REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCOMMISC E1172 of 2020

TEAM CONSTRUCTION LIMITED.....APPLICANT

VERSUS

THE VILLAGE @ DAYSTAR LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. The factual background to these proceedings is essentially common ground or undisputed. It is common ground that the Respondent is the registered owner of all that property known as **L.R. No. 20892/195** (herein after referred to as the property). It is agreed that by an Agreement dated the **31st** day of July 2018, (herein after referred to as the agreement), the Respondent hired the applicant to carry out construction works on the said property at a contractual sum of **Kshs 350,000,000/=.**

2. Both parties admit that the construction works commenced and progressed substantially and various interim certificates were issued by the project Architect. There is no contest that due to lack of funds on the Respondent's part, the works stalled mid-way leaving substantial amounts unpaid to the applicant.

3. The point of departure is that the applicant maintains that the Respondent has refused to pay its dues of **Kshs. 103,349,867/=** (computed up to **4th** August 2020). The applicant also contends that it is still in physical possession of the property and that it is entitled to a builder's lien over the property. It contends that the Respondent has been plotting to dispose the property, hence, it is apprehensive that it may not recover its dues arguing that the Respondents inability to pay its debt is evidence of its insolvency.

4. The Respondent's diametrically opposed position is that that the only certified payment due to the applicant is **Kshs. 84,687,339.881/=**, and that it has severally advised the applicant that payment will be made directly by the financier upon registration of a charge over the property. It states that any additional claims such as valuations for pending certificates, losses arising from closure of site and loss of profits are yet to be certified and verified by the Project Quantity Surveyor and Project Architect.

The applicant's application

5. Against the above background, vide an Originating Notice of Motion dated **27th** October 2020 expressed under the provisions of section **7** of the Arbitration Act[1] (herein after referred to as the act), section **3A** of the Civil Procedure Act,[2] Order **51** Rule **1** of the Civil Procedure Rules, 2010 and all other enabling provisions of the law, the applicant moved this court seeking the following orders: -

*a. **That** this application be certified as urgent.*

*b. **That** in view of the urgency, service of this application upon the Respondent be dispensed with and the application be heard ex parte in the first instance.*

*c. **That** pending the hearing and determination of this application, this honorable court be pleased to issue interim orders of injunction restraining, barring and/or stopping the respondent by itself or through its agents or servants from selling, transferring, mortgaging, charging or in any other way parting with the ownership of or offering as security in any manner, the property **L.R. No. 20892/195**.*

*d. **That** pending the hearing and determination of the arbitration proceedings over the dispute herein currently awaiting commencement before Mr. Kairu Bachia, QS, the arbitrator duly appointed by the President, Architectural Association of Kenya, including pending any post-arbitration execution proceedings, this honorable court be pleased to issue orders of injunction restraining, barring and/or stopping the respondent by itself or through its agents or servants from selling, transferring, mortgaging, charging or in any other way parting with the ownership of or offering as security in any manner, the property **L.R. No. 20892/195**.*

*e. **That** in the alternative, pending the hearing and determination of the arbitration proceedings over the dispute herein currently awaiting commencement before Mr. Kairu Bachia, QS, the arbitrator duly appointed by the President, Architectural Association of Kenya, including pending any post-arbitration execution proceedings, this honorable court be pleased to issue an order directing the Respondent, within 14 days from the date of the order, to deposit as security in an interest earning bank account to be opened in the joint names of the respective advocates herein, the sum of at least **Kshs. 103,349,867/=** (computed up to 4th August 2020) being a portion of the amounts that the applicant shall be claiming in the arbitration, made up as follows: -*

Balance of Principal……Kshs. 86,464,694.91

Interest up to 20th February 2020……Kshs. 11,413,023.51

Interest from 21st February to 4th August 2020……Kshs. 5,472,149.18

*Total……**Kshs. 103,349,867.60***

*f. **That** in the event of default by the Respondent in depositing the amount prayed for in (e) above within the time stipulated, the Respondent be barred from participating or taking part in the arbitration proceedings over the dispute herein currently awaiting commencement before Mr. Kairu Bachia, QS, the arbitrator duly appointed by the President, Architectural Association of Kenya, and the same to proceed ex parte.*

*g. **That** the Respondent be ordered to bear the costs of this application.*

6. On **28th** October 2020 the Honourable Justice Mary Kasango ordered: -

*a. **That** until **12th** October 2020 an injunction is hereby issued restraining the respondent by itself through its servants and or agents from selling transferring or mortgaging or parting in any way with the possession of ownership of property **L.R. No. 20892/195.***

*b. **That** the Originating Summons dated **27th** October 2020 shall be served for hearing on **12th** October 2020.*

7. On **30th** October 2020, the learned judge issued further orders as follows: -

*a. **That** the order made by this court on **28th**October 2020 in this matter is hereby reviewed and set aside.*

*b. **That** until **12th**November 2020 an injunction is hereby issued restraining the respondent by itself through its servants and or agent from selling, transferring or mortgaging or parting in any way with the possession of ownership of property **L.R. 20892/195**.*

*c. **That** the Originating Summons dated **27th** October 2020 shall be served for hearing on **12th** November 2020.*

The grounds relied upon

8. The Motion is premised on the grounds that clause **45** of the agreement provides for arbitration in the event of a dispute, and that the applicant substantially performed the construction work under the agreement. The applicant states that the construction work stalled due to lack of funds on the part of the Respondent leaving substantial amounts unpaid to the applicant. The applicant maintains that it has physical possession of the property as the contractor, and that, the Respondent does not dispute its claim which as at **4th** August 2020, it stood at **Kshs. 103,349,867.60** excluding additional claims yet to be computed. It states that owing to failure to settle the said sum, it initiated arbitration proceedings before Mr. Kairu Bachia QS.

9. The applicant contends that it has a lien over the said property which is the only available property in the event the arbitration award is made in its favour. It also states that some people have been visiting and viewing the property at the Respondent's invitation hence it is apprehensive that they could be potential buyers, and, that the Respondent's failure to settle the debt is evidence that is insolvent and it may be incapable of settling the arbitral award. It states that if the injunction is not granted its right to recover the debt will be defeated. It avers that it is in the interests of justice to preserve the substratum of the suit.

The Respondent's application

10. On **12th** November 2020, Mr. Orlando, counsel for the Respondent prayed for leave and time to file a reply to the applicant's Originating Notice of Motion and an application to lift the interim orders. He also informed the court that the parties have been communicating and there was a possibility of a consent. I directed that in the event of no settlement, hearing shall proceed on **8th** December 2020 and granted time frames for filing affidavits.

11. On **28th**October 2020, by a Notice of Motion dated **7th** October 2020, the Respondent applied for the interim orders to be reviewed/varied to exclude the prohibition against mortgaging or charging the property so as to allow the Respondent to finalize the construction pending the hearing and determination of the application herein. It also prayed for an order that this court lifts, vacates and/or sets aside the said orders and for expeditious determination of its application and these proceedings. Lastly, it prayed for the applicant's suit to be dismissed with costs.

12. The Respondent's application is premised on the grounds that the applicant approached this court with unclean hands, that it is guilty of material non-disclosure and that the *ex parte* orders threaten to frustrate the financing of the project to the tune of **Kshs. 350,000,000/=** to be secured by the property.

13. Additionally, the Respondent contends that applicant as the contractor has no legal and/or equitable interests whatsoever in the property. It states that the applicant's certified claim is undisputed, but it can only be honoured with the drawdown from the financier upon registration of the charge over the property, and, that, the injunction orders serve to sabotage the same contract the applicant seeks to be paid for, raising question as to its motive.

14. Also, the Respondent states that it consistently engaged the applicant on the status and all the stages in securing financing but the applicant concealed the said information to the court. Further, it states that the applicant misrepresented that the property was about to be sold yet it is always represented in meetings with the financier.

15. Additionally, the Respondent states that the subject agreement provides for appropriate remedies in the event of breach which do not include a lien over the property, and that, in construction contracts, a lien only accrues when a property is contractually agreed to serve as security for purposes of payment of a debt owed and/or when a landlord is attempting to levy distress for recovery of rent arrears, which is not applicable to this case. The Respondent contends that the applicant's remedy (if any) lies in recovery for damages.

16. The Respondent further states that the applicant does not deserve the orders which have the effect of barring the developer from dealing with the property thus occasioning the Respondent great loss and prejudice including inability to charge the property to secure funding to complete the project and that the orders if allowed will injure its ability to honour its obligations to third parties.

17. Further, the Respondent states that it has already secured a financier (a fact known to the applicant), subject to providing security over the subject property, and that any outstanding certificates will be settled directly to the applicant by the financier. Also, that the applicant has not met the threshold to warrant the injunction sought, nor has it established a *prima facie* case and this being a pecuniary claim, it is not exposed to irreparable harm, as opposed to the Respondent who risks losing the financing of **Kshs. 350,000,000/=.** It states that the lower risk of injustice lies in favour of refusing the injunction.

18. In addition, the Respondent filed the Replying Affidavit of Dominic Kiarie in opposition to the originating summons. However, the averments therein are a replica of the grounds in support of its aforesaid application. Thus, it will add no value to rehash the same here.

Applicant's Replying Affidavit

19. Mr. Ramesh Gami, the applicant's director swore the Replying affidavit dated **7th** December 2020 in opposition to the Respondent's application. He deposed that the application was filed in bad faith because the parties were negotiating a compromise which if adopted would accommodate the prayers sought in the Respondent's application. He deposed that the Respondent admits the applicant's debt of **Kshs 84,687,339.88,** and it is not enough to admit the claim but decline to give undertakings or timelines for payment.

20. He averred that the applicant seeks to ensure that its payment is secured, and that it did not suppress any information, and considering the Respondent's apparent insolvency owing to its inability to pay the debt and visitors to the property, the applicant is apprehensive that the Respondent intends to dispose property. He also deposed that the applicant has a "***builder's lien***" over the property which is as an equitable intertest and a common law right as provided in clause **20.0** and **29.4** of the agreement which vests physical possession of the property to the applicant until final hand-over.

