



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO 148 OF 2019

RHINO VALLEY LODGE LIMITED.....PLANTIFF

VERSUS

KENYA WILDLIFE SERVICES.....DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion dated 15th August, 2019 brought under Section 7 (1) of the Arbitration Act, 1995, and Sections 1A, 1B, 3A and 63 (c) and Order 40 Rules 1, 2 & 4 of the Civil Procedure Act and Rules and Articles 25 (c), 48 and 50 (1) of the Constitution of Kenya. The plaintiff/applicant is seeking for conservatory orders of protection against the defendant from evicting the applicant from all the portion of land measuring 12.3030 ha being part of LR. No. 24360 and from terminating the lease dated 30th September, 2015 in relation to the suit premises pending the hearing and determination of this application and further determination of the arbitration proceedings between the parties. The application is premised on grounds thereon and supported by the affidavit sworn by Wilfred K. Njiiri.

2. It is the applicant's case that it is a tenant of the respondent in respect of the suit premises. That the lease dated 30th September, 2015 is for 20 years and has an elaborate dispute resolution mechanism. The applicant avers that a dispute has arisen between the parties after the respondent gave notice to the applicant to terminate the lease and forcefully take over possession of the suit premises without following the dispute resolution mechanism and without any eviction orders. That the applicant wrote to the respondent declaring a dispute and commencing the arbitral process within the meaning of the lease and of Section 22 of the Arbitration Act, 1995. The Applicant is apprehensive that it will be evicted and risk losing its investment unless the court restrict the respondent from carrying out the threat. The applicant admits that it is in arrears of rent which it attributes to tribal clashes, post-election violence as well as terrorist attacks. The applicant states that having commenced arbitration, it is ready and willing to have the dispute resolved through arbitration as agreed by the parties to the lease and requires protection until that process is over. The applicant further states that should the respondent evict it from the property, bar the applicant's access to the property, take possession or give possession of the suit property to any other tenant, the arbitration will be rendered nugatory and the intention of the parties will be defeated.

3. The respondent filed a preliminary objection dated 6th November, 2019 on the grounds that the applicant lacks the locus standi to institute the proceedings since the lease was never stamped and registered. The respondent also filed grounds of opposition dated 6th November, 2019 on the grounds that the suit is incurably defective and bad in law, that the application seeks to redraw a written agreement, that the applicant has approached the court with unclean hands and is unworthy of the equitable remedy of injunction and that the applicant has erroneously invoked the jurisdiction of this court. The respondent also filed the replying affidavit sworn on 8th November, 2019 by Doreen Mutunga in which she deposed that the lease was not stamped and registered as required by law and that the applicant has approached the court with unclean hands since it is indebted to the respondent to the tune of Kshs.9,4643,778.20 and hence unworthy of the equitable remedy of injunction. The respondent avers that if the court is inclined to hear the matter on merit then the same be referred to the mediation by a judicially accredited mediator.

4. M/s Kinyua Muyaa & Co. Advocates for the Applicant submitted inter alia, that the function of this court at this stage is to consider interim measures of protection under Section 7 (1) of the Arbitration Act pending arbitration. That it is not desirable for the court to go into the merits of the dispute. Counsel for the applicant proposed that instead of a court appointed mediator, the parties be given time and opportunity to appoint their own mediator and if they are not able to agree then the court may appoint one or the parties should go to arbitration. The applicant's counsel urged the court to either allow the motion as drawn or in the alternative and as suggested by the respondent to issue and extend interim measures of protection pending mediation and failing mediation, arbitration in terms of the dispute resolution mechanism. That costs of the application may abide the outcome of the arbitration.

