



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO.E 417 OF 2018**

**IN THE MATTER OF THE ARBITRATION ACT 1995, AND IN THE MATTER OF AN ARBITRATION OVER THE CONSTRUCTION AND COMPLETION OF RESIDENTIAL MASIONETTES ON L.R. NO.209/3218/2 SUGUTA ROAD KILELESHWA**

**VINAYAK BUILDING LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**SONILE HOLDINGS LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

(1) Before this Court is the Chamber Summons Application dated 5<sup>th</sup> December 2018, by which **VINAYAK BUILDERS LIMITED** (the Plaintiff/Applicant herein) seeks the following Orders:-

**“(1) SPENT**

**(2) SPENT**

**(3) That the Defendant be restrained from transferring, charging, mortgaging, letting, disposing of or in any way dealing with the property known as Crystal Apartments on L.R.No.209/ 3218/2 at Suguta Road Kileleshwa pending the hearing and determination of this application.**

**(4) That the Defendant be restrained from transferring, charging, mortgaging, letting, disposing of or in any way dealing with the property known as Crystal Apartments on L.R.No.209/ 3218/2 pending the hearing and determination of this application.**

**(5) That the Defendant be restrained from transferring, charging, mortgaging, letting, disposing of or in any way dealing with the property known as L.R.No.209/3218/2 pending the hearing and determination of this application.**

**(6) In the alternative, the Defendant does give security of Kenya Shillings Eighteen Million Nine Hundred and Thirty nine twenty Seven Shillings and cents ninety only (Kshs.18,939,027.99) in cash to be deposited in an interest earning account in the joint names of the firms of the advocates on record herein for the Plaintiff and Defendant or by way of a bank guarantee from a reputable financial institution acceptable to the Plaintiff within such time as the court may find reasonable.**

**(7) Costs of the application provided for.**

(2) The application was premised upon **Article 159(2)(c)** of the **Constitution of Kenya 2010**, **Section 7** of the **Arbitration Act 1995**, **Rule 3** of the **Arbitration Rules 1997**, inherent powers of the Court and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by **PREMJI D. VEKARIA**, the Managing Director of the Plaintiff Company.

(3) **SONILE HOLDINGS LIMITED** the Respondent/ Defendant opposed the application through a Replying Affidavit dated **19<sup>th</sup> December 2018**, sworn by **DOMINIC KOSON**, the Managing Director of the Respondent Company. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed its written submissions on **28<sup>th</sup> January 2019** whilst the Defendant/Respondent filed its submissions on **11<sup>th</sup> February 2019**.

## **BACKGROUND**

(4) The Plaintiff entered into a Joint Building Council Agreement, executed between the parties on **14<sup>th</sup> November 2016**, for the construction and completion of residential apartments to be known as **“Crystal Apartments on LR.No.209/3218/2, Suguta Road Kileleshwa** for a sum of **Kshs.56,671,420/=**. The contract was for a period of 52 weeks with the commencement date being **1<sup>st</sup> November 2016** and completion date was to be **31<sup>st</sup> October 2017**. However the Respondent ran short of funds and the project was extended for a further year and was therefore due to be completed by **30<sup>th</sup> November 2018**.

(5) The Plaintiff/Applicant avers that it commenced the work and performed the contract to the Defendants satisfaction, but when the Plaintiff presented the certificates to the Defendant for payment the latter failed and/or declined to tender the payments required. The Plaintiff then issued a notice to suspend work on **20<sup>th</sup> July 2018** and on **26<sup>th</sup> July 2018** works were suspended for non-payment and certification of payments due from the Defendant. On **4<sup>th</sup> April 2018** the Plaintiff/Applicant issued a dispute notice and on **9<sup>th</sup> August 2018** submitted its claims to Arbitration seeking an award of **Kshs.18,939,027.99** together with interest thereon and costs.

(6) The Applicant states that the Defendant is purporting to sell the Apartments pending the outcome of the arbitration with a view to disposing of its assets which they submit would render the intended arbitration nugatory. They pray that the court issue an injunction to conserve the suit property pending the determination of the Arbitral process.

(7) In opposing the application the Defendant through its Managing Director avers that the Plaintiff has failed to establish a prima facie case to warrant the issuance of the temporary orders sought. Further the Respondent contends since an Arbitral Tribunal has already been set up under the chairmanship of **O.S Simon Malonza** this is a matter that ought to properly be placed before the said arbitral tribunal, which is vested with powers to grant the orders being sought. The Defendant/Respondent also states that it has already sold off most of the Apartment units to clients therefore granting interlocutory orders at their stage would be inappropriate. In response to the sum being claimed by the Plaintiff/Applicant the Respondent’s claim that they have already paid out a sum of **Kshs.6,227,505/=** at the time of termination of the contract, thus the sum being claimed by the Plaintiff is grossly exaggerated.

## **ANALYSIS AND DETERMINATION**

(8) I have carefully considered this application, the submission by both counsel, as well as the relevant statute and case law. The only issue for determination is whether this court has jurisdiction to grant the orders being sought.