21. Further, Mr. Gami deposed that the value of the land is approximately **Kshs. 7.5** Million, but the value is the works and developments carried out thereon by applicant amounts to more than **Kshs. 100,000,000/=**, hence, it is only fair it secures the payment and the need to be involved in charging the only available security in the event that the arbitral award is made in the applicant's favour which necessitates interim measures under section **7** of the Act or an alternative prayer for security.

Respondent's Supplementary affidavit

22. Mr. Dominic Kiarie, the Respondent's Managing Director swore the supplementary affidavit dated **14th** December 2020. He deposed that the applicant acted in bad faith by using negotiations to coerce the Respondent to accede to its uncertified, unfounded and exaggerated monetary demands contrary to the provisions of the agreement. He deposed that the applicant unilaterally computed and made attempts to coerce the developer to pay **Kshs. 149, 097,444.93/=,** almost **76%** over and above the principal sum of **Kshs. 84,687,339.88/=**despite knowing very well that any additional claims must be certified/verified by the Project Quantity Surveyor and Project Architect.

23. Mr. Kiarie averred that the parties had negotiated and agreed that the applicant would lift the interim injunction to allow for successful completion of the drawdown of the Facility but on **12th** November 2020, the applicant reneged on the agreement and mischievously failed to ask the court to lift the injunction as had been agreed. Mr. Kiarie deposed that the foregoing notwithstanding, the said negotiations were on a without prejudice basis and could not be a bar to the filing of any other application.

24. Mr. Kiarie also deposed that that the only certified payments due to the applicant is **Kshs. 84,687,339.88,** and that the applicant has

severally been advised it will be paid directly by the financier upon conclusion of the drawdown, and, that any additional claims are all yet to be certified and verified by the Project Quantity Surveyor and Project Architect.

25. He also deposed that the applicant's additional claim for purported losses arising from closure of site are unfounded because after the project stalled, the Project Architect wrote to all the parties communicating the suspension of works and demobilization of the site to which the Respondent would pay a total of **Kshs. 1,962,122.20** as demobilization costs. He deposed that the Respondent has not failed to give a structured settlement, but it has been clear that after drawdown of the facility, all outstanding certificates will be settled directly by the financier and subject to verification by the project quantity surveyor, the other subsequent claims will be disbursed.

26. He also deposed that a party seeking injunctive orders is under a duty to disclose all material facts to the fullest extent possible. Further, that the Respondent kept the applicant informed of all the developments regarding the financing. He deposed that the applicant's right to a lien has not accrued, and its claim if any would be by way of filing a suit for recovery of damages for breach of contract. Further, he deposed that a builder's lien does not give rise to proprietary rights, and whereas the applicant's certified and verified interests are **Kshs. 84,687,339.88**, the entire Project is worth over **Kshs. 500,000,000/=,** hence the balance of convenience tilts in favour of lifting the injunction to allow for successful draw down and completion of the Project.

27. Further, Mr. Kiarie deposed that whereas the applicant seeks security pending judgment, the application is disguised as one seeking interim relief under section **7** of the Act, and unless the e*x parte* orders are lifted, there is a real likelihood that the Respondent will lose out on the funding because the financier will renege on its commitment to advancing the loan facility, and considering the amounts involved, it would not be easy to secure an alternative financier.

Court's directions

28. On **15th** December 2020 I directed that the Respondent's application dated **20th** November 2020 shall be treated as grounds of opposition to the applicant's Originating Notice of Motion, and that the applicant's Originating Notice of Motion shall be determined by way of the affidavits/pleadings filed and written submissions.

Applicant's advocates submissions

29. Mr. Wananda, the applicant's counsel submitted that the applicant seeks *inter alia*, "***interim measures of protection***" pending Arbitration under Section **7(1)** of the Act, and, that main dispute between the parties is awaiting commencement before **Mr. Kairu Bachia, QS,** the Arbitrator appointed by the President, Architectural Association of Kenya. He cited *Laxmanbhai Construction Ltd v Kihingo Village (Waridi Gardens) Ltd & 2 Others*[3] which after reviewing decided authorities stated: -

> *"The object or purpose for which interim relief was granted was to prevent the injustice that would otherwise result to the party invoking the jurisdiction if the final relief obtained by him was of no avail since the impugned illegality had by then run its course to an extent that might be considered as irretrievable or irremediable."*

30. Mr. Wananda submitted that the Respondent admits the principal amount due to the applicant is **Kshs 84,687,339.88** but disputes the applicant's further claims for additional remedies such as interest, amounts payable under Valuations in pending Certificates still being awaited from the Architect and losses arising from closure of the site and loss of profits, which if up held by the arbitrator, the total sum due would be **Kshs 103** Million.

31. He argued that the Respondent's failure to settle the debt is evidence that the Respondent is insolvent and may therefore be incapable of settling any award granted by the Arbitrator. He argued that the applicant is apprehensive that the insolvency may motivate the Respondent to sell the property, which is the only security available in the event the arbitral award is in the applicant's favour. He argued that in absence of an injunction, the property may be disposed defeating the applicants right. He submitted that it is in the interests of justice that pending the determination of the arbitration, interim Orders be granted to preserve the substratum of the matter and to prevent the Respondent from defeating the applicant's interest by placing the property out of the applicant's reach before the determination of the arbitration. Additionally, Mr. Wananda submitted that the applicant has a recognized legal lien over the said property,

32. Mr. Wananda urged the court in the event it finds that the prayer for protective measures over the property is not a viable option, then, the Respondent be compelled to deposit funds as security sufficient to cover for the arbitral award that may be granted in favour of the applicant.

33. He dismissed the Respondent's application as an act of bad faith considering that the parties were negotiating a compromise which accommodated the prayers in the applicant's application.

34. Regarding the applicant's claim for a lien, Mr. Wananda cited the *Black's Law Dictionary, **[4]***which defines a "*lien"* as *"A legal right or interest that a creditor has on another's property, lasting usually. until a debt or duty that it secures is satisfied."* He submitted that a lien is also defined as "*a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied.*" He argued that a lien is a possessory right as opposed to a proprietary right as advanced by the Respondent.

35. Mr. Wananda submitted that the courts have severally recognized a "***builder's lien***" as an equitable interest and a common law right of retention over a building or structure which a builder has constructed or repaired, to secure payment of the contract price and that such lien entitles an applicant the full contract price. He cited *Fynbosland 435 CC v in Torro ya Africa (Pty) Ltd and Others*[5] which upheld a contractor's right of builder's lien stating: -

> *[20] A builder's lien is a right of retention over the building or structure which a builder has constructed or repaired to secure*

payment of the contract price…

[21] The applicant exercises control over the property which is subject to its right to a lien. The lien entitles the applicant to his full contract price…

[22] It is not in dispute that the applicant has a builder's lien on the buildings that it completed as well as those which are partly built…

25. The lien is in respect of the outstanding payment for work done in respect of the houses referred to above.

36. Mr. Wanandwa submitted that it is not in dispute that the property is the subject of the contract. He argued that since the Respondent admits the debt, the applicant is entitled as an interim measure pending arbitration, the legally recognized remedy of a "***builder's***" or "***contractor's lien***" over the property. He argued that the applicant is in legal physical possession of the property vested upon it under *Clause 20.0* and *Clause 29.4* of the contract which possession continues until completion and hand-over or in the event of termination of the contract.

The Respondent's Advocates submissions

37. Mr. Orlando, the Respondent's counsel submitted that Section **7** of the Act allows a party to seek an interim measure of protection, with respect to the subject matter of the dispute, but this must be done with caution to avoid usurping the arbitrator's role in contravention of section **10** of the Act. He submitted that the purpose of section **7** is to allow the preservation of the subject matter/ to maintain the *status quo* but certainly not to escalate the dispute between parties. He relied on *Charles Ndwiga Nthimba v Hampton Ireri Njeru**[6]*** which reiterated the principles to guide courts in determining an application under section **7** of the act.

38. Counsel argued that it is not in dispute that the agreement had an arbitration clause at Clause **45** thereof. On whether the subject matter of arbitration is under threat, he invited the court to consider the subject matter of the arbitration flowing from the terms of the contract. He submitted that no such threat has been demonstrated. He argued that the Respondent has adduced evidence to show that there are credible plans to ensure that the contract is performed, which plans are being frustrated by the *ex parte* orders currently in force. He argued that the subject matter of the arbitration is not the subject property as represented by the applicant but the performance of the agreement.

39. He submitted that the applicant has not disclosed the nature of prayers it intends to seek in the intended arbitration, an omission he argued automatically disqualifies the applicant from seeking interim relief under section **7** of the Act. Mr. Orlando submitted that looking at the contents of the agreement, the applicant's interest is to have its outstanding certificates settled as per the terms of the contract, and that the subject matter of the intended arbitration is the performance of the contract.

40. Regarding the third consideration on the appropriate measure of protection, he submitted that the applicant has demonstrated that lifting the said injunction would lead to the performance of the contract.

41. Mr. Orlando submitted that the fact that the applicant has filed the instant application pursuant to the provisions of section **7** of the Act implies that this court's jurisdiction has been invoked specifically for purposes of granting an interim measure of protection. He submitted that instead of following through with this objective, the applicant has through the back door, sought for attachment of security and/or the deposit of security pending judgment. He argued that the applicant's application is tantamount to an attempt to secure security pending judgment, disguised as an application for interim relief so as to sustain a rather illegitimate claim. He argued that there are other provisions of law which provide for applications for security pending judgment, but section **7** of the Act is not one of them.

42. He submitted the applicant failed to make a full and accurate disclosure of all material facts and thus obtained *ex parte* orders. He relied *Kenleb Cons Limited v New Gatitu Service Station Limited & Another**[7]*** for the holding that to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right, legal or equitable which requires protection by injunction. Also, he cited *Bao Investments & Office Management Services Limited v Housing Finance Company of Kenya Limited* [8]which held: - *"...A party who goes to a Judge in the absence of an opponent assumes a heavy burden and must put before before the Judge all relevant materials including material which is against him and that failure to discharge that burden will result in the dismissal of the application because Courts must protect themselves from parties who are prepared to deceive the Courts in order to obtain orders..."*

43. Mr. Orlando also cited *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others**[9]*** which held that *"...a party seeking an order of injunction is under an obligation to make the fullest possible disclosure of all material facts within his knowledge…the court ought to consider whether the facts not disclosed is of sufficient materiality to justify or require the immediate discharge of the order without examination of the merits..."* To further fortify his position, he cited *Coast Apparel EPZ Limited v Mtwapa EPZ Limited & Another*[10] where the court cited *Brink's MAT Limited v Elcombe & Others**[11]*** holding that: -

"…If material non-disclosure is established the Court will be 'astute to ensure that a Plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty..."

44. Counsel submitted that the applicant failed to disclose with sufficient detail the steps undertaken by the applicant towards honouring its part of the contract. He submitted that contrary to the applicant's contention that the Respondent has kept him in the dark, the applicant has indeed been put in the picture as evinced by the numerous correspondence attached to the parties' affidavits including letters dated 26th February 2020, 7th July 2020, 12th August 2020, 1st October 2020, and 11th November 2020. Additionally, he argued that as late as 8th October 2020 the applicant was represented at a site meeting with the consultants, the Respondent and the Project Financier where the drawdown of the facility was discussed at length with their full participation. He argued that the applicant has indeed been kept in the picture and he is aware of the challenges which contributed to delaying the payment including delay at the land's registry on subdividing the subject

property. For these reasons, counsel urged the court to vacate the *ex parte* orders.

45. Mr. Orlando submitted that the applicant approached the court with unclean hands with the sole objective of coercing the Respondent to accede to its uncertified, unfounded and exaggerated monetary demands contrary to the provisions of the contract. He argued that all payments due must be verified and certified by the Project Quantity Surveyor and Project Architect respectively.

46. Additionally, counsel urged the court to find that the applicant does not have any legal and/or equitable interests over the subject property and in the circumstances, the orders of injunction should rightfully be lifted. He argued that the right of builder's lien has not legally accrued, and that, the contract dated **31st** July 2018 does not provide for any such right of builder's lien. Also, that a substantial portion of the works is yet to be concluded, hence, it would be impractical to seek a lien when parties, including the applicant are still actively engaged in the performance of their respective duties.

47. He submitted that as per the contract, the remedy available to the applicant, if any, would be to file a suit for recovery of damages for breach of contract, and, that where damages are an adequate remedy, courts will not entertain an application for injunction based on a right of lien.[12] He submitted that no such right of lien is available to the applicant even if such a right was available, the applicant has not met the threshold required for one to qualify for such a right. He submitted that a right of builder's lien cannot be a blanket claim for entire property, and, that, a party claiming a builder's right of lien is under a legal duty to identify what portions of the suit property it claims a lien over.

48. Mr. Orlando submitted that despite claiming a lien, the applicant has not precisely pointed out what portions of the suit property it claims a lien over, hence he has not met the legal threshold to successfully claim a builder's right of lien. Additionally, he submitted that to successfully raise a claim for builder's lien, the applicant is under a duty to demonstrate possession. He argued that possession is a multidimensional element and must be proven in all aspects i.e natural physical possession, constructive possession and an intention to remain thereon at all material times. He placed reliance on *Builder's Depot CC v Damian Testa*, in which the court affirmed the proposition that a party seeking to enjoy a right of lien must strive to maintain possession of the property by way of an overt act. To fortify his argument, he relied on *Halsbury's Laws of England**[13]* thus:- 'a lien might arise in favour of the Contractor where fixed materials are in his possession.'

49. Mr. Orlando submitted that it is not sufficient to invoke the right to a lien citing abstract provisions of the subject agreement to adequately prove possession. He argued that it is necessary for the applicant to prove that the site (or relevant sections of the site) over which the builder's lien is asserted is occupied and under control of the applicant at all material times. He submitted that no evidence has been adduced to prove that the applicant is in actual possession of the property. He argued that the site was closed and the Project Architect vide a letter dated **5th** August 2020 communicated to the parties about the closure as well as the demobilization of site. As a result, he argued the applicant has not been in possession and cannot therefore claim right of lien.

50. Mr. Orlando urged the court in the event it finds that a right of lien exists in favour of the applicant to consider the value of the purported lien which is **Kshs. 84,687,339.88** against the value of the entire project which is well over **Kshs. 500,000,000/=** and find that it would be oppressive and unreasonable to put on hold the entire project considering that the value of the entire project is almost six times the value of the purported lien. He submitted that the balance of convenience tilts towards lifting the injunction to allow successful drawdown of the facility which would be beneficial to the applicant.

51. Counsel argued that it is un fair the applicant to seek an injunction and continue to impose interests on the principal amount. To fortify his argument, he cited *Ochola Kamili Holding Limited v Guardian Bank Limited*[14]which held that the order of an injunction is mainly intended to preserve the subject matter with a view to have expeditious determination of the dispute but not to oppress another party nor should an injunction be used to economically oppress the other party.

52. Mr. Orlando distinguished *Laxmanbhai Construction Limited v Kihingo Village (Waridi Gardens) Limited & 2 Others**[15]* on grounds that the facts in the said case are different from the instant case because in the said case, possession had been proven, the works had been concluded and majority of the units had been sold off (a total of 51 out of 55) in the instant case where no single unit has been sold or is about to be sold and substantive amount of works are still pending. He urged the court to find that a builder's lien is not available to the applicant and that the applicant has not met the legal threshold to successfully sustain such a claim.

53. Mr. Orlando submitted that the applicant has not met the threshold for the grant of an injunction laid down in *Giella v Cassman Brown.* He argued that the applicant approached the court with unclean hands, hence, he does not deserve equitable remedies. Also, he submitted that the applicant purports to seek an interim relief when in real sense, it seeks security pending judgement. He cited *Saleh Mohamed Juma Saleh Mohamed v Ramla Rubeiyah Said & Another* where the court declined to grant security for the recovery of such damages as may be payable to consequent upon breach of contract sought in an application for injunction on grounds that the Civil Procedure Act provides for grant of security before judgment which provisions had not been invoked. He submitted that no *prima facie* case has been laid out, and that the applicant does not have any legal and/or equitable interests over the suit property.

54. Counsel submitted that the applicant has not established whether he is likely to suffer irreparable harm beyond compensation by way of damages. On the contrary, he submitted that unless the orders of injunction are lifted, the Respondent will suffer irreparable harm beyond compensation by way of damages as it will be unable to secure funding to conclude the project, and, it will be unable to fulfil its obligations to the applicant. He submitted that the allegation that the Respondent is insolvent does not arise since from the onset, parties were aware that the project funding would be obtained from a financier. Lastly, counsel submitted that the balance of convenience tilts towards lifting the injunction and at the very least, lifting the prohibition on mortgaging to allow the Respondent to finalize the project.

Determination

55. Judicial decisions have engraved the extent of court intervention in arbitration, a position best captured in *Ann Mumbi Hinga v Victoria Njoki Gathara**[16]* which held that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Act or as previously agreed in advance by the parties. One of the permitted interventions under the Act therefore, is the High Court's power to grant interim measures of protection before or during the arbitral proceedings under section **7** of the Act. Interim

measures of protection are interim reliefs which are granted before the final award, for the purpose of ensuring that once the final award is rendered, the relief on the disputed matter would still be available.[17]Essentially, these reliefs protect the ability of a party to obtain a final award. Without them, final arbitral awards will be rendered nugatory as they minimize loss, damage, or prejudice during the arbitral process. [18] A party may apply to the High Court for Interim measures of protection and in doing so, will not lose their right to arbitrate as it will not be incompatible with the arbitration agreement. Alternatively, if the parties agree, a party may apply to the arbitral tribunal for interim measure of protection.

56. Section **7** of the Act is silent on types of interim measures, the conditions for granting these measures and the scope of measures that can be granted leaving courts with a wide discretion in determining the tests for allowing applications under the said provision. In *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others*[19] the Court of Appeal laid down the tests to be followed. The court distinguished interim measures from injunctions and went further to state that the factors that the court must take into account before issuing the interim measures of protection are: - (a) the existence of an arbitration agreement, (b) whether the subject matter of arbitration is under threat, (c) what is the appropriate measure of protection after an assessment of the merits of the application? (d) For what period must the measure be given as to avoid encroaching on the tribunal's decision-making power as intended by the parties? It is important to mention that the Court of Appeal faulted the High Court's application of Civil Procedure requirements for the grant of injunctions in a matter filed under section **7** of the Act.

57. The High Court in *Futureway Limited v National Oil Corporation of Kenya**[20]*** appreciated the cited the principles and added another test in the following words: -

> *"…I have no quarrel with the principles stated in Safaricom Ltd case. The prerequisites are sound. I would perhaps add that the grant of an interim order 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 court should also, in my view, look into the risk of substantial (not necessarily irreparable) harm or prejudice in the absence of protection."*

58. Decided cases are in agreement that the applicable tests as laid down in the above cases are settled. However, in *Safari Plaza Limited v Total Kenya Limited*[21] the court citing *Seven Twenty investments Limited v Sandhoe investments Kenya Limited**[22]*** was satisfied that in deciding whether to grant interim measure of protection all that a court would be interested in is whether or not there was a valid arbitration agreement. To me the court of Appeal decision represents the correct legal position.

59. As was appreciated in *Futureway Limited v National Oil Corporation of Kenya,*[23] the court in granting interim measures exercises judicial discretion. This exercise of discretion is meant to further the cause of justice, and to prevent the abuse of the court process. [24] In doing so, the court is called upon to strike a balance to ensure that the intended arbitration proceedings are not prejudiced either by failing to protect the *status quo* and or the subject matter of the intended arbitration and at the same time to ensure or avoid making an order that goes to resolving the dispute between the parties which ought to be left exclusively in the hands of the arbitrator.[25]

60. An applicant needs to do more and show that he stands to be prejudiced beyond redemption as the entire subject matter of the arbitration would be put to way beyond restitution or reparation. Once this is shown, the court stated that it would then assess the merits of the application to determine whether in the circumstances it would be appropriate to order a measure of protection. However, such a determination of the merits should not encroach on the substantive decision-making power of the arbitrators by venturing into the merits of the dispute.

61. Comparatively, the *Model Law* has created its own conditions which are enumerated under Article **17 A**, which state as follows: -

> *a. The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:*
>
> > *i. Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and*
> >
> > *ii. There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.*

62. In *CMC Holdings Ltd & Another v Jaguar Land Rover Exports Limited**[26]*** the court ddeclined to issue interim orders since the contract, which was the subject matter of the dispute, could not be wasted. In *China Young Tai Engineering Co Ltd v L G Mwacharo T/A Mwacharo & Associates & another*[27] the court stated the applicant must satisfy the court that the subject matter of the suit will not be in the same state at the time the arbitral proceedings are concluded unless an injunction is granted.

63. In *Elizabeth Chebet Orchardson v China Sichuan Corporation for International Techno- Economic Corporation & Kenya Commercial Bank**[28]*** the court stated that in determining an application for interim measure, 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 and that The injunction or interim measure of protection must be of urgent nature to preserve the subject matter of the dispute so that the proceedings before the arbitral tribunal are not rendered nugatory. The court imputed another criterion that 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. Put differently, the court must be satisfied that 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.

64. The interim protection order contemplated under section **7** is granted by the court to protect the interest of the party seeking such order until the rights are finally adjudicated by the Arbitral Tribunal and to ensure that the Award passed by Arbitral Tribunal is capable of enforcement. Though the power given to the court under section **7** is very wide such exercise of power, obviously, has to be guided by the

paramount consideration that the party having a claim adjudicated in its favour ultimately by the arbitrator is in a position to get the fruits of such adjudication and in executing the Award.

security

65. Applying these principles to the facts of the present case, I find that there is no justification for granting the interim reliefs of the nature sought. This becomes evident once weigh the applicable tests discussed above and the reasons offered by the applicant. As was held *in Portlink Limited v Kenya Railways Corporation**[29]*** and *Ongata Works Limited v Tatu City Limited**[30]*** interim measures are granted when the subject-matter of Arbitration is under threat. The question hurdle for the applicant to pass here is whether it has demonstrated real threat to the property. The applicant's reason as I understood it is that some people have been visiting the property, hence, it is apprehensive that they could be potential buyers.

66. The applicant admits that in filing this application, it acted on apprehension caused by its allegation that some people were visiting the property and it feared they could be potential buyers. In formulating the appropriate test, the court has first to ascertain the relevant circumstances from the available evidence. No evidence was offered to support or justify this apprehension. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Respondent was in the process of selling the property. The suspicion or apprehension must be based on reasonable grounds. The applicant fell short of establishing that the visitors referred to were would be buyers. Mere apprehension cannot be a ground for this court to unleash the orders sought. The applicant has failed to demonstrate that the subject-matter is under threat.

67. The other ground cited by the applicant is that the Respondent's in ability to pay the debt is a sign of insolvency. Other that citing inability to settle the debt, the applicant never elaborated the basis of its allegations. The Respondent admits part of the claim. It states that it is in the processes of securing funding by way of charging the same property but the process was derailed by the *ex parte* orders issued in this case which the applicant declined to consent to their lifting. It states that the balance of the amount claimed must be certified by the project quantity surveyor and the architect. If mere difficulties in settling a debt were to be evidence of insolvency as the applicant contends, then I am afraid many people who operate successful businesses on bank overdrafts and mortgages would be wound up. Differently put, the applicant is inviting this court to unleash such grave orders purely on its own fears as opposed to the test that the subject property must be real danger.

68. Closely tied to the applicants fear that the Respondent may be insolvent is the applicant's application that the Respondent be compelled to provide security as an alternative remedy in the main prayers are not granted. Here the applicant is simply inviting this court to order the Respondent to provide security for the performance of the award. I need not mention that the provisions of the Civil Procedure Rules relating to attachment before judgment cannot be read as it is and imported in section **7** of the Act. I find backing in the Court of Appeal decision in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others*[31] (supra) which faulted the High Court's application of Civil Procedure requirements for the grant of injunctions in a matter filed under section **7** of the Act.

69. However, while dealing with the application for direction to the other party to deposit the security of the amount in dispute in the arbitration, the court also has to keep in mind the drastic nature of such order and unless a clear case not only on the merits of the claim is made out but also the aspect that denial of such order would result in grave injustice to the party seeking such protection order inasmuch as in the absence of such order, the applicant party succeeding before the Arbitral Tribunal may not be able to execute the Award. Other than citing the allegation that the Respondent could be insolvent, the applicant fell short of demonstrating that in the event of succeeding, it would not be able to execute the award. In this regard, it was necessary to say more about the Respondents alleged insolvency to demonstrate that it could not raise the money. The fact that a party is in the process of looking for a financier to a project is not evidence of bankruptcy or in ability to pay debts. The Respondent stated that bit was raising funds to complete the project.

70. Additionally, before issuing an order for security, other considerations are relevant. The obstructive conduct of the Respondent may be one of the relevant considerations for the court to consider the application for security. There was no attempt at all to show that the Respondent acted in an obstructive manner to suggest likelihood of defeating execution. An applicant under section **7** must place some material before the court, besides the merits of the claim that order under section **7** is eminently needed to be passed as there is likelihood or an attempt to defeat the Award. The statutory discretion given to the court under section **7** must be exercised judicially in accordance with established legal principles and having regard only to relevant considerations. This is the proper approach for consideration of the application for interim relief under section **7.** The applicant has not satisfied the considerations upon which the court can order the Respondent to provide security pending arbitration.

71. Next is the applicant's argument that it is in possession of the site and therefore it is entitled to a builder's lien. I agree that a building contractor who enters upon a building site and occupies and takes control of it in terms of his contract in order to carry out the contract work, and remains in occupation for that purpose, has possession of the site which may be protected by a spoliation order. He possesses site in order to secure the benefit of his contract. He should not be deprived of his possession and that benefit by an unlawful dispossession of the site by the owner of the property or anyone else.[32]

72. The applicant's argument invoking a builder's lien is attractive. However, it collapses not on one but several fronts. *First*, the existence of a builder's lien is a matter to be determined by the arbitrator not this court. This is because there are a limited number of defences which a Respondent can raise in spoliation proceedings and these are:- denial; restoration impossible and counter spoliation. The respondent may deny that the act alleged was one of spoliation or claim that it was legally justified. Thus, a respondent may raise the defence that the applicant had consented to the removal of the property.[33]

73. *Second*, a builder's lien is not necessarily an unassailable right, hence my position that that is an issue for determination by the arbitrator. This is because the element of unlawfulness of the dispossession must be shown in order to claim a spoliation order. The cardinal inquiry is whether the person in possession was deprived thereof without his acquiescence and consent.

74. *Third*, the test is whether the whether the subject matter of arbitration is under threat, and not whether the applicant is in possession.

Fourth, the applicant admits that the construction work stopped. *Fifth,* there is uncontested evidence that the project architect issued a suspension of works and demobilization communication and advised the contractor leave the site. Whether or not the contractor is still on the site is a matter to be determined by the tribunal. *Sixth,* a demobilization fee of **Kshs. 1,962,122/=** was determined. This adds credence to the fact that nothing is happening at the site. *Seventh,* by inviting the court to find and hold that the applicant has a lien over the property because it is still in possession of the site, there is a real risk of the court venturing into merits of the dispute which will be the subject of the arbitration. As was held in *Infocard Holdings Limited v AG & 2 Others,**[34]* section **7** does not give courts the power to look into the merits of the Agreement and the dispute generally lest it interferes with the jurisdiction of the Arbitral Tribunal.

Conclusion

75. The tests and aspects discussed above must be kept in view while safeguarding the interests of the parties so as to avoid serious prejudice or undue hardship to the either party by issuing or declining the orders sought. Guided by the tests discussed above, and the circumstances of this case, and the numerous facets discussed above, I find no basis or justification to grant interim reliefs under section **7** of the Act. The balance of convenience favours declining the orders sought. The up shot is that the applicant's Originating Notice of Motion dated **27th** October 2020 is hereby dismissed with no orders as to costs.

Signed and Dated at **Nairobi** this **8th** day of **January** 2021

John M. Mativo

Judge

Delivered electronically via e-mail and uploaded into the e-filing system

John M. Mativo, Judge

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[1] Act No. 4 of 1995.

[2] Cap 21, Laws of Kenya

[3] {2012} e KLR**.**

[4] 10th Edition.

[5] (1861/2011) {2011} ZANWHC 68 (15 December 2011)**.**

[7] Civil Appeal No. 3112 of 1990 {1990} e KLR.

[8] {2006} e KLR.

[9] {2015} e KLR.

[10] {2017} e KLR.

[11] {1998} 3 ALL ER 180.

[12] Citing *Saleh Mohamed Juma Saleh Mohamed vs Ramla Rubeiyah Said & Another*

[13] 4th Edition Volume 4.

[14] Civil Case 547 of 2014 (2018) e KLR.

[15] {2012} e KLR.

[16] {2009} e KLR.

[17] Moses M, *The Principles and Practice of International Commercial Arbitration,* (Cambridge University Press, 2010).

[18] Gary B. Born, *International Commercial Arbitration: Commentary and Materials* (2nd edition, 2001) 920.

[19] {2010} e KLR**,** para 14.

[20] {2017} e KLR, para 35.

[21] {2018} e KLR

[22] {2013} e KLR.

[23] {2017} e KLR

[24] See Scope Telematics International Sales Limited v Stoic Company Limited & another {2017} e KLR.

[25] See for example *Dimension Data Solutions Limited v Kenyatta International Convention* Centre {2016}e KLR, para 11.

[26] {2013} e KLR.

[27] {2015} e KLR, para 10.

[28] {2013} e KLR.

[29] {2015} e KLR

[30] {2018} e KLR

[31] {2010} e KLR**,** para 14.

[32] See *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services and Others*,1996 (4) SA 231 (C)

[33] Ibid.

[34] {2014} e KLR.