



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO 162 OF 2013 (O.S)
IN THE MATTER OF SECTION 7 OF THE ARBITRATION ACT
AND
IN THE MATTER OF ORDER 37 OF THE CIVIL PROCEDURE RULES

BETWEEN

ROSEMARY KINANU GITUMA..... PLAINTIFF

VERSUS

NDEGE ROAD HOMES LIMITED..... 1STDEFENDANT

HASSCONSULT LIMITED.....2ND DEFENDANT

RULING

1. The Plaintiff's Originating Summons application dated 5th March 2013 and filed on 25th April 2013 was brought pursuant to the provisions of Sections 1A, 1B and 3A of the Civil Procedure Rules, Section 7 of the Arbitration Act, Rule 3 of the Arbitration Rules 1997 and all other enabling provisions of the law. It sought the following orders:-

1. Spent
2. **THAT this Honourable Court be pleased to direct that the Defendants/ Respondents furnish the requisite security pending Arbitration as an interim measure of protection.**
3. **THAT the prayers sought above be confirmed pending the hearing and determination of the dispute between the Plaintiff's/Applicant's and the Defendants/Respondent by Arbitration.**
4. **THAT this Honourable Court be pleased to make all such further Orders and/Directions as it deems fit and just to grant.**
5. **THAT costs of this Application be provided for.**

THE PLAINTIFF'S CASE

2. The Plaintiff's case was that by an Agreement for Sale dated 13th August 2008, the 1st Defendant agreed to sell to her a Town House Number Six (6) at Ndege Gardens in Karen area, Nairobi

- (hereinafter referred to as “the subject property”) for a consideration of the sum of Kshs 31,250,000/=. However, in total contravention of the terms and conditions of the said Agreement for Sale, the Defendants and/or their servants, employees and/or agents sold the property to a third party.
3. She paid several payments towards the stand premium. She disputed that the balance on the outstanding sum was Kshs 6,850,000/=. It was her contention that the Defendants did not give her twenty one (21) days’ notice specifying any default requesting her to rectify the same and that she never received the Rescission Notice. Although the Defendants had offered to refund her monies, the same were below the monies she had expended in purchasing the said subject property and damages incurred thereto.
 4. She swore an Affidavit on 5th March 2013 in support of her application. Her written submissions were dated and filed on 24th September 2013.

THE 1ST DEFENDANT’S CASE

5. Its case was that the Plaintiff’s Originating Summons was incurably defective and an abuse of the court process. Having been brought in bad faith, it prayed that the same be struck off. It said the 1st Defendant was entitled to re-sell the subject property upon default by the Plaintiff. It distanced itself from the transaction as all financial transactions were handled by the 2nd Defendant and contended that it had wrongly been enjoined in the proceedings herein.
6. The 1st Defendant’s written submissions were dated 5th August 2013 and filed on 6th August 2013.

THE 2ND DEFENDANT’S CASE

7. The Replying Affidavit on behalf of the 2nd Defendants was sworn by Mohammed Hassanali on 20th June 2013. It was filed on the same date. The 2nd Defendant also filed Grounds of Opposition dated 20th June 2013 on the same date in which it pointed out that the Plaintiff had not placed any material before the court to demonstrate that the Defendants would not meet the terms of any Arbitral Award that would be issued. It particularly took issue with the Plaintiff’s Originating Summons which it said it was defective for want of form and for failure to state the issues for determination.
8. The 2nd Defendant, which was the 1st Defendant’s agent in the sale of the subject property, denied that there was privity of contract between itself and the Plaintiff. Its case was that it rescinded the Agreement on 1st September 2009 after the Plaintiff failed to remit the monies as and when they became due and sold the subject property to David and Diana Gachewa. They contended that the Plaintiff’s claim ought to have been directed against her advocate to whom they remitted a sum of Kshs 7,100,000/=.
9. Its written submissions were dated 8th July 2013 and filed on 9th July 2013.

