



**Kiarie & another v Matiba (Being Sued as the Executrix to the Estate of Hellen Wamere Dadet)
(Environment & Land Case E155 of 2023) [2023] KEELC 18234 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18234 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E155 OF 2023**

**JO MBOYA, J
JUNE 14, 2023**

BETWEEN

DAVID MWANGI KIARIE PLAINTIFF

AND

LORNA WANJIRU MWANGI PETITIONER

AND

**EDITH MATIBA (BEING SUED AS THE EXECUTRIX TO THE ESTATE OF
HELLEN WAMERE DADET) DEFENDANT**

RULING

Background and Introduction

1. Vide Notice of Motion Application dated the 5th May 2023; the Plaintiffs/Applicants herein have approached the Honorable court seeking for the following reliefs;
 - i. (Spent).
 - ii. Pending the appointment of the Arbitrator of the arbitration of the Dispute between the Plaintiffs and the Defendant, the Defendants be restrained from selling, transferring or in any way charging or interfering with the current proprietorship of all that property known as Land Reference Number 1160/724 also known as Land Title No. Nairobi/Block 148/1234.
 - iii. That Land Reference Number 1160/724 also known as Land Title No. Nairobi/Block 148/1234 be preserved awaiting the outcome of the arbitration.
 - iv. Costs be in the cause.



2. The instant Application is premised and anchored on the grounds contained and enumerated at the foot thereof. Further, the Application is supported by the affidavit of one David Mwangi Kiarie, who is the 1st Applicant herein.
3. Be that as it may, upon being served with the subject Application and the attendant supporting affidavit, the Respondent duly entered appearance and thereafter filed an elaborate Replying Affidavit sworn on the 22nd May 2023; and to which the Respondent has annexed a total of 10 documents, inter-alia the sale agreement which was entered into and executed between the Parties on the 17th March 2022.
4. Suffice it to point out that the instant Application was hitherto certified as urgent and same was scheduled for inter-partes hearing on the 23rd May 2023. However, on the said date, Learned counsel for the Applicants failed to attend court and the application was thus dismissed for want of prosecution.
5. Nevertheless, the counsel for the Applicants filed another Application wherein same sought to review and discharge the orders of the Honourable court issued on the 23rd May 2023 and thereafter reinstate the instant Application for hearing and determination on merits.
6. For good measure, the orders made on the 23rd May 2023 were thereafter discharged and vacated, culminating into the restoration, restitution and reinstatement of the Application.
7. Further and in addition, the instant Application was ultimately set down for hearing on the 14th June 2023, whereupon the advocate for the respective Parties agreed to canvass and ventilate same by way of oral submissions.
8. Instructively, the application proceeded for hearing on even date and the Advocates for the respective Parties made their submissions before the Honourable Court.

Submissions By The Parties:

a. Applicants' Submissions:

9. Learned counsel for the Applicants' adopted the grounds contained at the foot of the Application as well as the contents of the supporting affidavit sworn on the 5th May 2023. Furthermore, Learned counsel thereafter raised and highlighted three pertinent issues for consideration by the Honourable court;
10. Firstly, Learned counsel for the Applicants has submitted that the Applicants herein entered into and executed a lawful and valid sale agreement with the Respondent, over and in respect of Land Reference Number 1160/724; also known as Land Title No. Nairobi/Block 148/1234.
11. Additionally, Learned counsel has submitted that pursuant to and upon entry into the sale agreement, the Applicants paid the sum of Kes.5, 500, 000/= only being 10% of the purchase price. Besides, counsel pointed out that the remainder balance was agreed upon to be paid within a duration of 90 days from the date of the execution of the sale agreement.
12. Nevertheless, Learned counsel pointed out that the balance of the purchase price was not paid to and in favor of the Respondent within the contractual timelines. However, it was added that thereafter the Parties entered into further negotiations, which were denoted vide various correspondence, copies of which have been annexed to the supporting affidavit.
13. Premised on the foregoing, Learned counsel has thus submitted that the sale agreement which was entered into and executed by the Parties remains valid and in existence. Consequently and in this regard,



counsel pointed out that it is incorrect for the Respondent to contend that the sale agreement, which was entered into between the Parties has been breached.

