



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 30 OF 2019

CHINA ZHONGXING CONSTRUCTION COMPANY LTD.....PLAINTIFF

-VERSUS-

EDEN DEVELOPMENT LIMITED (K).....DEFENDANT

RULING

1. The Application before me is dated 19/4/2019 filed pursuant to the provisions of Section 7 of the Arbitration Act, section 1A, 1B, and 3A of the Civil Procedure Act. The Application is seeking for the following orders;

a. spent

b. That this Honourable Court be pleased to issue an order of injunction restraining the Defendant from transferring the suit property known as LR. No. MN/I/3595 SHANZU MOMBASA pending hearing and determination of this application.

c. That this Honourable Court be pleased to issue an order of injunction restraining the Defendant from transferring the suit property known as LR. No. MN/I/3595 SHANZU MOMBASA pending referral of the dispute herein to arbitration and determination thereof.

d. That the costs of this application be awarded to the Plaintiff/Applicants.

2. The Application is premised on the grounds contained in the application and supported by the affidavit of **XU JIANSHENG**, described as the Plaintiff's Managing Director, sworn on 19/4/2019. The deponent avers that a contract for the construction of Beach Apartments at the Defendant's premises known as **LR. No. MN/I/3595 SHANZU MOMBASA** was entered into on 8/6/2009 and upon performance of the contractual obligations, the plaintiff was issued with final certificates of completion.

3. The deponent avers that the plaintiff prepared a final statement of account establishing a balance of the contractual amount in the sum of Kshs. 85,410,551/= inclusive of interests and unpaid withholding tax. However, the Defendant has failed and/or neglected to settle the said fees despite several reminders and demand letters. Consequently, the plaintiff is apprehensive that the defendant may dispose of the suit property before settling its fees and leaving it with no genuine recourse on its liquidated demand because of the respondent's violations.

4. For such grievance the plaintiff prays that this court grants it protection orders pending referral of the dispute between the parties to arbitration for determination as provided under clause 45.1 of the Agreement entered into on 8/6/2009.

5. In response to the application, the Defendant filed a Notice of Preliminary objection dated 22/5/2019 together with the Replying Affidavit of **Joseph Marie Ogeto** sworn on 23/5/2019. The Defendant contends that the interim orders issued by this court should be discharged and this matter referred to Nairobi High Court as the appropriate and proper forum for adjudication of the present dispute, since both parties to the dispute are based in Nairobi and the subject contract was executed in Nairobi. Because of the aforementioned reasons, the plaintiff is accused of forum shopping and certainly at a great cost and inconvenience to the defendant.

6. The Defendant further avers that though the suit property is based in Mombasa Municipality, the units on the suit property have been purchased, transferred, whilst some are in the process of being registered to third parties who have not been enjoined as parties to the dispute and in any event the contract dated 8/6/3009 did not provide that the executed project was to act as a guarantor against any of the contractors claim.

7. It is the Defendant's case that the present suit is contra-statute and there is no evidence to support grant of the orders sought.

8. The Application was canvassed with by way of written submissions. In the submissions, the plaintiff argues that it had made out a good case for the grant of interim orders pending the arbitral proceedings. Counsel for the Plaintiff, **Mr. Mingo Advocate** relied on the case of **Safaricom Limited –vs- Ocean View Beach Hotel Limited & 2 others (2010) eKLR**, to augment his submission that the Plaintiff had satisfied the conditions-precedent for the grant of interim measures of protection by the Court, pending arbitration, namely: that there is an arbitration agreement in existence; that the subject matter of the arbitration was under threat since the defendant may dispose the suit property before settling its fees; that the defendant has not denied owing the amount claimed and the Defendant has admitted in its response that they have disposed several parts of the suit property to 3rd parties and are in the process of disposing the fewer remaining parts of the property and thereby extinguishing their interest in the property while not offering any concrete approach to settle the Defendant's owed amounts.

9. The counsel further submits that the suit property is situate in Mombasa County within the local limits of this court and therefore this suit is appropriately before this court in accordance to Section 12 of the Civil Procedure Act.

10. The Defendant's submissions were not on record by the time of preparing this decision but I have had the benefit of considering the Defendant's arguments raised in the Replying Affidavit sworn on 23/5/2019 and at the conclusion of the arguments by the respective parties herein.

11. Having considered the subject application and the arguments and the submissions tendered, two main issues isolate themselves for determination are:

1. Whether this court has the requisite jurisdiction to entertain this matter.

2. Whether the applicant has made out a case for the granting of interim orders of protection pending arbitration.

Whether this court has territorial jurisdiction to entertain this matter

12. As I deal with this application, I am alive to the fact that a court can only exercise that jurisdiction that has been donated to it by either the Constitution or legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Jurisdiction is in the end everything since it goes to the very heart of a dispute. Without it, the court cannot entertain any proceedings and must down its tools. In case of **Owners of the Motor Vessel "Lilian S" V Caltex Oil (Kenya) Ltd (1989)KLR1**, Justice Nyarangi of Court of Appeal, as he then was, held thus: -

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

13. In the instant application, while the defendant contends that the suit is improperly before the court and should be transferred to Nairobi where the parties reside and where the contract was entered into, the plaintiff invokes the provisions of Section 12, Civil Procedure Act which stipulates: -

"12. Suit to be instituted where subject matter situate Subject to the pecuniary or other limitations prescribed by any law, suits -

(a) for the recovery of immovable property, with or without rent or profits;

(b) for the partition of immovable property;

(c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;

(d) for the determination of any other right to or interest in immovable property;

(e) for compensation for wrong to immovable property;

(f) for the recovery of movable property actually under distraint or attachment, where the property is situated in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situated: Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain."

