



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL CASE NO. 59 OF 2017

1. EDWARD DAVID ROBERTS

2. LUCY VIRGINIA WANJIRU PETTITPLAINTIFFS

VERSUS

1. ALEC ROGER AGNES VAN WIJK

2. GUIDO JOHANNES MARIA PALLADA

3. BELRO INVESTMENTS LIMITED.....DEFENDANTS

R U L I N G

1. Today after the parties have on three past occasions sought an adjournment to enable them attempt an out of court settlement, it was reported that they have agreed on all aspects of the dispute, essentially to complete the sale outside the contractual period, except the time within which to complete. That one point became sticky with one side, the plaintiff insisting on twelve months while the defendant maintaining that it offer of upto end of December 2017, taking into account what the suit contract was due for completion on 31/12/2016, was most reasonable. The parties could not even agree to allow the court decide for them that single point. The impasse left the court with no otherwise but to direct that the application dated 2/6/2017 be heard on the merit on a date to be taken at the Registry.

2. It was after those directions were given that the plaintiff sought that the interim orders issued on 2/6/2017 and subsequently extended by consent be extend once again. That request was resisted and opposed by the Defendant who said that having been interim and *ex parte* orders they can only be extended by consent or by a court order pursuant to discretion exercised in the usual manner.

Arguments by the parties

3. In his argument for the extension of the orders, Mr. Kongere urged the court to find in his clients favour so that the litigation here and these anticipated before the arbitrator to be appointed are not precipitated away or just rendered worthless. To him unless the orders are extended, the agreement will stand terminated and the position on the ground shifted in such a manner that there would be no substratum left for litigation or arbitration.

4. On the accusation that the plaintiff made material non-disclosure at the time it sought and obtained the reference orders, Mr. Kongere submitted that the accusations have been answered in the supplementary affidavit filed and the plaintiffs have taken the position that the agreement was changed behind them so as to make it difficult to complete.

5. On the side of the defendant, Mr. Khalid, sought to have the orders discharged on the basis that the law under order 40 Rule 4 forbid extension of interim orders unless by consent and only once. He also pointed out that the plaintiff is guilty of material non -disclosure that entitles the court to review the orders and have them discharged.

Analysis and determination

6. The only issue for determination is whether or not to extend the interim orders first issued *ex parte* on the 2/6/2017 and subsequently extended by consent as aforesaid.

7. The subject orders were injunctive in nature and thus governed by the known equitable principles whose only purpose is to do justice

between the parties and to avoid hardship and injustice. What is not in doubt is that the parties entered into a sale agreement and made a consensual completion date to be the 31/7/2017 with attendant default clauses and chose arbitration as the preferred forum for dispute resolution. It is also not in doubt that the completion date has now long past. It is also not in doubt therefore that whether the parties ought to be asked to account for failure to complete is a dispute that is core and can only be resolved in the manner elected by the parties in the contract. The only role this court is called upon to play is to consider the justice or injustice that would be served by having the interim orders extended.

8. I understand justice and equity to be a double-edged sword which ought to cut both ways so that what is good for the plaintiff would be good for the defendant if put in the position of the plaintiff and vice versa.

9. With the submissions offered before me today and the documents filed subsequent to the grant of the *ex parte* interim orders, I now doubt if I would have granted the interim order had all that been placed before me.

10. I agree fully with Mr. Kongere that the application to which the court granted interim relief was made pursuant to section 7 of the Arbitration Act and not Order 40 Rule 4 Civil Procedure Rules. However an injunction is an injunction howsoever grounded save that the threshold may vary from one statutory dictate to another. The fact that it is an equitable remedy remains in all events.

11. Now, in this suit the only matter to go to arbitration is whether or not the defendant should be allowed to terminate or be made to specifically perform. That will be determined by the elected forum based on the facts. However for this court it is imperative that even in exercising its discretion under section 7 of the Arbitration Act it acts cautiously so as not to preempt arbitral proceedings. It must warn itself from making any pronouncements that may tend to say whether or not the agreement has been terminated on its terms. The effect of an interim order sought in the terms of the application dated 2/6/2017 is to forestall any action by the defendant in purported terms of the agreement. That would, to me, be a preliminary finding on the contractual rights of the parties in the suit contract.

12. In *Don Woods Company Ltd vs Kenya Pipeline Ltd [2005] eKLR* the court had this to say on an application of similar kind and tenure:

“In other words, granting the orders being sought by the plaintiff would amount to this court preventing the defendant from exercising its rights under the contract”.

13. I am in full agreement with such proposition and say that at the moment if I extend the interim orders I would be restraining the defendant from exercising its contractual right as interpreted by it.

14. I however do not agree with Mr. Kongere that to have the orders discharged would spirit away the substratum of the litigation and arbitration proceeding. I say so noting that whether or not the defendant is acting contractually will be the dispute for determination by the arbitrator once appointed. If it be proved that the defendant was in breach of the contract, such a determination would follow and all that would have ensued pursuant to the breach would be of no effect.

15. The upshot is that I decline to exercise my discretion to extend the interim orders for now and urge the parties to take the earliest available date even before another Judge for the hearing application dated 2/6/2017.

16. It is so ordered.

Dated and delivered at Mombasa on this 13th day of October 2017.

P.J.O. OTIENO

JUDGE