14. Secondly, Learned counsel has submitted that the sale agreement which was entered into and executed by the parties contained a clause which indicated that any dispute arising from and out of the sale agreement would be referred to arbitration before one arbitrator agreed upon by the Parties and in default, an arbitrator appointed by the chairperson of the Institute of Arbitrators of Kenya.
15. Thirdly, Learned counsel for the Applicants has submitted that the Applicants have since written to the chairperson of the Institute of Arbitrators of Kenya to appoint and/or designate an Arbitrator to attend to and/or resolve the dispute between the Applicants and the Respondents herein.
16. Be that as it may, Learned counsel contended that despite the existence of a dispute, arising out of the sale agreement, which is pending resolution, the Respondent herein has since signaled her intention to sell and dispose of the suit property. In this regard, Learned counsel has contended that unless the Honourable court intervenes and grants an Interim protection, the suit property will be alienated and/or disposed of and thus the intended arbitral proceedings would be defeated.

b. Respondent's Submissions

17. Learned counsel for the Respondent has adopted and reiterated the contents of the Replying Affidavit sworn on the 22nd May 2023; and thereafter highlighted three pertinent issues for consideration and ultimate determination by the Honourable court.
18. First and foremost, Learned counsel for the Respondent has submitted that even though the Applicants and the Respondents entered into and executed a sale agreement dated the 17th March 2022, the Applicants herein failed and/or neglected to comply with the contractual terms thereof.
19. Further and in addition, Learned counsel contended that despite subsequent indulgence and accommodation by and at the instance of the Respondent, the Applicants herein failed and/or neglected to perform their part of the bargain, either as stipulated in the sale agreement or at all.
20. Consequently and as a result of the foregoing, Learned counsel for the Respondent has thus submitted that the sale agreement, which is being invoked and relied upon by the Applicants herein lapsed and/or stood extinguished.
21. Secondly, Learned counsel has submitted that the entire suit as well as the Application for interim protection mounted by the Applicants are misconceived, legally untenable and otherwise amounts to an abuse of the Due process of the Honourable court.
22. Thirdly, Learned counsel for the Respondent has submitted that insofar as the terms of the Sale agreement entered into on the 17th March 2022, have not been complied with and/or adhered to, the Applicants herein cannot be heard to claim and/or raise an Interests over and in respect of the suit property.
23. Additionally, counsel has submitted that to the extent that the Sale Agreement entered into lapsed and stood extinguished, the Applicants herein cannot continue to anchor their claim on the basis of the impugned Sale Agreement. In any event, Learned counsel has contended that the subject agreement has been rendered unenforceable.
24. In view of the foregoing, Learned counsel for the Respondent has thus implored the Honourable Court to find and hold that the entire Application dated the 5th May 2023; is devoid of merits and hence ought to be dismissed.



Issues For Determination

25. Having evaluated the Application dated the 5th May 2023; the Supporting Affidavit thereto and the Response vide Replying affidavit sworn by the Respondent and upon taking into account the oral submissions canvassed by Advocates for the respective Parties, the following issues do arise and are thus worthy of determination;
- i. Whether the Sale Agreement executed on the 17th March 2022; contains an Arbitration clause and if so; whether the dispute between the Parties ought to be dealt with vide arbitration.
 - ii. Whether the Applicants' have established and demonstrated sufficient cause or basis to warrant the grant of Interim Protection and preservation of the suit property.

Analysis And Determination

Issue Number 1

Whether the Sale Agreement executed on the 17th March 2022 contains an Arbitration clause and if so; whether the dispute between the Parties ought to be dealt with vide arbitration.

