



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS  
COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 501 OF 2020

PAUL CHEGE MBUGUA.....1<sup>ST</sup> PLAINTIFF/APPLICANT

MARY JENNIFER RUTH CHEGE.....2<sup>ND</sup> PLAINTIFF/APPLICANT

-VERSUS-

CYTONN CASH MANAGEMENT

SOLUTIONS LLP.....DEFENDANT/RESPONDENT

RULING

1. The application for consideration is the Plaintiffs' Notice of Motion dated 24<sup>th</sup> November, 2020 brought under **Section 7** of the **Arbitration Act**, **Sections 3, 3A** of the **Civil Procedure Act**, **Section 51(2)** of the **Advocates Act**, **Order 2 Rule 15**, **Order 24 Rule 4(1)** and **(2)**, **Order 50 Rule 1** of the **Civil Procedure Rules, 2010**. The Application seeks the following orders:

1. *Spent.*

2. ***THAT*** pending the hearing and determination of application, this Honourable Court be pleased to grant an interim order of attachment of the funds held by the Respondent and its associate entities, in its bank accounts being: Standard Chartered Bank, Chiromo Lane Branch, Account No. 015040476700 and No. 87050-40476700, Equity Bank (K) Limited, Mayfair Supreme Centre Branch, Account No.1510280005011 and No. 1510280005406 and No. 1510280005053 and SBM Bank Kenya, Account No.0012380804001.

3. ***THAT*** prayer 2 above and/or such other appropriate interim reliefs, be granted pending the hearing and determination of the Plaintiffs' claim against the Defendant by the appointed arbitrator.

4. ***THAT*** costs of this application be provided be in the cause.

2. The application is based on the grounds on the face of it and supported by the Affidavit of the 1<sup>st</sup> Plaintiff herein **PAUL CHEGE MBUGUA** sworn on even date. He averred that on or about the month of September 2016, the Plaintiffs entered into contribution agreements with the Defendant for the investment of certain funds in consideration of the payment of agreed monthly returns subject to the terms and conditions mutually agreed and set out in the said agreements.

3. He stated that the Defendant has failed, refused and/or neglected to honour its obligations under the said agreements to pay the agreed monthly payments together with the principal, at the times agreed or at all. He contended that consequently, the Defendant is in breach of the said agreements and has failed to regularize the position and pay the outstanding amounts, despite demand and being given time and opportunity to do so.

4. He deposed that the Plaintiffs' claim against the Defendant is for the principal sums under the contribution agreements, together with agreed interests and costs to date. It was also averred that the Plaintiffs' have already declared a dispute and invited the Defendant to agree on an arbitrator to hear and determine the underlying dispute and make an appropriate award in the circumstances. That however, the Defendant has failed, neglected and/or otherwise refused to agree to the same which has unduly delayed the hearing and determination of the dispute to the loss and prejudice of the Plaintiffs. Further, that the various attempts to agree on a suitable arbitrator have been rejected and/or unduly delayed by the Defendant with the sole intention of keeping the Plaintiffs out of their funds for as long as possible.

