



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 298 of 2007

SANTACK ENTERPRISES LIMITED .....PLAINTIFF

VERSUS

KENYA BUILDING SOCIETY LIMITED .....DEFENDANT

RULING

Two applications were argued before me. The one dated 14<sup>th</sup> June 2007 by the plaintiff and the one dated 21<sup>st</sup> September 2007 by the defendant. In the application dated 14<sup>th</sup> June 2007, the prayers sought and canvassed before me are:

**(D) pending the reference of the dispute between the plaintiff and the defendant herein to arbitration and pending its final determination in accordance with the law, an injunction do issue restraining the defendant by itself, its servants or agents in any manner whatsoever from terminating the joint venture agreement dated 4<sup>th</sup> July 2004 or from interfering with the plaintiff's continued implementation of the joint venture agreement or in any manner acting in breach of the express provisions of the said joint venture agreement.**

**(E) Pending the reference of the dispute between the plaintiff and the defendant herein to arbitration and pending its final determination in accordance with the law, an injunction do issue restraining the defendant by itself, its servants or agents in any manner whatsoever from violating the provisions of the joint venture agreement or acting in any other manner contrary to its express provisions and in particular clause No.15.3 thereof.**

On 15<sup>th</sup> June 2007, the plaintiff appeared through **Mr. Kimamo Kuria** Advocate before **Lady Justice Lesiit** and obtained prayers (a) (b) and (c) on interim basis. The application by the defendant dated 21<sup>st</sup> September 2007 is meant to displace or discharge those interim orders. It is essential to note that the defendant seeks two main prayers in that application namely;

**(1) that an interim order of protection be issued to restrain the defendant by itself, its servants and/or agents from getting into, accessing, constructing or erecting any structures whatsoever or in any other way interfering with the project site being Nairobi block 11344/ER Komarock Phase V pending the reference of the dispute to arbitration.**

**(2) That the exparte order of this Honourable court issued on 15<sup>th</sup> June 2007 and extended by order of this court on 31<sup>st</sup> July that pending the interpartes of the application dated 13<sup>th</sup> June 2007,**

**a temporary injunction be and is hereby issued restraining the defendant whether by itself, its servants or agents from terminating the joint venture agreement, dated 14<sup>th</sup> July 2004 and from throwing out or evicting the plaintiff from the project site known as parcel Nairobi Block 11344/R – Komarock Phase V or in any other manner whatsoever interfering with the plaintiff’s continued implementation of the joint venture agreement be discharged and/or set aside.**

It is the contention of the plaintiff that the joint venture agreement dated 14<sup>th</sup> July 2004 contains in clause No.15.2 thereof, an arbitration agreement requiring that disputes arising between the parties be referred to an arbitration. And that it is desirable that the said dispute be referred to arbitration, therefore pending the reference to arbitration and final determination of the dispute there is a need for the defendant to be restrained from carrying out its threats to terminate the agreement and to evict the plaintiff from the project site. It is also the contention of the plaintiff that such orders of injunction can only be lawfully granted by this court in accordance with the provisions of section 7 of the Arbitration Act. And the plaintiff is ready and willing to have the dispute referred to an arbitrator for determination, it is just and reasonable to await the outcome of the said process. The deponent of the supporting affidavit, who is a director of the plaintiff states in paragraph 9, the gist of what caused the dispute;

**“that following a change by some senior officers in the respondent company sometime in or about March/April 2005 as well as re-organisational changes in the structural relation between the respondent and its holding Company, the Housing finance Company of Kenya**

**) the new team has become extremely intransigent and un-cooperative and have by word and deed made it quite clear that they are intent on removing the applicant from the project and bringing in their preferred developer/contractor”.**

**On the other hand the defendant contends;**

**(1) that the stalling of the multibillion shilling development project to construct 521 housing units envisaged under the joint venture agreement is occasioning the defendant grave losses.**

**(2) The defendant intends to complete the stalled project through a different consortium of consultants in order to mitigate its loss but is prevented from so doing, as long as the court orders subsist.**

**(3) The plaintiff by itself or agents has since the grant of the interim orders in this matter continued to access the suit premises to undertake substantial but substandard works on site to the detriment of the defendant.**

**(4) The plaintiff is a mere licensee, has no proprietary right over the suit property allowing it to access the project site in the face of the defacto termination of the joint venture agreement which granted it such license. Any wastage arising from its works on the suit premises aggravates the defendant’s losses quite apart from the losses sustained from the failure by the plaintiff to complete the 1<sup>st</sup> sector of the project timeously or at all.**

The defendant also complains against the delay on the confirmation and appointment of arbitrators, which delay the plaintiff continues to perpetrate on the strength of the exparte order of 15<sup>th</sup> June 2007 extended variously by this court.

On the strength of the various and detailed documents filed by the parties, **Mr. Kuria** and **Professor Githu Muigai** made substantive submissions before me. I have taken into consideration all the relevant issues that were presented before me in this matter. I must confess that my task in analyzing the real issues in controversy was encumbered by the pending arbitration.