26. It is common ground that the Applicants and the Respondent herein entered into and executed a sale agreement dated the 17th march 2022 and wherein the Respondent covenanted to sale to and in favor of the Applicants the entire of the suit property at an agreed price of Kes.55, 000, 000/= only.
27. In addition, there is no dispute that pursuant to and out of the sale agreement, the Applicants endeavored to and indeed paid out the sum of Kes.5, 500, 000/= only, on account of the 10% stakeholders sum.
28. Nevertheless, it appears that the Applicants herein were unable to pay and/or liquidate the balance of the purchase price within the contractual timelines and thereafter the Applicants and the Respondents engaged in a plethora of correspondence, with a view to extending the contractual duration of the sale agreement.
29. Furthermore, both the Applicants and the Respondent have annexed and displayed various correspondence indicating that the Parties were in agreement that the terms of the previous agreement and in particular, the completion timeline be extended.
30. Notwithstanding the foregoing, the Respondent thereafter takes and adopts a position that the Applicants herein failed to comply with and/or adhere to the extended timelines, culminating into total breach of the agreement. In this regard, the Respondent thereafter signaled her intention to sell and dispose of the suit property to a Third Party.
31. On the other hand, the Applicants herein contend that the sale agreement which was entered into between the Applicants and the Respondent is still in existence and thus the Respondent cannot be allowed to sell, alienate and/or dispose of the suit property on the face of an existing contract.
32. Additionally, Learned counsel for the Applicants has contended that the Applicants have since raised a Dispute and have further sought for the intervention of the chairperson of the Institute of Arbitrators of Kenya to appoint and/or designate an arbitrator to attend to the issue.
33. Having adverted to the foregoing issues, the question that now needs to be resolved and addressed relates to the import and tenor of the arbitration clause as stipulated and underscored vide clause 11 of the said agreement.



34. For good measure, the Parties herein agreed and covenanted that any dispute that would arise pertaining to and concerning the interpretation, application and enforcement of the terms of the sale agreement shall be referred to a single arbitrator agreed upon by the Parties; or in default, to be appointed by the chairperson of the Institute of Arbitrators of Kenya.
35. Premised and anchored on clause 11 of the sale agreement, the Applicants herein have since declared a Dispute, inter-alia, that the Respondent is keen to sell and dispose of the suit property, albeit without due regard to the terms of the sale agreement. Further, the Applicants have also contended that the Respondent is threatening to exercise the right of forfeiture as pertains to the stakeholder sum.
36. Based on the foregoing, Learned counsel for the Applicants has thus contended that there are issues which ought to be referred to arbitration within and in accordance with the provisions of clause 11 of the sale agreement.
37. On her part, the Respondent contends that the sale agreement, which was entered into and executed by the Parties has since lapsed and or terminated on the basis of breach and violation thereof by the Applicants.
38. Additionally, the Respondent has also contended that the contract in question is also unenforceable and thus incapable of being performed and/or implemented. In this regard, the Respondent adverts to a position that there is no agreement capable of anchoring the Arbitral proceedings.
39. On my part, I beg to point out that the Applicants and the Respondent duly entered into a valid and binding Sale agreement, containing an arbitration clause. For clarity, the Parties herein covenanted that in the event of a dispute arising pertaining to and/or concerning the interpretation, application and enforcement of the agreement, such a dispute shall be referred to a single arbitrator.
40. To my mind, having agreed to refer any Dispute arising out of the contract to be addressed and resolved by a single arbitrator, the Respondent herein cannot now be heard to contend that the issues being adverted to by the Applicants do not warrant arbitral proceedings.
41. Instructively, the Respondent herein bound herself with the terms of the sale agreement and hence same cannot now resile/ renege from the terms thereof, including the arbitral clause, which was entered into at arms-length.
42. In addition, it is also common knowledge that where Parties have chosen arbitration as their preferred and express mode of resolving their dispute; then the Honourable court must oblige and facilitate the compliance by the terms of an agreement containing such arbitral clause.
43. Further and in any event, it is also imperative to underscore that the moment Parties chose an alternative dispute resolution mechanism; then the Honorable court is enjoined to promote such dispute resolution mechanism. In this regard, it is imperative to adopt, underscore and reiterate the provisions of Article 159 (2) (c) of The Constitution.
44. For ease of reference, the provisions of Article 159 (2) (c) of The Constitution provides thus;