LEGAL ANALYSIS

10. All the parties advanced arguments relating to the purchase and sale of the subject property, facts that would ordinarily have been presented before the arbitral tribunal. For that reason, the court will not consider the same. What is of concern to this court is whether or not the Plaintiff would have been entitled to the grant of an order for security for costs pending the hearing and determination of the arbitration between them.
11. The Defendants prayed that the Plaintiff’s Originating Summons be struck out *in limine* for being incurably defective. After perusing the written submissions, the court is inclined to agree with the Defendants right at the outset that the Plaintiff’s prayers in the Originating Summons were defective.
12. The first reason is that under Rule 11 of the Arbitration Rules, 1997 it is stated that Civil Procedure Rules shall only apply to proceedings under the Arbitration Act Cap 49 (laws of Kenya) in so far as they are appropriate. Order 37 of the Civil Procedure Rules, 2010 under which the

- Plaintiff premised her application is not applicable to instances where parties intend to proceed with arbitral proceedings.
13. Secondly, if the Plaintiff had intended to proceed under Order 37 Rule 3 of the Civil Procedure Rules where a vendor or purchaser of immovable property could take out an originating summons for “**determination of any question which may arise in respect of any requisition or objections or any claim for compensation or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of contract)**”, then she ought to have framed her questions for determination by the court.
 14. The prayers by the Plaintiff were not in the nature of questions that were envisaged under Order 37 of the Civil Procedure Rules as had been pointed out by the 2nd Defendant in its Grounds of Opposition. In the circumstances, the Plaintiff’s prayers would not succeed as drafted.
 15. Thirdly, if one was to assume that the Plaintiff was seeking interim measures of protection or an injunction, she was required to have filed a summons in the suit. Indeed, Rule 2 of the Arbitration Rules, 1997 provides that all applications under Section 6 and 7 of the Arbitration Act would be made by summons in that suit. In this case, the Plaintiff filed an originating summons instead. For that reason, the Plaintiff’s prayers cannot be granted by the court as the procedure, which could not be deemed to have been a technicality, was flawed and substantive.
 16. Fourthly, the Plaintiff did not seem to be clear on what relief she was seeking from this court. There is a very distinct difference between interim measures of protection and provision of security of costs. The Plaintiff had sought security for costs as an interim measure of protection. This is completely erroneous as orders under Section 7 of the Arbitration Act are granted to preserve the subject matter in the same state while parties proceed for hearing and determination of their matter by an arbitral tribunal.
 17. The court must ask itself whether its intervention will be for purposes of preservation the subject matter of the arbitral proceedings, the evidence and for preventing wastage of assets. The court wishes to refer to the case of **CMC Holdings Ltd, & Another Vs Jaguar Land Rover Export Limited (2013) eKLR** in which it held that there was a distinct difference between a contract and the subject matter of the dispute. There was nothing to be preserved in this case as the subject property had already been sold to third parties. The horse had already bolted from the stable.
 18. The uncertainty of what the Plaintiff was seeking from this court could also be discerned in her written submissions as she had now sought security for costs under Section 18 of the Arbitration Act. Section 18 (1) (c) of the Arbitration Act which clearly shows that the arbitral tribunal has power to award the same. It provides as follows:-

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).**

19. The court can only intervene in matters governed by the Arbitration Act only as provided for under Section 10 of the Arbitration Act. It cannot clothe itself with powers and jurisdiction it does not have. The effect of the provision is that the court can only grant orders only as envisaged in the said Act. The said Section provides as follows:-

“Except as provided in this Act, no court shall intervene in matters governed by the Act.”

20. Fifthly, the Plaintiff would have difficulties in seeking assistance of the court under Section 18 (2) of the Arbitration Act for the reason that there are no arbitral proceedings pending before any

arbitral tribunal for which assistance of this court would have been sought. The Plaintiff would also have had difficulties convincing the court to assist it in respect of the 2nd Defendant which was not a party to the Agreement for Sale. Notably, the Plaintiff would also not have been permitted to introduce fresh facts at the time of submissions which she had not sought in her application as that would be stealing a match against the Defendants as they would have been denied an opportunity to address themselves to the provisions of Section 18 of the Arbitration Act.

21. Having considered the pleadings, affidavit evidence, written submissions by the parties and the case law in support of thereof, the court was not satisfied that the Plaintiff was able to justify why it should grant her the orders sought as she had also not been to demonstrate that she would not be able to recover the arbitral award if the same was made in her favour bearing in mind that there are no arbitral proceedings commenced to date and more particularly because the proceedings herein were defective. In any event, she would only have sought assistance from the court if the jurisdiction and power of the arbitrator had been ousted by the consent of the parties under the said Section 18 of the Arbitration Act.

DISPOSITION

22. In the premises foregoing, the upshot of this court's ruling was that the Plaintiff's Original Summons dated 5th March 2013 and filed on 25th April 2013 was not merited and being incurably defective, the same is hereby struck out *in limine* with costs to the 1st and 2nd Defendants.

23. It is so ordered.

DATED and DELIVERED at NAIROBI this 4th day of Decemder 2014

J. KAMAU

JUDGE