



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT NO 48 OF 2017

ENGEN KENYA LIMITED PLAINTIFF/APPLICANT

VERSUS

STANELY MUNGA GITHUNGURI..... DEFENDANT/1ST RESPONDENT

ELIZABETH GITHUNGURI MUNGA INTERESTED PARTY/2ND RESPONDENT

RULING

1. By Notice of Motion Application dated 21st February 2017 the Plaintiff/Applicant is seeking the following orders:

- 1) That this Application be certified urgent and heard ex-parte in the first instance;
- 2) That in the first instance, pending hearing and determination of this Application, the Defendant, its servants and/or agents or otherwise howsoever be restrained from advertising, transferring, charging, leasing, interfering with the Plaintiff's quiet possession or in any manner whatsoever from dealing with all that property known as Sub-Division 2804, Section One, Mainland North, Mombasa;
- 3) That this suit be referred to Arbitration in accordance with Clause 17 of the Sale Agreement dated 22nd September 2016 between the Plaintiff and the Defendant;
- 4) That the Defendant, its servants and/or agents or otherwise howsoever be restrained from advertising, transferring charging, leasing, interfering with the Plaintiff's quiet possession or in any manner whatsoever, from dealing with all that property known as Sub-Division 2804, Section One, Mainland North, pending the hearing and determination of the dispute between the Plaintiff and the defendant by Arbitration pursuant to clause 17 of the Sale Agreement dated 22nd September 2016;

Alternative to prayer 3 & 4, if the court does not refer this matter to Arbitration: -

- 5) That pending the determination of this Suit, the Defendant, its servants and/or agents or otherwise howsoever be restrained from advertising, transferring, charging, leasing, interfering with the Plaintiff's quiet possession or in any manner whatsoever from dealing with all that property known as Sub-Division 2804, Section One, Mainland North, Mombasa;
- 6) That costs of this Application be provided for.

2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of Kemunto Michieka sworn on 21st February 2017 and two supplementary Affidavits sworn on 27th March 2017 and 2nd June 2017 respectively. Briefly, the Plaintiff states that on 10th February 1998 it entered into a Lease Agreement with the Defendant over all that parcel of land known as Sub-Division 2804, Section One, Mainland North, Mombasa for a period of twenty years with effect from 10th March 1998. That sometime in early 2016, the Defendant informed the Plaintiff that he intended to sell the Suit Property and after negotiation, the Plaintiff made an offer of kshs.120,000,000 which was promptly accepted by the Defendant and a Sale Agreement was entered between the Plaintiff and the Defendant on 22nd September 2016. That the Plaintiff paid a deposit of Kshs.12,000,000 to the Defendants and the Advocates for its financiers gave the requisite professional undertaking for the balance of Kshs.108,000,000. It is the Plaintiff's contention that instead of the Defendant releasing the completion documents to the Plaintiff or its advocates, he unilaterally cancelled the Sale Agreement without any justifiable basis or reason. Further, it is the Plaintiff's contention that the Sale Agreement dated 22nd September 2016 provided for Arbitration as a way of resolving any dispute between the parties on the terms of the Agreement. The Plaintiff avers that it has invested heavily in making the Suit Property fit for its business and it stands to suffer irreparable loss and damage should the sale transaction be frustrated by the Defendant.

3. The Application is opposed by the Defendant who filed a Replying Affidavit dated 13th March 2017. It is the Defendant's contention that he signed the Sale Agreement dated 22nd September 2016 under the mistaken belief that it was an agreement for the renewal of the Plaintiff's lease over the Suit Property and that he was unable to procure spousal consent for the sale and transfer of the Suit Property to the Plaintiff. The Defendant avers that he had received an offer of about Kshs.300 million for the property and had notified the Plaintiff that he would only be willing to sell the property to them at a purchase price of kshs.220 million to Kshs.250 million but the Plaintiff declined the offer and that all subsequent correspondence, negotiations and discussions with the Plaintiff regarding the property were in respect of the renewal of the lease and not a sale.

4. The Application is also opposed by the Interested Party who filed a Replying Affidavit dated 22nd May 2017 sworn by Clare Njeri Githunguri. It is the Interested Party's contention that she is the lawful wife of the Defendant and the Suit Property was purchased during the subsistence of the marriage and for the benefit of the marriage and the Defendant held it in trust for her and that the Defendant could not sell or otherwise alienate it without the interested party's consent. The Interested Party states that she is not a party to the Arbitration Agreement and the same can therefore not be enforced against her, and that on the basis that there was a failure to obtain spousal consent the Sale Agreement was invalidated and therefore there is no dispute to be referred to Arbitration.