159. Judicial authority

- (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
- (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—



- (a) Justice shall be done to all, irrespective of status;
- (b) justice shall not be delayed;
- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
- (d) justice shall be administered without undue regard to procedural technicalities; and
- (e) the purpose and principles of this Constitution shall be protected and promoted.

45. Lastly, Learned counsel for the Respondent submitted that there would be no dispute to be dealt with by the arbitrator insofar as the contract between the Applicants and the Respondent has since been breached and thus rendered unenforceable.
46. Instructively, the arguments by and on behalf of the Respondent may very well be correct. However, the question that does arise is whether the issues being raised are substantive issues which ought to be canvassed before and be determined by the arbitrator, or otherwise.
47. Nevertheless and to my mind, the issue as to whether or not the sale agreement between the Applicants and the Respondent has been breached or rendered unenforceable; are matters that falls within the purview of the arbitrator and not before this court.
48. Notably and in this respect, it is imperative to take cognizance of the holding of the court of appeal in the case of *Safaricom Ltd versus Ocean View Resort* (2010)eKLR, where the court stated and observed thus;

“In the circumstances of the matter before the Court, it is quite clear that the superior court has stepped out of its jurisdiction and unless such a step is stopped, this Court’s process is likely to be bogged down with matters which ought not to have come to it in the first place under any of this Court’s rules. We therefore have a responsibility to make declarations on nullities either sue moto or as and when moved by an aggrieved party as in this case. In my view, the High Court should have confined itself to the issue of either granting the interim measure or refusing to grant it without delving into the merits. The usurpation of the arbitrator’s jurisdiction by the superior court also contravened section 17 of the Arbitration Act and for these reasons, this Court cannot in our view, condone this state of affairs as the final Court in the land because it we did not do so, who would? Moreover, the superior court’s plainly illegal decision was likely in turn lead to the filing of unmerited appeals to this Court thereby resulting in abuse of this Court’s process because I have in this ruling also stated that, in arbitration matters all courts including this Court’s intervention is restricted to a facilitative role as specifically provided under the Act. Any other intervention outside the provisions of the Act is, with respect, unnecessary baggage on this Court as well and for this reason, this Court has the inherent power to reject the extra baggage and re-order things as provided in the applicable law. This explains why I must not fail to invoke this power to strike out the application and to set aside the superior court ruling and in its place give the interim measure of protection in terms of section 7 of the Arbitration Act and at the same time direct the parties to have recourse to the Arbitral process within a reasonable time as contemplated in sections 7 and 17 of the Arbitration Act. By dealing with



the matter contrary to sections 7 and 17 of the Arbitration Act the superior court clearly lacked jurisdiction and therefore its decision constituted a nullity.

49. Premised on the ratio espoused in the decision (supra), what is evident and apparent is that this Honorable court has no mandate and/or jurisdiction to interrogate and address the substantive issues, inter-alia, whether the contract in question has been breached or otherwise rendered unenforceable.
50. For good measure, such issues can only be adverted to and canvassed before the arbitrator, who shall thereafter be seized of the requisite Jurisdiction to adjudicate upon and resolve the named Issues.

Issue Number 2

Whether the Applicants have established and demonstrated sufficient cause or basis to warrant the grant of Interim Protection and preservation of the suit property.

