



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL SUIT. NO. E806 OF 2020**

**IN THE MATTER OF THE ARBITRATION ACT NO. 4 OF 1995**

**BETWEEN**

**CHRISTOPHER THIONGO WAWERU.....1<sup>ST</sup> APPLICANT**

**JAMES MWANGI KABUGI..... 2<sup>ND</sup> APPLICANT**

**AND**

**WAIYAKI WAY DEVELOPERS LIMITED.....1<sup>ST</sup> RESPONDENT**

**VIRJI MEGHJI PATEL..... 2<sup>ND</sup> RESPONDENT**

**MUIGAI PHARES THUMBLI.....3<sup>RD</sup> RESPONDENT**

**WAIYAKI RIDGE GARDENS LIMITED.....4<sup>TH</sup> RESPONDENT**

**N. K. MUGO & COMPANY ADVOCATES.....5<sup>TH</sup> RESPONDENT**

**RULING NO. 2**

1. This court issued an injunction in favour of the Applicants on 8th July 2020 restraining the Respondents from transferring any interest in Waiyaki Way Developers Limited and Waiyaki Way Ridge Gardens Limited pending determination of the application brought under **section 7** of the **Arbitration Act** seeking to refer the dispute between the parties to arbitration on condition that the Applicants execute an undertaking as to damages.
2. The Applicants duly executed the undertaking as to damages on 26th August 2020. The court dismissed the application for injunction on 26th November 2021 and discharged the injunction. The Respondent now seeks to enforce the undertaking as to damages by way of the Chamber Summons dated 28th April 2021 as amended on 2nd June 2021.
3. The Applicants oppose the application on the ground that the arbitrator should conduct the inquiry as to damages. I disagree. In the case of *Nguruman Limited v Jan Bonde Nielsen [2020] eKLR*, the court cited with approval *Cheltenham and Gloucester BS v Ricketts and Others [1993] 4 All ER 276* where the court held that, *"The undertaking is not given to the party enjoined but to the court."* In this case the court ordered the undertaking as a condition for the grant of the injunction. The inquiry as damages must therefore proceed before this court.
4. An arbitrator does not have jurisdiction to determine any matters apart from those within the purview of the arbitration agreement. An undertaking given to the court in proceedings before it is not a matter contemplated within the arbitration agreement and is outside the jurisdiction of the arbitrator.
5. Whether the Respondent suffered any damages as a result of the injunction is a matter of evidence. The matter shall therefore be set down for hearing in due course hence I direct as follows:

(a) The Respondent file and serve an affidavit annexing all the documents of proof within 14 days

(b) The Applicant shall file a Replying Affidavit in response thereto within 14 days of service.

(c) Mention on 22.09.2021 for directions and further orders.

(d) Costs in the cause.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of JULY 2021**

**D. S. MAJANJA**

**JUDGE**