REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 8 OF 2019

KIKEN PROPERTIES LIMITED.....1ST PLAINTIFF

TAKAUNGU SPICE LIMITED.....2ND PLAINTIFF

VERSUS

VIPINGO RIDGE LIMITED.....DEFENDANT

Coram: Hon. Justice R. Nyakundi

A.B. Patel for the defendant

Mr. Walker Kontos for the plaintiffs

RULING

Before this court two notices of motion are at stake for considerations and determination. The first notice of motion is one dated 31st March, 2020 filed in court on 7th April, 2020. In that application the applicant sought grant of an injunction restraining the defendant by itself and or the agencies from initiating and or progressing any steps to terminate leases issued to the plaintiffs pending the hearing and final determination of the application.

The grounds of the application are as follows:

a) On the 11th of March 2020 the court ordered that the dispute herein be referred to arbitration.

b) The Plaintiffs have initiated the arbitration process and have already proposed a list of arbitrators to the Defendant.

c) The Defendant is threatening to inter alia extinguish and or terminate the Plaintiffs' property rights even as the matter is referred to arbitration.

d) The Defendants actions aforesaid have persisted even before the 11th of March 2020, in contempt of orders of this court.

e) Unless this application is heard urgently, and the Defendant is restrained in the terms sought in this application, the Defendant will persist with its misconduct and illegal action thereby irredeemably prejudicing the Plaintiffs and the subject matter of the intended arbitration proceedings.

d) It is only fair that an interim measure of protection pending arbitration be granted and/or status quo be maintained to safeguard the intended arbitral process.

f) No prejudice shall be suffered by the Defendant if the orders sought are granted.

g) It is thus in the interest of justice that the orders sought herein are granted.

Further to the grounds an affidavit sworn on 31st March, 2020 by Nicholas Charles Allen to support the notice of motion on the strength of the application and reliefs applied for therein this motion was ordered served upon the defendants for an inter-partes adjudication by way of

written submissions.

As that was pending determination, by this court a second notice of motion filed in court on 7th April, 2020 seeking the following orders:

> ***"That pending the hearing and final determination of the application dated 31st March, 2020 this honorable court be pleased to grant mandatory injunction directing the defendants to restore water and electricity to the 1st plaintiffs property at Vipingo."***

In this new notice of motion, the applicant pointed out that the defendant had improperly disconnected water and electricity during the pendency of the notice motion dated 31st March, 2020. There was therefore a convergence of issues between the notice of motion dated 31st March, 2020 and the one of 7th April, 2020.

As a result of their intersections and assertive foundation of the dispute its prudent to certainly consolidate the two applications pursuant to Section 1A of the Civil Procedure Act on overriding objective which aims at the just, expeditious, proportionate and affordable resolution of the dispute.

In reliance of the replying affidavit by Andrew Kuiyaki the defendants vehemently opposed the applications premised on the following desperations:

