



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 222 OF 2018

CM CONSTRUCTION (EA) LIMITED.....PLAINTIFF

VERSUS

JUNCTION APARTMENTS LIMITED.....DEFENDANT

RULING

1. Section 19 of the Civil Procedure Act Cap 21 provides as follows:

“every suit shall be instituted in such manner as may be prescribed by the rules.”

2. The rules referred to in that section, are the Civil Procedure Rules (herein after referred to as the Rules).

3. Order 3 Rule 1 (1) of the Rules provides:

“every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.”

4. Order 37 of the Rules sets out who may take out originating summons and in respect of which matters. Originating summons may for example be taken out by the executors or administrators of a deceased person to determine various questions set out in that rule.

5. Order 51 Rule 1 of the rules provides:

“all applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provides”.

6. The definition section 2 of cap 21 defines pleadings to include; petition, summons and statement of claim.

7. From the above it becomes clear that a civil suit can either be instituted by plaint under Order 3 Rule 1 of the Rules, by originating summons under Order 37 of the Rules or by way of petition. It is only once the civil suit has been instituted that a party can file an application which, as provided under Order 51 should be by way of motion.

8. Before me in this matter is an action instituted by way of chamber summons. By that chamber summons, the plaintiff, CM construction (EA)Limited, seeks the following orders:

“i. That pending the hearing and determination of this application an order do issue compelling the respondent to pay the sum of Kenya Shillings Twelve Million Five Hundred Thousand (Ksh 12,500,000/=) in respect to certificate number 18 issued on the 15th March 2018 by the project architect for developments undertaken by the applicant at junction apartments limited Title Number Dagoretti/Riruta/6608.

ii. That pending the hearing and determination of this application an order do issue compelling the respondent to pay interest in respect to the unpaid sum of Kenya Shilling Twelve Million Five Hundred Thousand (Ksh 12,500,000/=) for the period it has remained unpaid for developments undertaken by the applicant at junction apartments limited Title Number Dagoretti/Riruta/6608.”

9. It is clear from the above that this was not only instituted in a manner not prescribed by the rules but, being an interlocutory application it

seeks final orders.

10. The defendant, Junction apartment Limited in my view, is correct in submitting that the orders sought by the plaintiff are legally untenable as they are final orders which cannot be granted in an interlocutory application.

11. The defendant raised three preliminary objections to the plaintiff's application as follows:

"1.This Honourable court lacks the jurisdiction to hear & determine the Applicant's Application dated 31st May 2018 by virtue of Clause 45.0 of the contract dated 22nd October,2012 entered into by the parties in the standard form published by the joint Building Council, Kenya April 1999 Edition, which provides arbitration as the dispute resolution mechanism to be used in cases of disputes;and the fact that the dispute herein has already been referred to arbitration.

2.The application is res judicata as the issues raised therein have been determined in HCC No. 156 of 2018.

3.The application is incompetent and legally untenable in view of the well laid cardinal principle that no final order may issue on an interlocutory application."

12. The 3rd objection I have already alluded to above, and I accordingly uphold it.

13. The plaintiffs and the defendant's relationship is governed by a building contract dated **22nd October 2012**. Clause 45.1 of that contract provides as follows:

"In case any dispute or difference shall arise between the Employer (Respondent/Defendant herein) and the contractor (Applicant/Plaintiff herein); either during the progress or after completion or abandonment of the works such disputes shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment by the Chairman or Vice Chairman of The Architectural Association of Kenya on request of the applying party."

14. The plaintiff by a letter addressed to the defendant and dated **29th May 2018**, gave notice of the dispute that had arisen between them relating to unpaid certificate no. 18. The plaintiff by that letter informed the defendant that it would proceed to refer the dispute to arbitration.

15. By plaintiff's letter dated **30th May 2018**, addressed to the chairman of Architectural Association of Kenya requesting that that chair to appoint an arbitrator over the dispute.

16. It would follow from the above that the arbitration process has commenced over the dispute and this court bearing in mind section 10 of the Arbitration Act Cap 49 is not permitted to intervene with this dispute. I am well guided by the decision **Kenya Airports Parking Services Ltd & Another vs Municipal Council of Mombasa**[2010]eKLR, where the judges considering the court of appeal decision in **Anne Mumbi Hinga vs Victoria Njoki Gathara (2009) eKLR** stated:

"it is clear from the above decisions of the Court of Appeal, that this court cannot intervene and consider matters to do with the merit of the dispute between the plaintiffs and the defendant. That is an issue that is squarely within the province of the arbitrator. I decline the invitation by the defendant to consider issues regarding the validity of the agreement between the plaintiffs and the defendant. That issue shall be determined by the arbitrator. The upshot of the above reason is that the defendant's notice of motion dated 16th July 2009 lacks merit and is hereby dismissed with costs to the plaintiffs."

17. This court lacks jurisdiction to grant the prayers sought in the chamber summons in view of the existence of the arbitration clause and because that arbitration process has commenced, and more importantly because the plaintiff seeks final orders which in accordance with the parties agreement can only be entertained by the arbitrator. I therefore uphold the first objection raised by the defendant.

18. On the 2nd objection, I am unable to make determination on it because the decree the defendant relies upon in support of this objection does not identify the immovable property. Accordingly, the 2nd objection therefore fails.

19. What then should be the orders of the court in view of the above discussion?

20. The effect of the breaches made by the plaintiff discussed above, is to dismiss the chamber summons with costs. In ordering dismissal of the chamber summons nothing remains to be determined in this matter. I will therefore order for this file to be closed.

21. The final orders of the court thereofer are:

a. The chamber summons dated 31st May 2018 is dismissed with costs to the defendant.

b. This file is hereby ordered to be closed henceforth.

DATED, SIGNED and DELIVERED at **NAIROBI** this **20th** day of **September**, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

MARY KASANGO

JUDGE