REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 273 of 2019

GLOBE DEVELOPERS LIMITED.....PLAINTIFF

=VERSUS=

MARK PROPERTIES LIMITED.....DEFENDANT

RULING

1. This is ruling in respect of a chamber summons dated 23rd August 2019. The application which is brought by the Plaintiff/Applicant seeks the following orders:-

1. Spent

2. Spent

3. Spent

4. Spent

5. Pending the hearing and determination of this suit an order of the intended arbitration , this Honourable Court be pleased to grant the Plaintiff an interim measure of protection by way of restraining the Defendant by itself, servants, agents or otherwise howsoever from interfering, hindering, entering into or in any manner howsoever impeding the Plaintiff's quiet possession and construction in their premises to wit LR 209/4904 Riverside Drive or from enjoying their quiet possession of the same.

6. The Officer in Charge of Kileleshwa Police Station do enforce compliance and keep the peace.

7. This case be referred to arbitration.

2. The Applicant is the registered owner of **LR No.209/4904** Riverside Gardens, Riverside Drive Nairobi. By a contract in writing dated 10th July 2016, the Applicant contracted the Respondent to put up 19 storey apartment blocks and parking, ancillary buildings and associated external works and services at Riverside, Gardens, Riverside Drive Nairobi. The practical completion date was 17th May 2019 at an inclusive sum of ***Kshs.1,434,031,250/= .***

3. The Respondent embarked on the contract but at some stage, the Respondent failed to proceed regularly and diligently which led the Architect to issue a notice of default dated 17th May 2019. The default notice demanded that the Respondent remedy the outlined defaults. The Respondent failed to remedy the defaults and proceeded to close the site with no works going on. The closure persisted for three weeks which led the Applicant to issue a termination notice dated 7th June 2019 which directed the Respondent to immediately hand over possession to the Applicant's agents.

4. The Applicant subsequently took possession of the site and posted its guards at the site. The Respondent through its agents with assistance of police officers from Kileleshwa Police Station went to the site on the evening of 7th July 2019 and had the Applicant's guards arrested after which they handed possession of the site to the Respondent. The Applicant sought the intervention of the Inspector General of police through the Regional Police Commander who directed the OCS Kileleshwa Police Station to facilitate the return of the Applicant to the site. On the 14th June 2019, the Applicant was returned to the site. However the Respondent again returned to the site and welded the gates.

5. The Applicant was once more forced to seek the intervention of the police. The Deputy Inspector General of police summoned representatives of the Applicant and the Respondent whereby it was agreed that the Architect was to call for a mutual measurement exercise.

The Architect did call for the meeting on 8th June 2019 whereby it was agreed that the Respondent would vacate the site after a joint measurement exercise is taken. Despite the Respondent receiving the minutes of the meeting of 18th June 2019, the Respondent refused to sign the minutes. There were meetings which followed in which measurement and re-measurement of the works done was carried out in the presence of representatives of both parties. As this was going on , the Respondent declared a dispute with regard to among other issues termination of the contract. The parties attempted an amicable settlement in accordance with clause 45.0 of the contract to no avail.

6. The Respondent's actions have necessitated the filing of the present application in which the Applicant seeks interim orders of protection pending the determination of the dispute before an arbitrator. The Applicant argues that the interim measures of protection are necessary to enable another contractor to go to the site and complete the works to avoid the clients who had purchased the apartments off plan from pulling out. The Applicant also argues that the apartments are exposed as there is no roof and windows have not been fixed. The interior fixtures have also not been done and that the Applicant took a facility from a bank which it is servicing yet there are no works going on. The Applicant argues that the Respondent's remedy lies in damages and therefore should not be allowed to impede the Applicant's work on its property.

7. The Respondent has opposed the Applicant's application based on a replying affidavit sworn on 27th September 2019. The Respondent contends that the Applicant's application is meant to secure an eviction against it without payment of its dues. The Respondent further contends that the remedy available to the Applicant in case of delay is liquidated and ascertained damages in accordance with clause 45 of the contract. The Respondent attributes delay in completion of the works due to disruption by the Applicant.

8. The Respondent argues that it proceeded regularly and diligently contrary to the allegations by the Applicant and that it made application for payment but in breach of the contract the consultants delayed the evaluations of the applications and at times understated the certificates. The Respondent further argues that as at the purported termination of the contract, the value of work had been understated by approximately 265,201,046/= which put the Respondent in extreme financial stress and that the Applicant has not paid fully as alleged.

9. The Respondent also takes issue in the manner in which the two default notices were delivered together contrary to the procedure of notice of termination. The Respondent contends that it has never completely stopped work on site except from 7th June 2019 when it was asked to stop based on termination. The Respondent denies that there was any agreement reached on 18th June 2019 for the Respondent to vacate the site. On the contrary, the Respondent claims that it is the Applicant which attempted to evict it using police, an act which it resisted.

10. The Respondent concludes that its officials refused to sign minutes of a meeting held on 18th June 2019 as it was not a true reflection of what transpired and that despite the actions by the Applicant, the Respondent has been willing to settle the matter and had communicated its choice of negotiators to the Applicant, but that the Applicant has frustrated the commencement of the negotiations.

11. The Respondent argues that it is on site in accordance with the contract terms but it is still willing to negotiate on the issues of valuation. The Respondent finally argues that if the court is minded to grant the prayers sought, then the applicant has to give a suitable bank guarantee in the sum of ***Kshs.350,000,000/=*** or alternatively grant vacant possession on payment of ***Kshs.325,000,000/=*** owed to it.

