



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

MISCELLEANOUS APPLICATION NO. 28 OF 2017

PETER KABIBI KINYANJUI

(Suing through his Donee JAMES NJOROGI KINYANJUI).....APPLICANT

VERSUS

KIAMBU COFFEE GROWERS COOPERATIVE UNION LIMITED.....RESPONDENT

RULING

The matter for determination is the Chamber Summons dated **12th April 2017**, by the Applicant seeking orders that;

1. Pending the hearing and determination of the intended Arbitration proceedings, this Honourable Court do issue a temporary injunction restraining the Respondent whether by itself, its agents, employees, assigns, servants or any other person claiming under it whatsoever from evicting, threatening to evict, demolishing, selling, disposing of, charging, pledging, dealing, interfering with and or intermeddling in any manner whatsoever with the Applicant's quiet and peaceful enjoyment of the property known as Title Number Kabete/kibichiko/755.

2. This Honourable Court do order and direct that the dispute between the Applicant and the Respondent be referred to Arbitration for hearing and determination.

3. The costs of this Application be provided for.

The Application is premised on the grounds that on **4th November 2013**, the Applicant entered into Lease Agreement with the Respondent which lease was for a term of **20 years** with effect from **1st January 2014**, and is bound to expire on **1st January 2034**. That the parties intention in entering the said Lease was for the construction of an **Arcade** by the name **Jessie Arcade**. That the Respondent was aware of the Applicant's intention to seek funding from a financial institution, in order to construct the said Arcade. That the Applicant commenced the construction of the said Arcade on or about **January 2014**, and spent **Kshs.74,523,419/=**. That having exhausted his personal finances on the project and on the understanding with the Respondent that he would obtain financing from a Financial Institution, the Applicant proceeded to seek funding from two financial institutions namely **Jamii Bora Bank** and **Kenya Women Micro Finance Bank**.

That the Applicant on approaching the said Financial Institutions, was informed that in order for the said Financial Institutions to provide funding, the Applicant needed to substitute his name with that of a Company due to his advanced age; to seek an extension of the term of the Lease for a further **20 years**, extension of the construction completion date as there was a six month delay in obtaining the necessary consents.

That the Applicant approached the Respondent seeking to vary the Lease in order to obtain construction finance. However, despite several negotiations, the Respondent has refused to vary the terms of the Lease thereby frustrating the Lease despite the Applicant fulfilling its obligations on the Lease.

That in Line with **clause 3.2** of the Lease Agreement, all disputes involving parties ought to be resolved through Arbitration. That the Applicant intends to refer to Arbitration the dispute for purpose of hearing and determination. Further that the Applicant has a prima facie case against the Respondent and should an injunction not be granted, the intended Arbitration proceedings will be rendered nugatory. That the orders sought are calculated at preserving the subject matter of the intended Arbitration. That the Respondent has threatened to re-enter the leased property and unless interim orders are granted, the subject matter of the Arbitral proceedings is in danger of being demolished. That no prejudice will be occasioned to the Respondent.

In his Supporting Affidavit, **James Njoroge Kinyanjui**, averred that he was the son and **Donee** of the Applicant pursuant to a **Power of**

Attorney registered on **26th October 2005**. That he has been informed by the Applicant that in order to commence the construction of the Arcade, several consents needed to be obtained and the Applicant managed to get the consent on **11th June 2014**, **6 months** after the commencement of the Lease. That the Respondent was well aware of the delay in obtaining a change of user. That he has been advised by the Applicant's Advocate which advise he believes to be true that there are fundamental clauses in the Lease which as drawn are not only ambiguous, but are unfair, oppressive and amount to unconscionable bargain and the same ought to be nullified. That based on the terms of the lease, the Applicant was expected to construct the Arcade within 18 months after obtaining necessary consents which fact was unconscionable

That despite unconscionable and unrealistic terms, the Applicant in good faith begun construction of the Arcade as he tried to negotiate with he Respondent in order to vary the lease. The Applicant hired a Quantity Surveyor and the Surveyor estimated the cost of construction to be **Kshs. 267,290,280/=**. Further, that the Applicant entered into various contracts with other contractors in order to begin construction. That without the initial funding, no funding would have been available from any Financial Institution. That the Applicant approached the Respondent seeking to vary the Lease and during negotiations, the Respondent's officials intimated that they were not opposed to the substitution of the Applicant with a Company provided the Applicant was a majority shareholder.

