



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 105 OF 2013

ELIZABETH CHEBET ORCHARDSON.....PLAINTIFF

VERSUS

CHINA SICHUAN CORPORATION FOR

INTERNATIONAL TECHNO-ECONOMIC CORPORATION.....1ST DEFENDANT

KENYA COMMERCIAL BANK.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Chamber Summons application dated and filed on 19th March 2013 was brought under the provisions Section 7 (1) of the Arbitration Act, Rule 2 of the Arbitration Rules 1997, Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act Cap 21 (laws of Kenya), Order 40 Rules 2 (1) and 4 (1) and Order 48 Rule 4 of the Civil Procedure Rules and all other enabling provisions of the law. Prayers Nos 1, 2, 3 and 4 of the said application are spent and the court will therefore not deal with the same. The application sought the following remaining orders:-

- i. Spent
- ii. Spent
- iii. Spent
- iv. Spent

v. **THAT a temporary injunction do issue restraining the 2nd Defendant, by itself, its successors, assigns, agents, advocates or servants from releasing or authorising the release of the balance of the purchase price of Kshs 6,030,000/= to the 1st Respondent or its agents, successors, assigns, advocates or servants whomsoever in respect of purchase of apartment No 01 in Block 1 Zone A3 on LR No 71/14 (Jacaranda Gardens) pending reference to, hearing and final determination thereof of arbitral proceedings and dispute between the Applicant and the 1st Respondent.**

vi. **THAT the costs of this application be in the cause.**

2. The grounds which the Plaintiff relied on to support its application were generally as follows:-

a. **THAT the Plaintiff and the 1st Defendant entered into an agreement for sale in which the 1st Defendant agreed to sell and the Plaintiff agreed to purchase apartment No 01 in Block 1**

- Zone A3 on LR No 71/14 (Jacaranda Gardens) (hereinafter referred to as the subject property) on the basis of a sample show house that was ready.
- b. **THAT the Plaintiff paid a deposit of Kshs 670,000/= leaving a balance of Kshs 6,030,000/= that was to be advanced through a mortgage facility by the 2nd Defendant.**
 - c. **THAT when the Plaintiff visited the Jacaranda Gardens, she found the same house she had been allocated was not aforesaid the subject property and that the same did not meet her expectations as per the sample house she had been shown by the 1st Defendant.**
 - d. **THAT she expressed her dissatisfaction to M/S Ochieng, Onyango, Kibet & Ohaga Advocates for the 1st Defendant's and demanded for her deposit but that instead the said advocates called for the release of the monies from M/S Sichangi & Co Advocates for the 2nd Defendant which the said advocates threatened to release to the 1st Defendant's advocates whereupon she would be liable to meet her obligations to the 2nd Defendant.**
 - e. **THAT the sale agreement provided for determination of disputes through arbitration and that no prejudice would be visited upon the Defendants if interim measures of protection by way of injunction was issued pending the hearing and determination of the dispute by an arbitral tribunal.**

AFFIDAVIT EVIDENCE

3. The application was supported by the Plaintiff's Affidavit sworn on 19th March 2013 in which she set out the grounds in support of her application *extenso*.
4. In opposition to the said application, the 1st Defendant filed Grounds of Opposition dated 20th March 2013 on the same date. The grounds were in broad and general terms as follows:-
 - a. **THAT the application was bad in law, misconceived, incompetent, oppressive, unwarranted, ill-advised and should be dismissed in *limine*.**
 - b. **THAT the Plaintiff had not shown that she had a *prima facie* case with a probability of success or that she would suffer damages that would not be compensated by way of damages.**
 - c. **THAT the said application was seeking orders to defeat a clear rule in respect of issuance of professional undertakings between advocates as the 1st Defendant's advocates had discharged their obligations under the said undertaking by delivering the duly registered documents for subsequent payment which had not been done to date.**
 - d. **THAT the Plaintiff had not come to court with clean hands as she had not disclosed material facts.**
 - e. **THAT the Plaintiff's application had been accentuated by malice and was an abuse of the court process.**
5. The 1st Defendant also filed a Replying Affidavit sworn by Peter Musyoki on 3rd April 2013 in which it stated that the 1st Defendant undertook the repairs that had been complained of by the Plaintiff and that there were provisions in the agreement for sale that provided for rectification of defects within a period of six (6) months of its receipt of written complaints of such defects.
6. It was the 1st Defendant's further contention that the Plaintiff's advocates had authorised the release of the balance of the purchase price and in the circumstances, there was no dispute that was capable of being taken to arbitration and that the Plaintiff had never notified the 1st Defendant of its intention to refer the matter to arbitration.
7. In a Supplementary Affidavit that was also sworn on 3rd April 2013, the Plaintiff deponed that the application was proper as it was premised on the provisions of Section 7 (1) of the Arbitration Act. She added that she had a *prima facie* case which had been brought before the court and that she was accentuated by actual apprehension and strong desire to prevent the injury threatened by the 2nd Defendant when she filed the present application so that the dispute could be referred to arbitration.