> ***1. THAT I am the General Manager of the Defendant Company and am duly authorized by it and its Board of Directors to make this Affidavit on its behalf.***
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> ***2. THAT same where otherwise stated to the contrary the facts deponed to herein are within my own personal knowledge. Where they are derived on information or based on documents received or in my possession, the sources of such information and the grounds of such belief are stated all of which I verily believe to be true.***
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> ***3. THAT I have read and understood the contents of the Notice of Motion dated 31st March 2020 and the Supporting Affidavit of Nicholas Charles Allen sworn on the same date thereinafter referred to as 'the Plaintiff's First Affidavit') both of which were filed on the 1st April 2020 as well as the Notice of Motion dated 7th April 2020 and the Supporting Affidavit of Nicholas Charles Allen sworn on the same date (hereinafter referred to as 'the Plaintiff's second Affidavit') both of which were filed on the 7th April 2020 and the Certificate of Urgency dated the 7th April 2020 as well as the Chamber Summons application also dated the same date and the Affidavit of Paul Ogunde sworn on the same date in support thereof.***
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> ***4. THAT at the hearing of the Plaintiff's applications dated the 31st March 2020 and 7th April 2020, I shall crave leave to refer to all the pleadings filed herein by the Plaintiff on 11th September 2019 and, in particular, the Affidavit of Nicholas Charles Allen sworn on the 2nd September 2019 and the Exhibits annexed thereto as well as the Affidavit of Alastair Cavenagh sworn on the 26th September 2020 and filed in support of the Defendant's Notice of Motion application dated the same date and filed on the 27th September 2019.***
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> ***5. THAT in so far as the Plaintiff's application dated the 7th April 2020 is concerned, the Plaintiffs' are clearly conducting themselves with complete lack of candour and malafides particularly as concerns the allegation that the disconnection of the water and electricity was effected on 2nd April 2020 after the Plaintiffs' first application dated 31st March 2020 and this Honourable Court's directions had been issued thereon on the 1st April 2020.***
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> ***6. THAT in this regard, I annex hereto and mark as Exhibit 'AK1' the Photostat copies of the correspondence received from the Plaintiff's advocates at 09.34 Hrs on 2nd April 2020 serving the application and Order of directions issued by this Honourable Court as well as the e-mail correspondence exchanged between the parties directly in which Mr. Nicholas Charles Allen acknowledged that disconnection had already been effected pursuant to notices issued to him by the Defendant on the 20th February which is also attached hereto. In terms of the provisions of Clause 2.20.2 of the Sub-Lease, the notice was to expire on the 22nd March 2020 yet the Defendant allowed the Plaintiffs an additional 10 days to discharge their payment obligations. The account still remains in arrears. It is not sufficient that the Plaintiffs choose what they will pay for and what they will not. Service Charge amounts include other services including keeping the retained parts in a state f proper repair and maintenance as well as properly painted, cleaned, lit and the entire Estate secure amongst other obligations as set out in the Third schedule to the Lease which the Plaintiffs continue to enjoy and have deliberately and continue to deliberately refuse to pay for, in the case of the Second Plaintiff fromorm August 2014.***
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> ***7. THAT it is therefore wrong to misleadingly suggest that matters have been escalated by the Defendant by effecting disconnection without notice after service of the application of the 31st March 2020. The disconnection was actually effected before the application of the 31st March 2020 was served upon the Defendant's advocates. Be that as it may, I shall now deal with the merits of the application now before the Court.***
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> ***8. THAT I annex hereto and mark as Exhibit 'AK2' true Photostat copies of the statements of account relating to both Plaintiffs in this matter form which it is evident the First Plaintiff's outstanding arrears of USD 4,500, K.Shs 250,962.99 and K.Shs 822,648.00 and those of the Second Plaintiff are USD 14,460.00, K.Shs 1,451,467.00 and K.Shs 3,162,692.96. In addition to this, the Defendant is also entitled to interest over and above these amounts in terms of Clause 2.19.4 of the Sub-Lease entered between the parties.***

9. <u>THAT</u> this Honourable Court will note that the amount in arrears is substantial and the Defendant is having to continue to fund the Plaintiffs' payment obligations in order to ensure that it continues to discharge its services obligations under the Third Schedule of the sub-lease without prejudicing other home owners on the Estate who timeously discharge their payment obligations.

10. <u>THAT</u> in addition to this, the Plaintiffs seek an order of injunction to restrain the Defendant form completing any sale transfer or charging or parting with any interest over the entire development at Vipingo Ridge and in this regards alleges that the Defendant have permitted the development to be transferred to a third party, Superior Homes Limited – see Paragraph 10 of the Affidavit of Nicholas Charles Allen sworn on the 2nd September 2019 and filed herein on the 11th September 2019. In this regard, I feel I can do no better than annex hereto marked as exhibit 'AK3' a true Photostat copy of the Sub-Lease in respect of part of L.R No 24880 between SUNSAIL TRADINGLIMITED and SUPEROR HOMES AT VIPINGO LIMITED dated the 30th August 2018 and registered on the 14th November 2019 which speaks for itself.

11. <u>THAT</u> the Plaintiffs do individually own two Plots A 64 (registered as CR. 52290/1 in the name of 1st Plaintiff) and F 20 (registered as CR. 43754/1 in the name of 2nd Plaintiff) in the Defendant's development, known as Vipingo Ridge Golf Resort. The interest vested in the Plaintiffs in the plots is leasehold by virtue of two Sub-Lease dated 7th April 2008 (for plot no.F.20) and 27th May 2011 (for plot no. A64) as stated earlier. The Sub-Lease recognizes that the Defendant retained all the common parts and to her demarcated plots as well as other portions of the land as defined therein save and the plaintiffs only acquired a leasehold interest over the portions demarcated Plot A64 and F20. For the Plaintiffs to suggest otherwise in a bid to interfere with the Defendants' proprietary rights so that the Defendant is restrained form dealing with even any of the other plots as defined in the Sub-Lease on the land is not only lacking in candour but is also malicious.