The Applicant then began arrangements to which Company would substitute him on the Lease, and he chose **Majoreni Development Company** wherein he was a Director and the Company had to be restructured and he became majority shareholder. That thereafter the Applicant through his Advocates scheduled several meetings with the Respondent and his Advocate with a view to reaching an amiable settlement. However, the same have not yielded any results.

It was his contention that the Applicant diligently paid contractors fees in accordance with the Contractors Agreement and was issued with interim Certificates. That most of the payments were made through **Majoreni Development Company**, as the Applicant was hopeful the Company would replace him. That the Applicant sought to purchase the piece of land in which the Arcade is being constructed, but the said proposal was rejected. That the Respondent has frustrated the said Lease.

On **30th March 2017**, the Respondent through its Advocates issued a Notice to the Applicant purporting to terminate the Applicant's Lease over the property and an order to vacate within 14 days. That the purported termination is malicious and should it be allowed to stand, the Applicant will suffer substantial loss and the same would be unjust enrichment. That he has been advised by his Advocate that the scope of Arbitration is wide enough to cover the existing dispute. Further that it is not incompatible with an Arbitration agreement for a party to request from the High Court before Arbitral proceedings commence an interim measure of protection. That the Applicant wrote to the Respondent's Advocates with a view of having the dispute resolved by way of Arbitration, but the same was rejected. He also averred that the Applicant has a prima facie case against the Respondent and should an injunction not be granted, the arbitral proceedings would be rendered nugatory. That it is in the interest of Justice that the Order sought herein are granted.

The Application is opposed and the Respondent through **Peter Oren Murigi**, its Chairman swore a Replying Affidavit on **24th May 2017**, and averred that the capacity of the nominee to sue on behalf of the Lessee in the instant proceedings is wanting.

That the Applicant approached the Respondent in **January 2013**, with a view to entering into an agreement for leasehold over **L.R Kabete/Kibichiku/755**. That they wrote to the Lessee asking him to give clear details of his intended Developments and the Lessee wrote back on **6th February 2013**, outlining details of his intended development. That a draft Lease agreement was prepared by the Respondent's Advocates and it was discussed with the Lessee in a meeting held on **15th July 2013**. That the Respondent's Advocate in a letter dated **17th July 2013**, advised the Lessee to get independent representation and the Lessee appointed **Messer Kagwe, Kamau & Karanja Advocates** who communicated their appointment in a letter dated **26th July 2013**. That the Lease agreement went through normal process of amendments and the registration was done by the Lessees then Advocates who communicated completion of the process. That the lease was for a period of **20 years** and the Lessee immediately took possession of the suit property and commenced development.

That when the Respondent requested the Lessee to provide Bill of Quantities, the response was that the development was not being financed by any Financial Institution and there was no need for the said documents. That the construction stalled in **December 2014**, and the Lessee stopped construction upon receiving advise from his Advocates on record advising him to either get a variation of the Lease or consider getting out of it before expending too much money on the project.

That on **10th April 2015**, the Lessee through his current Advocates wrote to the Respondent offering to purchase the suit property. That on **11th August 2015**, the Respondent's Advocates wrote to the Lessees Advocate expressing concern over the stalled construction. Further that the Respondent's Advocates instead received a letter from the Applicant's Advocate calling for a re-negotiation with a view that the Respondent accepts to resell and the Applicant agrees to purchase the property at the value of the construction works including all associated costs.

That when the Respondent could not re negotiate, the Lessee stopped paying rent as required under clause **1.3.5** of the Lease agreement prompting a letter to his Advocates. That the lessee did not address the breach and instead his Advocates wrote a letter asking for a meeting which was responded to by the Respondent's Advocates. That the Lessee persisted in his breach by failing to complete construction and pay ground rent and the Respondent wrote a letter through its Advocates on record advising that the breach would be deemed to be a repudiation of the agreement and gave 21 days to remedy the breach. That there was subsequent communication between the parties and the Respondent notified the Lessee of the intention to reenter the suit property.

