



**End to End Kenya Limited v Rhombus Construction Company Limited & another  
(Civil Cause E008 of 2022) [2022] KEHC 17036 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 17036 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CAUSE E008 OF 2022  
MN MWANGI, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**END TO END KENYA LIMITED ..... PLAINTIFF**

**AND**

**RHOMBUS CONSTRUCTION COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**TOP SCOUT KENYA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application before this Court is a Notice of Motion dated February 22, 2022 brought under the provisions of Section 7 of the Arbitration Act, Order 40 Rules 1, 2 and 3 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. The plaintiff seeks the following orders-
  - i. Spent;
  - ii. Spent;
  - iii. That this Honourable Court be pleased to grant an injunction restraining the respondents, their agents and/or servants from seizing, repossessing, leasing, disposing of, advertising for sale and/or in any way interfering with the applicant's possession and use of Hydraulic Excavator SY245H pending reference of this dispute to Arbitration;
  - iv. That this Honourable Court be pleased to grant an injunction restraining the respondents, their agents and/or servants from seizing, repossessing, leasing, disposing of, advertising for sale and/or in any way interfering with the applicant's possession and use of Hydraulic Excavator SY245H pending the hearing and determination of the suit;
  - v. That this Honourable Court be pleased to grant a mandatory order compelling the respondents, their agents and/or servants to operationalize the use of Hydraulic Excavator



SY245H without any form of interference whatsoever pending the hearing and determination of the suit herein;

- vi. That this Honourable Court be pleased to grant a mandatory order compelling the respondents, their agents and/or servants to return to the applicant the unlawfully repossessed SANY Motor Grader STG 190C-8 and operationalize the use of the said machine without any form of interference whatsoever pending the hearing and determination of the suit herein; and
  - vii. That costs of this application be provided for.
2. The application is supported by an affidavit sworn on February 22, 2022 by Abdirahman Mohamud Abdow, the applicant's director. In opposition to the application herein, the 1<sup>st</sup> respondent filed grounds of opposition dated April 21, 2022.
  3. The application herein was canvassed by way of written submissions. The applicant's submissions were filed on May 6, 2022 by the law firm of Abdiaziz & Company Advocates. The 1<sup>st</sup> respondent's submissions were filed by the law firm of Sigano & Omollo LLP Advocates on May 9, 2022.
  4. Mr Mohamed, learned Counsel for the applicant submitted that the nature of the agreements between the parties herein was not only a lease but also on rent to own, hence the title of the excavator would pass to the applicant upon payment of the full loan. He relied on the provisions of Section 7(1) of the Arbitration Act, 1995 which provides for the grant of interim measures of protection in arbitration. He also relied on the Court of Appeal decision in Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR, where the Court settled the factors to be satisfied for grant of interim measures of protection as being the existence of an arbitration agreement; whether the subject matter of arbitration is under threat; the appropriate measure of protection after an assessment of the merits of the application; and for what period the measure of protection must 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.
  5. He cited to the case of Giella v Cassman Brown & Co. Ltd (1973) EA 358 at page 360, where the Court set down the principles for grant of an interlocutory injunction. He submitted that from the pleadings of the main suit, it is indisputable that the applicant's case raises several issues of law and fact, such as whether the applicant is in breach of any terms and conditions of the contracts. In addition, Mr. Mohamed submitted that these are triable issues which can only be determined upon subjecting them to a full trial so as to determine their veracity or otherwise before a qualified Arbitrator to be agreed on by the parties herein. To this end, he relied on the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR, where the Court defined what constitutes a prima facie case.
  6. It was submitted by Mr Mohamed that the 2<sup>nd</sup> respondent illegally repossessed the SANY Motor Grader STG 190C-8 on October 18, 2021 while acting on the 1<sup>st</sup> respondent's instructions without any prior notice to the applicant. He stated that the 1<sup>st</sup> respondent also instructed the 2<sup>nd</sup> respondent to illegally and unprocedurally repossess the Hydraulic Excavator SY245H to the detriment of the applicant which had been diligently fulfilling its obligations by making the requisite payments, thus necessitating the application herein. Mr. Mohamed contended that the 1<sup>st</sup> respondent's breach of contract and the illegal repossession seriously crippled and continue to affect the applicant's operations thus occasioning it loss that no form of monetary value can remedy. He submitted that if the orders sought herein are not granted, the applicant stands to lose the amount already paid to the 1<sup>st</sup> respondent.
  7. Mr Omolo, learned Counsel for the 1<sup>st</sup> respondent similarly relied on the provisions of Section 7 of the Arbitration Act. He cited the case of Isolux Ingeniera, S.A. v Kenya Electricity Transmission Company



