



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 244 OF 2019

JERALD LEE COOPER.....1ST PLAINTIFF

BOARD OF MANAGEMENT OF DR. B T

COOPER UNITED METHODIST

EDUCATIONAL CENTRE.....2ND PLAINTIFF

=VERSUS=

PATANISHO EDUCATIONAL CENTRE LIMITED.....DEFENDANT

RULING

1. The plaintiffs brought this suit through a plaint dated 22/7/2019. They sought the following orders against the defendant:

a) A declaration that the defendant as the registered lessee of Nairobi/Block 167/504 is bound by the terms of the agreement for sale between the defendant and the 1st plaintiff;

b) A declaration that the 1st plaintiff is entitled to set off all monies paid to the defendant as rent effective 1st July 2018 from the balance of the purchase price.

c) A prohibitory injunction restraining the defendant whether by itself and/or through its servants, agents, advocates or any of them or any person whatsoever acting or purporting to act by, through or under its authority or any of them howsoever from doing any acts contrary to the declarations so claimed as aforesaid including but not limited to any act interfering with the 2nd plaintiff's quiet possession and enjoyment of the suit premises or otherwise howsoever interfering with the suit premises.

d) A mandatory injunction directing and compelling the defendant to refer any or all alleged disputes or claims regarding the terms of the agreement for sale dated 16th March 2018 to arbitration.

e) General damages

f) Costs of this suit

g) Interest at court rate on items (e) above from the date of filing this suit.

h) Any other or further remedy that the court may deem fit to grant.

2. Simultaneous with the plaint, the plaintiffs brought a notice of motion dated 22/7/2019 seeking the following orders:

1) Spent.

2) That pending the hearing and determination of this application inter partes, an injunction do issue restraining the defendant, by itself, its servants or agents, or advocates or any of them or any person whatsoever acting or purporting to act by, through or under its authority or any of them howsoever from interfering with the plaintiffs quiet possession and enjoyment of the suit premises or otherwise howsoever interfering with the premises occupied by the 2nd plaintiff, or terminating the agreement of sale dated 16th March 2018 between the 1st plaintiff and the defendant or evicting the 2nd plaintiff from the suit premises on that piece of land known as Title Number Nairobi/Block 167/504.

3) *That pending the initiation, adoption and conclusion of the intended arbitration proceedings an injunction do issue restraining the defendant, by itself, its servants or agents, or advocates or any of them or any person whatsoever acting or purporting to act by, through or under its authority or any of them howsoever from interfering with the premises occupied by the 2nd plaintiff, or terminating the agreement for sale dated 16th March 2018 between the 1st plaintiff and the defendant or evicting the 2nd plaintiff from the suit premises on that piece of land known as Title Number Nairobi/Block 167/504.*

4) *Costs of this application be provided.*

3. The above notice of motion is the subject of this ruling. It was supported by an affidavit sworn on 9/7/2019 by Jerald Lee Cooper, a second affidavit sworn on 22/7/2019 by Reuben Replie Osono, and a supplementary affidavit sworn on 21/1/2020 by Reuben Replie Osono. The application was canvassed through written submissions dated 2/12/2019. The defendant opposed the application through a replying affidavit filed on 6/12/2019 and written submissions dated 20/1/2020.

4. The case of the plaintiffs was that at all material times, the defendant was the registered leasehold proprietor of Title Number **Nairobi/Block 167/540** situated in Kayole, Nairobi (**the suit property**). On 16/3/2018, the defendant entered into a sale agreement with the 1st plaintiff pursuant to which the defendant agreed to sell the suit property to the 1st plaintiff at a purchase price of Kshs 8,120,000. The 1st plaintiff paid the agreed deposit of Kshs 120,000 leaving a balance of Kshs 8,000,000. They contended that it was a term of the contract that any dispute arising out of the contract would be referred to arbitration for settlement. It was further contended that it was a further term of the contract that any variation of the contract had to be in writing and had to be executed by both parties. The plaintiffs contended that the defendant had issued a dishonest notice purporting to unilaterally vary the contract by changing the purchase price from Kshs 8,120,000 to Kshs 12,000,000. They added that the defendant had threatened to evict the 2nd plaintiff from the suit property. They further contended that the defendant had endlessly frustrated the contract by failing to obtain the consent to transfer. Consequently, they sought the above orders.

