



Munyao v Powertech Agencies Ltd (Environment & Land Case E092 of 2023) [2023] KEELC 18662 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18662 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E092 OF 2023**

**AA OMOLLO, J
JULY 13, 2023**

BETWEEN

SIMON MUTUNGA MUNYAO PLAINTIFF

AND

POWERTECH AGENCIES LTD DEFENDANT

RULING

1. The Plaintiff/Applicant filed a notice of motion application dated March 6, 2023 seeking for the orders that:
 - i. That the Honourable Court be pleased to grant a temporary injunction restraining the defendant whether by itself, its employees, agents, servants and all such persons acting on its behalf from advertising for sale or lease ,entering into any agreement sale or lease ,creating any encumbrance ,transferring, letting ,charging, alienating or otherwise howsoever, wasting ,constructing on, or otherwise interfering or dealing with the suit property being; NAIROBI/BLOCK 263/2075(Formerly LR No 15081/38) situate in Nairobi County pending the hearing and determination of this application.
 - ii. That the Honourable Court be pleased to grant a temporary injunction restraining the defendant whether by itself, its employees, agents, servants and all such persons acting on its behalf from advertising for sale or lease, entering into any agreement sale or lease, creating any encumbrance, transferring, letting, charging, alienating or otherwise howsoever, wasting, constructing on, or otherwise interfering or dealing with the suit property being; NAIROBI/ BLOCK 263/2075(Formerly LR No 15081/38) situate in Nairobi County pending the hearing and determination of the main suit.
 - iii. That the costs of this application be provided for.



2. In response to the application, The Respondent filed a notice of preliminary objection dated March 21, 2023 and a replying affidavit. The PO stated that the suit is defective as the court lacks jurisdiction by dint of Section 4(4) of the Arbitration Act 1996, and that the action is not sustainable in law as the parties have an agreement to arbitrate in the form of an arbitration clause within their contract in clauses 16.7 and 16.8 of the terms and conditions, in the event of a dispute therefore the instant motion should be struck out.
3. Directions was taken that the Preliminary Objection be heard first and the same proceeded on March 27, 2023. The Respondent sought for the court to send the matter for arbitration as per clause 16.7 and 16.8 of the agreement of sale noting that courts now embrace arbitration as an alternative dispute resolution mechanism.
4. The Applicant contended that the only matter that were to be submitted to arbitration are those which did not fall under this Court and in clause 16.8, last paragraph allowed a party to seek injunctive relief from any court of law. On the other hand, the Respondent contended that clause 16.8 is on interim reliefs pending determination of the arbitrator and what the applicant is seeking are permanent orders.

Analysis

5. I have considered the Preliminary Objection that is urging for the dismissal of the application on the basis that the court has no jurisdiction because the contract between the parties provided for arbitration at clause 16.7 and 16.8.
6. It is not disputed that the Applicant and the Respondent entered into a sale agreement whose clause 16.7 provided as follows;

“16. 7: Any dispute, controversy or claim arising out of or relating to this Agreement or a termination hereof (including without prejudice to the generality of the foregoing, whether as to its interpretation, application or implementation), shall be resolved by way of consultation held in good faith between the Parties. Such consultation shall begin immediately after one party has delivered to the other written request for such consultation. If within fifteen (15) Business Days following the date on which such notice is given the dispute cannot be resolved amicably, the dispute, controversy or claim shall (provided that such dispute, controversy or claim is not required to be adjudicated by the Environment and Land Court pursuant to the Land Laws) be submitted to arbitration in accordance with clause 16.8.”

7. Clause 16.8 reads;

“Should any dispute, controversy or claim as is referred to in cause 16.7 arise between the Parties and the consultation process referred to in clause 16.7 shall not resolved such dispute, the dispute shall upon application by any Party be referred for arbitration to a person acceptable to the Parties or if the Parties cannot agree on the appointment of such person within a period of thirty(30) days from the date of such application, then the dispute shall be referred to arbitration by a single arbitrators to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators ,Kenya Branch upon the written request of either Party. The arbitration shall take place in Nairobi and the language or arbitration shall be English. The arbitration shall be conducted in accordance with the rules or procedures for arbitration under the Arbitration Act, 1995 as amended from time to time. The decision



of the arbitrator shall be final and binding on the parties and may be made an order of a court of competent jurisdiction. Notwithstanding the foregoing, a Party is entitled to seek preliminary injunctive relief or interim or conservatory measures from a court in Kenya of competent jurisdiction pending the final decision or award of the arbitrator.” (underline mine for emphasis).

8. As a rule of the thumb, parties are bound by their own terms and the court cannot rewrite contract between them. From my reading and interpretation of the above outlined clauses, it shows that in the event a dispute arose with regard to the agreement in subject, parties would explore consultation among themselves and where the dispute is not settled, the same would be taken to arbitration provided that the same is not required to be adjudicated by the Environment and Land Court pursuant to the Land Laws.
9. Both clause 16.8 of the sale agreement and section 7(1) of the *Arbitration Act* Cap 4 of 1995 gave the parties entitlement to seek for preliminary injunctive relief before court pending determination by the arbitrator. Section 7(1) provides thus;

“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”
10. The claim filed is that of breach of contract for sale of land. This is a matter that can be adjudicated by the arbitrator as well as this court. However, attending before the arbitrator would take precedence. It is therefore correct to say that this Court does not have jurisdiction at the first instance.
11. Similarly, at this first instance, the Applicant is seeking for temporary injunctive orders against the Respondent. The Plaintiff is aggrieved that unless the Defendant is restrained by an order of this court, they are likely to sell the property to 3rd parties to their detriment. Clause 16.8 permitted either party to approach this Court for an injunctive relief. It is noteworthy that to show merit for the grant of an injunctive relief, an applicant has to anchor such an application on a claim.
12. Section 19 of the *Civil Procedure Act* provides that a suit shall be instituted in such manner as may be prescribed by the Rules. One such mode in which a party can bring a claim to court is by way of plaint (Order 3 rule 1 of the *Civil Procedure Rules*). The Rules do not provide for institution of suits by way of an interlocutory application. The Applicant used an avenue known in law to approach this court for an order of interim relief. Consequently, I find that the preliminary objection raise was premature. It is struck out with costs to the applicant.
13. The application for temporary injunction shall proceed to be heard on merit on a date to fixed in court during the delivery of this ruling.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY, 2023.

A. OMOLLO

JUDGE

In the presence of

Mr Munyi advocate for the Plaintiff/Respondent

Mr Ombati advocate for the Defendant/Applicant

