum of choice and process of dispute resolution, by virtue of **Article 159 COK 2010**, the Court downs its tools and allows parties to pursue alternative dispute resolution mechanisms, in this case, arbitration.

The Parties herein entered into an agreement for sale of Building Flat 807 Jumeirah Heights at Parklands for Ksh 12.5 million. The Agreement was signed on 6<sup>th</sup> December 2017 and is annexed to the instant application. At **Pg 25 Clause T** is the Arbitration Agreement/Clause that provides as follows;

***“Unless otherwise provided in this agreement , any dispute, difference or question whatsoever, which may arise between the parties, including the interpretation of rights and liabilities of either party shall be referred to an Arbitrator under the Rules of the Arbitration Act 1995 of Kenya.....”***

The Arbitration agreement/Clause confirms the parties choice of forum as Arbitration and have made it clear that any issue between the parties is to be determined by the Arbitration proceedings, which process has been commenced and/or is being pursued. Therefore, this Court lacks the requisite jurisdiction to hear and determine any aspect of the dispute.

The applicant sought to rely on **Section 7 of Arbitration Act 1995** that reads;

### **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.***

The Law grants an Applicant an opportunity to apply to the Court to grant interim orders to preserve the subject matter and/or maintain *status quo* so as to ensure that there is a dispute for hearing and determination before the Arbitrator. The interim orders envisaged are in form of injunctions, deposit and/or holding of funds and any other relevant and legal interim order to freeze/stop/ remain as is situation so as to enable parties pursue Arbitration proceedings. In fact once Arbitration proceedings commence, the Arbitrator on hearing the dispute may amend, set aside and/or enforce and maintain the interim order. So **Section 7 Arbitration Act** is not an avenue for final orders before/pending hearing of the suit.

The Application for summary judgment under **Order 36 of CPR 2010** and/or Judgment on Admissions under **Order 13 of CPR 2010** cannot be the subject of an interim order under **Section 7 of Arbitration Act** as these applications if successful the entry of judgment determines the suit and the dispute is settled at this stage.

The Applicant submitted that in the case of ***Infocard Holdings Limited vs AG & 2 Others [2014] eKLR*** it was held that **Section 7** does not give Courts the power to look into the merits of the Agreement and the dispute generally lest it interferes with the jurisdiction of the Arbitral Tribunal. To interfere is prohibited while intervening is permitted in appropriate circumstances.

The Applicant relied on the case of ***Portlink Limited vs Kenya Railways Corporation [2015] eKLR*** and ***Ongata Works Limited vs Tatu City Limited [2018]eKLR*** to fortify the position of granting interim measures when the subject-matter of Arbitration is under threat.

In the instance case; the amount sought in refund is a liquidated demand of Ksh 3, 474, 504/- and is alleged to have been admitted by the Defendant but who has refused to refund the same pending hearing of the dispute. The other issue is that interest was not contracted for and hence the Applicant shall continue to suffer loss for the period the amount remains due and owing.

A reading of the correspondence between the parties annexed to the application does not disclose admission of the amount; it is confirmation of termination of the contract and refund on the basis of resale of the apartment and deduction of contractual amounts before remittance of the balance. This, to the Court is not clear cut admission of the alleged amount due and owing. In any case it was intimated to this Court that Arbitration proceedings were to commence in October 2019 and appropriate orders may be sought at the forum of choice.

The Respondent and Applicant relied on the landmark case of ***Safaricom Limited vs Ocean View Beach Limited & 2 Others [2010]eKLR*** on interim measures of protection pending Arbitration proceedings which held 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:-

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?"*

The Respondent relied on the case of NCC International AB vs Alliance Concrete Singapore Pte Ltd [2008]5 LRC 187 which provides;

*“The granting of an interim measure of protection or injunction pending the determination of an arbitral reference was a discretionary measure that should be exercised cautiously so as not to usurp the role of the arbitral tribunal and that it could decline to grant such orders where an arbitration tribunal had concurrent jurisdiction to make such orders. The court should therefore come in under very exceptional circumstances.”*

The case law above demonstrates that the interim measures envisaged by section 7 of the Arbitration Act are geared to pressure the subject matter of Arbitration that may be under threat. This is not the case with regard to the Applicant's case.

#### **DISPOSITION**

1. **From the above considerations, this finds that it lacks jurisdiction to hear and determine the dispute as there is a valid Arbitration Agreement that parties shall resolve disputes through Arbitration.**
2. **The Application filed on 19<sup>th</sup> June 2019 for summary judgment is dismissed with costs as it does not fall under Section 7 Arbitration Act 1995 that provides for interim measures pending hearing before the Arbitral Tribunal.**
3. **The dispute is referred to be heard and determined before an Arbitral Tribunal. Any urgent/interim application shall be made before the Arbitral Tribunal.**
4. **The orders remain valid and enforceable forthwith, however, due to the ongoing lockdown from the coronavirus pandemic, no party's right shall be jeopardized and parties may pursue Arbitration proceedings after the Government officially announces resumption of normalcy.**

**DELIVERED DATED & SIGNED IN OPEN COURT ON 28<sup>TH</sup> APRIL 2020**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**ASHITIVA ADVOCATES LLP FOR APPLICANT**

**ABDULLAHI, GITARI & ODHIAMBO ADVOCATES LLP FOR DEFENDANT**