LEGAL SUBMISSIONS BY THE PLAINTIFF

8. In her written submissions filed dated and filed on 3rd April 2013, the Plaintiff submitted that Section 7 (1) of the Arbitration Act provided as follows:-

“It is not incompatible with an arbitration agreement for a party to request from the High Court, before during or arbitral proceedings, an interim measure of protection and for the High Court to grant the same”.

9. She argued that there was a valid arbitration agreement within the meaning of Section 4 (1) of the Arbitration Act and it had an arbitration clause. She submitted that Clause L in the Agreement for Sale provided that all claims and disputes whatsoever arising under the said Agreement were to be referred to arbitration in accordance with the Arbitration Act.

10. It was her contention that a dispute had arisen as she had severally notified the 1st Defendant that she would not take up the subject property in light of its breach of contract but that the 1st Defendant had failed to reimburse her the monies she had paid and had instead demanded that the balance of the purchase price be remitted to it by the 2nd Defendant.

11. The Plaintiff referred the court to the cases of Collins (Contractors) Ltd vs Baltic Quay Management (1994)- CA (7.12.04) and Amec Civil Engineering vs Secretary of State for Transport [2004] EWHC 2339 (TCC) (11 October 2004) where in the latter case it was held that:-

“The word “dispute” should be given its normal meaning. There is no special or unusual meaning conferred upon it by lawyers.”

12. Further, the Plaintiff stated that it had satisfied the criteria set out in the Geilla vs Cassman Brown (1973)EA 360 where the court held that an applicant seeking a grant of a temporary injunction must meet the following conditions:-

- a. **The Applicant must show a *prima facie* case with a probability of success.**
- b. **The Applicant must show that unless the interlocutory injunction is granted, he might suffer irreparable injury which would not be adequately compensated by way of damages.**
- c. **If the court was in doubt it would decide on a balance of convenience.**

13. It was the Plaintiff's contention that the existence of the arbitration agreement was in itself proof of a *prima facie* case with a probability of success. She argued that her obligations under the mortgage would fall due irrespective of the outcome of the arbitral proceedings and that she would be forced to take a property she did not want in the event the arbitral tribunal found in her favour. She added that her name would be listed with the Credit Reference Bureau in the event she did not pay the monies which action would affect her credit worthiness with other financial institutions.

14. She referred the court to the cases of Francis A. Djirackor & Another vs Speedway Investments Limited & Another (2012) eKLR and Communication Carrier Limited & Another vs Telkom Kenya Limited (2005) eKLR where the respective courts granted orders for injunction pending reference of the disputes to arbitration.

15. She distinguished the 1st Defendant's submissions and cases that it had cited as relating to professional undertakings did not address the issue at hand. It was her averment that the 2nd Defendant would not suffer any prejudice if the injunction was granted. She submitted that the 2nd Defendant had in fact not filed its opposition to her application despite having been served with the same and its advocates appearing in court during the inter partes hearing that had been ordered by the court.

16. It was therefore the Plaintiff's submission that it was fair, equitable, proper and just that the interim measure of protection be granted pending the commencement of the arbitral proceedings.

LEGAL SUBMISSIONS BY THE 1ST DEFENDANT

17. In its written submissions dated and filed on 11th April 2013, the 1st Defendant stated that the order for injunction sought by the Plaintiff was grounded on a professional undertaking. It was its submission that there was no dispute that would warrant the referral of the dispute to arbitration in

- light of Special Condition F as read with sub-clauses (a), (b) and (c) on the Apartment-Inspection state and condition. It argued that the 1st Defendant was required to carry out repairs on any defects complained of under the said clause and that in fact the Plaintiff had agreed to take up another apartment as compensation.
18. The 1st Defendant further submitted that the Plaintiff's contention that her name would be sent to the Credit Reference Bureau was not sufficient to show that she would suffer irreparable loss bearing in mind that she had the option of taking another unit or taking the subject property and selling the subject property to a third party. It said that the 2nd Defendant could also realise its security if she did not want to take up the mortgage. It was the 1st Defendant's submission that the Plaintiff already had ownership of the subject property while the 1st Defendant was forced to stand without any security for the resources it had put into the said apartment.
19. In addition, the 1st Defendant argued that if there was indeed a dispute, then the Plaintiff could be compensated by way of damages which were quantifiable. The 1st Defendant therefore submitted that the Plaintiff had not been able to satisfy the conditions set out in the case of **Geilla vs Cassman Brown** (Supra).
20. As regards the professional undertaking, the 1st Defendant referred the court to the cases of **HCCC No 582 of 2003 Naphtali Paul Radier vs David Njogu Gachanja t/a D. Njogu & Co Advocates (unreported)**, **Equip Agencies Limited vs Credit Bank Limited (2007) eKLR** and **Civil Appeal No 48 of 1994 Kenya Reinsurance Corporation & V. E. Muguku Muriu t/a Muguku Muriu & Co Advocates** (unreported) where the common thread of the said cases was that professional undertakings must be enforced irrespective of disputes between the parties.