12. <u>THAT</u> neither Sunsail Trading Limited nor Superior Homes At Vipingo Limited are parties to the dispute and this Honourable Court has no jurisdiction to issue any orders – in particular Prayers 5 or 8 – sought by the Plaintiffs under the guise of interim relief. I verily believe that the Plaintiffs have approached this Honourable Court with unclean hands and are undeserving of the exercise of any discretion of this Honourable Court. In any event, Mr. Nicholas Charles Allen has inspected the accounts with the auditors certificates having been availed to him.

The applicant case

Background. The applicants who claim to have purchased the suit property from the defendants seems to be aggrieved with a number of issues which have arisen within the terms of the lease agreement. The matter is currently pending the choice of arbitrators and the ultimate commencement of arbitral proceedings to decide the dispute as between the plaintiff and the defendant.

Learned counsel for the applicants submits that in the interim period permitting the defendant to terminate the plaintiffs property rights under the lease marked as exhibit NA-Z and have it marketed to third parties for sale would be in violation of the their rights.

Learned counsel, also brought to the attention of this court that besides threats to subject the lease to a termination the defendants have gone ahead to disconnect the basic utilities of water and electricity of the plaintiff. Learned counsel in placing reliance on the various precedents submitted that the purpose of the interim injunction is to preserve the suit property by maintaining status quo whereas, the arbitral mechanism is permitted to take shape in order to determine the dispute (see **Lagoon Development Ltd v Beijing Industrial Designing & Researching Institute 2018 eKLR, CMC Holdings Ltd & another v Jaguar Exports Ltd (2013) eKLR, Seven Twenty Investments Ltd v Sandhoe Investment Kenya Ltd (2013) eKLR** and **Coast Apparel EPZ Ltd v Mtwapa REPZ (2017).** In contrast learned counsel for the defendants contended that the interim relief under Section 7 of the Arbitration Act is not available to the plaintiffs due to the following reasons:

1. The applicant confers around service charges and wholly bills whose payment is in question by the defendants' rights of dispossession of property on the basis of the registered deeds.

2. That the plaintiffs knowingly and fully aware of the outstanding bills which have accumulated over time have failed to pay up or make any form proposals on the scheme of determination. It is further urged by learned counsel that in such circumstances if the grant of injunction is allowed, the defendants are likely to suffer irreparable harm and prejudice. He also placed reliance on the covenants and obligations retained in Clause 2.19.

3. Third schedule, Clause 4.1, 4.3, and 4.6, Clause of the sublease agreement. Learned counsel urged and contended that the imperative nature of the application should be judged in the context of the principles in CMC Holdings Ltd (supra), Isolux Ingeniera S.A. v Kenya electricity, Transmission Company Limited and 5 others (2017) eKLR Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 others 2010 eKLR, Future Way Ltd v National Corporation of Kenya (2017) eKLR and Richard Boro Ndungu v KPMG East Africa Association & 2 others (2017) eKLR

Analysis

That brings me to the sole question of law which is formulated at the beginning of the two motions by the plaintiffs under Section 7 of the Arbitration Act what can be said of the plaintiffs remedy on the applications to date?

In a comparative jurisprudence in **Gujarat Bolstering Co. Ltd v Cocacola Company and others (1995) SCC** the Supreme Court interalia observed under on this as follows:

"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could

not be adequately compensated in damages, recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh out need against another and determine where the balance of convenience lies."

The guiding principle as to the exercise of discretionary power is as summarized in T.S. Muwanga v East African Steel Corporation Ltd High Court Civil Suit No. 10 of 1993 (1993) v KALR 55 and in Rook's Case 5 Rep100(a) Kengaley's case 10 Rep 140B, East WSCK v Citing of Land on Style 42, "it is to be exercised not capriciously, but on judicial grounds and for substantial reasons and it must be exercised within the limits to which an honest man and competent to the discharge of his office ought to confine himself, that is within the limits and the objects intended by the legislature."

The principles governing grant of interim injunctions dependent on the facts of each particular case are now well settled in the celebrated cases of **Giella v Cassman Brown Ltd (1973) EA 358 Mrao Limited v First American Bank of Kenya Ltd and others (2003) KLR, American Cyanamid Co. v Ethicon ltd (1975) AC 396** the applicant must establish the following conditionality:

a) A prima facie case with a probability of success.

b) Irreparable loss not compensatable by way of damages.

c) The balance of convenience

This being the in **Nguruman Limited v Jan Bonde Nielsen & 2 others CA No. 77 of 2012.**

From the undisputed facts the Court of Appeal reaffirmed that for an injunction to succeed the applicant must satisfy the legal grounds as stated herein under that:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements as outlined above."

