



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CASE NO. 666 OF 2016**

**GODFREY KIARIE KIMANI &**

**MARY WANGUI MUNGAI KIARIE .....PLAINTIFF**

**VERSUS**

**RYAN PROPERTIES LIMITED.....DEFENDANT**

**RULING**

1. This ruling relates to two applications brought by the plaintiffs and the defendant respectively. The plaintiffs' application is a chamber summons dated 17/10/2017 through which the plaintiffs seek the following orders:

**1. That this application be certified as urgent and consequently service of the same be dispensed with and the same be heard ex-parte in the first instance for reason of its urgency.**

**2. That there be an interim conservatory order by way of an interim injunction against the defendant/respondent herein stopping the defendant/respondent by itself, its contractors, agents, employees, servants or others acting through it from in any way continuing with the construction of hostels/multi dwelling units on L.R. 12767/40 (Original 12767/3) pending the inter-partes hearing and determination of the application herein.**

**3. That there be a temporary conservatory order by way of a temporary injunction against the defendant/respondent herein stopping the defendant/respondent by itself, its contractors, agents, employees, servants or others acting through it from in any way continuing with the construction of hostels/multi dwelling units on L.R. 12767/40 (Original Number 12767/3) pending the hearing and determination of the intended arbitration between the plaintiffs and the defendants/respondents or otherwise until further orders by the arbitrator to be appointed.**

**4. That the costs of this application be provided for**

2. The defendant's application is a notice of motion dated 11/7/2018 through which the defendant seeks the following orders:

**1. The application be certified urgent.**

**2. Service of this application be dispensed with in the first instance.**

**3. Pending the hearing and determination of this application, there be an order of stay of further proceedings in the intended arbitration between the plaintiff's and the defendant herein before Mr James Mang'erere (hereinafter referred to as "the arbitrator")**

**4. This honourable court be pleased to set aside the entire ruling by the arbitrator dated 2nd May 218**

**5. Cost of this application be borne by the plaintiffs.**

3. At all material times, the defendant, Ryan Properties Limited was the developer of Grash Gardens Estate, a gated residential estate situated on Land Reference Number 12767/40 in Karen, Nairobi. The plaintiffs purchased two residential units out of the ten units which the defendant initially undertook to develop on the property. The plaintiffs contended that in breach of the respective agreements for sale and leaves the defendant has embarked on the development of hostels on the suit property. Aggrieved by the action, the plaintiff's brought a plaint dated 17/10/2017 seeking the following orders:

**a. That there be a preservatory order by way of a temporary injunction against the defendant herein stopping the defendant**

by itself, its contractors, agents, employees, servants or others acting through it from in any way continuing with the construction of hostels or any other construction save for the 2 remaining town houses as originally approved for development on Land Reference Number 12767/40 (Original 12767/3) pending the hearing and determination of the intended arbitration between the plaintiffs and the defendant or otherwise until further orders by the arbitrator to be appointed.

**b. That there be a preservative order by way of a permanent injunction against the defendant herein stopping the defendant by itself, its contractors, agents, employees, servants or others acting through it from in any way continuing with the construction of hostels or any other construction save for the 2 remaining town houses as originally approved for development on Land Reference Number 12767/40 (Original 12767/3) pending the hearing and determination of the intended arbitration between the plaintiffs and the defendant or otherwise until further orders by the arbitrator to be appointed.**

**c. That this honourable court do issue such other and or further assistance as may be requested during the arbitral process in ensuring that the ends of justice are achieved in this matter.**

**d. That this honourable court be pleased to issue such other and or further orders as the ends of justice may require**

**e. That the costs of this suit be borne by the defendant**

4. Together with the plaint, the plaintiff filed the chamber summons application dated 17/10/2017 on the same day. The application was supported by an affidavit sworn on 17/10/2017 by Godfrey Kiarie Kimani in which he deponed that they fully discharged their obligations under the house purchase contracts but the defendant had continued to commit various breaches, including taking steps towards development of student hostels on the suit land; handling service charge money as private income yet it was supposed to cater for services; treating the borehole on the suit property as private property; and failing to develop the remaining two houses as agreed by the parties. The plaintiffs contended that they had declared a dispute based on the above issues and had initiated arbitration proceedings. They contended that they were apprehensive that the defendant would continue with the construction of the illegal hostels and this would prejudice their rights.

5. The plaintiffs' application was opposed by the defendant through a replying affidavit sworn on 17/11/2017 by Jackson Kanyarati. Although the last two paragraphs of the replying affidavit bear paragraph numbers 42 and 43 respectively, the affidavit does not have paragraphs 27 to 41. In essence, the replying affidavit has only 28 paragraphs.

6. Mr Kanyarati deposed that the reason for reducing the units from 10 to 8 was that the main house which stood on the suit property at the time of signing the agreements was not demolished to create more space for two additional houses as earlier planned and the resultant change was approved by the Physical Planning Department of the then City Council of Nairobi. He added that the claim that the construction of the hostels will prevent the transfer of the reversionary interest to the management company had no basis because the portion on which the hostels are to be constructed had been excised from the rest of the estate, leaving the estate with eight houses.

