

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Environmental & Land Case 448 of 2009

FATIMA HEMANI PLAINTIFF

VS.

DEVSHIBHAI & SONS LIMITED 1ST DEFENDANT

NEPTUNE CREDIT MANAGEMENT LTD 2ND DEFENDANT

RULING

The dispute between the plaintiff and the defendants herein is founded on a building contract which appears to have been breached by either or both parties. The bottom line however is that there are differences between the two parties relating to the said building contract. There is now a plaint before me wherein the plaintiff seeks orders against the two defendants to restrain them from threatening or intimidating the plaintiff or her house guests or workers or trespassing onto her premises.

There is also a prayer for a declaration that the claim for payment to the plaintiff is premature and does not lie until the pending completion works are done. I not however, that, it is the defendants who have been demanding payment and not the other way round.

Based on the said pleading, the plaintiff filed an application by way of Chamber Summons dated 27th August 2009 seeking injunction orders against the defendants based on the prayers in the plaint.

There is no doubt from both the pleadings and the said application that the foundation of the dispute is infact the differences based on the building contract.

I have had time to look at the building contract where in Clause 40 it is provided that, if there are any differences between the parties, the same shall be referred to arbitration. There is no dispute that both parties are governed by the provisions of the said contract. However, it is the plaintiff's case that the allegations in the plaint constitute a tort and the same can be divorced from the said building contract.

I have looked at the material presented before me including the affidavit in support of the application and the replying affidavits filed by the defendants herein. With respect, I am unable to divorce the building contract from the allegations in the plaint although the same may be said to be remotely related. That notwithstanding, the plaintiff is bound to prove at this stage that she has a prima facie case with a probability of success and that if the order is not granted in her favour, damages would be inadequate compensation for any loss or injury she may suffer. If the court is in doubt then it shall decide the matter on a balance of convenience.

Had the parties gone by the provisions of the said building contract, they would have ended up before an arbitrator. I believe, these matters now complained of would not have arisen and therefore, I am unable to appreciate the plaintiff's contention that the issues complained of in the plaint can be divorced from the contract aforesaid.

That being the case, I am not persuaded that the plaintiff has presented a prima facie case with a probability of success. That being the foundation principle in cases of this nature, I do not think that the

issue of damages arises at this stage. It follows therefore that the plaintiff's application must be dismissed with costs.

It is so ordered.

Dated, signed and delivered at Nairobi this **30th** day of **September, 2009**.

A. MBOGHOLI MSAGHA

JUDGE