



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL SUIT 298 OF 2007

SANTACK ENTERPRISES LIMITED..... PLAINTIFF

VERSUS

KENYA BUILDING SOCIETY LIMITED.....DEFENDANT

R U L I N G

The plaintiff and the defendant entered into a joint venture agreement for the development of certain residential houses in a parcel of land known as **LR No. Nairobi Block 11344 R**. The said development was referred as **Koma-Rock Estate Phase V**. Disagreement arose between the plaintiff and the defendant on the manner of implementation of the said project. The plaintiff filed suit seeking interim relief of this court pending reference of the dispute to arbitration. The plaintiff applied for an interim order of injunction to restrain the defendant from terminating or interfering with the plaintiff's continued implementation of the joint venture agreement (JVA) pending the hearing and determination of the dispute by an arbitrator. When the defendant was served, and entered appearance, it similarly sought an interim order of injunction to restrain the plaintiff from constructing or erecting any structures whatsoever or in any manner interfering with the project site pending reference of the dispute to arbitration.

Warsame J heard the two applications together and in his considered ruling delivered on 30th November, 2007 stated as follows:

“On the other hand, the defendant complains that the plaintiff has no capacity to undertake a project of such magnitude and has failed to diligently execute the works as agreed. And so far no unit is complete nearly two years since mobilization. The time schedule given by the plaintiff has not at all been followed to date. It is also the case of the defendant that the materials and workmanship have not been to the standards given in the drawings and specifications agreed between the parties. It is further contended by the defendant that construction, sale and collection of part of the revenue for Section I (127) two bedroom units, 70 three bedroom units and 2 corner shops was to be complete by the end of December 2006. This was not done. In short, the application is being accused of inability to carry out and implement a project of such high magnitude. Now having taken into consideration all the issues raised by the plaintiff and defendant, I am inclined to preserve the subject in contest by allowing the application of the plaintiff in terms of prayer D and E. On the same breadth, I think the plaintiff cannot be allowed the jeopardize the arbitration that is going on between the parties by changing the status at the ground. There are serious accusations made out against the plaintiff, which might radically change the relationship between the parties.”

In the premises, I also grant prayer No. 2 in the application dated 21st September, 2007. Both orders would be in existence or in place for a period of 60 days to enable the parties to finalize the arbitration. Each party shall be at liberty to apply and the costs shall be in the cause.”

It was clear from the above ruling that Warsame J appreciated the fact that there existed a dispute between the plaintiff and the defendant which had to be resolved by arbitration in accordance with the joint venture agreement. He also appreciated that the *status quo* as it existed at the time both the plaintiff and the defendant came to court had to be maintained pending the hearing and determination of the dispute by arbitration. The learned Judge further appreciated that the arbitral process had to be fast tracked so that the dispute between the plaintiff and the defendant could be resolved as soon as possible. In this regard, he granted the interim reliefs sought by the plaintiff and by the defendant for a period of sixty (60) days. There was however a caveat; in the event that the arbitration process was not concluded within sixty (60) days, either party was at liberty to apply.

Sixty (60) days expired before the arbitral process commenced. The plaintiff, through his counsel wrote to the defendant’s counsel on the 21st December, 2007 seeking the defendant’s view on whether there was necessity for an order to be sought from court for extension of the period of the arbitral process. The defendant did not specifically respond to the request made by the plaintiff. On 31st January, 2008 the defendant, with the assistance of the police took over the project site from the plaintiff. The guards who had been employed by the plaintiff to guard the premises were forcefully evicted and replaced by guards appointed by the defendant. It was conceded by the defendant that the order used to secure possession of the suit premises was the one which was issued by Warsame J on the 30th November, 2007.

When the plaintiff was evicted from the suit premises, it filed the present application on the 4th February, 2008 seeking to be reinstated to the suit premises. It was contended on behalf of plaintiff that its eviction from the suit premises was unlawful since the arbitral process had not been concluded. The plaintiff sought orders of mandatory injunction to restore it to the suit premises and for the *status quo* as at 30th January, 2008 to be maintained pending the hearing and determination of the dispute by arbitration. In response to the plaintiff’s application, the defendant objected to the plaintiff being restored to the suit premises. The argument put forward by the defendant in support of its position was two pronged. The defendant argued that since the order issued on 30th November, 2007 was expired, the defendant was within its right as provided in the joint venture agreement to take over the suit premises. Its other argument was that it had relied on the order issued in its favour by the court to secure possession of the suit premises.

It is evident from the arguments made on behalf of the defendant that the defendant relied on self-help to take over possession of the suit premises. As stated earlier in this ruling, it was clear from the ruling of Warsame J that the court intended to preserve *status quo* pending the resolution of the dispute between the plaintiff and the defendant by arbitration. It was the said court’s desire that the arbitral process be concluded within sixty (60) days of the issuance of the interim reliefs. The parties were further directed to make appropriate application to court if the arbitral process was not concluded within sixty (60) days. The defendant’s act in taking over possession of the suit premises was contrary to the spirit of Warsame J’s ruling. The defendant, in taking over the possession of the premises, was in effect circumventing the order of the court and pre-empting the resolution of the dispute by arbitration.

It was clear that the defendant could not have obtained possession of the suit premises pursuant to the provisions of the joint venture agreement. This is because the said joint venture agreement provides an elaborate procedure for terminating the agreement. A fundamental requirement is that before the agreement can be terminated, notice must be given to the opposing party. I hold that the defendant obtained possession of the suit premises by duping the Deputy OCS Kayole Police station that it had an order which allowed it to take over the suit premises from the plaintiff’s possession.

It was clear to this court that the defendant’s act was unlawful. If the defendant desired to have the order issued on 30th November, 2007 reviewed or set aside, nothing could have been difficult than for the defendant to make an appropriate application before the court. I repeat, the period of sixty (60) days

stated in the order of Warsame J was the period which the arbitral process was expected to have been concluded. It was not contemplated that the interim orders preserving *status quo* in respect of the suit premises would expire upon the expiry of sixty (60) days. It is the humble opinion of this court that once a party obtains an order of interim relief pending the hearing and determination of a dispute pursuant to an arbitration agreement, such interim relief can only be vacated or set aside upon the conclusion of the arbitral process or by an order of the court.

In the premises therefore, this court will make appropriate orders to ensure that the spirit of Warsame J's ruling is given effect to. I will not address other arguments which were presented to this court because in my view they are not germane to the matters in dispute in this application. The order that commends itself to this court is as follows:

- (i) The *status quo ante* prior to the unlawful eviction of the plaintiff from the suit premises is hereby ordered restored.
- (ii) The defendant is hereby compelled by order of mandatory injunction to restore the plaintiff to possession of the suit premises i.e. LR No. Nairobi Block 11344 R – Koma Rock Phase V with immediate effect.
- (iii) The interim reliefs issued by Warsame J on 30th November, 2007 shall continue to be in force pending the hearing and determination of the dispute between the plaintiff and the defendant by arbitration as contemplated by the joint venture agreement.
- (iv) Each party shall be at liberty to apply.
- (v) The defendant shall pay the costs of this application.

DATED at NAIROBI this 5th day of MARCH, 2008.

L. KIMARU

JUDGE