5. M/s Musinga & Company Advocates for the respondent, submitted that having not registered the lease, no interest was vested upon the applicant and as such it lacks the locus standi to institute and enforce these proceedings. They relied on the case of W.J. BLAKEMAN LIMITED -V- SERVICES LTD (1985)eKLR where the court held that an unregistered lease was void. The respondent's counsel submitted that the arbitration agreement is equally null and void by virtue of a void lease. Counsel referred the court to Section 6 of the Arbitration Act

and submitted that the preliminary objection raised has merit and the suit ought to be dismissed with costs. The respondent's counsel further submitted that whereas there existed an arbitration clause in the lease agreement, there exists no dispute to be referred to arbitration. That both parties agree that the applicant is in arrears of rent and therefore there is no dispute whatsoever. It was submitted that the application is creating a scapegoat over the failure to pay rent. It was the respondent's submission that the application ought to be dismissed or the applicant be ordered to deposit the rental dues of Kshs.9,764,774.00 in a joint interest earning account pending the hearing and outcome of the arbitration proceedings within 60 days from the date of ruling on the application and further orders that the arbitration proceedings to commence within 60 days failure to which the orders of interim protection to lapse automatically.

6. I have considered the application and the submissions made. In this case, both parties are in agreement that there existed an arbitration clause in the lease agreement. It is however, the respondent's submission that there exists no dispute to be referred to arbitration. In my view, it is not desirable for the court to go into the merits of the dispute. The issue that presents itself for this court's determination, in my view, is whether the applicant is entitled to the interim orders sought pending the commencement, hearing and determination of the intended arbitration.

7. Section 7(1) of the Arbitration Act provides as follows:

“(1) It is not incompatible with an arbitration agreement for a party to request the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”

8. The principles that should guide the court in determining an application for interim measure of protection under Section 7 of the Arbitration Act were clearly laid down in the case of **Portlink Limited –v- Kenya Railways Corporation (2015)eKLR** as follows:

“In issuing an interim measure of protection as provided in Section 7 the court's determination of the parties dispute is restricted. The court's role was eloquently outlined in the decision of J. G. Nyamu JA, in the case of Safari Limited –v- Ocean View Beach Hotel Limited & 2 Others (2010) eKLR where it was stated that the court faced with such application should take into account the following : -

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. ”

9. As already stated, in this case, it is common ground that there exists an arbitration clause in the lease agreement. Although the respondent's case is that there is no dispute to be referred for arbitration, at this stage it is not appropriate for this court to make a finding whether there exists a dispute or not. In my view, that is an issue that the arbitrator will have to determine once the arbitration proceedings are commenced as per the lease agreement.

10. The second issue is whether the subject matter of arbitration is under threat. The applicant submitted that the respondent has given the applicant notice to terminate the lease and has threatened to take over possession of the suit premises. The applicant argues that if evicted, it will be severely prejudiced and the arbitration will be rendered nugatory. The respondent on the other hand contends that the applicant has admitted to being in arrears of Kshs.9,764,774.00 and therefore there is no dispute whatsoever in that line. By virtue of the threatened eviction, the subject matter was indeed under threat.

11. Although my answer to the question of whether the subject matter of arbitration is under threat is in the affirmative, I am also to consider whether the applicants have established the third guiding principle (in the Portlink Limited Case (supra), “in the special circumstances which is the appropriate measure of Protection after an assessment of the merits of the application” which special circumstances favour the applicant to warrant the granting of the orders sought. In this case, there is no dispute regarding the rent as the same is admitted. In my view, in order to balance of the interests of both parties, it is only fair to order for interim protection on terms.

12. In the result, I allow the application dated 25th August, 2019 in terms of prayers (a), (b), (c), (d) and (e) on the following conditions:

i) The applicant to deposit the rental dues of Kshs.9,764, 774/= in a joint interest earning account in the names of the advocates for both parties pending the outcome of the arbitration proceedings within 60 days from the date of this ruling.

ii) Mediation and failing mediation, arbitration in terms of the dispute resolution mechanism to commence within 60 days from the date of this ruling.

iii) Failure to comply with clause (i) and (ii) above, the orders of interim protection to lapse automatically.

iv) Costs of the application to abide the outcome of the arbitration.

13. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 29th day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE