



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI

CIVIL SUIT NO 417 OF 1989

ALIVIDZA..... PLAINTIFF

VERSUS

LZ ENGINEERING CONSTRUCTION LTD.....DEFENDANT

RULING

The defendant has brought this application under section 6(1) of the Arbitration Act and order 50 rule 1 of the Civil Procedure Rules for an order of this court to stay the proceedings in the suit. The application is supported by an affidavit sworn on 11.2.89 by David Bornstein, the defendant's company General Manager.

The ground on which the application is based is that there is an agreement between the parties to the suit providing for – reference to arbitration of any matter in dispute arising out of the agreement between the parties and that the subject matter of the suit is one such matter.

In his grounds of opposition to this application, the plaintiff blames the defendant for failing to refer the matter to arbitration and claims that he was forced to come to court by reason of lack of any provision in the agreement between the parties of procedures for dealing with the reliefs he is seeking in this court, namely, besides others, an interim injunction to protect his interest in the suit property, pending reference of the matter to arbitration and final disposal thereof.

What emerges from the pleadings filed by the parties in connection with this application and submissions by learned counsel for both parties is that the plaintiff does not really seriously contest the defendant's basic argument ie that the matter be referred to arbitration and that pending such reference and final determination by the arbitrator, the suit should be stayed. The plaintiff however claims that since his interest to the suit property is being threatened by the defendant (see the defendant's advocate's letter dated 5.1.89) and the arbitration process does not provide a procedure for protecting such interest pending the determination of the dispute through the process, his only remedy was to file a court action and apply for an interim injunction.

Having regard to the law on the subject, I think the course of action followed by the plaintiff was fully justified. There is no other way he could have obtained an order to protect his interest in the suit property without first instituting a suit. This becomes clearly so, when it is considered that the defendant, on its part, did not think it fit, in the first place, to invoke the arbitration clause, when a dispute arose between it and the plaintiff, but instead proceeded to threaten cancellation of the sale transaction. That the law clearly allows the plaintiff to apply to court for the type of relief he is seeking in the suit cannot in my view be gainsaid. In *Russell on Arbitration* (19th edition, page 326) the learned author states:-

“In addition to its powers to make orders relating to merely procedural matters, the court has wide powers to make orders for the purpose of preserving the status quo pending arbitration. These powers include those of making orders for the preservation, interim custody or sale of goods, the subject matter of the reference or for the detention or preservation of any property or thing concerned in the reference; of appointing receiver and of granting an interim injunction.” (emphasis is mine)

And citing the case of *Foster v Hasting Corporation* [1903] LT 730, the learned author further states:-

“The court in order to preserve the status quo, in a case where one of the parties to a contract had given a notice purporting to dismiss the contractor, restrained the party from acting on the notice until judgment or further order or until a reference provided for by the contract had been held.”

In the instant case both parties recognize that there is a dispute between them, the proper forum for resolution of which is a reference to arbitration in terms of the agreement between them. At the same time it is clear that the plaintiff has cause to apprehend that the suit property which also is the subject of the agreement between the parties, may be sold unless appropriate orders are made restraining the defendant from doing so. In those circumstances this court is entitled, in an application of this nature (see *Russell on Arbitration* page 327) not only to grant the stay sought but also to protect the status quo by granting auxillary relief including an interim injunction. Accordingly in accordance with the agreement between both the plaintiff and the defendant and in fairness to both parties I make the following orders:-

1. That the proceedings in this suit be stayed until the matter has been referred to arbitration and determined or further orders of this court.
2. That the defendant is hereby restrained from acting upon the letter dated 5.1.89 (marked MA “C” and annexed to the plaintiff’s application) until further orders of this court.
3. That the defendant or its agents are restrained from selling, disposing or otherwise alienating the suit property ie Nairobi (Block 106 /242 (House No 203) until the determination of this suit or further orders of this court.
4. Costs of this application to be costs in the cause.

Dated and Delivered at Nairobi this 28th Day of February, 1989

T. MBALUTO

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JUDGE