5. It was further contended that the Defendant and its associates are now disposing various properties and unless the proceeds or part thereof are preserved for the satisfaction of the claim herein, there will be no assets and funds available for settlement or execution of an award made in the matter. It was noted that the said properties include the residential units built on Title No. Kiambaa/Ruaka/6667, Ruaka more particularly known as THE ALMA, Westlands plot no. 22, plots in the Applewood Project, Karen and a three (3) acre parcel of land on Argwings Kodhek Road, next to Cavina School, Hurlingham Nairobi.
6. It is the Plaintiffs' contention that the proceeds of the said transactions together with other funds available to satisfy their claim risk being withdrawn and withheld from the reach of the Plaintiffs' and/or deployed to other collateral uses. That this will make it impossible for the Plaintiffs to recover the same even by way of execution even where an award for the claim herein is made by the Arbitrator who shall be seized of the matter.
7. It is averred that this court has jurisdiction to issue preservative orders pending arbitration, in the interests of justice and to ensure that the underlying claim is not rendered nugatory and otherwise superfluous by the mischievous actions of the Defendant.
8. The Defendant responded to the Plaintiffs' applications through a Replying Affidavit sworn by its Statutory Manager, **PATRICIA NJERI WANJAMA**, on 10<sup>th</sup> December, 2020. She deposed that this Honourable Court has no jurisdiction to grant the orders sought in the said Application whether under the provisions cited or at all.
9. She averred that the Defendant was incorporated as Cytonn Cash Management Solutions LLP ("CCMS") which changed its name in 2018 to Cytonn High Yield Solutions LLP ("CHYS"). That the Defendant is a limited liability partnership that offers structured investment solutions to investors with its main underlying investment being off-plan real estate while the Plaintiffs are two of over 3,500 investors, who acquired partnership interests in CHYS upon contributing the minimum capital contribution.
10. She denied that the Defendant is in breach of contribution agreements with the Plaintiffs either as alleged or at all. She averred that on the contrary, the Defendant's principal partner has acted in punctilious compliance with their terms for the benefit of all the investors including the Plaintiffs herein. That in the wake of the negative economic effects arising out of the understandable and necessary drastic steps taken by the Government to contain the global Covid-19 pandemic, not only were lucrative opportunities curtailed but there was also a spike in withdrawals which threatened to put the whole partnership in peril. To avert that, the said principal partner in CHYS invoked the force *majure* provisions of the Investment Agreements, and extended period of maturity of all investments.
11. It was averred that some of the investments from which the higher yield was derived have been made in the real estate projects referred to in the 1<sup>st</sup> Plaintiff's Affidavit. It is argued that contrary to the 1<sup>st</sup> Plaintiff's assertion, there is nothing sinister or devious at all going on. The properties on which those developments are being carried out either as a joint venture with a landowner or by the individual entities, with whom the Plaintiffs have no relation of any kind, and which are all independent of the Defendant, are offered to the market for profit in the ordinary course of business. It was stated that even assuming that the Plaintiffs have a well-founded claim (which is denied) and the Defendant would not be able to meet any judgment in their favour (which is also denied), those properties would never be available.
12. Further, it is averred that in response to an invitation by the Plaintiff to the Nairobi Centre for International Arbitration Centre "NIAC" (which was sent without any attempt at mediation or even agreement on an arbitrator as provided), the Defendant pointed out that the NIAC had no role to play, but instead proposed Justice (RTD) Havelock as arbitrator. The Plaintiff accepted this proposal and indeed, sent a confirmation letter to Justice Havelock approving his appointment.
13. The Defendant avers that in the premises, the Plaintiffs have failed to place any adequate grounds to warrant the grant of any relief in their favour either as sought in the said Application or at all. Thus, it prays that this application be dismissed with costs.

#### **Submissions**

14. This application was canvassed by way of written submissions. Both the Plaintiffs' and the Defendant's written submissions are dated 26<sup>th</sup> April 2021.
15. The Plaintiffs submitted that this honourable court has jurisdiction under Section 7 of the Arbitration Act, Chapter 49, Laws of Kenya, to grant conservatory orders to protect and preserve the substratum of the suit to avoid an instance where the Defendant disposes off all its available property and which admittedly is being developed using the Plaintiffs together with other investors' funds.
16. The Plaintiff submitted that the Defendant has not denied that it is still developing and disposing off housing units by way of sale hence the necessity and requirement for a preservative order by way of an interim injunction pending determination of the arbitration matter. They reiterated that unless the orders sought are granted and the interim injunction issued as prayed, the subject matter of the arbitral proceedings will not be in the same state as at the time the arbitral reference was filed. It was their contention that the instant application satisfies the grounds provided in law and evidential threshold for the grant of an interim measure of protection.
17. The Plaintiff faulted the Defendant's averment that due to the prevailing circumstances, it had extended period of maturity for all investments. In their view, this means that the Defendant would not be paying the Plaintiffs and other investors their funds as agreed in the Contribution Agreements yet it continues to dispose of properties developed with those funds. They argued that this is a case of the Defendant seeking to eat its cake and still have it by indefinitely refusing to pay the investors but still deriving commercial benefit from their investments.
18. They submitted that this honourable court has sufficient jurisdiction in such circumstances, to protect the substance of the matter so that a successful party will be able to execute and realize the benefit of its litigation by freezing the Defendant's bank accounts stated in the application and further restraining the Defendant against any disposal of property as aforesaid. The Plaintiffs cited the case of **International Air Transport Association & Another v Akarim Agencies Company Limited & 2 Others [2014] eKLR**, where the court elaborated on

the nature of freezing orders

19. On whether the Plaintiffs have met the threshold for grant of the preservative orders sought, they submitted that the evidence on record establishes an arguable case based on allegations of breach of the contribution agreements by the Defendant. The Plaintiffs further submitted that the admission by the Defendant of default of payment of interest to the Plaintiffs proves that they have an arguable case with probability of success.

