



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI HIGH COURT
CIVIL SUIT NO 618 OF 2015

VINAYAK BUILDERS LTD.....PLAINTIFF

VERSUS

S & M PROPERTIES LTD.....DEFENDANT

RULING

1. The Defendant via a construction contract retained and engaged the Plaintiff/applicant to erect a block of apartments within a time span of 52 weeks with effect from 3rd October, 2014 to 2nd December, 2015.
2. However by September 2015 dispute arose over plastering and walling works and thus some payments due was withheld. This precipitated the invocation of the arbitration clause by the Applicant in the construction contract, consequently the Chairman of the Architectural Association of Kenya appointed Emmanuel Odhiambo to be a sole arbitrator.
3. Meanwhile the Respondent moved into the site of construction and took possession of the same to the exclusion of the Plaintiff. This precipitated the filing of the instant matter via an Originating Summons contemporaneously with the Chamber Summons dated 9.12.2015.
4. The Chamber Summons sought the following orders:-

1. Dispensed with

2.

3.

4. An Order to restrain the Defendant, agents, assigns, employees, consultants or any other person claiming under it from terminating the Plaintiff’s employment taking possession or otherwise interfering with the Plaintiff’s possession of the site premises LR o. 209/17493 Mwambao Road Parklands pending the hearing and determination of the suit.

5. Dispensed with.

6. An Order restraining the Defendant from transferring, letting, disposing of or in any way dealing with LR No.209/17493 pending the hearing and determination of the suit.

ALTERNATIVELY

7. The Defendant to give security of kshs.100 million to be deposited on an interest earning account in joint names of the firms of parties advocates pending the hearing and determination of the arbitration.

8. Costs.

5. The application is anchored on the provisions of Art 159, (2)(c) constitution of Kenya, S. 7 of Arbitration Act 1995 and Rule 3 of Arbitration Rules 1997.
6. The application is based on the grounds on the face of the Chamber Summons and Supporting Affidavit of Premiji Vekaria sworn on 9.12.2015. The application is opposed by the respondent and the Respondent has filed a Replying Affidavit sworn by Ishobha Mulji on 15.12.2015 and his Supplementary Replying affidavit sworn on 17.12.2015.
7. The Plaintiff's case is briefly that, it was contracted via a building contract dated 3.10.2014 to erect a block of apartments which was to commence on 3.10.2014 for 52 weeks span ending on 2.12.2015.
8. The Plaintiff commenced work diligently and regularly up to September 2015 when the Plaintiff was due for payment on certificate no.6. At this stage the Quantity Surveyor had valued the work done by the Contractor as required of him under the contract.
9. However the Defendant via its Consultants raised disputes on plaster and walling works and thus refused to honour payments due to the Plaintiff. This prompted the Plaintiff to invoke arbitration clause in the contract, thus the Chairman of the Architectural Association of Kenya appointed Emmanuel Odhiambo as a sole arbitrator to hear the dispute.
10. The arbitrator convened a meeting on 23.11.2015 but he could not proceed as under clause 45.5 of the contract, it is stipulated that the proceedings could only commence after 90 days following the service of notice of dispute. The earliest date same could commence was 30.12.2015.
11. Meanwhile on 4.12.2015 the Defendant evicted Plaintiff and took possession of the site, tools, equipments and materials on site. This according to the Plaintiff was in breach of the contract which stipulated the process of terminating a contract.
12. The Applicant is apprehensive of loss of value and user of site office, equipment, tools and materials at the site. It claims a joint inventory was to be taken prior to eviction. The Applicant thus seeks the Orders sought pending determination of the arbitration.
13. The Respondent's case is that; the contract was to commence on 3.10.2014 and it was for an amount of Kshs.90,029,537.54 and lapsing on 2.10.2015. A span of 52 weeks. There was an extension of 3 weeks on initial contract period thus expiry was 23.10.2015. The Applicant did not complete the works by 23.10.2015 as agreed thus liable to pay Kshs.300,000 per week of delay.
14. The Respondent accuses the Applicant for delay and not adhering to the timelines agreed. Further the Applicant abandoned works and defied instructions from Applicant and the Architects. The termination of contract was pursuant to clause 38 of the contract and was strictly followed. The termination was effected on 4.12.2015 as per the notice and possession taken over by the Respondent.
15. On 10.12.2015 an inspection of site on work done, materials, goods delivered, contractor's equipment and temporary office was done and inventory taken. A formal account was made on work carried out as at 4.12.2015 by the applicant. The same discloses an overpayment to the Applicant by Kshs.48,906/2 which Respondent seeks refund.
16. For certificate 1-5 the Applicant has been paid Ksh.31,036,958.94 representing 34% of the total work to be executed by 23.10.2015.
17. The Respondent avers that some of the works done by the Applicant is defective and does not accord with the specifications thus constraining the architects to issue orders for rectification.
18. The Respondent avers that it intends to get another contractor to complete the work. Thus Orders sought would occasion irreparable loss. Further the Respondent avers that the Kshs.100 million sought to be deposited is not based on any fact or law. In any event no specific amount is claimed in the Originating Summons or in the issues referred to the arbitrator. The Respondents thus avers that the threshold of grant of Interim Injunction has not been met to warrant granting of Orders sought.

