



**Rupra Construction Company Limited v Adm Consulting Limited & another (Commercial Civil Case E068 of 2021) [2022] KEHC 165 (KLR) (Commercial and Tax) (23 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 165 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL CASE E068 OF 2021**

**A MSHILA, J**

**FEBRUARY 23, 2022**

**BETWEEN**

**RUPRA CONSTRUCTION COMPANY LIMITED ..... APPLICANT**

**AND**

**ADM CONSULTING LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**VICTORIA COMMERCIAL BANK LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant filed a Notice of Motion dated 29<sup>th</sup> January 2021 premised under the provisions of Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, Order 40 Rules 1 and 4 of the *Civil Procedure Rules*; The application is supported by the grounds on its face and by the sworn Affidavit of Joginder Singh Rupra dated 29<sup>th</sup> January 2019 and sought the following orders that;
  - a. An interim order of injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from offering or offering for sale by public auction, private treaty or whatsoever from dealing with all that property known and described as LR. No. 2327/330 located at Karen, Nairobi belonging to the 1<sup>st</sup> Respondent.
  - b. Pending the hearing and determination of the ongoing arbitral proceedings between the plaintiff/respondent and the 1<sup>st</sup> defendant/respondent before QS Haron G. Nyakundi, Sole Arbitrator, an interim order of injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from offering for sale by public auction, private treaty or whatsoever from dealing with all that property known and described as LR. No. 2327/330 located at Karen, Nairobi belonging to the 1<sup>st</sup> respondent.



2. The parties were directed to canvass the application by filing and exchanging written submissions; hereunder is a summary of the rival submissions.

### **APPLICANT'S CASE**

3. The applicant submitted that the 2<sup>nd</sup> respondent issued a notification of sale in respect to the property notwithstanding the contractor's lien and if the 2<sup>nd</sup> respondent is successful in auctioning the property, the arbitral proceedings will be rendered nugatory and the applicant will suffer irreparable loss.
4. That it entered into a contract with the 1<sup>st</sup> defendant/respondent and fulfilled its obligations under the contract but a dispute arose after the 1<sup>st</sup> respondent failed to pay in full the sum owed for the works done.
5. The breach of contract by the 1<sup>st</sup> respondent necessitated the commencement of arbitral proceedings. In the premises, the applicant is entitled to exercise a contractor's lien over all that property known as LR. No. 2327/330.
6. It was the applicant's case that it had established a 'prima facie' case with a probability of success as contemplated by the Court of Appeal in *Mrao versus First American Bank of Kenya Ltd & 2 others* [2003] eKLR.
7. The amount owed to the applicant by the 1<sup>st</sup> respondent is Kshs.111, 802,617.45 which is manifestly colossal and the non-payment of the aforesaid sum to the applicant has caused it to lack funds to settle claims for wages due to its staff and other stakeholders that were involved in the contractual project.
8. Further, the applicant submitted that the non-payment of the sum owed has severely damaged the applicant's reputation in the construction industry as it has been unable to remit due payments to its staff, associates and other stakeholders.
9. The applicant stated that if the 2<sup>nd</sup> respondent is allowed to sell the suit property; the applicant will be unable to assert its rights against the 1<sup>st</sup> respondent to recover the outstanding amount due to it.
10. On the contractor's lien over the suit property, the applicant submitted that it was a fundamental term of the Contract under Clause 3.4 of the General Obligations of the Employer to make adequate financial arrangements to ensure all payments to the Contractor are made within the periods and in the manner stipulated in the Contract.
11. Owing to the 1<sup>st</sup> respondent's breach of the terms of the Contract, the applicant exercised its right to terminate the Contract for non-payment under Clause 39.1 of the Contract vide a Notice of Termination dated 27<sup>th</sup> November 2019. To date the sums due to the applicant by the 1<sup>st</sup> respondent remain unpaid.
12. The applicant is thus entitled to a Contractor's lien pending the settlement of the outstanding fees by the 1<sup>st</sup> respondent. The applicant relied on the case of *Fynbosland 435 CC and Torro ya Africa (PYT) Ltd & 2 others* [2011] ZANWHC 68 where the Court explained that a builder's (Contractor's) lien is "a right of retention over the building or structure which the builder has constructed or repaired to secure payment of the contract price..... The lien entitles an Applicant to his full contract price."
13. The Applicant pleaded with the court to stop the sale of the suit property by the 2<sup>nd</sup> respondent pending the determination of the arbitral proceedings. Section 7 of the *Arbitration Act* provides that this is not incompatible with an arbitration agreement to seek interim protection of the Court during arbitral proceedings.

### **RESPONDENTS' CASE**



14. The 2<sup>nd</sup> Respondent in response stated that advanced a sum of Kshs.325, 000,000 to the 1<sup>st</sup> respondent and therefore, the 2<sup>nd</sup> Respondent had a first legal charge, further charge, second further charge and third further charge registered in its favour over the suit property.
15. It was the 2<sup>nd</sup> respondent's contention that there is no contractual relationship between it and the applicant and the contractor's lien constitutes a non-registrable interest in the suit property incapable of superseding the registered interest of the 2<sup>nd</sup> respondent in the suit property in its capacity as a Chargee.
16. The alleged debt of Kshs.111, 802,617.45 is unproved and unascertained as the claim is before the Arbitrator and the applicant cannot have a contractor's lien over the suit property. The said contractor's lien would only crystalize after the debt has been definitively ascertained to be owing to the applicant by the 1<sup>st</sup> respondent or if the debt is unequivocally admitted to be owing.
17. Further, that it is not in dispute that the suit property is charged in favour of the 2<sup>nd</sup> respondent and under Section 96 of the *Land Act*, the 2<sup>nd</sup> respondent has the right to sell the charged property in the event of default in repayment of the facilities advanced to the chargor; in this instance the 1<sup>st</sup> respondent.
18. The 2<sup>nd</sup> respondent submitted that the applicant's application failed to establish a 'prima facie' case with any prospects of success. The applicant's contractor's lien does not exist and if it did it does not supersede the 2<sup>nd</sup> respondent's registered interest in the suit property. (See: *Thomas & Piron Grands Lacs Limited versus Lighthouse Property Company Limited; Chasebank Kenya Limited (under Receivership) & Another* [2019] eKLR.)
19. In addition to the above, the 2<sup>nd</sup> respondent stated that the applicant has not explained how it would suffer irreparable loss if the injunction sought is not granted and has thus failed to satisfy this ingredient;
20. It submitted that the balance of convenience lay in declining to grant the injunction, the 2<sup>nd</sup> respondent urged the court to dismiss the application and to be persuaded by the reasoning of the court in *Willow Park Limited versus Jamii Bora Bank Limited & another* [2019] eKLR.
21. The 1<sup>st</sup> respondent submitted that the claim before the court is 'sub judice' as it is commenced during pendency of arbitral proceedings. Further, that the 2<sup>nd</sup> respondent is not a party to the arbitral proceedings. It is in the interest of justice that the application be dismissed.

#### **ISSUES FOR DETERMINATION**

22. The Court, after reading and considering the Application, Response and the respective written submissions, has framed the following issue for determination;
  - a. Whether the applicant has made out a case for the grant of interim orders of protection pending Arbitration;

#### **ANALYSIS**

23. The applicant seeks an order of injunction pending the hearing and determination of the ongoing arbitral proceedings between the plaintiff/applicant and the 1<sup>st</sup> defendant/respondent.
24. A grant of an interim measure of protection is indeed discretionary and thus the court ought to take into account the factor of urgency with which the applicant has moved to court. The purpose of an order of protection is to preserve assets or in some way maintain the status quo as the parties await the outcome of the arbitral proceedings. Therefore, the court should also, look into the risk or prospects of any harm or prejudice in the absence of protection.



25. Section 7 of the [Arbitration Act](#) empowers the High Court to protect arbitral proceedings by issuing injunctive orders protecting the subject matter of arbitration. The section stipulates as follows;

“7.

- (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. (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.”

26. In [Seven Twenty Investments Limited -Vs- Sandhoe Investment Kenya Limited](#), [2013] eKLR, the court further held:

“Perusal of section 7 of the [Arbitration Act](#) clearly shows that the issue of whether or not there is a dispute or whether or not there would be losses by either side would not be a factor for a court to take into consideration when deciding whether or not it should grant an order of interim measure of protection or injunction to safeguard the subject matter of the arbitral proceedings. All that a court would be interested in is whether or not there was a valid arbitration agreement and if indeed the subject matter of the arbitral proceedings was in danger of being wasted or dissipated so as to preserve the same pending the hearing and determination of the arbitral reference.”

27. It is important to appreciate that conditions for grant of a conservatory order pending referral of a dispute to Arbitration as stipulated in Section 7 of the [Arbitration Act](#) are different from the conditions for grant of interlocutory injunction as spelt of in the [Giella v Cassman Brown](#)[1973] EA 358.

28. This difference was brought out very succinctly in the case of [Safaricom Limited -vs- Ocean View Beach Hotel Limited & 2 Others](#) [2010] eKLR, where the Court of Appeal held that the principles enunciated in [Giella -vs- Cassman Brown \(supra\)](#) should not be the basis for granting the interim measures of protection pursuant to the provisions of Section 7 of the [Arbitration Act](#). The Court of Appeal interpreted interim measures in the following terms:

“By determining the matters on the basis of the Giella principles, the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names... whatever their description, however, they are intended in principle to operate as “holding” orders, pending the outcome of the arbitral proceedings.”

29. In issuing an interim measure of protection as provided in Section 7 the Court’s determination of the parties dispute is restricted. The Court’s role was eloquently outlined in the decision of J. G. Nyamu



J.A. in the case Safari Limited –Vs- Ocean View Beach Hotel Limited & 2 others [2010] eKLR where it was stated the Court faced with such application should take into account the following-

- a. The existence of an arbitration agreement.
- b. Whether the subject matter of arbitration is under threat.
- c. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?
- d. 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?

30. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.

31. In the present case, it was not disputed that the parties herein entered into a contract for the development of Apartments on the suit property vide contract dated 21<sup>st</sup> November 2014. It was also not disputed that the contract contained an arbitration clause at clause 45.1, which provides:

“In case any dispute or difference shall arise between the Employer or the Architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within 30 days of the notice. The dispute shall be referred to arbitration and final decision of a person to be agreed between the parties.....”

32. Bearing the above in mind, has the applicant met the threshold for the grant of an interim measure as outlined in the Court of Appeal case of *Safaricom Limited v Ocean View Beach Hotel Ltd & 2 others (supra)* With regard to whether the subject matter is under threat, this court has considered the various arguments advanced by the opposing parties.

33. The applicant avers that the 1<sup>st</sup> respondent has not performed part of its obligations under the said contract and as a result the applicant is claiming a sum of KShs.111, 802,617.45.

34. In light of the above, the arbitral proceedings were instituted for the recovery of the debt owed to the applicant by the 1<sup>st</sup> defendant/respondent and therefore, the suit property is in no way the subject matter of the arbitration. The applicant has the right to pursue its debt even in the absence of the suit property.

35. Further, this court concurs with the 2<sup>nd</sup> respondent's contention that there is no contractual relationship between it and the applicant and the contractor's lien constitutes a non-registrable interest in the suit property incapable of superseding the registered interest of the 2<sup>nd</sup> respondent in the suit property in its capacity as a Chargee.

36. From the foregoing, this court finds that, the applicant has no registrable interest in the suit property and granting the interim protection order/injunction is not merited.

#### **FINDINGS AND DETERMINATION**

37. In the light of the foregoing this court makes the following findings and determinations;



- (i) This court finds that the applicant has not made out a case for the grant of interim orders of protection pending Arbitration;
- (ii) The application is found to be lacking in merit and it is hereby dismissed;
- (iii) The applicant shall bear the costs of this application.

Orders Accordingly.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**HON. A. MSHILA**

**JUDGE**

**In the presence of;**

Wangare holding brief for Wandati for the 2<sup>nd</sup> Respondent

Mutinda for the plaintiff /Applicant

No appearance for the 1<sup>st</sup> Respondent

Lucy-----Court Assistant