51. The Applicants main contention relates to the fact that the Respondent herein is keen and/or desirous to sell, dispose of and/or alienate the suit property to a Third party. In this regard, the Applicants contend that the intended sale and disposal, if not averted by way of interim intervention; then the suit property would be placed beyond the Applicants, irrespective of the outcome of the arbitration proceedings.
52. Furthermore, the Applicants herein have also contended that insofar as the sale agreement is still lawful and in existence; same have a legitimate interests to and in respect of the suit Property.
53. Premised on the foregoing, it is the Applicants' position that it would be appropriate and expedient for this Honorable court to intervene and to protect and preserve the suit property, pending the hearing and determination of the arbitration proceedings.
54. Invariably and to my mind, the provisions of Section 7 of the Arbitration Act 1995, were meant to ensure that the substratum of the arbitration proceedings or intended arbitration proceedings is neither destroyed nor defeated during the pendency of such proceedings.
55. In short, the import and tenor of an order of interim intervention is essentially to preserve the property, which forms the crux and/or substratum of the dispute. For coherence, the substratum of the suit before the Honourable court and the intended arbitral proceedings is the suit property, which the Applicants' claim to have bought and/or purchased.
56. Consequently and in the premises, the question that deserves and merits determination is what will happen if (sic) no interim intervention is granted by the Honourable court, either in the manner sought or otherwise.
57. Clearly and for good measure, in the absence of an order of interim intervention, the Respondent herein who has expressly stated that same is keen to proceed with the sale and disposal of the suit property, would no doubt go ahead and alienate same. In this regard, there is no gainsaying that the suit property would stand sold and alienated.
58. In the circumstances, what would then arise would be a situation where proceedings are being taken both before this Honorable court in accordance with Rule 2 of the Arbitration Rules 1997 and before the Arbitrator, but in respect of a non-existent property.
59. Premised and based on the foregoing, it is imperative to state and underscore that there is need and necessity to conserve and preserve the substratum of the intended arbitral proceedings. Certainly, such conservation and/or preservation can only arise and ensue if the orders sought at the foot of the Application are granted.



60. To be able to understand the import, tenor and scope of the interim orders of intervention, it is instructive to re-visit the decision in the case of *Safaricom Ltd versus Ocean View Beach Resort* (2010)eKLR (per Omollo JA), who stated and held thus;

“Will that appeal be rendered nugatory if we do not grant to the applicant the injunction it seeks? The respondents have asked the applicant to vacate the premises and not only vacate but also remove or demolish the equipment erected by the applicant on the premises. On the available material, if the applicant does not comply with the respondents’ demands, the applicant may well be evicted and its equipment removed. That, in my view, would render the applicant’s intended appeal nugatory. The same position would apply if eviction of the applicant and the demolition of its equipment were to go on when the arbitral process is underway”.

61. Whereas the situation in the decision (supra) related to an instance where an eviction would have ensued, if the injunction was not granted, what will happen in the instant case will be that the suit property would be sold and transferred to a Third Party and hence the Applicant’s Rights and Interests; if any, would be extinguished.

Conclusion and Disposition

62. Having addressed and analyzed the two pertinent issues, which were enumerated herein before, it must have become evident and apparent that unless the orders sought are granted, the suit property, which is the substratum of the intended arbitration proceedings, will be sold, disposed of and/or alienated.

63. For good measure, if the suit property were to be alienated prior to and before the determination of the arbitration proceedings, then certainly, the entire proceedings would be rendered academic.

64. Consequently and in the premises, the Application dated the 5th May 2023; is meritorious and hence same be and is hereby allowed in terms of the following;

- i. The Defendant be and is hereby restrained and/or barred from selling, transferring or in any way charging or interfering with the current proprietorship of all that property known as Land Reference Number 1160/724 also known as Land Title No. Nairobi/Block 148/1234, pending appointment of the Arbitrator and determination of the arbitration proceedings.
- ii. Land Reference Number 1160/724 also known as Land Title No. Nairobi/Block 148/1234 be and is hereby preserved and conserved pending the outcome of the arbitration.
- iii. Costs of the Arbitration shall abide the outcome of the arbitration proceedings.

65. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE, 2023.

OGUTTU MBOYA

JUDGE

In the presence of:

Mr. Muturi Kamande for the Applicants

Mr. Mutuma for the Respondent