Limited & 5 others [2017] eKLR, where Judge Onguto held that the Court has a loose discretion to ensure that the aim and purpose of an interim measure of protection is achieved. Mr. Omolo submitted that the grant of interim measures of protection under Section 7 of the Arbitration Act is discretionary in nature. In citing the case of Safaricom Limited v Ocean View Beach Hotel Limited & 2 others (*supra*), he contended that the principles for interlocutory injunction do not apply in the proceedings herein. He further submitted that pursuant to the provisions of Section 7 of the Arbitration Act, once the Court hears the application, the suit on which it is anchored is also terminated. In addition, he stated that the orders sought herein are nebulous since the applicant has not disclosed if arbitral proceedings have commenced.

8. Mr Omolo submitted that the application herein should be determined by the principles set out in Safaricom Limited v Ocean View Beach Hotel Limited & 2 others (*supra*) which have guided Courts in exercise of their judicial discretion for granting interim measures of protection under Section 7 of the Arbitration Act. He stated that the parties herein have an Arbitration Agreement entrenched in Clause 18.5 of the subject leasing and rent to own agreements. He also stated that from the 1<sup>st</sup> respondent's letter dated September 15, 2021 and the applicant's Advocate's letter dated September 20, 2021, it is apparent that the subject matter herein is the non-payment of the leasing and quarterly rent to own payments owed to the 1<sup>st</sup> respondent.
9. He cited the case of EON Energy Limited v Desnol Investment Limited & 4 others [2018] eKLR, where the Court took the view that the possible threats to the subject matter of arbitration may include the danger of being wasted away or disposed of. He submitted that there was no threat or danger of wastage or dissipation of the subject matter. He contended that from the orders sought herein, the applicant wants to retain possession of the Hydraulic Excavator SY245H which continues to attract a default rate comprising of a daily payment, calculated at current applicable market rate of USD 524 pursuant to Clause 10.6 of the leasing and rent to own agreements dated August 7, 2020. He also submitted that none of the interim measures of protection sought by the applicant seeks to preserve the subject matter herein, which is non-payment of leasing and quarterly rent to own payments owed to the 1<sup>st</sup> respondent.
10. In submitting on the case of Safaricom Limited v Ocean View Beach Hotel Limited & 2 others (*supra*), Mr Omolo stated that the Court held that after the grant or failure to grant an interim measure of protection under Section 7 of the Arbitration Act, there would be no pending suit because the substance of the suit under the said provisions is grant or refusal of the interim measure itself. He submitted that the duration of operation of the orders sought is nebulous and indefinite. In addition, he contended that the orders granted pending reference to arbitration would only be efficacious if the applicant promptly took steps to commence the arbitration proceedings, hence the applicant was in breach of Section 19A of the Arbitration Act. Mr Omolo also submitted that the interim measures of protection may also be obtained before the Arbitral Tribunal pursuant to the provisions of Section 18(1) of the Arbitration Act.

### **Analysis And Determination**

11. I have considered the application filed herein and the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the respondent and the written and oral submissions by Counsel for the parties. The issue that arises for determination is whether the application herein is merited.
12. In the affidavit filed by the applicant, it deposed that it entered into two agreements, one for leasing and the other for rent to own with the 1<sup>st</sup> respondent dated August 7, 2020 in respect of a new SANY Motor Grader STG 190C-8 chassis number PY5819CA0092 and registration number KHMA665S



and a new Hydraulic Excavator SY245H chassis number 0E1110246K3L70090CM and registration number KHMA279R. The applicant stated that it was a term of the agreements that the applicant would make three equal monthly payments for the first three months which was the leasing period, and thereafter on the fourth month, it would make payments of four equal quarterly instalments to own the assets.

13. The applicant contended that the three month leasing period commenced on September 2, 2020 and for the said month, it made full payment on August 10, 2020 upon execution of the agreements and that for the month of October, 2020, the applicant made two RTGS wire transfer payments of Kshs 900,000/= and Kshs 600,000/=, respectively, leaving a balance of Kshs 451,032.00. The applicant stated that for the month of November, 2020, it made an RTGS wire transfer of Kshs 1,000,000/= on December 2, 2020 which offset the 2<sup>nd</sup> month's balance, thus leaving a balance on the leasing payment at Kshs. 1,042,064.00 as at November, 2020. The applicant stated that thereafter, it sought an extension of the leasing period by one month, to which the 1<sup>st</sup> respondent responded in the affirmative only to inexplicably immobilize and stall the operations of the machines for the entire month of December, 2020 without prior notice to the applicant.
14. It was stated by the applicant that after the lapse of the lease period, the applicant indicated its intention to rent to own the machines and the 1<sup>st</sup> respondent agreed to the request and the applicant proceeded to make deposits for the first installment which was for the period between January and March 2021. The applicant deposed that as it was making arrangements for payments for the next quarter of the rental period and to settle the outstanding balance, the 1<sup>st</sup> respondent again without prior notice immobilized the machines on 2<sup>nd</sup> April, 2021 thus the machines remained non-operational and idle on the site paralyzing the applicant's road works. The applicant further stated that the 1<sup>st</sup> respondent vide its letter dated 15<sup>th</sup> September, 2021 wrote to the applicant demanding payment of a sum of Kshs. 21,385,022.03, which sum it claims was inclusive of the two quarterly installments notwithstanding the fact that the 1<sup>st</sup> respondent had immobilized the machines. It was stated that the applicant responded to the said demand vide a letter dated September 20, 2021 stating that the outstanding amount it owed was Kshs 1,042,064.00.
15. The applicant averred that thereafter, the 1<sup>st</sup> respondent instructed the 2<sup>nd</sup> respondent to illegally repossess the SANY Motor Grader STG 190C-8 which machine was repossessed on October 18, 2021 without prior notice to the applicant. It further averred that the contracts herein contain a dispute resolution mechanism which provides that parties shall resolve any dispute through negotiation first and if negotiation fails, the matter shall be referred to the decision of a single Arbitrator to be agreed on by the parties. The applicant stated that there is a dispute in regard to the outstanding amount owed by the applicant to the 1<sup>st</sup> respondent, as well as the illegal immobilization of the machines, thus the applicant intends to refer the dispute to arbitration. In addition, the applicant stated that the 1<sup>st</sup> respondent acted in breach of the dispute resolution clause by instructing the 2<sup>nd</sup> respondent to illegally repossess the SANY Motor Grader STG 190C-8 and the Hydraulic Excavator SY245H from the applicant allegedly for the outstanding debt.
16. In the grounds of opposition dated April 21, 2022, the 1<sup>st</sup> respondent opposed the application herein on the following grounds-
  - i. That the Court's intervention sought herein will fatally undermine the intended arbitration process and the outcome of the arbitration process thereby rendering it a mere window dressing exercise as the orders sought by the applicant exceed the scope of interim measures of protection envisaged under Section 7 of the *Arbitration Act*;



- ii. The 2<sup>nd</sup> defendant/respondent herein is not a party to the subject arbitration agreement and will not participate in the purported intended arbitration proceedings, thus the interim measures of orders sought against the 2<sup>nd</sup> defendant/respondent herein are untenable because there is no contractual relationship between the plaintiff/applicant and the 2<sup>nd</sup> defendant/respondent created by the subject leasing and rent to own agreements;
  - iii. The orders sought herein by the plaintiff/applicant will seriously undermine the contractual obligations particularly expressed in Clause 10.3 of the subject leasing and rent to own agreements which provide as follows;
    - “On the happening of an event of default, without prejudice to any claims for the arrears of the quarterly instalments or payment of interest, the renter shall;
      - a. Deliver the Asset to the owner’s business address;
      - b. Pay to the owner any amounts due and owing in terms of this agreement plus any interest accrued thereon as at the date of such termination;
      - c. Return to the owner all registration books and certificates, policies and certificates of insurance and licenses relating to the asset.”
    - iv. That the plaintiff/applicant has failed to pay the quarterly installments payable to the 1<sup>st</sup> defendant/respondent under Clause 4 of the subject leasing and rent to own agreements and has therefore failed to comply with its obligations under Clause 10.6 of the subject leasing and rent to own agreements for Hydraulic Excavator SY245H dated August 7, 2020 which provides as follows;
      - “In the event that at the end of the Term all payments have not paid up by the Renter as set out at Clause 4, in accordance with the terms of this agreement the renter shall be liable to pay a default rate to the owner as set out below;
        - a. A daily payment for the rental of the equipment calculated at current applicable market rate of United States Dollars Five Hundred and Twenty-Four (USD 524)”;
    - v. That the plaintiff/applicant’s application for interim measures of protection lacks merit and ought to be dismissed forthwith.”
17. It is undisputed that an arbitration clause exists at Clause 18.5 of the leasing agreement on one hand, and the rent to own agreement dated August 7, 2020, on the other hand. As such, this Court lacks the requisite jurisdiction to hear and determine any aspect in relation to the substantive dispute. The instant application has been brought under the provisions of Section 7(1) of the Arbitration Act No 4 of 1995 which provides as hereunder-
- “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.”
18. Pursuant to the provisions of Section 7 of the Arbitration Act, 1995 the High Court is empowered on application, to grant interim orders to preserve the subject matter and/or maintain status quo so as to ensure that there is a dispute for hearing and determination before the Arbitrator. It is trite that the interim orders envisaged are in the form of injunctions, deposits and/or any other relevant and legal



interim order so as to enable parties pursue Arbitration proceedings. As correctly submitted by the 1<sup>st</sup> respondent's Counsel, the principles set out in the case of *Giella vs Cassman Brown* [1973] E A 358 are not applicable herein, since this Court is considering an application for interim measures of protection pending arbitration.

19. In *Telewa Road Construction Limited vs Kenya National Highways Authority* [2014] eKLR, the Court when addressing the issue of an application which sought an interim order of protection pending appeal rendered itself as hereunder-

“The injunction herein was granted on a balance of convenience as granting it on the grounds that the Plaintiff has established a prima facie case with a probability of success could be misinterpreted to mean that the court has considered the merits or demerits of the dispute between it and the Defendant and which this court found it has no power or jurisdiction to do.”

20. The principles guiding the Court in determining an application brought under the provisions of Section 7 of the *Arbitration Act* were laid down in the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR where Nyamu, JA held that-

“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.”

21. As already observed in this ruling, there exists an arbitration clause at paragraph 18.5 of the two leasing and rent to own agreements dated August 7, 2020. As such, this Court lacks the requisite jurisdiction to hear and determine the substantive dispute on merits. On the issue of whether the subject matter of arbitration is under threat, the applicant submitted that the 2<sup>nd</sup> respondent illegally repossessed the SANY Motor Grader STG 190C-8 on October 18, 2021 while acting on the 1<sup>st</sup> respondent's instructions without any prior notice to the applicant and subsequently, the 1<sup>st</sup> respondent instructed the 2<sup>nd</sup> respondent to illegally and unprocedurally repossess the Hydraulic Excavator SY245H to the detriment of the applicant who has been diligently fulfilling its obligations by making the requisite payments.

22. The applicant contended that its business has been crippled and it stands to suffer loss of the payments already made towards owning the assets should the 1<sup>st</sup> respondent proceed to lease or dispose of the machines by sale.

23. The 1<sup>st</sup> respondent on the other hand did not dispute having repossessed the machines herein. It however submitted that from the 1<sup>st</sup> respondent's letter dated September 15, 2021 and the applicant's Advocate's letter dated September 20, 2021, it is apparent that the subject matter herein is the non-payment of leasing and quarterly rent to own payments owed to the 1<sup>st</sup> respondent and not the machines herein, therefore, there is no threat or wastage or dissipation of the subject matter.



24. There is no doubt that the applicant and the 1<sup>st</sup> respondent got into a leasing agreement and another one for rent to own, with the 1<sup>st</sup> respondent both dated August 7, 2020. The 1<sup>st</sup> respondent defaulted in its payments which led to the repossession and immobilization of the machines herein. I am of the considered view that the subject matter of the arbitral proceedings is the same as the subject matter of the leasing and rent to own agreements which are the SANY Motor Grader STG 190C-8 and the Hydraulic Excavator SY245H since, without the said machines there would not be an agreement that created the relationship between the applicant and the 1<sup>st</sup> respondent herein.
25. It is trite that in protecting the subject matter of the proceedings before the Arbitrator, this Court should ensure that the Arbitrator's jurisdiction is not ousted by any illegal conduct by any of the parties herein. Since it is not disputed that the 1<sup>st</sup> respondent has already repossessed the SANY Motor Grader STG 190C-8 and has immobilized the Hydraulic Excavator SY245H, it cannot be ascertained whether or not the 1<sup>st</sup> respondent shall proceed and lease and/or sell the said machines to third parties, thus alienating the subject matter of the intended Arbitral proceedings.
26. The High Court may issue any form of interim order of protection to protect the subject matter of the arbitration. However, in issuing any order, the Court must exercise circumspection so as not to interfere with the Arbitral Tribunal's jurisdiction to determine the merits of the matter. As a result, this Court shall not delve into the circumstances leading to the repossession and immobilization of the machines by the 1<sup>st</sup> respondent as it would amount to usurping the Arbitrator's jurisdiction.
27. This Court is empowered under Section 7 of the [Arbitration Act](#), 1995 to grant interim orders to preserve the subject matter and/or maintain status quo so as to ensure that there is a dispute for hearing and determination before the Arbitrator. The High Court's jurisdiction is only limited to issuance of preservation orders and not restitution and/or compelling orders as these are the preserve of the Arbitrator. Therefore, prayers No. 5 and 6 in the application herein fail. In addition, as correctly submitted by Mr Omolo for the 1<sup>st</sup> respondent, it was held by the Court of Appeal in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others (supra)*, that pursuant to the provisions of Section 7 of the [Arbitration Act](#), once the Court hears the application, the suit on which it is anchored is also terminated. Consequently, prayer No. 4 of the application herein fails.
28. Having found that there exists a dispute between the parties herein, and that the subject matter of the arbitration is under threat, it is only fair and just to issue an interim order of protection. This Court is therefore satisfied that the applicant has demonstrated on a balance of convenience that injunctive orders ought to issue.
29. The upshot is that the application dated February 22, 2022 is merited and the same is allowed in the following terms:
  - i. That this Court grants an order of injunction restraining the respondents, their agents and/or servants from seizing, repossessing, leasing, disposing of, advertising for sale and/or in any way interfering with the applicant's possession and use of Hydraulic Excavator SY245H pending reference of the dispute between the parties to Arbitration;
  - ii. Arbitration proceedings in terms of the dispute resolution mechanism to commence within 60 days from the date of this ruling;
  - iii. Failure to comply with clause (ii) above, will lead to the interim order of protection to lapse automatically; and
  - iv. Costs of the application shall abide the outcome of the arbitration.



It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

No appearance for the plaintiff

Mr Justus Omolo for the 1<sup>st</sup> defendant/1<sup>st</sup> respondent

No appearance for the 2<sup>nd</sup> defendant

Mr Oliver Musundi - Court Assistant.

