



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 655 OF 2015

RAJINDER KUMAR MANDAL.....PLAINTIFF

VERSUS

ANIL KUMAR MANDAL.....1ST DEFENDANT

MI-TECH INTERNATIONAL LIMITED.....2ND DEFENDANT

RULING

Coming up before me for determination are two applications. The first is the Plaintiff's Notice of Motion dated 1st July 2015 (hereinafter referred to as the "First Application") and the second is the 1st Defendant's Chamber Summons dated 30th November 2015 (hereinafter referred to as the "Second Application").

In the First Application, the Plaintiff seeks for an order of temporary injunction restraining the 1st Defendant from collecting the Plaintiff's 25% share of rental income relating to the property known as Land Reference Number 209/8569 along Waiyaki Way, Nairobi (hereinafter referred to as the "suit property") pending the hearing and determination of this suit, an order that the 1st Defendant do provide audited accounts regarding 25% share of rental income to the Plaintiff for the last 12 years and a further order directed to the 2nd Defendant to remit 25% share of the rent payable directly to the Plaintiff's nominated bank account.

The First Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Shamy Rajinder Kumar Mandal, sworn on 1st July 2015, in which he averred that he is a donee of the Power of Attorney issued by the Plaintiff, a copy of which he annexed. He further averred that this suit relates to the suit property, a commercial property with a building thereon which attracts a handsome amount of rent per month. He added that the building is currently occupied by the 2nd Defendant. He averred further that on 4th May 1979, Yash Dev Khosla transferred the suit property to four people as tenants in common in equal shares, namely, the Plaintiff, the 1st Defendant, Vijay Kumar Mandal and Ved Prakash Mandal. He added that as a consequence, each of them owns 25% of the suit property. As proof of that arrangement, he annexed a copy of the title deed to the suit property. He further averred that for the last 12 years since the year 2003, the 1st Defendant has managed the suit property and collected the rent therefrom on behalf of the other tenants in common. He then added that for that period of time, the 1st Defendant has never remitted to the Plaintiff his 25% share of the rent, thereby

intentionally depriving the Plaintiff of the use and enjoyment of his share of the suit property. He further added that the 1st Defendant has not provided to the Plaintiff any reports regarding the condition of the suit property or payment of land rents with the result that the Plaintiff is apprehensive of a possible confiscation by the government. He stated further that the 1st Defendant has not responded to the Plaintiff's repeated requests for details of the tenants and rent collected. On those grounds, the Plaintiff sought that the First Application be allowed.

In response to the First Application, the 1st Defendant, Anil Kumar Mandal, filed his Replying Affidavit sworn on 30th November 2015 in which he made averments similar to the ones contained in his Supporting Affidavit to the Second Application which are set out below.

In response to the First Application, the 2nd Defendant filed its Grounds of Opposition dated 4th September 2015 and filed on 11th September 2015 in which it stated that it is non-suited in these proceedings, the suit does not disclose any reasonable cause of action against it and that there exists a landlord and tenant relationship between it and the 1st Defendant and it is therefore entitled to recognize the 1st Defendant as the landlord until the Plaintiff's rights are ascertained in this suit.

In the Second Application, the 1st Defendant sought for these proceedings to be stayed pending reference of this dispute to arbitration and that the court set aside the interim injunction orders granted on 9th July 2015 and extended from time to time. The Second Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 1st Defendant, Anil Kumar Mandal, sworn on 30th November 2015 in which he averred that the Plaintiff is his Uncle and the said Shamy Rajinder Kumar Mandal is his cousin. He averred further that the Plaintiff, Ved Prakash Mandal (now deceased), Prem Prakash Mandal (his father who is now deceased), Vijay Prakash Mandal (now deceased) were brothers and were engaged in business together with himself in a company known as Overseas Export Company Limited (the "Company"). He further averred that in the course of running the Company, the five of them acquired the following 6 immovable properties together:

- 1) L.R. No. 7468/1 in Spring Valley
- 2) The Suit Property
- 3) L.R. No. 1870/V/39 Brookside
- 4) L.R. No. 5/115 Musa Gitau Road
- 5) L.R. No. 37/303 Hombe Road
- 6) Title No. Mombasa/Block X/Parcel 254A

He further averred that during the life of the business, there arose disagreements and disputes among them leading to their appointing 3 eminent persons to mediate and resolve the disputes. He averred that the mediators estimated the values of those properties and arrived at an agreement whose terms resulted in the re-allocation of the properties and appointment of new beneficial owners thereof. He further averred that out of that mediation, the parties entered into an agreement called Deed of Family Settlement And/Or Arrangement executed on 18th February 1996 (hereinafter referred to as the "Deed of Settlement"), a copy of which he annexed. He pointed out that the Plaintiff signed the Deed of Settlement through his son. He further pointed out that this arrangement was entered into 15 years ago and the Plaintiff was fully involved yet he failed to disclose this fact to this court when he filed this suit and sought interim orders of injunction. He further averred that under the Deed of Settlement, the suit property was allocated to him while the Mombasa property was allocated to the Plaintiff. He further informed the court that the Musa Gitau property was allocated to him on condition that he pays the Plaintiff a sum of Kshs. 11.25 million. It was his averment that despite his best endeavors, he was not able to sell off the Musa Gitau Road property within the 90 days specified in the Deed of Settlement so after deliberations with the mediators,

he offered and the Plaintiff accepted him to pay him Kshs. 10 million in full and final settlement of his claims against him. He averred further that following the execution of the Deed of Settlement, the parties occupied, used, claimed and or rented out the specific properties beneficially allocated to them including the Plaintiff who used, occupied, controlled and enjoyed exclusive possession of the Mombasa property. He stated further that in the same vein, he proceeded to take suit property which was allocated to him under the Deed of Settlement which he has enjoyed exclusive use, possession, ownership and control. On that ground, he pointed out that the Plaintiff was incredibly insincere in demanding rent or account from him in respect of the suit property. He denied having been appointed by anybody to manage the suit property on behalf of the Plaintiff or any of the other registered owners. On that ground, he opined that this suit and the First Application are dishonest and based on a misrepresentation of very material facts. He further pointed out clause 3.1 of the Deed of Settlement which requires that a dispute arising therefrom be referred to arbitration before the named arbitrators. On that account, he urged the court to vacate the interim injunction and instead order that the status quo be maintained until this dispute is heard and decided in arbitral proceedings.

In response to the Second Application, Shamy Rajinder Kumar Mandal filed his Replying Affidavit sworn on 19th January 2016 in which he admitted the existence of the Deed of Settlement which purported to share the properties as stated by the 1st Defendant including the allocation of the suit property to the 1st Defendant and the allocation of the Mombasa Property to the Plaintiff but added that this arrangement has never taken effect. His averment was that the suit property remains registered in the names of the Plaintiff, the 1st Defendant, Vijay Kumar Mandal and Ved Prakash Mandal. He further averred that the Plaintiff did not disclose the existence of the Deed of Settlement because it is time barred under section 4(1) of the Limitation of Actions Act, 19 years having lapsed since it was executed on 18th April 1996. It was his averment that the 1st Defendant had ample time to honor the now time barred Deed of Settlement but he failed to do so while telling the Plaintiff that he would only act on the Deed at his leisure and pleasure. He also averred that the 1st Defendant never pursued the Confirmation of Grant relating to estate of his late father Ved Prakash Mandal without which it was not possible to transfer the properties to each of the parties as stipulated in the Deed of Settlement. He said that this was finally done on 30th March 2009, over 12 years after the Deed of Settlement was executed. He stated that on that premise, there is no agreement between the parties to refer this dispute to arbitration as the Deed of Settlement is no longer in force. He stated that this court has competent jurisdiction to decide this matter. On those grounds, he requested the court to dismiss the Second Application and allow the First Application.

Both parties filed their respective written submissions.

The jurisdiction of this court to hear and determine this dispute has been challenged by the 1st Defendant on the ground that the parties hereto entered into the Deed of Settlement which prescribed that any dispute relating to, inter alia, the suit property must be referred to arbitration. This is the gist of the Second Application in which the 1st Defendant has requested this court to stay these proceedings, refer this dispute to arbitration in accordance with the Deed of Settlement and discharge the interim injunction in force. The Plaintiff has, however, contested this position on the argument that while it is true that they did enter into the Deed of Settlement which prescribes arbitration, the same is no longer in force as it expired under the provisions of section 4(1) of the Limitation of Actions Act. **Section 4(1) of the Limitation of Actions Act Cap 22** provides as follows:

Actions of contract and tort and certain other actions

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-

a. Actions founded on contract;

b. -

The Plaintiff informed the court that the reason why he did not disclose the existence of the Deed of Settlement to the court at the time of filing this suit and the First Application was because the Deed of Settlement is no longer in force as it was time barred. **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...”

There is no contention on the fact that there was an arbitration agreement in the Deed of Settlement. However, is the Deed of Settlement, and by extension the arbitration agreement, time barred? This court will not venture to answer that question and agrees with the 1st Defendant that the matter should be referred to arbitration despite the Plaintiff’s objections as to the validity of the Deed of Settlement and the arbitration agreement therein. I rely on the decision of Justice Luka Kimaru in the case of **Kenya Airports Parking Services Ltd versus Municipal Council of Mombasa (2010) eKLR** where he ruled as follows:

“It is therefore clear that the parties to the agreement anticipated that any dispute between them would be resolved by arbitration. Although the defendant would like this court to render an opinion regarding the legality of the agreement, under Section 10 of the Arbitration Act, this court lacks jurisdiction to deal with a dispute where parties have agreed to have a dispute between them resolved or determined by arbitration. This position applies even where one of the parties is challenging the validity of the agreement. A party who wishes to challenge the validity or legality of an agreement may do so at the first instance when the matter is placed before the arbitral tribunal.

Under Section 17(1) of the Arbitration Act, the arbitral tribunal has powers to render a decision in regard to its own jurisdiction. The defendant is not prohibited by law from raising the issue regarding the validity or otherwise of the agreement before the arbitral tribunal. In a recent Court of Appeal decision, Anne Mumbi Hinga versus Victoria Njoki Gathara (2009) eKLR, the Court of Appeal reiterated the principal of non-intervention by the courts where parties have agreed to resolve any dispute between them by arbitration.”

In light of the foregoing, I arrive at the finding that this matter should and is forthwith referred to arbitration in accordance with the Deed of Settlement. The Second Application is therefore allowed in its entirety. The First Application is accordingly hereby dismissed. Costs shall be in the cause.

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

MARY M. GITUMBI

JUDGE