



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. E012 OF 2020

SAMUEL GATHIRUA MUCHUKI MWANGI.....PLAINTIFF

- VERSUS -

KAMAL DEEP PANESAR KAUR.....1ST DEFENDANT

AMRITPAL SINGH PANESAR.....2ND DEFENDANT

RULING

What is before me is a Notice of Motion application dated 10th July, 2020 brought by the plaintiff. In the application, the plaintiff has sought the following orders;

- a. That a temporary injunction does issue restraining the defendants from further alienating, accessing, entering, taking possession, evicting, interfering with the plaintiff's quiet possession and/or in any other manner endangering the plaintiff's occupation of all that property known as L.R No. 14970/42 pending the hearing and determination of the arbitral proceedings between the parties.
- b. That a temporary injunction does issue restraining the defendants from further alienating, accessing, entering, taking possession, evicting, interfering with the plaintiff's quiet possession and/or in any other manner endangering the plaintiff's occupation of all that property known as L.R No. 14970/42 pending the hearing and determination of the suit.
- c. That the proceedings herein be stayed pending the determination of the arbitral proceedings.
- d. That an inhibition does issue in the interim pending the determination of the arbitral proceedings and this suit, inhibiting the registration of any dealing with the suit property and in the alternative, the status quo presently prevailing between the parties do continue pending the determination of the arbitral proceedings and this suit.
- e. The costs of the application.

The plaintiff's application that was supported by the affidavit and supplementary affidavit of the plaintiff sworn on 10th July, 2020 and 4th September, 2020 respectively was brought on the following grounds: The plaintiff and the defendants entered into an agreement of sale dated 15th September, 2014 under which the defendants agreed to sell and the plaintiff agreed to purchase all that parcel of land known as L. R No. 14970/42 (hereinafter referred to only as "the suit property") at a consideration of Kshs.65,500,000/= on terms and conditions that were set out in the said agreement. The plaintiff averred that the said agreement of sale was to be completed within 90 days from the date thereof. The plaintiff averred that pursuant to the terms of the said agreement, he paid a deposit of Kshs. 6,500,000/= and was given possession of the suit property by the defendants pending

completion.

The plaintiff averred that the defendants failed to obtain the completion documents to facilitate the completion of the agreement despite demand and receipt of further payments that the plaintiff made to them in good faith towards the balance of the purchase pending completion. The plaintiff averred that he learnt that the defendants had transferred the suit property to the 1st defendant without his knowledge. The plaintiff averred that the defendants had breached the agreement of sale aforesaid by their failure to transfer the suit property to the plaintiff. The plaintiff averred that when attempts to settle the matter amicably with the defendants failed, he invoked the mechanism for arbitration provided for under the agreement of sale dated 15th September, 2014 between the parties. The plaintiff averred that in response to his proposal to refer the dispute to arbitration, the 1st defendant initiated the process of evicting him and his family from the suit property which they had occupied since 2013. The plaintiff averred that the 1st defendant served him with a notice to vacate the suit property and a letter demanding rent. The plaintiff averred that this was followed by a distress for rent by an auctioneer. The plaintiff averred that the 1st defendant had claimed that the plaintiff was a tenant on the suit property. The plaintiff averred that he had initiated the arbitration process by writing to the chairman of the Chartered Institute of Arbitrators to appoint an arbitrator to determine the dispute between him and the defendants over the agreement of sale of the suit property. The plaintiff averred that he needed the court's protection. The plaintiff averred that he needed a guarantee that he would be able to enforce an arbitral award that may be issued in his favour in the arbitral proceedings against the defendants or a decree that he may obtain from the court in this suit. The plaintiff averred that he had established a prima facie case against the defendants to warrant the grant of the orders sought and that he stood to suffer irreparable injury which could not be adequately compensated in damages if the orders sought were not granted. The plaintiff urged the court to grant the prayers sought in the application in the interest of justice.

The plaintiff's application was opposed by the defendants through a replying affidavit sworn by the 1st defendant on 27th July, 2020. The defendants admitted that there was an agreement of sale dated 15th September, 2014 entered into between the defendants and the plaintiff in respect of the suit property. The defendants contended however that the said agreement of sale lapsed and/or failed due to non-performance by the plaintiff. The defendants denied that they breached the said agreement of sale. The defendants contended that they were ready with the completion documents within the completion period and that the same could not be released to the plaintiff's advocates due to the plaintiff's failure to provide professional undertaking in respect of the balance of the purchase price.

