



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 601 OF 2015

SAMUEL MUREITHI MURIOKI.....PLAINTIFF

VERSUS

MICHAEL NJOROGE GACHUHI.....DEFENDANT

RULING

Coming up before me for determination are two applications, one by the Plaintiff being the Notice of Motion dated 21st April 2015 and filed on 23rd April 2015 (hereinafter referred to as the “First Application”) and the Defendant’s Notice of Motion dated and filed on 30th April 2015 (hereinafter referred to as the “Second Application”).

In the First Application, the Plaintiff seeks for orders of temporary injunction restraining the Defendant from taking possession and or entering the property known as Nairobi Block 119/2843 (hereinafter referred to as the “suit property”), that pending the reference of the dispute to arbitration the Defendant be restrained from trespassing on to the suit property and further that an order of mandatory injunction do issue compelling the Defendant to cease any activity that may interfere with the Plaintiff’s access to the suit property.

The First Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff, Samuel Mureithi Murioki, sworn on 21st April 2015, in which he averred that he entered into a Tenancy Agreement with the Defendant on 22nd December 2014 in which he agreed to lease to the Defendant his business premises situate on the suit property for a term of 8 years. He further averred that according to the terms of the said Tenancy Agreement, the Defendant was required to pay to him a refundable deposit of Kshs. 1,100,000/- together with a further deposit of Kshs. 500,000/- upon execution of the Tenancy Agreement. He further added that according to clause 3(e) of the Tenancy Agreement, the Defendant was required to pay the balance of Kshs. 5,100,000/- to him on or before 15th January 2015. He further averred that upon execution of the Tenancy Agreement, the Defendant did pay to him the deposit of Kshs. 500,000/- but failed to meet his obligations in respect of clause 3(e) on the balance. He further added that in anticipation of receiving these monies, he had proceeded to commit himself financially with the knowledge that the Defendant would meet his obligations under the said agreement. He added that contrary to his expectations, the Defendant failed to do so, thereby causing him to default in his financial obligations that resulted to the proclamation of his goods by M/s Antique Auctions on behalf of Equity Bank Ltd. He added that as a result of the breach by the Defendant, he has suffered immense financial loss, mental anguish and embarrassment and has further been blacklisted with

the credit reference bureau. On those grounds, he sought for the Defendant to be restrained from assuming possession of the suit property until these issues are addressed by an arbitrator as set out in the Tenancy Agreement.

In the Second Application, the Defendant seeks for an order directed at the Plaintiff to refund to the Defendant the sum of Kshs. 5,920,000/- given to him on account of the Tenancy Agreement or in the alternative the Plaintiff be ordered to deposit the said sum into an interest earning account in the names of the advocates of the parties herein within 14 days from the date of the court order or in the alternative the Plaintiff be ordered to hand over possession of the suit property to the Defendant pending the hearing and determination of this suit.

Determination

The Plaintiff has alluded to an arbitration clause in the Tenancy Agreement dated 22nd December 2014 which both the Plaintiff and Defendant agree to have entered into. Clause 24 of the said Tenancy Agreement is to the following effect:

“Any dispute arising from the implementation of this agreement shall be referred to an arbitrator in line with the provisions of the Arbitration Act.”

Section 6(1) of the Arbitration Act provides as follows:

“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 proceedings and refer the parties to arbitration...”

Section 7(1) of the same statute provides as follows:

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

In light of these provisions, I am at liberty to consider the two applications before me prior to staying this suit to allow it to be referred to an arbitrator. In the First Application, the Plaintiff has indicated to this court that the Defendant is not in possession of the suit property. In fact, this position is confirmed by the Defendant himself who seeks an order compelling the Plaintiff to hand over possession of the suit property to him. Evidently, the suit property is in possession of the Plaintiff and no evidence has been brought to this court to indicate that the Plaintiff's possession is threatened by the Defendant in any way. This court will not issue orders in vain. Accordingly, the First Application is hereby dismissed with no order as to costs.

The Second Application essentially seeks prayers that go to the very heart of the dispute between the Plaintiff and the Defendant. Attempting to grant the orders sought in the Second Application would be usurping the mandate of the arbitrator. The court will not venture to do that. The Second Application is accordingly dismissed with no order as to costs.

The parties are at liberty to refer this dispute to an arbitrator and this suit is hereby stayed to await the adoption of the award from the arbitrator.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE