



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. MISC. APPL. NO. E100 OF 2021

MICHAEL KIMONDIU.....1ST APPLICANT

RUEBEN MWANGI.....2ND APPLICANT

WILLIAM MUCHANGI.....3RD APPLICANT

ROSE KAUME.....4TH APPLICANT

(Bringing the application in their individual capacities and

as members, and the officials respectively Chairman, Vice-Chairman,

Treasurer, and Secretary of and on behalf of the members of the

CULLINAN APARTMENT OWNERS ASSOCIATION.)

VERSUS

GARDEN REAL ESTATE

DEVELOPMENT LIMITED.....RESPONDENT

RULING

1. This Miscellaneous suit was filed vide the Notice of Motion dated 20.5.2021 where the Applicants seek the following orders:

1) Spent.

2) The Respondent be restrained from registering any leases, charges, or documents conveying any interest in land whatsoever on the indenture of conveyance of the propriety Land Reference Number 1/344 pending the hearing and determination of the application.

3) The Respondent be restrained from registering any leases, charges, or documents conveying any interest in land whatsoever on the indenture of conveyance of Property Land Reference Number 1/344(hereinafter pending the hearing and determination of the arbitration presided over by the Arbiral Tribunal consisting of Engineer Isaac G Wanjohi and Mrs Florence Oduk with Paul Ngotho, HSC as umpire (hereinafter “the Arbitration.”)

4) The Applicant be awarded costs of this application.

2. The application is premised on the grounds set out on the face of the application and on the supporting affidavit of Michael Kimondiu. The Applicants contend that the Respondent is the registered proprietor of the suit property **Land Reference No. 1/344**. The Applicants are home owners of various units of apartments in the suit land. That when they bought their units, management companies were to be incorporated and each purchaser of the apartment unit was to be issued with a share certificate. This however did not happen hence the home owners formed their home owners Association “The Applicant”. They averred that various repairs need to be undertaken to rectify defects as the house units were apparently built off plan. The dispute is apparently before the arbitration platform of which the claimed amount is Kshs 96,313,216/-.

3. The Applicants further stated that the Respondent has not sold six units that is A1, A3, A5, B2, D1, D2 and D12 and they desire that the same be preserved. This is because the amount claimed before the arbitration platform is high and if the remaining empty units are sold, the

Respondents may not be able to satisfy the arbitral award.

4. The case is opposed by the Respondent via the replying affidavit of GaoRang, the General Manager of the Respondent dated 19.10.2021. He avers that the Respondent was the developer of the apartments in question and that the said apartments were well constructed and completed and certified ready for occupation on 15.12.2014. That as per the sale agreement, the defects liability period during which the Respondent was to rectify any defects or faults was 6 months, hence the Applicants are simply coercing the Respondents to do repairs 7 years after occupation and that there is no evidence indicating that the Respondents are incapable of satisfying an arbitral award.

Determination.

5. On 19.10.2021, this court gave directions for the application to be heard by way of written submissions of which the Applicant was to file and serve submissions and any further affidavit by 26.10.2021. The Respondent was on the other hand to file and serve submissions by 2.11.2021. Documents filed outside the given timelines were to stand as expunged. The Applicant's further affidavit and submissions are dated 28.10.2021 which means there was no compliance with the court order.

6. This court will therefore only consider the application the supporting affidavit thereof and the replying affidavit in arriving at a determination.

7. The orders sought by the Applicants are in the nature of interim relief, awaiting determination of the claim they have lodged in the arbitration where they are seeking an award of Kshs 96,313,216.26. **Section 7 of the Arbitration Act** stipulates that:

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

8. In the case of **Prebesta Investment Limited & Another v National Bank of Kenya & 2 others (2016)eKLR** the court stated as follows;

“ The principles that should guide the court in determining an application for interim measure of protection under Section 7 of the Arbitration Act were clearly laid down in the case of Portlink Limited case (supra) as follows:

“In issuing an interim measure of protection as provided in Section 7 the Court's determination of the parties' dispute is restricted. The Court's role was eloquently outlined in the decision of J. G. Nyamu J.A. in the case SAFARI LIMITED –Vs- OCEAN VIEW BEACH HOTEL LIMITED & 2 OTHERS (2010)eKLR where it was stated that the Court faced with such application should take into account the following:-

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””

9. The Respondent has in paragraph 18 of their Replying Affidavit recognized that arbitral awards are enforced by the High Court. In paragraph 19, they state as follows:

“It is a term of the sale agreements that the parties agreed to be bound by any award made by an Arbitral Tribunal. The Respondent has therefore demonstrated its willingness to adhere to any arbitral award that may be awarded.”

10. This is the closest the Respondent has come to admitting that there are ongoing arbitration proceedings. It therefore follows that the issues being advanced by the Respondent regarding the other terms of the sale are not issues for determination by this court. Whether the buildings were built upto standard and whether the Applicants are entitled to damages are issues tabled before the Arbitration body.

11. The Respondent has also not denied that they have 6 apartments which have not been sold.

12. In the interest of justice, I find that it is only fair that the units be preserved as the parties await the decision of the tribunal.

Final Orders

1. The application dated 20.5. 2021 is allowed in terms of prayer No. 3, but the orders shall remain in force for a period of one (1) year only.

2. Each party to bear their own costs

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021 THROUGH MICROSOFT

TEAMS.

LUCY N. MBUGUA

JUDGE

IN THE PRESENCE OF:-

NYAUCHI FOR THE APPLICANTS

GACHUHI FOR THE RESPONDENT

COURT ASSISTANT: EDEL BARASA