The defendants averred that it was after the collapse of the sale of the suit property to the plaintiff that the defendants transferred the same to the 1st defendant. The defendants averred that the plaintiff was duly informed of the said transfer in writing and of the fact that the 1st defendant was no longer interested in selling the property. The defendants averred that the deposit of Kshs. 6,500,000/= that was paid by the plaintiff was duly refunded to him. The defendants averred that the plaintiff was always their tenant and that possession of the suit property was given to the plaintiff on the understanding that the plaintiff was to remain a tenant on the suit property pending completion of the agreement of sale. The defendants averred that after the expiry of the initial tenancy agreement, the parties entered into another tenancy agreement on 28th July, 2016. The defendants contended that the arbitration process initiated by the plaintiff was unlawful in that it was based on an agreement of sale that was no longer in existence. The defendants averred that due to the plaintiff's persistent failure to pay rent, they were left with no alternative but to levy distress for the recovery of the same.

In his supplementary affidavit, the plaintiff denied the defendants' claim that the agreement of sale dated 15th September, 2014 lapsed due to the plaintiff's non-performance of his obligations thereunder. The plaintiff averred that the defendants failed to complete the agreement of sale due to matrimonial differences that arose between the defendants and that the completion documents annexed to the 1st defendant's affidavit were never brought to his attention. The plaintiff denied that he was informed of the transfer of the suit property to the 1st defendant. The plaintiff reiterated that he was not the defendants' tenant on the suit property. The plaintiff contended that apart from the deposit of Kshs. 6,500,000/= that he paid to the defendants, he paid a further sum of Kshs. 9,230,000/= to them. The plaintiff averred further that an arbitration clause is an independent agreement and that even if the defendants felt that the agreement of sale dated 15th September, 2014 had lapsed, they were still under an obligation to submit to the arbitration process. The plaintiff averred that the defendants had already submitted themselves to the jurisdiction of the appointed arbitrator and had even attended a preliminary meeting called by the arbitrator.

The plaintiff's application was heard by way of written submissions. The plaintiff filed submissions dated 4th September, 2020 while the defendants filed submissions dated 13th August, 2020. In his submission, the plaintiff argued that he had satisfied the threshold for grant of an interim measure of protection pending arbitration. The plaintiff submitted that he had established, that; there was in existence an arbitration agreement between the parties, the subject matter of arbitration was under threat and that, the

measure of protection and the duration thereof that he had sought were appropriate.

In their submissions in reply, the defendants submitted that injunctive orders are equitable and discretionary in nature. The defendants submitted that a party who fails to perform his part of contract cannot obtain an injunction to restrain breach of the same contract by the other party. The defendants submitted further that the plaintiff had approached the court with unclean hands and as such he was not entitled to the injunction sought. The defendants submitted further that as at the time of coming to court, the plaintiff was in rent arrears to the tune of Kshs. 878,840/=. The defendants submitted further that the plaintiff was not candid to the court in that he failed to disclose that he had entered into a tenancy agreement with the defendants and had received in full a refund of the deposit that he had paid for the suit property. The defendants submitted further that the plaintiff had not established a prima facie case with a probability of success against the defendants and that he stood to suffer irreparable damage if the orders sought were not granted. The defendants submitted that even if the court considered the balance of convenience, the same would tilt in favour of the defendants. On whether there were valid arbitration proceedings to warrant the grant of interim measure of protection sought by the plaintiff, the defendants submitted that there was none. The defendants submitted that the agreements that gave the plaintiff occupation rights in respect of the suit property did not have arbitration clauses. The defendants submitted that the agreement of sale dated 15th September, 2014 did not give the plaintiff any right to occupy the suit property and that the same was in any event terminated on account of the plaintiff's financier's failure to provide professional undertaking. The defendants submitted that the injunctive orders sought by the plaintiff relates to his tenancy and not to the agreement of sale which had an arbitration clause. The defendants submitted that since the agreement of sale did not cover the tenancy relationship between the plaintiff and the defendants, the issue of possession of the suit property could not be the subject of arbitration. The defendants submitted that the court could not grant injunctive orders in respect of a matter that was not the subject of arbitration. The defendants submitted further that in the plaintiff's suit before the court, the plaintiff had sought final orders and that the orders sought were beyond the arbitration clause. The defendants submitted that in the circumstances, the court should determine the dispute with finality.

The defendants took issue with the plaintiff's act of seeking final orders in this suit and invoking the arbitration clause at the same time. The defendants termed that move an abuse of the process of the court, forum shopping and a clear case of "judicial lottery". The defendants submitted that there was no basis for staying this suit. The defendants urged the court to dismiss the plaintiff's application.

I have considered the plaintiff's application together with the two affidavits filed in support thereof. I have also considered the replying affidavit filed by the defendants in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the authorities cited in support thereof. The following is my view on the matter. Section 6 of the Arbitration Act, 1995 provides as follows:

6. Stay of legal proceedings

(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 proceedings 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.

From my reading of section 6 of the Arbitration Act, 1995, although "a party" is defined in section 3 of the Arbitration Act, 1995 as

“a party to an arbitration agreement and includes a person claiming through or under a party”, a party envisaged under section 6 of the Arbitration Act, 1995 who can apply for stay of proceedings cannot be a plaintiff who has brought proceedings in court in a matter which is subject to an arbitration agreement to which he is a party. I am of the view that a party to an arbitration agreement cannot bring a suit for substantive and final reliefs and then purport to seek a stay of his own suit pending arbitration. In other words, a party to an arbitration agreement cannot seek remedies both in court and in arbitration at the same time in respect of any dispute falling under the ambit of the agreement. The only leeway provided to such a party under the Arbitration Act, 1995 is set out in section 7 of the Act, which gives the court power to grant interim measures of protection to a party to or contemplating instituting arbitral proceedings. In the suit before me, the plaintiff has not sought an interim measure of protection pending arbitration. The reliefs sought in the plaint are as follows;

- a. An order cancelling the notice to vacate served upon the plaintiff by the 1st defendant.
- b. A declaration that the Agreement of sale dated 15th September, 2014 between the plaintiff and the defendants has been breached by the defendants jointly and severally.
- c. An order of specific performance of the Agreement of sale dated 15th September, 2014 to compel the defendants to jointly and severally transfer the suit property to the plaintiff.
- d. In the alternative, special damages of Kshs. 20,750,000/= paid by the plaintiff to the defendants.
- e. General Damages

With these substantive reliefs sought in the plaint, the court is left to wonder as to what reliefs the plaintiff would be seeking in the arbitral proceedings. In the circumstances, the defendants’ contention that the plaintiff may be out to try his luck in both forums may not be far-fetched. In my view, the manner in which the orders sought in the plaintiff’s application have been framed is intended to embarrass a fair determination of the application. I am in agreement with the defendants that the application in the way it is framed is an abuse of the court process. The plaintiff cannot at the same time seek a temporary injunction pending the determination of the arbitral proceedings and, the hearing and determination of this suit. This leaves no doubt that the plaintiff’s intention is to invoke at the same time, the jurisdiction of this court and that of the arbitral tribunal in the determination of the dispute between the plaintiff and the defendants. Apart from the order for stay of proceedings which I also find mischievous for reasons which I have given above, all other reliefs sought in the application are sought pending the determination of arbitral proceedings and the suit.

Different principles apply to applications for interim measure of protection pending arbitration and the normal applications for temporary injunction pending the hearing and determination of a suit. The court is unable to determine from the pleadings whether the plaintiff wants this case determined through arbitration or by this court so as to decide on the correct principles to apply to the application before it. The court has no business deciding for the plaintiff the forum to go to for redress. In this case however, as embarrassing as it is, the court has to decide whether to determine the application before it as one for interim measure of protection pending arbitration or as one seeking a temporary injunction pending the hearing and determination of the suit. As I have already mentioned, the plaintiff cannot have it both ways. The plaintiff’s application is embarrassing, frivolous, vexatious and an abuse of the process of the court and a suitable candidate for striking out under the inherent power of this court reserved in section 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya.

However, in the interest of justice, I will consider the application limited only to the limb seeking interim measure of protection pending arbitration. It is common ground that the parties entered into an agreement of sale dated 15th September, 2014 in respect of the suit property. It is also common ground that the agreement had an arbitration clause which provided in part as follows:

“Should any dispute arise between the parties hereto with regard to the interpretation, rights, obligations and/or implementation of any one or more of the provisions of this agreement, the parties shall in the first instance attempt to resolve such dispute by amicable negotiation. Should such negotiation fail to achieve a resolution within fifteen (15) days, either party may declare a dispute by written notification to the other, whereupon such dispute shall be referred to arbitration...”

It is common ground that a dispute has arisen between the parties with regard to the completion of the said agreement of sale. The plaintiff has claimed that the agreement has been breached by the defendants by their failure to provide the completion documents. The defendants on the other hand have claimed that the said agreement has been breached by the plaintiff by his failure to provide professional undertaking in respect of the balance of the purchase price in exchange with the completion documents which the defendants had obtained within the completion period provided for in the agreement of sale. From the evidence before the court, the plaintiff was given possession of the suit property to occupy as a tenant pending completion of the agreement of sale. The plaintiff was not given possession of the suit property pursuant to or under the terms of the agreement of sale dated 15th September, 2014. Under clause 7 of the said agreement of sale, vacant possession of the suit property was to be handed over to the plaintiff on the date of completion. Without determining the matter with finality so as not to prejudice the arbitral proceedings, I am persuaded on a prima facie basis that the plaintiff was to remain in occupation of the suit property as a tenant pending the completion of the sale transaction and the transfer of the property to him. I am in agreement with the defendants that the issue of the plaintiff's right to occupy the suit property and the issue of his rights and obligations under the agreement of sale date 15th September, 2014 are separate and distinct. As a tenant, the plaintiff had an obligation to pay rent to the defendants. From the notice to vacate that was served upon the plaintiff dated 16th April, 2020, I have noted that the rent that was being demanded from the plaintiff by the defendants was for the months of April, May and June, 2020 which means that the plaintiff had paid rent up to March, 2020. The plaintiff could only pay rent if he was a tenant.

In Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR that was cited by the plaintiff in his submission, the Court of Appeal (Nyamu J.A) stated that the factors to be considered by the court before issuing an order of interim measure of protection pending arbitration are the following;

1. The existence of an arbitration agreement.
2. Whether the subject matter of arbitration is under threat.
3. The appropriate measure of protection after an assessment of the merits of the application.
4. The period for which the measure is to be given.

As I have mentioned above, the fact that there was an arbitration agreement between the plaintiff and the defendants is not disputed. The issue as to whether that arbitration agreement is still valid after the lapse of the agreement of sale as alleged by the defendants is not for this court to determine. That is an issue for the arbitral tribunal. On whether the subject matter of arbitration is under threat, I am in agreement with the plaintiff that that is the case. Since the defendants entered into the agreement of sale of the suit property with the plaintiff, the defendants have transferred the property once to the 1st defendant. There is no guarantee that they will not transfer the property further during the pendency of the arbitral proceedings. I am of the view that it is necessary to preserve the property pending the outcome of the said proceedings. On the interim protection to grant, the only order I am inclined to give would be that which shall prohibit any further transfer and any encumbrance being registered against the title of the suit property.

For the foregoing reasons, the plaintiff's application dated 10th July, 2020 succeeds in part. The application is allowed on the following terms;

1. Pending the determination of the dispute between the parties in the arbitral proceedings that have been commenced by the plaintiff or further orders by the court, there shall be an inhibition inhibiting the registration of any other or further dealings with all that parcel of land known as L.R No. 14970/42.
2. All further proceedings in this suit are stayed pending the determination of the dispute between the parties in the arbitral proceedings that have been commenced by the plaintiff or further orders by the court.
3. The costs of the application shall be in the cause.

Dated and Delivered at Nairobi this 17th Day of December, 2020

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Ogano h/b for Mr. Mosongo for the Plaintiff

Ms. Aluoch h/b for Mr. Gikera for the Defendants

Ms. C. Nyokabi-Court Assistant



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