In a more substantial manner the court further said: **These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially, see (Kenya Commercial Finance Co Ltd v Afraha Education society (2001) Vol. 1 EA 86)**

"If the applicant establishes a prima facie case, that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong, the applicants claim may appear. At that stage if prima face case is not established, then irreparable injury and balance of convenience need no consideration. The essence of a prima facie case does not permit leap-frogging by the applicant for injunction directly without crossing the other hurdles in between."

These legal principles are to be tested in line with the facts presented by the plaintiffs to determine whether they qualify for an injunction. With the material placed before court the relationship between the plaintiffs and the defendant is governed by sub-lease of Plot No. 20 comprising three thousand one hundred fourteen (3114) square metres or thereabouts being part of LR No. 24880.

If the defendant seeks to transfer directly or indirectly any or part of his shares for purposes of sale to a third party as deponed in paragraph 6 of the affidavit in support by Nicholas Charles Allen dated 31st March, 2020, customarily it would occasion loss and damage. The plaintiff also contends that in all circumstances of the case, if the defendant is permitted to proceed in a manner it has threatened or purported to conduct the affairs of the company incontravention of the lease their contractual obligations will result in a breach of their rights and legitimate expectation.

Further, it should be noted that on 11th March, 2020 this court pursuant to a notice of motion dated 27th September, 2019 heard and determined that with respect to any claims arising out of the sub-lease agreement and other incidentals thereto be referred to arbitration as a binding clause contained in the aforesaid agreement.

In accordance with that ruling the whole question of the suit is pending determination by the arbitral tribunal suffice to say how the state of affairs following that ruling already in place the parties are expected to preserve the status quo awaiting directions from the arbitrator or a decision on the merits.

In the present case learned counsel for the plaintiff intimates to the court that despite the ruling to have the proceedings referred to arbitration, the defendants on account of its conduct continue to vex and oppress the plaintiffs in breach of the agreement. As per the applications learned counsel urged the court to restrain them.

There have been many jurisprudential precedents of great importance warning of the danger of giving an appearance or undue interference with the proceedings set to be initiated, commenced before an arbitral tribunal, primarily a matter which the court has given directions to that effect. The court in **Cunningham Reid and another v Buchanan Jarain (1988) 1 WLR 678** said:

"The parties in this case incorporated an agreement to arbitrate in their contract at a time when they know, who would be claiming against whom and at a time when they no doubt reasonably anticipated that there would be no claim to arbitrate at all. It was an agreement which they made for better or worse, for richer or poorer, and the ordinary duty of the court is to give effect to the parties own agreement."

The learned counsel for the defendant submitted that the court is now functus officio by virtue of ceding to the application that the arbitral tribunal be rendered as the proper forum for the dispute.

It is important to take cognizance of the facts that the court here is not concerned with the merits of the dispute or an endeavor to do substantive justice between the parties in accordance with the applicable contract law. This exercise is the burden imposed on courts under Section 7 of the arbitration Act which it will be recalled provides:

(1) It is not incompatible with an arbitrator 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."

Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the meaning or any finding of facts made in the course of the ruling as conclusive for the purposes of the application.

In **CMC Holdings Ltd & another v Jaguar Land Rover Exports** (supra) the court held: **"The purpose of the section is not to usurp the power of the arbitral process but limited to the preservation of the assets to ensure the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that the subject matter of the arbitral proceedings will be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection."**

There are three critical questions to be answered at this stage namely:

a) What will be the legal effect of marketing the shares of the suit property currently held in the name of the plaintiff with the sole purpose of alienation, sale or transfer to a third party?

b) To what extent, if at all, in particular to the plaintiffs can damages be an adequate remedy applicable upon outcome of the arbitral proceedings? Given the conflicting affidavit evidence and the fact being that jurisdiction of determining the dispute is currently vested with the arbitrator.

In answer to these questions it is eminently pronounced in an illuminating declaration of legal principles in **National Commercial Bank Jamaica Ltd v Olint Corp Ltd (2009) UKPC 16:**

"[16] ... the court must ... assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] 1ALL ER 504, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

[17] In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld as the case may be. The basic principle is that the court should take whichever curse seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in American Cyanamid [1975] 1 ALLER 504 at 511:

> ***'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.'***

[18] Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.

[19] There is, however, no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the curt should take whichever course seems likely to cause the least irremediable prejudice to one party or the other ... [w]hat is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see Films Rover International Ltd v cannon Film sales Ltd [1986] 3 ALL ER 772 at 780-781. But this is no more than a generalization. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out

to have been wrongly granted are low; that is to say, that the curt will feel, as Megarry J said in Shepherd Homes Ltd v Sandham [1970] 3 ALL ER 402 at 412, 'A high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted."