LEGAL ANALYSIS

21. As can be gleaned from Section 7(1) of the Arbitration Act, it is not incompatible with an arbitration agreement for a party to request from the High Court before or during the arbitral proceedings, an interim measure of protection and for the High Court to grant the same.
22. According to the Black's Law Dictionary 9th Edition, an interim measure of protection is defined as follows:-
- “An international tribunal's order to prevent a litigant from prejudicing the final outcome of a lawsuit by arbitrary action before a judgment has been reached. This measure is comparable to a temporary injunction in national law.”**
23. In the same dictionary, injunction has been defined as:-
- “A court order commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate and complete remedy at law and that an irreparable injury will result unless the relief is granted.”**
24. A court must be satisfied that such an injunctive order is essential and that it esteems that the act being restrained is contrary to equity and good conscience. It is a remedial writ which a court issues for purposes of enforcing its equitable jurisdiction.
25. This court held in the case of **CMC Holdings Ltd & Another vs Jaguar Land Rover Exports Limited [2013] eKLR** as follows:-
- “...The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.”**
26. In the case of **Mugoya Construction & Engineering Limited vs The National Social Security Fund Board of Trustees & Another [2005] eKLR**, it was held that:-

“...the jurisdiction to grant injunctive relief was to preserve the subject matter of the suit pending determination of the issues between the parties...”

27. Having carefully analysed the oral and written submissions by counsel for both the Plaintiff and the Defendant, the court notes that there was a lot of emphasis on the question of whether or not there was, in existence, a dispute between them that was capable of being referred to arbitration which would then empower this court to grant the orders for an interim measure of protection or injunction for the preservation of the subject matter.
28. Perusal of Section 7 of the Arbitration Act clearly shows that the issue of whether or not there was a dispute or whether or not there would be losses by either side would not be a factor for consideration by this court when deciding whether or not it should grant the said interim measure of protection or injunction to safeguard the subject matter of the arbitral proceedings. All that a court would be interested in at this juncture 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.
29. The injunction or interim measure of protection must be of urgent nature to preserve the subject matter of the dispute so that the proceedings before the arbitral tribunal are not rendered nugatory. It therefore follows that the subject matter and the dispute or difference being referred to the arbitral tribunal are separate and distinct entities.
30. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.
31. Perusal of the **Cetelem vs Roust Holdings (2005) 4 All ER 52** shows that the gist of the granting of an order of interim measure of protection or injunction is strictly for purposes of preserving assets and evidence the court said were **“...not confined to tangible assets but could for example, include chose in action.”** It is for the same reason that the court granted an injunction to preserve a site in **Don woods Company Limited vs Kenya Pipeline Company Limited [2005] eKLR.**
32. The question of whether or not there was any breach of contract by whichever party or whether there is a dispute capable of being arbitrated upon or whether the professional undertaking should be enforced should rightly be resolved by the arbitrator. The authorities cited by the parties do state the correct position on the issue of professional undertakings but this court takes the position that whether or not the said professional undertaking should be enforced lies in the domain of the arbitral tribunal. This court cannot look at the merits of the parties' cases as doing so would be to interfere with the jurisdiction of the arbitral tribunal.
33. The role of the court under the Arbitration Act is merely complementary. It was never intended that the court could to intervene in the dispute between the parties who had chosen arbitration as their mode of resolution of the dispute them. Section 10 of the said Act provides as follows:-

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

34. The court therefore agrees with the Plaintiff that it would be just, equitable, proper and fair to grant an injunction pending the referral of the dispute to the arbitral tribunal for the reason that in the event the monies are released to the 1st Defendant by the 2nd Defendant and the Plaintiff succeeds in the arbitral proceedings, she would not be able to escape the obligations to the 2nd Defendant once the monies are released. That would essentially have the effect of rendering the arbitral proceedings nugatory. Restraining the 2nd Defendant from releasing the monies to the 1st Defendant will maintain the status quo to give the arbitral tribunal hear and determine the dispute.
35. This therefore means that this court can grant an interim measure to preserve the subject matter, which in case, is the balance of the purchase price being held by the 2nd Defendant. Once they are through with the said arbitral proceedings, they would then find the monies still in the hands of the 2nd Defendant.
36. This court has come to the conclusion that this is a good case to grant an order for injunction under Section 7 (1) of the Arbitration Act purely on the ground of a balance of convenience.

Granting the injunction on the grounds that the Plaintiff has established a *prima facie* case or that she would be adequately compensated by way of damages would mean that this court has considered the merits or demerits of the dispute between her and the 1st Defendant which this court cannot do.

37. This was an observation that the court made in the **Cetelem vs Roust Holdings** case (Supra) where the court held:- **“There was, however, nothing in the subsection to limit the power of the court to the making of orders which did not involve a preliminary determination of a contractual right of the parties...”**

DISPOSITION

38. The upshot of this court's ruling therefore is that it finds that the Plaintiff's Chamber Summons application dated and filed on 19th March 2013 is merited and accordingly, the same is hereby allowed in terms of prayer No 5 therein. Costs in the cause.

39. Orders accordingly.

DATED and DELIVERED at NAIROBI this 17th day of December 2013

J. KAMAU

JUDGE