



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

MISC. ELC APPLICATION NO. 45 OF 2019

ALFRED NZOMO KITHUSI & 43 OTHERS.....APPLICANTS

=VERSUS=

LONEHILL ESTATE LTD & ANOTHER.....RESPONDENTS

RULING

1. The Applicants filed a Notice of Motion dated 14th March 2019 in which they sought the following orders.

1. Spent

2. Spent

3. That the Honourable Court be pleased to issue a temporary order of injunction restraining the Respondents, its servants, agents and/or employees from selling, transferring, disposing or dealing in any way with the suit premises identified as land Reference No.209/67005/6 comprised in the lease registered in the land titles Registry as LR No. 97457/1 pending the hearing and determination of the arbitration matter between the 1st Respondent and the applicants.

4. That this Honourable Court be pleased to transfer the management of the suit premises to the Applicants pending the hearing and determination of the arbitration matter between the 1st Respondent and the applicants; and

5. That the costs of this application be provided for.

2. The Applicants had entered into sale agreements with the 1st Respondent in which the Applicants agreed to purchase various apartments of different sizes which were being put up by the 1st Respondent on LR No.209/6705/6 (IR No.97457/1) . The Applicants purchased their respective apartments off-plan. Upon completion of the apartments, the apartments were handed over to the Applicants.

3. After the apartments were handed over, the Applicants started experiencing problems with the company which had been given the task of paying utility bills for the common areas. The management company could not even pay electricity bills which were due leading the power distributor issuing a disconnection notice. The Applicants had to give an undertaking to the power distributor not to disconnect the power as that would have comprised the security of the Applicants including their cars.

4. The Applicants tried to talk to the 1st Respondent to complete the sale transaction but the 1st Respondent was unable to. As the agreements which the Applicants had signed provided for arbitration, the Applicants referred the dispute between them and the 1st Respondent to an arbitrator. The Applicants now contend that as the title to where the apartments are located is charged to the 2nd Respondent, the 2nd Respondent might exercise its statutory power of sale and auction their houses. The Applicants cited an incident where a company related to the 1st Respondent had caused houses it constructed to be advertised for sale by public auction for non-payment of the loan it had taken.

5. The Applicants therefore argue that the court should grant them interim measure of protection as per section 7 of the Arbitration Act to protect them as the dispute is being handled at the arbitral tribunal. The applicants argue that the 1st Respondent might sell their apartments to unsuspecting third parties or they be sold in case the 1st Respondent defaults in payment of the loan owed to the 2nd Respondent.

6. The Applicants application is opposed by the 1st Respondent based on a replying affidavit of Peter Kiarie Muraya the Managing Director of the 1st Respondent sworn on 19th June 2019. The 1st Respondent contends that the application by the Applicants is premature in that what the applicants are seeking cannot be done until the title which has been charged to the 2nd Respondent is released and the sub-leases

registered as per the agreements signed with the Applicants.

7. The 1st Respondent argues that it is servicing the loan taken from the 2nd Respondent and that there is no default which will warrant the apartments to be auctioned. The 1st Respondent further argues that the issue of service charge, electricity and incomplete construction works are matters which are active before the arbitrator which proceedings have been delayed due to requests for extension of time by the Applicants to file their amended pleadings.

8. The 2nd Respondent has opposed the Applicants application based on a replying affidavit sworn by Francis Kariuki , a legal officer with the 2nd Respondent. The 2nd Respondent contends that it extended financial facility amounting to Ksh.400,000,000/= which is being serviced by the 1st Respondent. The 2nd Respondent argues that it cannot be restrained from exercising its Statutory Power of Sale should it reach that point and that it has no privity of contract with the applicants.

9. In a further affidavit sworn by the Applicants on 9th July 2019, the applicants state that the 1st Respondent has not explained why it cannot cause partial discharges to be given so that the leases can be registered in their names or why it cannot agree to maintain status quo as the arbitration proceedings go on.

10. I have considered the applicants' application as well as the opposition to the same by the Respondents. I have also considered the submissions by the applicants and the 1st Respondent. There are two issues to be determined. The first one is whether the applicants have shown a case for grant of interim measure of protection. The second one is whether there should be an order directing that the management company be handed over to the applicants pending conclusion of the arbitration proceedings.

11. On the first issue, it has now been settled that in considering whether to grant interim measure of protection, the court does not apply the principles in the case of **Giella Vs Casma Brown & Co.Ltd (1973) EA 358**. The principles to be considered in deciding whether to grant an interim measure of protection were set out in the judgement of Nyamu JA in **Safaricom Limited Vs Ocean view Beach Hotel & 2 other (2010) eKLR** where the Judge stated as follows:-

“ Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-

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”.

12. In the instant case, there is no doubt that there is an arbitration agreement in the agreements signed by the applicants and the 1st Respondent. The only issue to be addressed is whether the subject matter of the arbitration is under threat. The 1st Respondent is servicing the loan which it took from the 2nd Respondent. The second Respondent has not issued any statutory notices. The process of arbitration has commenced and should be nearing completion now. In the circumstances, there is no threat to the subject matter of the arbitration which will warrant the court to give interim measure of protection.

13. On the second issue, the contract between the 1st Respondent and the Applicants was that the Applicants were not to pay service charge for a period of 10 years from the time the apartments were handed over to them. This period has not ended and it will amount to the court to re-writing a contract for the parties if the orders were to be granted. There is therefore no basis upon which this court can make an order vesting the management company on the applicants. I therefore find no merit in the Applicants' application which is dismissed with costs to the Respondents.

It is so ordered

Dated, Signed and delivered at Nairobi on this 14th day of November 2019.

E.O.OBAGA

JUDGE

In the Presence of:-

M/s Wangui for Mr Kissinger for 2nd Respondent

Mr Leibor for Mr Kiprof for 1st Defendant and

Mr Makau for Applicants

Court Assistant: Hilda

E.O.OBAGA

JUDGE