14. The above Section requires that when the subject matter is immovable property, that the suit be filed within the local limits of where the property is situated. In this case the Applicant in their plaint pleaded the suit property was in Mombasa. Ordinarily therefore, the suit ought to have been filed at Mombasa because the suit property is situated within the immediate local jurisdiction of the High Court at Mombasa. Consequently, I find that the contestation as to the jurisdiction of the court is untenable and that the Court has the jurisdiction to entertain the Application for interim measure of protection orders of protection sought by the Plaintiff pursuant to Section 7 of the Arbitration Act. In any

event, section 12 is not the conferrer of jurisdiction upon this court. This court's jurisdiction is conferred by dint of article 165(3)a of the which vests upon the court unlimited jurisdiction in both civil and criminal matters. I do not understand the defendant to allege that the constitutional provision has been qualified by the provision of the Act.

Whether the applicant has made out a case for the granting of interim orders of protection pending arbitration.

15. The grant of an interim measure of protection is indeed discretionary and thus the court ought to take into account the factor of urgency with which the Applicant has moved to court. The purpose of an order of protection is to preserve assets or in some way maintain the status quo as the parties await the outcome of the arbitral proceedings. Therefore, the court should also, in my view, look into the risk or prospects of any harm or prejudice in the absence of protection. Section 7 of the Act stipulates as follows:

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."

16. The Court of Appeal in the case of **Safaricom Limited v Ocean View Beach Hotel Ltd & 2 others (supra)**, outlined the factors to be considered before the granting the interim measure of protection. The court said :-

"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?"

17. In the present case, it was not disputed that the parties herein entered into a contract for the development of Apartments on the suit property vide contract dated 8/6/2009. It was also not disputed that the contract contained an arbitration clause at clause 45.1, which provides:

"In case any dispute or difference shall arise between the Employer or the Architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within 30 days of the notice..."

18. Bearing the above in mind, the question that can be posed at this stage is whether the Plaintiff has met the threshold for the grant of an interim measure as outlined in the Court of Appeal case of **Safaricom Limited v Ocean View Beach Hotel Ltd & 2 others (supra)**. With regard to whether the subject matter is under threat, I have considered the various arguments advanced by the opposing parties. The plaintiff avers that the defendant has not performed part of its obligations under the said contract and as a result the plaintiff is claiming a sum of Kshs. 85,410,551/=. On the part of the defendant, the debt has not been denied. In fact, the defendant has confirmed that indeed it has sold and transferred units on the suit property to third parties who have acquired rights over the suit property while some units are in the process of being registered. Further, the Defendant argues that the impugned contract did not provide that the executed project was to act as a Guarantor against any contractor's claim.

19. From the foregoing, it is my view, the plaintiff has established that there is a likelihood/threat of wastage of the suit property which is the subject matter of the intended arbitration. Therefore, if the interim protective orders are not issued in favour of the Plaintiff, the subject matter of the arbitration would have been dissipated.

20. In the case of **Seven Twenty Investments Limited -Vs- Sandhoe Investment Kenya Limited, (2013) eKLR**, Kamau J held as follows:

"Perusal of section 7 of the Arbitration Act clearly shows that the issue of whether or not there is a dispute or whether or not there would be losses by either side would not be a factor for a court to take into consideration when deciding whether or not it should grant an order of interim measure of protection or injunction to safeguard the subject matter of the arbitral proceedings. All that a court would be interested in is whether or not there was a valid arbitration agreement and if indeed

the subject matter of the arbitral proceedings was in danger of being wasted or dissipated so as to preserve the same pending the hearing and determination of the arbitral reference.”

21. I am bound by the decision of the Court of Appeal in the **Safaricom Limited v Ocean View Beach Hotel Ltd & 2 others (supra)** that once the court finds that an arbitral agreement between the parties exist, and there is a dispute that should be determined by an arbitrator, the court is obligated to grant an interim order of preservation as I hereby do to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings.

Conclusion

22. In conclusion and for the reasons above stated, I make a finding that this application is properly before this Court and that the same has merit. Accordingly, I allow the same and make the following orders:

i. In terms of Clause 45.1 of the contract dated 6/6/2009, the dispute herein between the plaintiff and the defendants is referred to arbitration in terms of the aforesaid clause.

ii. THAT pending the reference of this dispute to arbitration and determination thereof, the Defendant/Respondent by itself, its officers, employees, servants and/or agents or otherwise however are hereby restrained from transferring the Suit Property known as LR. No. MN/I/3595 SHANZU MOMBASA or any unit of apartment comprised therein that remains alienated as at today

iii. Costs of the application to abide by the outcome of the arbitration.

23. It is so ordered.

Dated, signed and delivered at Mombasa this 26th day of October, 2020.

P.J.O. OTIENO

JUDGE

In the presence of:

Mr. Mingo for the plaintiff/Applicant

Mr Nyamweya for the defendant/ respondent

Ms Mwanaidi - Court Assistant