(9) **Article 159(2)(c)** of the Constitution of Kenya encourages arbitration as a means of alternative dispute resolution. Therefore Courts are obliged to uphold and protect the independence and autonomy of the arbitration process. The Plaintiff/Applicant places reliance on **Section 7** of the **Arbitration Act** which allows a party to seek interim order either before or during arbitral proceedings. **Section 7** provides as follows:-

**“(7) Interim measures by court.**

**(1) 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.**

**(2) 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 ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.**

(10) The Respondent however disputes the applicability of **Section 7** arguing that **Section 18** of the **Arbitration Act** gives powers to an Arbitral Tribunal to grant the very same orders being sought before this court. Given that the Tribunal is already in place, the Respondent posits that this application ought not be entertained by the Court.

**Section 10** of the Arbitration Act provides as follows:-

**“Except as provided in this Act, no Court shall intervene in matters governed by this Act”**

**Section 18** of the same Act provides thus:-

### **18 Power of Arbitral Tribunal**

**(1) Unless the parties otherwise agree, an arbitral tribunal may, on the application of a party-**

**(a) Order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure; or**

**(b) Order any party to provide security in respect of any claim or any amount in dispute; or**

**(c) Order a claimant to provide security for costs.**

**(2) The arbitral tribunal or a party with the approval of the arbitral tribunal, may seek assistance from the High Court in the exercise of any power conferred on the arbitral tribunal under subsection (1).**

(11) From the above it is manifest that although courts have the power to intervene in arbitral proceedings, such interference ought to be limited and ought not in any way however result in any prejudice to the arbitration proceedings. The court ought to refrain from making any orders that move towards resolving the matter in dispute between the parties. Similarly the court ought to refrain from delving into matters which the Arbitral Tribunal has jurisdiction to hear and determine. These are matters which ought to be left exclusively in the hands of the arbitrator.

In the case of **Cetelem Vs Roust Holdings (2005) EWCA civ 618** it was stated:-

**The whole purpose of giving the court power to make such orders is to assist the arbitral process in cases of urgency before there is arbitration on foot...of course, in any case where the court is called upon to exercise the power, it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertaking from the claimant, that the substantive questions are reserved for the arbitrator or arbitrators** [own emphasis]

(12) Further the court of Appeal in the case of **Safaricom Limited V Ocean View Beach Hotel Limited & 2 others CA 327 of 2009** set out factors to be taken to account before issuing the interim measures of protection. They include:-

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? [own emphasis].

(13) The question then arises as to what is the subject matter of the Arbitration in this case. The dispute which the Plaintiff/Applicant's referred to Arbitration was the non-payment of the sum of **Kshs.18,939,027.99** which they claimed was due and owing from the Defendant/Respondent. However by this application the Plaintiff/Applicant seeks to stop the Defendant from disposing of Apartment Units on **LR.No.209/3218/2 Suguta Road Kileleshwa** on the basis that these are the only assets held by the Defendant which would be available to service any award.

(14) In the case of **CMC HOLDINGS LTD & ANOTHER Vs JAGUAR LAND ROVER EXPORT LIMITED 2013 eKLR**, the court held that there exist a distinct difference between a contract and the subject matter of a suit. The **subject matter** of the arbitration is the money which the Plaintiff/Applicant claims it is owed by the Defendant. As such this court declines the invitation to interfere with property which does not form the subject matter of the arbitration process. To do this would be to exceed the jurisdiction conferred upon the court by the **Arbitration Act**. The Court can only grant orders provided for by said Act.

(15) In **EAST AFRICAN POWER MANAGEMENT LTD –VS- WEST MOUNT (K) LTD (Nairobi Civil Appeal No.55 of 2006)** the Court of Appeal reiterated that the role of Courts in arbitration matters was merely facilitative. That under Section 10, the Court had a very limited role in intervening where parties had voluntarily agreed to refer their dispute to arbitration.

This is a case where the parties had agreed to refer any disputes arising from their Agreement to Arbitration for resolution. The arbitral tribunal has already been set up and a chairman appointed. Under **Section 18** of the **Arbitration Act** the present application is one which lies within the province of that Arbitral Tribunal, and as such ought to have been made before said Tribunal.

(16) In **SECRETARY COUNTY PUBLIC SERVICE BOARD & Another –Vs HULBHAI GEDI ABDILLE [2017]eKLR**, the Court held as follows:-

**“Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not involve the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under that other regime.”**

This application is one that the Arbitral Tribunal has full jurisdiction to hear and determine. Why rush to court when another forum already exists. The court has no mandate to meddle in matters where the Arbitral Tribunal is already in place. That arbitral tribunal is best suited to hear and determine this application.

(17) Accordingly I find no merit in this application. The same is hereby dismissed in its entirety with costs to the Defendant/Respondent.

Dated in **Nairobi** this **4<sup>th</sup>** day of **October 2019**.

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**Justice Maureen A. Odera**