



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Case 64 of 2010

FIESTA ACHAYO WARINWA.....PLAINTIFF

VERSUS

ARCHER DRAMOND MORGAN LTD.....DEFENDANTS

R U L I N G

1. The court record herein has been reconstructed, the main record having apparently been irretrievably lost. The main prayers in the **chamber summons** dated **25th March 2010** filed by the Plaintiff are numbers 3, 4, 5, 6, 7 and 8 which seek the following orders-

“3. That the defendant be restrained and enjoined whether by itself, its agents, employees from selling, alienating, leasing, giving possession of or transferring the property known as **Unit Number 64 on L.R. No 27317** to any third parties pending the hearing and determination of this application and the main suit.

4. That the Honourable Court declares that the defendant’s rescission of the contract dated 1st December 2006 is unlawful for reasons of breach of the said contract on the part of the defendant itself.

5. That the Honourable court does order that the Certificate of Occupation issued to the defendant by Mavoko Municipal Council is irregular and unlawful as it relates to L.R. No. 12867/10 whereas the suit property is L.R. No. 27317.

6. That the Honourable court declares that the Certificate of Practical Completion by the defendant’s architects dated 27th May 2009 is irregular and a nullity for the reason that it relates to L.R. No. 12867/10 and not L.R. No. 27317 which is the suit property.

7. That the Honourable court does order that the defendant did not satisfactorily complete the construction of Unit Number 64 on L.R. NO. 27317, and its rescission of the contract dated 1st December 2006 is therefore unlawful.

8. That the Honourable court does order it has jurisdiction pursuant to **Section 60 of the Constitution** to hear and determine this application and the suit irrespective of Clause 13.2 of the sale agreement.”

2. On 28th July 2010 this court ruled that prayers 4, 5, 6 and 7 could not be pursued at this interlocutory stage as they raised issues that must be canvassed upon tested evidence at the full hearing of the action. So the main prayers that have been canvassed in this application are numbers 3 and 8. Prayer 9 relates to costs of the application.

3. The application was canvassed by way of written submissions. The Plaintiff’s submissions were

filed on 2nd November 2010 while those of the Defendant were filed on 16th November 2010. The Plaintiff filed a response to the Defendants submissions on 8th December 2010. I have considered all those submissions, including the cases cited. I have also read the supporting and opposing affidavits. Finally, I have perused the plaint. I have not seen a statement of defence in the reconstructed court file.

4. Regarding the issue of jurisdiction of this court (prayer 8 of the application) it is common ground that the contract between the parties has an arbitration clause. But what is sought by the Plaintiff at this stage is a temporary injunction (prayer 3) to preserve the suit property pending disposal of the suit. Such disposal may be by way of arbitration under the arbitration clause. It cannot be in dispute that this court has jurisdiction to grant such temporary injunction pending arbitration.

5. It can also not be in dispute that where the contract between the parties contains an arbitration clause, that machinery of dispute resolution must be exhausted first before the parties can resort to the courts. It is common ground in this suit that the contract between the parties contains an arbitration clause, and that such arbitration has not yet been resorted to.

6. As to the propriety of granting a temporary injunction to preserve the suit property, there can be no doubt that there are serious issues in dispute between the parties to be resolved by the arbitrator (or by the court should arbitration not be conducted for any valid reason). Prayers 4, 5, 6 and 7 of the present application are evidence of these serious issues.

7. The justice of the matter demands that the suit property be preserved pending resolution of these issues either by arbitration or by hearing of this suit as the case might be. This justice is informed by a balance of convenience. That convenience is based on two factors -

(i) The value of property appreciates at a great rate in this country, especially in Nairobi and in areas surrounding it. Property whose purchase price in the year 2006 was KShs 3.5 million may easily be worth twice that much now.

(ii) Whereas the Plaintiff stands to lose a valuable home, there cannot be any undue loss to the Defendant on account of appreciation in value of the property by waiting for resolution of the dispute.

8. I have deliberately refrained from examining whether the Plaintiff has demonstrated a *prima facie* case with a probability of success or whether she stands to suffer irreparable loss. This is because, as I have already alluded elsewhere, the dispute herein must go to arbitration first as per the arbitration clause in the contract, and I do not want to prejudice that arbitration in any way. I am thus unable to decide the application for temporary injunction upon the first two principles set out in the case of **Giella v Cassman Brown & Co Ltd [1973] EA 358**. But I find no difficulty at all in deciding the application upon a balance of convenience which I find to be in favour of the Plaintiff.

9. I will therefore grant a temporary injunction in terms of prayer 3 of the chamber summons dated 25th March 2010. It will remain in place pending arbitration of the dispute disclosed by this case in accordance with the arbitration clause in the contract between the parties. The temporary is granted upon the condition that the Plaintiff shall file an appropriate undertaking as to damages within twenty-one (21) days of delivery of this ruling. The court may give directions regarding reference of the dispute to arbitration. Costs of the application shall be in the cause. Those shall be the orders of the court.

10. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully regained my health.

DATED AT NAIROBI THIS 15TH DAY OF AUGUST 2012

H. P. G. WAWERU

JUDGE

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER
2012**

ASIKE-MAKHANDIA

.....

JUDGE