Parties submissions

19. After going through the materials before the court and the parties submissions, I find the issue for determination is ; **whether the Applicant has established a good and sufficient cause to warrant the exercise of this court’s discretion under Section 7 of arbitration Act, and thus grant Orders of Interim measure of protection pending reference to arbitration and conclusion of the arbitral proceedings?**
20. Section 7 of the Arbitration Act provides;

“it is not incompatible with an arbitration Agreement for a party to request from the High Court, before or during arbitral proceedings an Interim of measure of protection and to the High Court to grant that measure”.

21. In the case of **SAFARICOM LTD Vs. OCEAN VIEW BEACH HOTEL LTD & 2 OTHERS CA 327/2009** the Court held that;

“it may be necessary for arbitral Tribunal or acourt to issue Orders intended to preserve the outcome of arbitral evidence, to protect assets or in same way to maintain the status quo pending the outcome of the arbitral proceedings.....”

22. The Court went ahead and set out the factors to be taken into account before issuing the Interim measure of protection namely;

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 the assessment of the merits of the application?**
4. **For what period must measure be given especially if requested for before the commencement of arbitration so as to avoid encroaching on the tribunal in decision making power as intended by the parties?**

23. The Applicant complaint is that the Respondent sought to evict it from the site in breach of the contract and thus deprived the Applicant right to possession of the site without a joint account and/or inventory being taken. At the site the Plaintiff maintains a site office, equipment, tools and materials which the Respondent has confiscated.

24. The above state of affairs prompted the filing of the instant application for interim measure of protection. The Respondent has responded by averring that on 10.12.2015, a joint inspection exercise between the Applicant and Quantity Surveyor for purposes of taking a record of work was done, materials and goods delivered on site, the contractors equipment of site and temporary office was carried out and account filed in court.

25. The Respondent avers that the Applicant abandoned the works and refused to resume despite notice thus termination of contract was lawfully effected. The Applicant vacated site and relinquished possession to the Respondent on 4.12.2015.

26. The Applicant has been paid in full for certificates No. 1-5 and the contract period lapsed on 23.10.2015. The Applicant seeks an alternative to Orders of Injunctions by way of deposit of Ksh.100 million though not indicated as to how the amount is arrived at.

27. The court observes that the dispute was sparked by non issuance of certificate no. 6 and thus failure of payment of the work which was to be certified thereof. The Applicant does not state the value or estimate of the amount it is owed up to stage the possession of site was taken by the Respondent by 4.12.2015.

28. It is not denied that, for certificates no. 1-5 the work was paid. The Respondent has complained of the quality of work on plastering and walling works. There are also allegations of over payment to the applicants. The accusations and counter accusations go to the merit of the dispute.

29. In the case of **Anne Mumbi Hinga vs. Victoria Gathara** the Court held;

“...the court cannot intervene and consider matters to do with merit of dispute between the parties. That is the issue that is squarely within the province of the arbitrator...”.

30.The Court in the instant matter will not intervene as to the issues of who breached the contract or who owes who in the dispute. That is the province of the arbitrator to determine. In the case of **BABS SECURITY LTD Vs. GEOTHERMAL DEVELOPMENT LTD (2014) e KLR** the Court held;

“...the protection envisaged under S.7 is to ensure that the subject matter of arbitral proceedings is not in danger of being wasted or dissipated before a final decision by arbitral tribunal is made on the matter. But the ultimate decision will depend on peculiar circumstances of each case and matter such as;

- nature of that contract to be preserved

-. nature of and potentiality of dissipation of the subject of the arbitral proceedings and any other relevant factor attending the case will guide the decision of the court determining whether or not an Order for Interim protection should be made”.

31.It is not disputed that the contract lapsed on 23.10.2015 and there is no evidence of the extension of the same. As to the validity of termination of the contract, that is the issue for arbitration.

32.The Applicant Principle concern is the payment of the work which ought to have been certified by certificate no. 6. The Plaintiff seeks to conserve the contract in terms of prayer 4 of the application. However, the contract on prima facie bases appears to have lapsed on 23.10.2015.

33.Further the Applicant seeks to stop charging, disposing of the LR No.2098/17493. The same property is not subject of the dispute save for the hosting for the site. There is in any event no evidence which has been tendered on prima facie basis of imminent charging, disposing or transferring of the same property.

34.The alternative prayer of depositing of Ksh.100 million is not justified by fact or law. It is just plucked from the air. The entire contract was for slightly over Kshs.90 million of which over Ksh.30 million has been paid. Only one certificate is disputed.

35.There is no evidence as to the Respondents inability to pay any amount to cover the works which may have been certified in event the Applicant succeeds in the arbitral matter. The Court thus finds that the Orders sought have no merit.

36.However for the interest of justice, the Court makes the following orders;

1. **The Applicant is granted 14 days to conduct its inspection, take inventory, and accounts on site for purposes of ascertaining the status quo on the ground as pertains to equipments, materials, site office, work done, and any other relevant observations.**
2. **The Orders of status quo prevailing will lapse there after 14 days.**
3. **Costs in the cause.**

C. KARIUKI

JUDGE

Dated, Signed and Delivered in Court at Nairobi this 15th day of January, 2016.

F.A OCHIENG

JUDGE