



**Omni International Consolidated Ltd v Marami Farmers Cooperative
Society Limited (Miscellaneous Application E597 of 2021)
[2022] KEHC 17 (KLR) (Commercial and Tax) (28 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 17 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E597 OF 2021**

**A MABEYA, J
JANUARY 28, 2022**

BETWEEN

OMNI INTERNATIONAL CONSOLIDATED LTD PLAINTIFF

AND

MARAMI FARMERS COOPERATIVE SOCIETY LIMITED DEFENDANT

RULING

1. Before Court is an application dated 11/8/2021. It was brought under section 7 of the [Arbitration Act](#), Rule 2 of the Arbitration Rules, section 3A of the [Civil Procedure Act](#) and Article 159 of the Constitution.
2. The application sought several orders including orders for a temporary injunction to restrain the respondent from demolishing the premises erected on the property known as LR No. 36/II/49 (“the suit property”) pending the determination of arbitration proceedings. There was also a prayer for compensation and security of Kshs.20,000,000/- pending arbitration.
3. The application was supported by the affidavit of Ibrahim Abdullah sworn on 11/8/2021. The grounds thereof were that the parties had entered into a lease agreement dated 1/2/2019 for a period of 5 years and 3 months with a monthly rent of Kshs. 150,000/=. In March 2020, the respondent informed the applicant of its intention to change the terms of the lease by extending the period to 35 years and increasing rent to Kshs. 350,000/= on the condition that the premises were to be redeveloped into an 8 storey building.
4. The applicant then withheld rent for March 2020 waiting to execute the new agreement. That in May 2020, the applicant requested for the respondent’s consent to make repairs on the leased premises but



the respondent withheld the consent under the guise that a new building was coming up. That the applicant was thus unable to operate its hotel business.

5. On 23/2/2021, the respondent unlawfully terminated the lease and evicted the applicant. The applicant was unable to find its property or gain access into the premises. The applicant was thus apprehensive that its property was lost and that the respondent would enter into a new agreement without regard to the lease between them.
6. That there was a conflict between the parties which needed to be resolved through arbitration as per clause 10 of the lease agreement.
7. The respondent did not respond to the application despite the numerous opportunities given. On 24/11/2021, the court gave directions that both parties file and exchange submissions within 7 days. None of the parties availed their submissions on the Court's CTS filing system. I therefore proceeded to make my determination after considering the documents on record.
8. The instant application is brought inter alia under section 7 of the Arbitration Act and seeks interim protection pending arbitration. The said section provides that: -

“(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”.

9. In Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR, the Court of Appeal discussed the nature of interim protective measures and considerations guiding a court before granting an interim order of protection. It was held that: -

“Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo, measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are: -

1. The existence of an arbitration agreement.
 2. Whether the subject matter of arbitration is under threat.
 3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.
 4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties”.
10. In the present case, the lease agreement dated 1/10/2018 was produced. Clause 10 thereof provided that any dispute should first be resolved by negotiation and if that fails, parties were to appoint a mediator to mediate the dispute. If mediation was to fail, any party was at liberty to refer the matter to arbitration within 14 days of the mediator's appointment. Clause 10.3 however provided that nothing would prevent a party from seeking urgent injunctive or interlocutory relief in a court with jurisdiction. The first test is thus passed.



11. On whether the subject matter of the arbitration was under threat, it was contended that the respondent had unlawfully evicted the applicant and denied it access to its property which was exposed to burglary, loss and damage. It was also averred that the respondent had the intention of demolishing the leased premises and put up a new building. There was apprehension that the respondent would enter into a new agreement without regard to the existing lease between the parties. It is thus clear that the leased premises are under threat. The second test has thus passed. In the circumstances, injunctive orders preserving the premises would have been appropriate.
12. However, as regards the period of existence of the injunctive orders, there are special circumstances that I must consider. First of all, the applicant did not demonstrate that it followed the well provided for dispute resolution mechanism under clause 10 of the agreement. The applicant was bound by the agreement and was thus under a duty to first initiate negotiations, failure to which a mediator ought to have been appointed and attempt to resolve the dispute. It was only upon failed negotiations and mediation that the applicant would have a recourse to arbitration.
13. Without demonstrating that due process was followed, the court would be reluctant to issue injunctive orders in vacuum. In the case of *Coast Apparel Epz Limited v Mtwapa Epz Limited & another [2017] eKLR* it was held that: -

“In my view, an interim order of protection is meant to protect the subject matter of arbitration. For it to be granted, the court must be satisfied that the parties have already commenced the process for putting in place an arbitral panel or arbitration proceedings have already started. It is not an order issued in a vacuum as it is premised on intended or ongoing arbitration proceedings. A party to an arbitration agreement cannot come to court, in the manner the Plaintiff has done, to seek an order to refer a dispute to arbitration. Inherent in every agreement with an arbitration clause is the requirement for any aggrieved party to refer any dispute to an arbitration forum using the process provided in the agreement”.
14. Be that as it may, it is undoubted that the subject matter of the dispute requires protection, albeit conditionally. I thus proceed to grant prayer 3, 5 and 7 of the application on the condition that the applicant commences the dispute resolution mechanisms provided under Clause 10 within 45 days of this order, failure to which the orders will be automatically vacated without further recourse to court.
15. As regards the other prayers, I find that they are central to the intended negotiation, mediation and/or arbitration proceedings, and the granting of such orders will be prejudicial to the dispute resolution processes. They are therefore declined.
16. The applicants will have the costs of the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY, 2022.

A. MABEYA, FCI Arb

JUDGE