He further averred that the Lessee sought to invoke the Arbitration clause and he was informed that the issue of renegotiation was outside the purview of arbitral proceedings. That the Lessee is invoking the Arbitration clause with a view to forcing the Respondent to vary a binding Agreement. That the agreement dated **4th November 2013**, was contracted with the full participation of the Lessee, and the purported contracts with contractors do not concern the Lessor. Further that the Lessee has not demonstrated that he sought financing. That the Application letters are for **Majoreni Development Company limited**, and his Advocates have advised that Arbitrators cannot be used to provide succor for parties who have breached their contractual obligations or aid in the coercion of a party to vary a binding Agreement.

That the Court is mandated under *Section 6(1)(b) of the Arbitration Act* to decline to refer a matter to arbitration when there is no dispute between the parties over the matters agreed to be referred to Arbitration and the instant case falls within the said bracket.

The parties filed written submissions which the Court has carefully read and considered and finds that the issues for determination are;

1. Whether the Donee has the requisite capacity to sue

2. Whether the Application is merited.

1. Whether the Donee has the requisite capacity to Sue

The Respondent has contended that a reading of the Power of Attorney shows that *James Njoroge Kinyanjui*, was appointed together with others and the same must be exercised jointly. The Court having read the Power of Attorney finds that the said *James Njoroge* was one of the persons that the Power of Attorney authorizes to sue on behalf of the donor hence he is clothed with requisite locus to sue.

The Respondent has further submitted that the Donee did not seek for leave of Court to sue before the suit was filed as provided by **Order 9 Rule 1 of the Civil Procedure Rules**. From the reading of the Power of Attorney, the Donees to sue for him and his name and though the Court's approval may not have been sought, the Court finds that the same does not deprive him of the capacity to sue. The Respondent has not demonstrated to the Court what prejudice it has suffered by failure of the Donee to seek the approval of the Court. Therefore, the Court finds that failure to seek approval did not affect the Applicant's capacity to sue. See the case of *Edmund Mwangi Waweru ... Vs... Gabriel Wanjohi Waweru & another [2017] eKLR* where the Court held that;

“Whilst the legal position relied on by the defendant is categorical on the need of a person holding a Power of Attorney to seek approval of the court before he can be deemed to be a recognised agent of another for purposes of doing the acts specified in Order 9 Rule 1 of the CPR, I agree with Meoli J., that failure to seek approval of the court to do the acts specified in that section of the law does not necessarily render the act or appearance fatally defective.

89. On whether failure by the plaintiff to seek the approval of this court to file and prosecute the suit herein deprived him the capacity donated to him by his sister to institute and prosecute the suit, I begin by pointing that the Power of Attorney granted to the plaintiff authorised him to sell, make legal claims, maintain and exercise all of her rights as owner of the property in all capacities.

90. Although the initial Power of Attorney granted to the plaintiff was limited in duration, I note that it was severally renewed until a general power not limited in duration was issued in 2006.

91. Despite the fact that the approval of this court was not sought before the plaintiff instituted this suit, there being no prejudice caused on the defendant on account of that failure, I find and hold that the failure did not affect the respondent's capacity to sue on account of the general Power of Attorney given to him by his sister.”

Having considered all the facts herein and the findings in the above quoted case, the Court finds and holds that the applicant has the requisite capacity to sue.

2. Whether the Application is merited

It is the Respondent's contention that the Applicant is seeking to have the matter referred for Arbitration so that the Contract can be varied. The Applicant has sought for prayers that the dispute be referred to Arbitration. It is the Respondent's further contention that the issue at hand does not fall within the purview that is to be referred to Arbitration. It is not in doubt that the parties had an Agreement in which the Applicant was to lease the land and construct an Arcade. It is further not in doubt that the Applicant has sought to vary the Lease so as to be able to meet his obligations.

The Respondent's on the other hand has averred that the Applicant is in breach of the agreement between the parties and that the parties could not renegotiate on the Contract. The Applicant is also claiming that the Respondent is frustrating the said Contract and has accused the Respondent of bringing unconscionable terms to the agreement to his detriment.