No doubt that the parties are in agreement that the dispute be referred to arbitration in accordance with clause No.15.2 of the joint venture agreement dated 14<sup>th</sup> July 2004. This was done by consent on 27<sup>th</sup>

June 2007 when the application for the plaintiff's injunction came up for interparties hearing. Again on 4<sup>th</sup> October 2007 the parties herein filed a consent order in terms;

- (1) The resolution of the dispute herein be and is hereby referred to arbitration by;**
  - (a) Mr. Norman Mururu**
  - (b) Mr. Adeel Haq and**
  - (c) If there is disagreement between the arbitrators, they will jointly appoint an umpire.**
- (2) The parties be at liberty to apply.**

It means the dispute is one that concerns an arbitration clause, which the parties have agreed to perform. The parties have also agreed on the relevant persons who would determine their dispute. The only jurisdiction for this court is whether to hold the parties herein to their respective positions, pending the resolution of the dispute by the arbitrators. In my understanding the only issue that remains is whether to accord an interim protection to the position taken by the parties herein.

Section 7 of the Arbitration Act No.4 of 1995 states;

**(1)“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”.**

It is the position of the plaintiff that it has not committed any breach in the terms of the joint venture agreement and that no grounds for terminating the agreement exists. Therefore it is entitled an interim order of protection. **Mr. Kuria** Advocate submitted that clause No.15.1 provides for the procedure to be followed in the settlement of disputes, which is disputes or disagreements must be resolved amicably. That according to the various documents attached various contentious issues have come up between the parties. And it was always the plaintiff who asked the respondent to arrange for a meeting to settle the disputes but the defendant has refused to accede to meetings and discussions for resolving the disagreements.

According to the joint venture agreements, the relationship between the parties herein is that of a partnership in the construction and completion of the subject project. The applicant has set out all the difficulties it has encountered since coming into the site, which are attributed to the acts and omissions of the defendant. According to the plaintiff it is the acts of omission and commission of the defendant which caused delays in the implementation of the project. And it is indeed the defendant who are the cause of the delay in the finalization and implementation of the project.

**Dr. Githu Muigai** learned counsel for the defendant says that the plaintiff falls short of the test for the grant of an injunction under Order 39 which is well established. Let me straight away answer that the jurisdiction of this court in granting an injunction in the circumstances at hand is premised on Section 7 of the Arbitration Act. And since both parties could terminate the agreement, the defendant cannot be restrained from exercising that option. According to the defendant the fact of an existence of an arbitration clause does not warrant the intervention of the court by way of an injunction. It is incorrect to suggest that because there is an arbitration clause, the termination has to be in conjunction with the joint venture agreement.

Let me also say that the plaintiff was selected as the most appropriate party to enter into the joint venture agreement with the defendant. The said joint venture agreement involved inter alia the provision of appropriate infrastructure on a portion of the parcel of land known as parcel **Nairobi/Block 11344/R Komarock Phase V** and the construction and sale of approximately 521 units of low and medium class housing units. The proposed project implementation schedule was provisionally to be done in three sectors over a period of approximately five years commencing from the date that construction starts.

After entering into the Joint Venture Agreement, the plaintiff took possession and secured the site, mobilized equipment and labour and commenced work on the project. It is alleged that the plaintiff built only two show houses while work is still on-going on eighty five other units currently at different stages of completion. The plaintiff also alleges that it has spent large sums of money on the project and the plaintiff is continuing to diligently implement the project.

On the other hand, the defendant complains that the plaintiff has no capacity to undertake a project of such magnitude and has failed to diligently execute the works as agreed. And so far no unit is complete nearly two years since mobilization. The time schedule given by the plaintiff has not at all been followed to date. It is also the case of the defendant that the materials and workmanship have not been to the standards given in the drawings and specifications agreed between the parties.

It is further contended by the defendant that construction, sale and collection of part of the revenue for Section I (127) two bedroom units, 70 three bedroom units and 2 corner shops was to be complete by the end of December 2006. This was not done. In short, the applicant is being accused of inability to carry out and implement a project of such high magnitude.

Now having taken into consideration all the issues raised by the plaintiff and defendant, I am inclined to preserve the subject in contest by allowing the application of the plaintiff in terms of prayer D and E. On the same breadth, I think the plaintiff cannot be allowed to jeopardize the arbitration that is going on between the parties by changing the status at the ground. There are serious accusations made out against the plaintiff, which might radically change the relationship between the parties.

**In the premises I also grant prayer No.2 in the application dated 21<sup>st</sup> September 2007. Both orders would be in existence or in place for a period of 60 days to enable the parties to finalize the arbitration. Each party shall be at liberty to apply and the costs shall be in the cause.**

Dated and delivered at Nairobi this 30<sup>th</sup> day of November 2007.

**M. A. WARSAME**

**JUDGE**

**Court:** ruling delivered in the presence of **Mr. Kuria** for the Plaintiff and **Mr. Imende** for **Githu Muigai** for the defendant/respondent in open court.

**M. A. WARSAME**

**JUDGE**

**30.11.2007**