7. The deponent further deposed that the plaintiffs had not established a dispute worthy reference to arbitration because the issues raised can be resolved by the Nairobi City County Government. He added that the plaintiffs had not established a prima facie case with a probability of success.

8. At the hearing of the two applications, Mr Githara, counsel for the plaintiffs, submitted that the plaintiffs were purchasers of houses in a gated community developed by the defendant in Karen and they hold registered leases in respect of the houses. He added that both the sale agreements and the leases require that any dispute relating to the agreements and the leases be resolved through arbitration. Counsel further submitted that such disputes as contemplated in the agreements and leases have arisen, relating to: (i) construction of student hostels in the estate by the defendant; defective and incomplete works; (iii) refusal by the defendant to hand over the management company; and (iv) refusal by the defendant to register some of the leases. He added that the defendant had admitted that there is a dispute but contended that the dispute was not worthy adjudication through arbitration or civil proceedings. He urged the court to halt further construction until the dispute is resolved through arbitration.

9. Mr Waigwa, counsel for the defendants submitted that the plaintiffs did not have *locus standi* because they were merely shareholders in the management company. He argued that they ought to have brought a derivative suit. Counsel further submitted that the plaintiffs had not demonstrated that there is a legal right being infringed or threatened with infringement. Thirdly, counsel submitted that there was no arbitrable dispute to warrant referral to arbitration. Counsel further argued that the defendant had already indicated that the portion where the hostels were being built would be excised and the hostels will not be part of the estate. Lastly, he submitted that arbitration should not be allowed to continue because there was no arbitrable dispute.

10. I have considered the two applications, the respective supporting affidavits and the parties' rival submissions. I have also considered the relevant legal framework and jurisprudence on the key questions in the two applications. Three questions fall for determination. The first question is whether the applicants have *locus standi* to bring the present suit. The second question is whether an arbitrable dispute is disclosed in the plaintiffs' application. The last question is whether the plaintiffs have satisfied the criteria for grant of an interim measure of protection pending arbitration within the framework of Section 7 of the Arbitration Act. I will make pronouncements on the three questions in the above order. Before I make those pronouncements, I will make some general remarks about the place of arbitration as an alternative dispute resolution mechanism in Kenya's legal system. These remarks are necessary because the defendant has contended that the issues raised by the plaintiff can be resolved by the Nairobi City County Government.

11. Kenya ratified the United Nations Commission on International Trade Law (UNCITRAL Model Law) which obligates courts to uphold the principle of party autonomy in resolving commercial disputes. The essence of the principle of party autonomy is that, where parties to a contract have consensually and in unequivocal terms provided for the forum through which to resolve their disputes, the courts are obligated to give effect to that choice of dispute resolution forum. The Court of Appeal in **Nyutu Agrovat Ltd Vs Airtel Networks Limited (2015) eKLR** reaffirmed the supremacy of the principle of party autonomy in the resolution of commercial disputes in the following words:-

**“Our Section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to recognize this autonomy, we would become a pariah state and would be isolated internationally.”**

12. Guided by the above legal philosophy, I proceed to determine the three issues in this application. The framework on stay of court proceedings and referral of disputes to arbitration is contained in Section 6 of the Arbitration Act which provides as follows:

**1. A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceeding and refer the parties to arbitration unless it finds-**

**a. That the arbitration agreement is null and void, inoperative or incapable of being performed; or**

**b. That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.**

**2. Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.**

**3. If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.**

13. In the applications under consideration, it is common ground that the plaintiffs purchased their respective units in Grash Gardens. All the parties agree that formal agreements were executed and those agreements stipulated that in the event of any dispute relating to the agreements, arbitration would be the chosen dispute resolution forum. It is similarly common ground that the parties to this suit executed leases which have been registered in pursuance of the agreements. The leases similarly provided for arbitration as the chosen dispute resolution forum. The agreements for sale stipulated that ten houses would be developed on the suit land. The leases which followed the agreements provided that eight houses would be developed.

14. The first gravamen of the plaintiffs is that the defendant has reneged on the terms of the sale agreements and the leases and is in the process of developing student hostels on the suit land yet both the agreements for sale and the leases provided that the developer would develop residential units with similar design and facilities. Secondly, the plaintiffs are aggrieved that the development works executed by the defendant are defective and incomplete. Thirdly, they contend that the defendant has refused to operationalize and hand over the management company. Fourthly, they contend that the defendant has refused to register some of the leases.

15. In my view, as purchasers and leases, the plaintiffs are the proper parties to raise the issues that are raised in this suit. Those issues stem from the contractual relationship which exists between the plaintiffs and the defendant. The plaintiffs are in essence contending that the defendant is in breach of the terms of their respective contracts as set out in the agreements for sale and in the leases. Under the doctrine of privity of contract, the plaintiffs are the proper parties to bring claims for adjudication in the forum agreed by the parties. The contention that the plaintiffs are irregularly litigating on behalf of the management company is in my view incorrect.

