



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO.129 OF 2010

FRANCIS MURIUKI MURAGURIPLAINTIFF

VERSUS

MGS INTERNATIONAL (K) LTD.....DEFENDANT

RULING

The substantive suit is expressed in the amended plaint dated 14th October 2010 in which Francis Muriuki Muraguri, the plaintiff herein sued M.G.S International (K) Ltd, the Defendant praying for judgment in the following terms.

- (a) An order of injunction prohibiting and/or restraining the Defendants, its agents, servants or any one of them from alienating, transferring, charging or in any dealing with L.R. Number Karatina town Block 1/284 until the full hearing and determination of this suit.***
- (b) An order of specific performance compelling the defendant to specifically perform its part of the contract dated 22nd June 2009 by immediately transferring L.R. NUMBER Karatina town Block 1/284 unto the Plaintiff***
- (c) Alternatively and without prejudice to (b) above refund of the deposit of the purchase price with bank interest rate of 22% from 22nd June 2009 until payment in full.***
- (d) Costs of suit.***

The Defendant denied the plaintiff's claim by filing a defence. Pending the hearing and the determination of this suit, the plaintiff applied for an order of injunction vide the summons dated 28th September 2010. When the aforesaid summons came up for interpartes hearing, the defendant argued its preliminary

objection expressed in the notice dated 18th October 2010.

In the aforesaid notice, the defendant urged this court to strike out the application and the suit on the ground that it has no jurisdiction to hear and determined the suit since it is based on an agreement which has clause which stipulates that any dispute between the parties to the agreement shall be referred to arbitration. The defendant opposed the preliminary objection on the basis that the agreement expressly provides a clause entitling an aggrieved party to seek for a preliminary order. It is also argued that the defendant waived its right to rely on the arbitration clause when it filed a replying affidavit and a defence.

I have considered the rival submissions on the preliminary objection. It is not dispute that the plaintiff and the defendant executed the sale agreement dated 22nd June 2010 in which the defendant is said to have agreed to sell to the plaintiff its leasehold over L.R. No. Karatina Town Block 1/234 plus the developments thereon at a consideration of Kshs. 22,000,000/-. It is said that the plaintiff paid a deposit of 2,200,000/= being 10% of the consideration with the balance payable to the defendant upon completion of the transaction within 90 days. The plaintiff is now before this court complaining that the Defendant has failed to perform his part of the bargain and that is why he has sought the orders stated in the amended plaint. The Defendant has contended that the dispute can only be determined through arbitration as per clause 20 of the agreement. It is denied by the plaintiff that the agreement expressly provides for the dispute to be referred to arbitration. There is also no dispute that a party is entitled to seek preliminary injunctive relief or conservatory measures from court pending the final decision or award of the arbitrator.

The question which need to be answered is whether or not the defendant waived its right to rely on the arbitration clause when it filed a replying affidavit to oppose the summons dated 28th September 2010 and by filing a defence against the plaintiff's suit. The answer to the aforesaid issue is not difficult to make. There is no doubt that the defendant has filed a replying affidavit to respond to the summons dated 28th September 2010. It has also filed a defence to deny the plaintiff's claim. By filing the above pleadings the defendant waived its right to rely on the arbitration clause. The court of Appeal expressed itself in Corporate Insurance Co. =vs= Loice Wanjiru Wachira C.A. 151 of 1995 (unreported) at pages 5 – 6 as follows:

”In the present case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to rely on the clause”.

It is therefore obvious that the defendant's preliminary objection is for dismissal which I hereby order with costs to the plaintiff.

Dated and delivered this 11th day of February 2011.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Kingori h/b Wahome for plaintiff N/A for the Defendants.

Court: The application dated 28th September 2010 is fixed for hearing on 14th March 2011. Interim order extended until then.

J.K. SERGON

JUDGE