A dispute may be defined as a conflict or controversy. As per the averment by the parties, it is not in doubt that indeed there is a conflict by the parties.

Under *Clause 3.2* of the Lease dated *4th November 2013*, is stated;

“All disputes and questions whatsoever which shall arise between the parties hereto touching this lease or the construction or application thereof of any clause or thing herein contained or to the rights or liabilities of any party under this lease shall be referred to the decision of a single Arbitrator to be appointed in accordance with the provisions of the Arbitration Act or Acts amending or replacing the same. The Decision of such Arbitrator shall be final, conclusive and binding on the parties.

Whether or not there is a breach of the Contract, there is no doubt there is a dispute covered under this clause and the Court finds and holds that the prayer seeking to refer the matter for Arbitration is thus merited.

The Applicant has also sought for injunctive measures. Section 7 of the *Arbitration Act* provides

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

Therefore, it is clear that the Court has the requisite jurisdiction to grant the interim injunctive orders. In the case of **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009** (2010) eklr the Court held as follows:

“It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names.....

Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are (1). The existence of an arbitration agreement. (2). Whether the subject matter of arbitration is under threat. (3). In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application? (4). For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal’s decision making power as intended by the parties? In the matter before the court, the Judge went on to make orders which undermined the arbitration and the outcome of the arbitration contrary to section 17 of the Arbitration Act. A court of law when asked to issue interim measures of protection must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration. There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff’s claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made and not to take out of the hands of the arbitrators (or other decision makers) a power of decision which the parties have entrusted to them alone. In the present instance the latter considerations must prevail. If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide...Although the English Arbitration Act 1996 is not exactly modelled on the Model Law unlike our Act, the principles as outlined in the Channel Case are in line with the arbitral tribunal’s jurisdiction as set out in section 17 of the Arbitration Act of Kenya. The section gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under section 17(6) of the Arbitration Act as the Commercial Court in this matter purported to do. In this regard, the Superior Court did act contrary to the provisions of section 17 and in particular violated the principle known as “Competence/Competence” which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this means is “Competence to decide upon its competence” and as expressed elsewhere in this ruling in German it is “Kompetenz/Kompetenz” and in French it is “Competence de la Competence”. The entire ruling is therefore a nullity and it cannot be given any other baptism such as “acting wrongly but within jurisdiction.”

Guided by the above decided case, this Court finds that there is an Arbitration agreement which it has found that ought to be referred to an Arbitrator as there is a dispute between the parties. Further the Court has seen the letter dated **30th March 2017**, in which the Respondent has allegedly terminated the Lease and ordered the Applicant to vacate. From the annexures produced in evidence, it is not in doubt that the Applicant had started developing and in terminating the lease agreement, the Court finds that the subject matter of the Arbitration is under threat and if not protected the Arbitration proceedings would be rendered nugatory as there is a dispute whether or not there is breach of the said Agreement.

For the above reasons, the Court finds and holds that the Applicant is entitled to the injunctive orders sought herein. However, in order not to be seen to be overstepping the mandate of the Arbitrator, the Court finds that the interim measures ought to only last until the Arbitration proceedings commence so that the Arbitrator would then be able to steer the said proceedings.

Having considered the instant Chamber Summons dated **12th April 2017**, the Court finds it merited and the same is allowed in the following terms;

1. Pending the Commencement of the Arbitration proceedings, a temporary injunction be and is hereby issued restraining the Respondent whether by itself, its agents, employees, assigns, servants or any other person claiming under it whatsoever from evicting, threatening to evict, demolishing, selling, disposing of, charging, pledging, dealing, interfering with and or intermeddling in any manner whatsoever with the Applicant’s quiet and peaceful enjoyment of the property known as Title Number Kabete/Kibichiko/755.

2. This Honourable Court do order and direct that the dispute between the Applicant and the Respondent be referred to Arbitration for hearing and determination.

3. The costs of this Application be in cause

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 11TH DAY OF MARCH 2021

L. GACHERU

JUDGE

11/3/2021

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Githii holding brief for Mr. Ngige for the Applicant

No appearance for the Respondent

L. GACHERU

JUDGE

11/3/2021