12. In a further affidavit sworn on 27th September 2019, the Applicant denies the allegations of the Respondent in the replying affidavit and in particular that there was understatement of the works done by ***Kshs.265,201,046.*** The Applicants contends that so far, the Respondent has been paid a sum of ***Kshs.668,996,055/=*** whereas ***Kshs.74, 332,895,92*** has been retained as per the contract pending completion.

13. On the issue of the two default notices being sent together, the Applicant denies that this was the case. The Applicant argues that the default notice dated 17th May 2019 was sent to the Respondent on the same day by a rider but that the Respondent refused to receive it.

14. The Applicant states that the Respondent had sought ex-parte orders in **NBI HCCC No.179 of 2019 Mark properties Ltd Vs Globe Developers Ltd** but that when it failed to get orders, it forcefully took possession of the site using hired goons.

15. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. This is an application which was brought under Section 7 of the Arbitration Act. There is no contention that the dispute which has arisen herein is headed for arbitration. The duty of this court is therefore only to determine whether the Applicant has shown grounds for issuance of interim measure of protection. There are a long line of cases which have held that where a matter is headed to arbitration, the Court should be cautious not to address matters which the arbitrator is going to determine.

16. In **Safaricom Limited Vs Ocean View Beach Limited & 2 others (2010) eKLR Nyamu J A** stated as follows:-

" 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 before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties".

17. In the instant case, there is no contention that there is an arbitration clause in the contract. Indeed both parties to the dispute are raring to go for arbitration. The issues or questions which stand for determination are firstly whether the subject matter of the dispute is under threat; secondly which appropriate measure of protection should be granted and lastly, for what period should those interim measures last. In the instant case, the Applicant has given details of how the Respondent started defaulting in the construction works and the efforts which have been undertaken to get out of the problem.

18. It is clear from the replying affidavit by the Respondent there have been attempts to settle out the matter. The attempts have been geared towards the Respondent vacating the site to enable another contractor to carry on with the works. There have been allegations that the Respondent at some stage vacated the site but later came back. The Respondent conceded that there was a meeting held on 18th June 2019 and that there were minutes which were circulated and that its officials refused to sign the minutes as they were not a true reflection of what transpired at the meeting.

19. The Applicant has stated in the two affidavits that there was measurement and re-measurements of works which the Respondent had carried out including the materials on site. This has not been denied. The Respondent has also conceded that it stopped working on 7th June 2019 when it was informed that the contract had been terminated. Whether the termination was lawful or not is not for this court to determine.

20. The Applicant has given the details of how an incomplete building which is the subject of the arbitration is wasting away. These details are contained in paragraph 27 of the further affidavit. I wish to reproduce the same as follows:-

> ***a. The steel bars at the rooftop are currently exposed to the elements by reason of which they could rust thereby comprising the structural integrity of the buildings.***
>
> ***b. The form – work at the rooftop is being compromised and it is liable to be re-done.***
>
> ***c. The warranty of some installations like the lifts will lapse if they cannot do the fittings within the contractual period.***
>
> ***d. Fittings like wardrobes and kitchens have been fixed in some apartments, which the Defendant has not affixed windows in. These exposes them to elements, to their detriments.***
>
> ***e. The doors are currently stored, and are susceptible to warping if stored for inordinate periods.***
>
> ***f. The concrete work on the rooftop is currently not being cured by reason of which it could develop cracks, necessitating the said works to be re-done.***
>
> ***g. All internal timber work like the stair case should be covered by now, given that there are no windows, and it has not been done thereby further imperilling the said works .***
>
> ***h. The Plaintiff stands to expose itself to approximately fourthy buyers of the apartments.***

21. It is clear from the contents of paragraph 20 herein above that the subject of arbitration is under real threat. There is therefore need to grant interim measure of protection. The contract has already been terminated. There are no works going on. The parties had already embarked on the exercise of measurement of works already done and the materials already on site. Calculations of the amount of works done and materials on site are going on. We are aware that arbitration proceedings take time.

22. The Applicant is basically seeking to mitigate its loses. This is why I agree with the reasoning in **Mapenzi Resorts Ltd Vs Sabaki Builders**

(2014) eKLR where Justice Khaminwa declined to discharge a mandatory injunction which had been granted in favour of the Plaintiff /Respondent removing the Applicant from the construction site. In **Itabuild Imports Ltd Vs AIC Kijabe Hospital (2015) eKLR** Justice Ogola declined to allow an application by Itabuild imports Ltd which sought to restrain AIC Kijabe Hospital from contracting another contractor to finish the works which Itabuild Imports Ltd had failed to complete. The contract between Itabuild Importers Ltd and AIC Kijabe had been terminated and the Judge held that if Itabuild Imports Ltd succeeded at the arbitration that the contract was unlawfully terminated, it could be paid damages.

23. The Respondent is arguing that it is on site and is holding on to the site as lien until payment. The law is clear that in a building contract the issue of lien does not arise. See the case of **Saleh Mohammed Juma Saleh Mohammed Vs Ramla Rubeiya Said & Another (1998) eKLR**.

24. The extent of threat to the subject matter of the intended arbitration has been stated herein above. The issue herein is finishing of an incomplete building. It will not be precise to estimate when the works will be completed. In the circumstances thereof, this court cannot prescribe any definite time but will say that the interim measure of protection sought will last until hearing and determination of the intended arbitration.

I therefore find that the Applicant's application has merits. I allow it in terms of prayers ***5, 6,***and ***7***. The Respondent shall bear the costs of this application.

It is so ordered.

Dated, Signed and Delivered at ***Nairobi*** this **14th** day of ***October 2019.***

E.O.OBAGA

JUDGE

In the presence of ;-

Mr Wandabwa and Mr Cohen for Applicant

Mr Nyaanga and Mr Sanjay for Respondent

Court Clerk : Hilda

E.O.OBAGA

JUDGE