16. The second issue is whether there is an arbitrable dispute to warrant arbitration within the framework of Section 6(1) (b) of the Arbitration Act. In paragraphs 25 of his replying affidavit sworn on 17/11/2017, Mr Jackson Kanyarati deposes as follows:

**25. I verily believe that the plaintiffs have filed this suit to divert attention from the express contractual terms of the agreements for sale as demonstrated below:**

**a. The plaintiffs' claim that the construction of the hostels will prevent the transfer of the reversionary interest to the management company has no basis because the portion on which the hostels are situated has been excised from the rest of the estate, leaving the estate with eight houses as had earlier been planned.**

**b. The plaintiffs' claim that the construction of the hostels will completely alter the nature of the estate has no basis because the hostels are situated on a different plot of land separated by the high perimeter fence from the rest of the estate.**

**c. The plaintiff's claim that they have made repairs on the houses has no basis as they have not produced any evidence of invoices, receipts, completion on hand-over certificates for the work done to enable the defendant made a considered decision.**

**d. In any event, the request for proof by the defendant does not qualify as a dispute for determination by this honourable court or in arbitration proceedings.**

17. He adds as follows in paragraph 26 (a) and (b) of the same affidavit

**26. I am advised by my advocates on record which advice I verily believe to be true and correct that:**

**a. The plaintiffs have not established a dispute worthy of reference to arbitration as the issues raised, if any, can be**

resolved by the Nairobi City County.

**b. The honourable court should use judicial time and resources efficiently on other matters.**

**c. The plaintiffs have not satisfied the test in *Giella v Casman Brown***

**d. No irreparable loss will be suffered by the plaintiffs if orders sought are not granted. As expounded above, the grievances of the plaintiffs can be responded to in a general meeting and actions by directors can be ratified at the meeting.**

**e. In any action in which an alleged wrong has been done against the Company, the proper claimant is the company itself and not the plaintiff's as is the case herein.**

18. From the above depositions in the replying affidavit, the defendant does admit that there are disputes relating to the construction of hostels on the suit land and the workmanship of the executed works. It however contends that the disputes can be resolved by the Nairobi City County Government.

19. In my view, the defendant's decision to construct hostels on the suit land and the plaintiff's objection thereto constitute a proper arbitrable dispute within the framework of Section 6(1) (b) of the Arbitration Act. The contention that the defendant has breached the terms of the agreements and the leases as enumerated by the plaintiff similarly discloses a dispute to be interrogated and determined by the arbitrator. I am therefore satisfied that there is a proper arbitrable dispute between the plaintiffs and the defendant in relation to the agreements for sale and the leases.

20. The last question is whether the plaintiffs have satisfied the criteria for grant of an interim measure of protection within the framework of Section 7 of the Arbitration Act. In **Safaricom Limited Vs Oceanic Beach Hotel Limited & 2 Others (2010) eKLR** the Court of Appeal (Waki J) outlined the following approach to be applied when determining an application for interim measures of protection under Section 7 of the Arbitration Act:

**“An interim measure of protection such as that sought in the matter before us is supposed to be issued by the court under Section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for grant of an injunction..... 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 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”**

21. In the present suit, the plaintiffs contend that they purchased houses on off-plan basis and the agreements provided that ten similar units were to be developed and sold by the defendant. Subsequent leases alluded to eight similar units. The plaintiffs have presented evidence and it is admitted by the defendant, that the defendant is in the process of developing hostels on the same suit land. The defendant contends that it intends to excise the portion of the suit land on which the hostels are being developed. Without making any definitive pronouncement on the ramifications of the actions of the defendant, there is evidence that development of hostels on the same suit land on which the defendant offered to develop a gated residential estate called Grash Gardens may drastically change the character of the estate to the detriment of the plaintiffs. I will refrain from making further pronouncements on this issue because it falls within the mandate of the arbitrator. It suffices to observe that there is evidence that the subject matter of arbitration which is the land on which the estate stands is under threat of development of a different model of project in the form of student hostels and if the interim measure of protection is not granted, the plaintiff may stand to suffer irreparably.

#### **Summary and Disposal Order**

22. In light of the above findings, I make the following disposal orders in relation to the plaintiffs' chamber summons dated 17/10/2017 and the defendant's notice of motion dated 11/7/2018:

**a. The plaintiffs' chamber summons application dated 17/10/2017 is allowed in terms of prayer 3.**

**b. The defendants' notice of motion application dated 11/7/2018 is dismissed.**

**c. The plaintiffs shall have costs of the two applications**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF NOVEMBER 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Wamae holding brief for Mr Githara Advocate for the plaintiff

Mr Baragu holding for Mr Waigwa Advocate by the Defendants

June Nafula - Court Clerk