



**Sprinter Real Estate Investment Limited v Diaspora Housing Management Limited; Njau & 27 others (Proposed Interested Parties) (Environment & Land Case E010 of 2022) [2023] KEELC 17718 (KLR) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17718 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E010 OF 2022**

**JG KEMEL, J  
MAY 23, 2023**

**BETWEEN**

**SPRINTER REAL ESTATE INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**DIASPORA HOUSING MANAGEMENT LIMITED ..... DEFENDANT**

**AND**

**MORILLE NJAU ..... PROPOSED INTERESTED PARTY  
ONTARIO INC ..... PROPOSED INTERESTED PARTY  
ANNE NYAMBURA MWANGI ..... PROPOSED INTERESTED PARTY  
ANNAH WANJIRU KERETHI ..... PROPOSED INTERESTED PARTY  
ANNASTASIA NJERI MUNGA ..... PROPOSED INTERESTED PARTY  
ANTHONY NGATA KUNG’U ..... PROPOSED INTERESTED PARTY  
DENNIS ODHALO ..... PROPOSED INTERESTED PARTY  
EDWARD KINUTHIA MURUA ..... PROPOSED INTERESTED PARTY  
FLORENCE WARUGURU MUCHIRI ..... PROPOSED INTERESTED PARTY  
GEORGE KIINGATI KANGERE ..... PROPOSED INTERESTED PARTY  
GRACE MUTHONI KARANJA ..... PROPOSED INTERESTED PARTY  
GRACE NJERI NJAU ..... PROPOSED INTERESTED PARTY  
JACQUELINE OKWAYO ..... PROPOSED INTERESTED PARTY  
WELLINGTON TECHERA ..... PROPOSED INTERESTED PARTY  
JANE WAITHIRA KIGURU ..... PROPOSED INTERESTED PARTY**



**JESUS RESTORATION CENTRE ..... PROPOSED INTERESTED PARTY**  
**JOSEPH MUCHIRI NJIIRI ..... PROPOSED INTERESTED PARTY**  
**KARANJA WA MUIRURI ..... PROPOSED INTERESTED PARTY**  
**LOISE MUTHONI KINUTHIA ..... PROPOSED INTERESTED PARTY**  
**MARY NJAMI NJONJO ..... PROPOSED INTERESTED PARTY**  
**PETER NJIRI KIRUTHI ..... PROPOSED INTERESTED PARTY**  
**STEPHEN WAMBUA KASUVU ..... PROPOSED INTERESTED PARTY**  
**NAOMI MUTHEMBWA MBILI ..... PROPOSED INTERESTED PARTY**  
**TERESIAH MUTHONI NJUGUNA ..... PROPOSED INTERESTED PARTY**  
**TERESIAH WAMBUI KAMAU ..... PROPOSED INTERESTED PARTY**  
**TOBIAS MAHIRI ..... PROPOSED INTERESTED PARTY**  
**WILFRED KABURUNJE RUTH ..... PROPOSED INTERESTED PARTY**  
**ROSEMARY NJOKI KAGE ..... PROPOSED INTERESTED PARTY**

## **RULING**

1. This Ruling is in respect to the Application dated 26/1/2023 filed by the Plaintiff.
2. This Motion seeks Orders That;
  - a. Spent.
  - b. This Honorable Court be pleased to review and correct an error in its Ruling dated 19<sup>th</sup> December 2022 in particular paragraph 34 of the Ruling, Order No. d thereof, by correcting an error apparent on the face of it, and clarify the status quo therein to read as follows;- “in the interim, status quo orders as at the date of this Ruling are ordered for purposes of preserving the substratum of the subject matter until the conclusion of the Arbitral proceedings.” And further that the status quo prevailing as the date of this Ruling is that the premises is in the possession of the Plaintiff.
  - c. As a consequence of the above, a Restriction be put on the suit premises being; Kiambaa/Ruaka/7048 prohibiting any dealings with the same until conclusion of the Arbitral process.
  - d. Costs be in the cause.
3. It is based on the grounds that; the Plaintiff is the beneficial owner of the suit land having transferred it to the Defendant under circumstances that now appear fraudulent. That the Plaintiff maintained possession of the suit premises despite ceding ownership to the Defendant. That the Defendant has not met its terms of the joint venture including paying the monies payable under the agreement.
4. The Application is supported by the Supporting Affidavit of even date sworn by Richard Mbugua Ng’ethe. He deponed that the Plaintiff is the beneficial owner of the suit land having been the previously registered owner of Kiambaa/Ruaka 6495 & 6496 as shown by RMN2 ‘a’ and ‘b’ copies of the respective title deeds. That the suit land was transferred to the Defendant in furtherance of a Joint Venture entered into vide a sale agreement dated 11/2/2021 marked RMN1a. That the rival parties



seemingly fell out on cited fraudulent deals by two directors of the Defendant Company prompting the Plaintiff to file the instant suit and later the Defendant's Application dated 17/2/2022; the gist of this Court Ruling delivered on 19/12/2022 marked as RMN5.

5. That in the said Ruling (Order d) the Court held; "in the interim status quo orders as at date of this Ruling are ordered for purposes of preserving the substratum of the subject matter and pending the commencement of the Arbitral proceedings". See page 11 – 12 of RMN-5.
6. That the thrust of the Ruling as can be seen in paras 30-33 is that the suit property was to be preserved until the Arbitral process is concluded. That there is therefore an error on the face of the record in the wording of the Order (d) of the Ruling where the status quo ought to be maintained until the conclusion of the Arbitral proceedings.
7. In addition the Applicant sought orders that the status quo as at the date of the Ruling is that the suit premises are in possession of the Plaintiff.
8. That there be a consequential order that there be a restriction on the suit land restricting any dealings to preserve it from any dealings until the Arbitral proceedings are concluded.
9. That the error on the face of the record was found when counsel in conduct of the matter was preparing for the Arbitral process. That because of the error the Defendant has attempted to invade the suit premises forcefully and cause anarchy and hence the urgency in correcting the error.
10. Despite service of the Application – see Affidavit of Service sworn on 7/3/2023 by Dominic Gachuma, Court Process Server, the Defendant failed to file any objection.
11. Notably, on 20/3/2023 the Defendant's Learned Counsel Mr. Marete intimated his wish to oppose the Motion, he was granted leave to file Replying Affidavit and written submissions on 20/3/2023 within 7 days but at the time of writing this Ruling, he had not complied with the said directions.
12. The Motion is thus unopposed. Nevertheless, it is determined on its merits as hereunder.
13. The Plaintiff filed its written submissions dated 7/3/2023 through the firm of F. N. Njanja & Co. Advocates. The Plaintiff echoed its averments in its Supporting Affidavit already highlighted above leading to this Honourable Court's Ruling delivered on 19/12/2022. That the Court inter alia granted preservative orders over the suit land pending the commencement of the Arbitral process.
14. It is the Plaintiff's further contention that the Court's Order is erroneous on the face of the record to the extent that the status quo pending at the time was to last the commencement of arbitration and once commenced, the suit land might be at risk hence the need to rectify the same to include status quo to remain until completion of the arbitration proceedings. That the status meant and still is that the Plaintiff is in possession and occupation of the suit land. That it is against para. 31 of the Ruling that the Plaintiff so submits.
15. The Plaintiff also urged the Court to put a restriction on the suit premises to preserve the property pending the completion of the Arbitral process.
16. The main issue for determination is whether the Application is merited.
17. The Application is filed pursuant to Sections 1A, 1B, 3A, 99 *Civil Procedure Act* and Order 45 *Civil Procedure Rules*. Inter alia Section 1A *Civil Procedure Act* states;

“(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.



- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in Subsection (1).”
18. In addition, Section 1B *Civil Procedure Act* (CPA) provides for the duty of the Court to ensure furtherance of Section 1A above with an aim to ensure the just determination of the proceedings. In similar fashion, Section 3A *Civil Procedure Act* empowers this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.
19. Order 45 *Civil Procedure Rules* states;
- “1. Application for review of decree or order [Order 45, rule 1.]
- (1) Any person considering himself aggrieved—
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.”
20. The Plaintiff has sought review of the orders on the grounds of an error on the face of the record. It is its view that the Court committed an error when it granted the interim measures pending the commencement of the Arbitral proceedings.
21. An error apparent on the face of the record, was discussed at length in the case of *Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya* [2019] eKLR as follows:
- “In *Attorney General & O’rs v Boniface Byanyima* HCMA No. 1789 of 2000, the Court citing *Levi Outa v Uganda Transport Company* {1995} HCB 340, held that the expression “mistake or error apparent on the face of record” refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no Court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.” (emphasis mine)
22. The Court went on to make the following observation-
- “There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by ‘error apparent’. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out, see the decision in *Thungabhadra Industries Ltd. v Govt. of A.P.*”



The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. To put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the Court/tribunal on a point of fact or law. In any case, while exercising the power of review, the Court/tribunal concerned cannot sit in appeal over its judgment/decision."

23. In granting the orders that it did the Court was guided by the provisions of Section 7 of the Arbitrators Act as follows;

"7. Interim measures by Court

(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."

24. The Plaintiff principally is urging this Court to Review Order (d) of its Ruling dated 19/12/2022 to order that the status quo prevailing at the time of the Ruling be extended to cover not only the commencement but conclusion of the arbitration proceedings.

25. In answering the issue it is imperative that the Court sets out the role of the role of arbitrators in preservation of the subject matter. Section 18 of the Arbitration Act provides the power of an Arbitral tribunal, it includes:-

"(1) Unless the parties otherwise agree, an Arbitral tribunal may, on the Application of a party—

a. order any party to take such interim measure of protection as the Arbitral tribunal may consider necessary in respect of the subject-matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure; or

b. order any party to provide security in respect of any claim or any amount in dispute; or

c. order a claimant to provide security for costs."

(2) The Arbitral tribunal or a party with the approval of the Arbitral tribunal, may seek assistance from the High Court in the exercise of any power conferred on the Arbitral tribunal under subsection (1)."

26. From the plain reading of Section 18 of the Arbitration Act 1995 it is clear in my mind that the parties are entitled to seek for an interim measure of protection before the arbitrator pending the resolution of the dispute. They are intended in principle to operate as "holding" orders, pending the outcome of the Arbitral proceedings. The making of interim measures was never intended to anticipate litigation. However, where the Arbitral tribunal has the power, it cannot issue interim measures until the tribunal



itself has been established. Moreover even where an Arbitral tribunal has the power to issue interim measures such powers are generally restricted to the parties involved in the arbitration itself.

27. Section 18 (2) provides that parties with the approval of the Arbitral tribunal can seek assistance from the High Court to enforce interim measures. In such cases, the Court is guided by judicial precedent in *Infocard Holdings Limited v Attorney General & 2 Others* [2014] eKLR, the Court stressed that the purpose of the interim measure of protection is to preserve the subject matter of the dispute pending arbitration. The Court, therefore, should in making the order or rejecting the Application be concerned with the finding out whether the subject matter of arbitration is in danger of being wasted or whether the Application would be rendered nugatory by declining to grant the orders sought.
28. Furthermore, the case *Isolux Ingeniera, S.A. v Kenya Electricity Transmission Company Limited & 5 Others* [2017] eKLR Onguto J. L stated as follows in prescribing the applicable standards when issuing interim measures in Arbitral proceedings:-

“The *Act* prescribes no standards applicable to Applications for interim measure of protection but case law has essentially settled the standards. Unlike Arbitral tribunals which will consider imminent harm and the likelihood of success on the merits of the dispute, a Court faced with an Application for interim measures must avoid venturing into the merits of the dispute for the obvious reason that this is not its remit. It is the remit of the Arbitral tribunal. The Court must thus be careful not to pre-empt the ultimate award, even as it considers an Application for interim measures of protection.

The Court however has a loose discretion to ensure that the aim and purpose of an interim measure of protection is achieved.”

29. The parameters of the Court when dealing with an Application under the above Section were succinctly set out by Nyamu, JA in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others Civil Application* No. 327 of 2009 the following terms:

“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?”

30. From the above legal edicts, an arbitrator under Section 18 of the *Arbitration Act* has powers to issue interim measures. However, they can outsource the powers of the Court, by seeking its leave to enforce the interim measures in Arbitral proceedings.
31. The Orders of stay of proceedings are yet to be vacated, reviewed or appealed against. They are therefore valid and enforceable. The Plaintiff ought to have moved the Court to lift the orders but sadly it did not.
32. That said I take consolation in the fact that the Arbitral body has powers to so grant the said orders. In drawing the orders as it did, this Court was cognizant of the powers of the arbitrator to preserve the property pending the hearing and determination of the arbitration.
33. The Court finds that there was no error apparent on the face of the record



34. The other prayer was for this Court to order for registration of a Restriction on the suit land pending the conclusion of the arbitration hearings. Restrictions are provided for under Part VII of the Land Registration Act. Section 76 thereto provides;

“76. Restrictions

- (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the Application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.
- (2) A restriction may be expressed to endure—
  - a) for a particular period;
  - (b) until the occurrence of a particular event; or
  - (c) until the making a further order is made, and may prohibit or restrict all dealings or only the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.
- (3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.”

35. The procedure to be followed is undoubtedly outlined above and is categorical that any person interested in the land may move the Registrar to register a restriction over the land. Taking into account the now settled doctrine of exhaustion of alternative remedies, this Court declines the invitation to make an order for a Restriction as prayed at this stage of the suit.

36. Ultimately the Application has no merit. It is dismissed with no orders as to costs.

37. Orders accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 23RD DAY OF MAY, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of**

**Njanja for Plaintiff**

**Mwendwa holding brief for Kithinji for Defendant**

**3<sup>rd</sup> – 27<sup>th</sup> Interested Parties – Absent**

**Court Assistants – Kevin/Lilian**

