



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISC APPLICATION . NO.539 OF 2015

FEDHA CONNECT LIMITED APPLICANT

VERSUS

SIFA & KINGS INVESTMENTS LIMITED RESPONDENT

RULING

1. The Parties herein are not agreed as to whether a Dispute has arisen between them requiring Arbitration. Fedha Connect Limited (FEDHA) is of the view that one has arisen and has in the Originating Summons of 10th December 2015 sought the following order:-

1. THAT Justice (Rtd) Jonathan Havelock be appointed as arbitrator under the Arbitration Clause contained in a Sale Agreement dated 1st October, 2015 made between the Applicant and the Respondent on such terms and conditions as this Honorable Court may seem just.

2. Fedha entered a Sale Agreement dated 1st October 2014 with Sifa and Kings Investments Limited (SIFA) for the purchase of office space identified as number 65A (the Suit property) located on Land Reference 1/688.

3. Things did not go as planned and on 11th March, 2015 Fedha issued a Notice of Rescission and demanded a refund of the full purchase price of Kshs.22,702,795.00 (inclusive of VAT) on account of what it saw as fraudulent misrepresentation and certain breaches of The Sale Agreement and the Agreement for Lease that it had subsequently entered with Sifa. It is the position of Fedha that Sifa has failed to make good that demand.

4. Fedha also takes the position that a dispute has arisen and in paragraph 21 of the Affidavit of Wanjiku Mugane sworn on 10th December 2015 in support of the Application, she deposes:-

“THAT consequent upon the aforesaid actions by the Respondent and by reason of the positions taken by the parties, a dispute has arisen as to whether the Respondent is liable for fraudulent misrepresentation and breach of the Agreement for Sale and whether the Applicant is entitled to rescind the Agreement for Sale and accordingly to a refund of the purchase price, damages and other remedies.”

5. The position taken by Sifa is that the Notice of 11th March, 2015 required of it to refund the full purchase price in accordance with clause 10.2.1 of the Agreement and that during the pendency of these proceedings and with a view to giving effect to the clause, parties attempted to jointly appoint an Estate Agent to procure a purchaser for the property.

6. It is also stated that Sifa secured a purchaser who executed an Agreement for Sale on 3rd October 2016. The purchaser is Mweru Properties Limited and the completion date is provided to be 9th September, 2016. It seems, however, by that time of the hearing of the Summons the full purchase price under the terms of the second agreement had not been paid.

7. Clause 23 of The Sale Agreement between Fedha and Sifa is on Dispute Resolution and provides:-

“23.1. All questions hereafter in dispute between the parties hereto and all claims for compensation (if any) or otherwise not eventually settled and agreed between the parties hereto shall in the first instance be resolved by amicable negotiations.

23.2. Should such negotiations fail to achieve a resolution, the dispute shall be referred to a single arbitrator in accordance with the provisions of the Arbitration Act (Chapter 49, Laws of Kenya) such arbitrator to be appointed in default of agreement by the

Chairman for the time being of the Chartered Institute of Arbitrators. The arbitration shall be conducted in Nairobi and the language to be used in the proceedings shall be English. The decision of the arbitrator shall be final and binding to the extent permissible by the law and any party may apply to a Court of competent jurisdiction for enforcement of such award.

23.3. Notwithstanding the above provisions of this clause, a party is entitled to seek preliminary injunctive reliefs or interim or conservatory measures from any Court of competent jurisdiction pending the final decision or award of the Arbitrator”

8. It is common ground that through the letter of 11th March 2015 written by its advocates Ms. Mboya Wangong’u & Waiyaki, Fedha exercised its right of recession by issuing a Notice rescinding the Sale Agreement of 1st October 2014. That right is found in clause 10.2.1 of The Sale Agreement. The effect of that right is better understood when clause 10.2 is reproduced in its entirety:-

“10.2. If the Vendor shall fail to comply with any of the conditions hereof or of the condition subject to which this sale is made including the condition relating to the completion of the sale the Purchaser may give the Vendor at least Twenty-one (21) days notice in writing confirming the Purchaser’s readiness to complete the sale in all respects and specifying the default and requiring the Vendor to remedy the same before the expiration of such notice AND if the Vendor shall fail to comply with such notice the Purchaser shall at the Purchaser’s sole option be entitled to do any of the following:-

10.2.1. to rescind the contract, in which case the Deposit and any surplus monies shall be refunded in full to the Purchaser as soon as the Vendor sells the property to a third party: or

10.2.2. to sue the Vendor forthwith for specific performance.

9. In that Notice of Recession Fedha, demanded the full refund of the Purchase Price of Ksh.22,702,795.00 within 7 days of the date of the Notice, being 11th March 2015. Sifa does not contend that Fedha was not entitled to rescind the Notice but points out that the refund was to be made as soon as Sifa sold the property to a third party. And while Sifa had entered into a Sale Agreement with a third party (Mweru Properties Ltd) that Sale had not completed and therefore Sifa was not in breach of clause 10.2.1 and no dispute could have arisen.

10. This is my view of the matter. There does not seem to be contention that circumstances had arisen that entitled Fedha to exercise its option to Rescind the contract. While there is evidence that Sifa had acknowledged Fedha’s right to Rescind and is making arrangements to refund, there is no evidence that Sifa accepted the Rescission before this Originating Summons was filed on 10th December, 2015. The evidence available is that the Communication about the refund between Counsel for the Parties happened after the filing of the Summons.

11. To the extent that Sifa neither refunded the full purchase price as demanded nor communicated its acceptance of the Rescission to Fedha (entitled of course to insist that refund would only be upon a sale to a third party), a dispute had arisen. That silence gave rise to a dispute. The nature of the dispute was whether Fedha was entitled to rescind the Agreement for Sale. This is one of the disputes that Fedha identified to have arisen in paragraph 21 of the Affidavit of Wanjiku Mugane.

12. This Court reaches a decision that Fedha was perfectly in order when it filed the present Summons and it is merited.

13. But circumstances may have changed since the presentation of the Summons! In the course of the hearing herein Counsel for Sifa indicated that completion of the second Agreement was expected soon. If this was to happen and the refund in full made to Fedha, then parties may consider the Orders I shall presently make to be of no practical purpose.

14. This Court is asked to appoint Justice (Rtd) Jonathan Havelock as an Arbitrator because Parties have failed to agree on the choice of Arbitrator and that further, the Chair of The Chartered Institute of Arbitrators had not responded to Fedha’s request of 9th October 2015 to appoint an Arbitrator. However, because the Arbitration Clause (23.2) provides that, in default of agreement, by the parties, the Chairman for the time being of The Chartered Institute of Arbitration shall appoint an Arbitrator, this Court will give the Chairman further opportunity to exercise that prerogative but within set timelines. Failing which this Court shall make the appointment.

15. The Court’s final Orders.

1) The Chairperson of The Chartered Institute of Arbitrators (Kenya Chapter) to appoint an Arbitrator to determine the Dispute that has arisen between the parties herein in respect to the Agreement of Sale of 1st October 2014 within 14 days of this Order.

2) In Default of (1) above, the Court shall make the appointment.

3) Costs of Originating Summons of 10th December 2015 to the Applicant.

4) The Court shall at the time of delivery of this Ruling fix a Return date

Dated, Signed and Delivered in Court at Nairobi this 24th day of November, 2016.

F. TUIYOTT

JUDGE

PRESENT:

Ochwari for Odera for Plaintiff

Saluni for Luseno for Defendant

Alex - Court clerk