[20] **For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren: see Films Rover International Ltd v Cannon Film Sales Ltd[1986] 3 ALL ER 772.** ***What matters is what the practical consequences of the actual injunction are likely to be. ... [emphasis added]***

In my view discernible from the notice of motion and background facts of the threats of marketing and sale alluded to by the plaintiff are carried to their logical conclusion, the likelihood of irreparable harm to be suffered outweighs the grounds raised in opposition by the defendant to urge the court to decline the relief of injunction.

It has also been a feature of this case that there are deep seated issues between either party to the contract which require to be determined at the arbitral proceedings in connection with the sub-lease agreement.

In this sense, it is appropriate to grant an interim injunction in terms of Section 7 of the Arbitration Act to the extent that preserves the subject matter of the dispute yet to be heard and determined by the arbitrator. The grant is to prevent the defendants from initiating any marketing, alienation, assignment, sale or transfer or to give effect to any contract rights to a third party to the detriment of the plaintiffs in the whole of Plot No. F20 or thereabouts being part of LR No. 24880 pending the hearing and determination of arbitral proceedings.

Reverting to the notice of motion of 7th April, 2020 on grant of mandatory injunction to restoration for water and electricity supply to the 1st plaintiff property at Vipingo, the principles are well settled.

In considering whether sufficiently the application has justified the criteria with the existence of unpaid bills it would be conscientious to observe the following principles in terms of the interim measure sought to restrain wrongful conduct, when the subject matter is either pending before court or in this case has already been referred to arbitration. For exercise of discretion the general positon is as articulated in the case of Kenya **Breweries Ltd v Auther v Washington Okeyo (2002) 2002 eKLR** the Court of Appeal decision went as follows:

"The test whether to grant mandatory injunction or not is correctly stated in Halsbury Laws of England 4th Edition paragraph 948 that:

> ***"a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary out, which can be easily remedied, or if the defendant attempted to break a contract on the plaintiffs, a mandatory injunction will be granted on an interlocutory application." (See also Nation Media Group & 2 others v John Harun Mwau (2014) eKLR).***

The court must first be satisfied that it is a case of extreme hardship and compelling circumstances for interim mandatory injunction to issue. In this regard, it may happen one of the parties to the agreement has taken steps not to perform certain obligations necessary for the purpose of preserving evidence or the assets. In order to prevent a breach of obligation it is nevertheless mandatory to grant an injunction to compel performance of the requisite acts which are likely to occasion prejudice or injustice before the dispute is fully determined.

In the instant case it is alleged that the defendants disconnected the electricity and water supply to the premises of Nicholas Charles Allen. He has further prayed for orders of interim injunction for the restoration of the utilities pending the hearing and determination of the arbitration. The basis for the disconnection from the point of view of the defendant was that either inadvertently, or neglect or for the non-performance the plaintiff has failed to settle the outstanding bills.

I think the Arbitrator would be best seized of jurisdiction at an opportune time when the trial commences to distill all that there is between the plaintiff and the defendant. As of now I am unable to agree to the position taken by the defendant that this court is functus officio to adjudicate over the applications.

That view was on the basis of the plaintiffs failure that he was in breach of not paying for the utilities. It seems to me quite clear that the conduct of the defendant was tortious given the fact that the claim on reciprocal rights, duties and obligations of the parties are all within the domain of the arbitrator. I must premise that the whole agreement between the parties may be kept in perspective by the arbitrator.

In my opinion in disconnecting water, and electricity as did the defendant is one way to dismember the dispute and render the arbitral proceedings untenable.

This being an interlocutory matter, there is no standard for ascertaining the invasion or threats to the plaintiff' rights to enjoy the property and specifically usage of water and electricity, one cannot rule out the nature of the injury to be considered serious which the party in breach may not compensate the injured in terms of money. Having said so much in this monumental dispute, I do exercise discretion to grant the first instance interim stay in terms of Section 7 of the Arbitration Act whatsoever and howsoever against the defendant from interfering with assets which form the subject matter of the set dispute before the arbitrator. It follows therefore that interim mandatory injunction do issue compelling the defendant to reconnect water and electricity to the suit property forthwith pending the determination of the arbitration in accordance with the terms and conditions of the agreement.

Given the earlier ruling thereto no party is at liberty to bring any action or other legal proceedings against the others unless there is a clear demonstration that it would not be an issue first to be heard and determined by the arbitrator. To do so leave of this court shall be sought to bring an action or other legal proceeding against the other.

I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF APRIL, 2020.

.....

R. NYAKUNDI

JUDGE