20. Further, it was submitted by the Plaintiffs that under Order 40 Rule 2 of the Civil Procedure Rules, the jurisdiction of the court to grant an order of injunction is discretionary and can be exercised where it is proved that any property in a suit is in danger of being dissipated. They argued that in the present case, they have demonstrated the same which fact, in any event is not denied by the Defendant.

21. They submitted that since the Defendant is still developing and disposing various properties and holding funds in various bank accounts which are liable to removal, transfer or use, they risk being left without a remedy in the event of success in the main action. Thus, they urged the court to safeguard them by issuing the orders sought, in the interests of justice and to ensure that the underlying claim is not rendered nugatory or superfluous by the mischievous actions of the Defendant.

22. On the Defendant's part, it was submitted that this Honourable Court has no jurisdiction to grant the reliefs sought in the Plaintiffs' application under the provisions invoked. The Defendant set out what each of the cited provisions entail to demonstrate their irrelevance to the instant application. For instance, it noted that Section 3A of the Civil Procedure Act preserves the inherent jurisdiction of the Court to prevent abuse of its process but does not grant this Honourable Court power to interfere, however temporarily, with a Defendant's constitutionally enshrined rights to property under Article 40. It argued that it is well settled that inherent jurisdiction cannot be invoked in an area governed by express rules.

23. The Defendant argued that whereas it has not been invoked, attachment before judgment is available under Order 39, Rule 5 of the Civil Procedure Rules, 2010. It submitted that since it constitutes a serious interference with a Defendant's fundamental rights, the threshold to be met before an order for attachment before judgment can be issued is very high. It stated that Courts have been emphatic in insisting upon the full satisfaction of the prerequisites of Order 10 Rule 5. In support of this submission, it relied on the case of **Champaklal Ramji Raishi Patel v I&M Bank Limited 2 others; Ndeto Mutua (Intrested Party) (2020) eKLR.**

24. It was submitted that the Plaintiffs have not come anywhere close to establishing entitlement to any an order of attachment either as sought in the instant application or at all. The Defendant noted that the Plaintiffs have not alleged, let alone shown, that the Defendant is disposing of its property and such disposition is with intent to obstruct or delay the execution of any decree that may be passed against it. In its view, that alone is sufficient to dispose of the present application.

25. It reiterated that the Plaintiff has not produced an iota of evidence to show that the Defendant would be unable to satisfy any decree passed against it. Further, it contended that the Plaintiffs have failed to appreciate that its affiliates, which are separate and distinct entities, are the ones disposing off the units mentioned and that such disposition cannot be a basis for seeking attachment against the Defendant.

26. Further, the Defendant noted that the Plaintiffs have not sought for Mareva injunction anywhere in their pleadings. It submitted that it is trite law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, must be disregarded. It argued that the alleged *mala fide* disposal of assets is an integral part of the Plaintiffs' argument that may persuade this court to grant it a Mareva Injunction yet there was no inkling of such demonstration to the court by the Plaintiff at all. The Defendant cited the case of **Clips Limited v Brands Imports (Africa) Limited formerly named Brand Imports Limited (2015) eKLR** where the court held, *inter alia*, that new issues cannot be raised in submission.

27. The Defendant thus urged that the Plaintiffs' application be dismissed with costs to it.

### **Analysis and Determination**

28. I have carefully considered the Plaintiff's application, the Affidavit in support, the Replying Affidavit by the Defendant and the parties' respective submissions. In my considered view, the only issue that arises for determination is whether the Plaintiffs are deserving of an interim measure of protection under **Section 7 of the Arbitration Act, 1995** pending arbitration.

29. The said **Section 7** of the Act empowers the High Court to protect arbitral proceedings by issuing interim orders protecting the subject matter of arbitration. It provides thus:

***“(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings an interim measure of protection and for the High Court to grant that measure.***

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

30. The Court of Appeal in **Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others [2010] eKLR** interpreted the meaning of interim measures of protection in arbitration law as follows:

***“It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders***

*take different forms and go under different names...whatever their description, however, they are intended in principle to operate as “holding” orders, pending the outcome of the arbitral proceedings.”*

31. The **Blacks' Law Dictionary, 8<sup>th</sup> Edition** defines an interim measure of protection as follows:

*“An intentional tribunal’s order to prevent a litigant from prejudicing the final outcome of a lawsuit by arbitrary action before a judgment has been reached. This measure is comparable to a temporary injunction in national law.”*

32. In **CMC Holdings Limited & Another v Jaquar Land Rover Exports Ltd [2013] eKLR**, the court while highlighting the purpose of interim measures of protection held as follows:

*“The measures are intended to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued. These orders are not automatic. 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. The court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.”*

33. In the **Safaricom Ltd Case [supra]**, the Court of Appeal outlined the nature of interim protective measures and set down four conditions necessary for the grant of an interim measure of protection under **Section 7** of the Act. It pronounced itself on the same as follows:

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

*i. The existence of an arbitration agreement;*

*ii. Whether the subject matter of the arbitration is under threat;*

*iii. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?*

*iv. For what period must the measure be given especially if requested for before commencement of the arbitration so as to avoid encroaching on the tribunal’s decision making powers as intended by the parties?”*

34. In the instant application, it is not disputed that there is a binding arbitration agreement between the Plaintiffs and the Defendant. The Plaintiffs averred that a dispute has arisen which requires arbitration as agreed. It is notable that the parties have already commenced the process of engaging a sole arbitrator to determine the alleged dispute.

35. The Plaintiffs contend that the Defendant and its affiliates are disposing various properties developed using funds invested by them and other investors. They are worried that the proceeds of the sales together with other funds available to satisfy their claim are being held in various banks accounts held by the Defendant and the same are at risk of dissipation and/or being withdrawn and withheld by the Defendant unless an interim order of protection is granted by this court.

36. As noted hereinabove, interim measures of protection in arbitration take different forms and what is suitable is dependent on the facts of each case. The Plaintiffs asked the court to consider granting an interim order of attachment of the funds held by the Respondent and its associate entities, in its bank accounts being: Standard Chartered Bank, Chiromo Lane Branch, Account No. 015040476700 and No. 87050-40476700, Equity Bank (K) Limited, Mayfair Supreme Centre Branch, Account No.1510280005011 and No. 1510280005406 and No. 1510280005053 and SBM Bank Kenya, Account No.0012380804001.

37. The question that this court must consider therefore is whether **the Plaintiffs have laid a proper basis for an order of attachment of the Defendant’s aforesaid funds.**

38. **Order 39** of the **Civil Procedure Rules** empowers this court to make an order for attachment before judgment which power must however be exercised with some degree of caution. **Rule 2 thereof** provides as follows in this regard;

*“Where the Defendant fails to show such cause, the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit or make such order as it thinks fit in regard to the sum which may have been paid by the Defendant”*

39. The factors to be considered before making an order for attachment before judgment were set out in the case of **Kuria Kanyoko t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu & Others [1988] 2 KAR 126**, where the court held thus;

*“The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by order*

**38 Rules 5 (currently order 39) namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.”**

40. It follows therefore that for an order of attachment before judgment to be granted, a party must satisfy the following conditions;

**a. That the Defendant is about to dispose of his property or remove it from the jurisdiction of the court; and**

**b. That the Defendant intends to obstruct or delay any decree that may be passed against him.**

41. It is noteworthy that this remedy is designed to guarantee a party who subsequently succeeds in a case of enjoying the fruits of its judgment.

42. I note that the Defendant averred that there is nothing sinister at all going on and it claims that its actions resulted from the *force majeure* clause in the contribution agreement. It is noteworthy that I cannot comment on the merits or otherwise of the Plaintiffs Claim at this juncture as the same may embarrass the fair hearing of the dispute pending before the Arbitrator. I will therefore restrict myself to considering whether the material provided by the Plaintiffs in support of their application show that the Defendant has handled its property or funds in a manner that suggests that it wants to avoid any judgment that may be passed against it.

43. Annexure “PM2” on the 1<sup>st</sup> Plaintiff’s Supporting Affidavit are letters addressed to the Defendant, the proposed Arbitrator and to the Plaintiffs’ Advocates. Annexure “PM1” on the other hand is the Contribution Agreement entered into between the Plaintiffs and the Defendant. I am unable to see anything on record that demonstrates that the Defendant has handled the proceeds of the sales in a manner to suggest that it intends to avoid any decree that may be passed against it.

#### **Disposition**

44. The upshot is that the Plaintiffs’ application dated 24<sup>th</sup> November, 2020 lacks merit and is accordingly dismissed. The costs of the application shall abide the outcome of the arbitral proceedings and/or the main suit, whichever settles the dispute.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF APRIL, 2021**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Ms Kihara h/b for Mr. Njenga for the Plaintiffs/ Applicants.
2. Mr. Isoe h/b for Mr. Amok for the Defendant/Respondent.