5. When the Application came up before me for hearing inter-partes on 14th March 2017, Counsel agreed to file Written Submissions which submissions were duly in place by 8th June 2017 and the same were highlighted by Counsel on 20th July 2017. I have considered the Application, the affidavits filed both in support and in opposition to the Application. I have also considered all the annexures exhibited by the parties. I have further considered the pleadings, the submissions, authorities cited and all the arguments advanced in support and in opposition to the Application. Having done so I take the following view of this matter.

6. It is not disputed that the Defendant leased the Suit Property to the Plaintiff for twenty years effective 1st March 1998 and the lease is expiring on 28th February 2018. In this suit, the Plaintiff is seeking to compel the Defendant to transfer the Suit Property to the Plaintiff in accordance with the Sale Agreement dated 22nd September 2016. The Defendant alleges that he signed the said Agreement under the mistaken belief that it was an agreement for the renewal of lease over the Suit Property and not for sale. He also alleges that he was unable to procure spousal consent for the sale and transfer of the Suit Property to the Plaintiff. Further, the Defendant avers that he had received an offer of about kshs.300 million for the property and had notified the Plaintiff that he would only be willing to sell the property to them at a purchase price of kshs.220 million to kshs.250 million. It is also the Defendant's contention that his wife,

the Interested Party, declined to consent to the transfer of the property to the Plaintiff for reasons among others that the purchase price is too low. I have perused the Agreement for sale dated 22nd September 2016 which is annexed to the Plaintiff's Supporting Affidavit and marked "Km4b". Clause 17 thereof provided *inter alia* that:

“ All claims and disputes whatsoever arising under this agreement shall be referred to Arbitration....”

I also note that in both the Plaintiff's Supporting Affidavit as well as the Defendant's Replying Affidavit there is attached letters of offer to lease or purchase the Suit Property. In addition, among the documents attached to the Defendant's Replying Affidavit is a letter dated 3rd January 2017 marked as "SMG 5" on cancellation of sale of the Suit Property among others. As no other agreement has been exhibited, I take the view that the sale that the Defendant purported to cancel is the Agreement of Sale dated 22nd September 2016.

7. In my considered opinion, the claim by the Plaintiff that the Defendant transfers the Suit Property and the cancellation of the sale by the defendant constitutes a dispute. What the Plaintiff seeks in prayer 3 of the Application is an order to have the Suit referred to Arbitration in accordance with Clause 17 of the Sale Agreement dated 22nd September 2016. In paragraph 12 of his Replying Affidavit, the Defendant alleges that this court has no jurisdiction to grant the orders sought in the Plaintiff's Application as the matter is the subject to arbitration. In my considered opinion, where the contract between the parties contains an arbitration clause, that machinery of dispute resolution must be exhausted first before the parties can resort to the courts. It is common ground, and both the Plaintiff and the Defendant are in agreement that the contract between them contains an arbitration clause, and that such arbitration has not yet been resorted to. It is the Plaintiff's contention that it informed the Defendant of its intention to refer the matter to arbitration but the Defendant never responded. However, since both parties are now in agreement that the dispute ought to be referred to arbitration as per the arbitration clause in the agreement the law enjoins the court to respect that and to give effect to it.

8. The Plaintiff has submitted that this court has jurisdiction to issue an injunction to preserve the subject matter of the dispute pending the outcome of the intended arbitration proceedings. However, on his part, the defendant has submitted that this court would have very limited room for intervention and would only do so in accordance with the provisions of the Arbitration Act. On her part, the Interested Party submits that the Sale Agreement dated 22nd September 2016 was illegal and void as she had not consented and cannot therefore attract the protection of the law. She further submitted that in view of the illegality, there is no dispute that is capable of being submitted to arbitration. In my humble view, these are issues that cannot be determined at this stage.

9. The Plaintiff's Application is premised in both Order 40 of the Civil Procedure Rules and the Arbitration Act as well as Article 159 of the Constitution of Kenya. The Suit Property is in the possession of the Plaintiff by virtue of a lease that is due to expire on 28th February 2018. There is evidence that the Defendant has expressly assured the Plaintiff that its rights in the Suit Property will be respected until 28th February 2018 when the lease is set to expire. Further, there is evidence that the Interested Party has placed a caveat over the Suit Property. The Plaintiff is however apprehensive that if no injunction is granted, nothing will prevent the Defendant and/or the Interested Party from selling the Suit Property to a third party other than the Plaintiff. It is true that if the caveat lodged by the Interested Party were removed there is nothing that would prevent the Plaintiff from transferring the Suit Property whilst the dispute is under arbitration and the arbitral process may be rendered futile. In that respect, justice demands that whilst the dispute is under arbitration process, the subject matter ought to be protected. This right of intervention is provided for under Section 7 of the Arbitration Act.

10. The upshot of the foregoing is that the Plaintiff's Notice of Motion dated 21st February 2017 is merited and is granted in terms of prayers 3 and 4 in the said Motion. Each party to bear their own costs.

Ruling dated, signed and delivered at Mombasa this 4th day of October 2017

C. YANO

JUDGE