5. The case of the defendant was that the 2nd plaintiff was not privy to the contract and had without basis defaulted to pay rent. Secondly, the defendant contended that he had obtained all completion documents except the consent of the Nairobi City County Government. His position was that failure to obtain the consent was occasioned by the Nairobi City County Government's inability to issue the consent owing to the unresolved issues surrounding titles in the particular area.

6. The plaintiffs filed written submissions dated 2/12/2019 through the firm of Gitau Gikonyo & Company Advocates. Counsel for the plaintiffs submitted that the conditions to be met before granting an injunction pending arbitration were laid down in the case of **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR**. It was contended that all the conditions spelt out in the above case had been met. It was further submitted that there was evidence that there was a dispute to be referred to arbitration and therefore, the court should intervene under the provisions of the Arbitration Act. Reliance was placed on the decision in **Kenya Oil Co Ltd v Kenya Pipeline [2010] eKLR** and **Prof Lawrence Gumbe & another v Honourable Mwai Kibaki & others, High Court Miscellaneous No 1025 of 2004**. Further reliance was placed on the decisions in **Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR**; **Housing Finance Co of Kenya Ltd v Njuguna**; and **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR**.

7. The defendant filed written submissions dated 20/1/2020. It was the defendant's submission that the only available remedy was rescission of the sale agreement because issuance of the consent to transfer was indefinite. It was further contended that the dispute before court arose because of the 2nd plaintiff's default to pay rent and was unrelated to the sale agreement.

8. I have considered the said application together with all the evidential materials placed before the court in support and against the application. I have also considered the relevant statutory framework and jurisprudence. Prayer 1 (one) relates to certification and urgent disposal of the application. It is therefore spent. Prayer 2 relates to interim relief pending the *interpartes* hearing and determination of the application. The application has been heard and is being determined through this ruling. Prayer 2 is therefore equally spent. What remains for determination is prayers 3 and 4. The single key issue falling for determination in this application, therefore, is whether the plaintiffs have satisfied the criteria for grant of an interim injunction pending initiation and conclusion of intended arbitral proceedings in terms of prayer 3 of the motion.

9. What emerges from the plea in the present application is that the court is invited to exercise its jurisdiction to grant an interim measure of protection under Section 7 of the Arbitration Act, which 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 principles upon which this court exercises jurisdiction under Section 7 of the Arbitration Act were outlined by the **Court of Appeal** in **Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others [2010] eKLR** in the following words:

“An interim measure of protection such as that sought in the matter before us is supposed to be issued by the court under Section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for the grant of injunctions as the High Court purported to do in this matter....Under our system of the law on arbitration, the essentials which the court must take into account before issuing the interim measure of protection are: (i) the existence of an arbitration agreement; (ii) whether the subject matter of arbitration is under threat; (iii) in the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application; and (iv) for what period must the measure be given especially if requested

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

11. Before court are two plaintiffs suing jointly. They jointly seek an interim measure of protection under Section 7 of the Arbitration Act. The arbitration agreement they are relying on is dated 16/3/2018 and was between the 1st plaintiff on one part and the defendant on the other part. The 2nd plaintiff was not privy to the arbitration agreement. The 2nd plaintiff cannot therefore enforce the arbitration agreement against the defendant. Similarly, the 2nd plaintiff has no *locus* to move the court to exercise its jurisdiction under Section 7 of the Arbitration Act. Because the plaintiffs brought a joint suit and are jointly seeking the interim measure of protection, they do not, in my view, satisfy the requirement for existence of an arbitration agreement. On that ground alone, the plea for interim measure of protection cannot be granted to the two plaintiffs on the platform of this joint suit and joint application because to do so would amount to granting a relief under Section 7 of the Act to a stranger to the arbitration agreement. The stranger is the 2nd plaintiff.

12. The net result is that the plaintiffs' application dated 22/7/2019 is found to be unmerited and is rejected. The plaintiffs shall bear costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF MAY 2020.

B M EBOSO

JUDGE

In the presence of:-

Mr Gikonyo for the Applicants/Plaintiffs

June Nafula - Court Clerk