



**Mutuku v Kyanzavi Farmers Company Limited (Civil Case E169 of 2021)  
[2021] KEHC 422 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 422 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E169 OF 2021  
WA OKWANY, J  
DECEMBER 16, 2021**

**BETWEEN**

**ROBERT MUTHAMA MUTUKU ..... APPLICANT**

**AND**

**KYANZAVI FARMERS COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. The applicant herein, Robert Muthama Mutuku, filed this application on 30<sup>th</sup> March 2021 seeking the following orders; -
  - 1) Spent.
  - 2) Spent
  - 3) THAT pending referral of their dispute to arbitration and eventual hearing and determination of the dispute between the plaintiff and the defendant, the defendant, its agents, servants or workmen be restrained from evicting or interfering with the plaintiff's occupation and use of the premises leased to the plaintiff on the ground floor of Land Reference No 209/4285(Agriculture House).
  - 4) THAT such further or other order be granted as this court will deem just and expedient in the circumstances of this case.
2. The application is brought under Section 7(1) of the *Arbitration Act* and Order 40 Rules 1, 2 and 4 of the *Civil Procedure Rules*.
3. The application is supported by the applicant's affidavit and is based on the grounds that; -



- i. The defendant has threatened to forcibly evict the plaintiff from the suit premises which the plaintiff has been occupying as a tenant for the last 11 years.
  - ii. The threatened forcible eviction is not unlawful but is also illegal.
  - iii. The written lease executed between the plaintiff and the defendant contains an arbitration clause (clause 7) but the defendant has refused to heed the plaintiff's request that the dispute concerning whether or not the plaintiff's lease should be renewed or referred to arbitration.
  - iv. The threatened forcible eviction and the refusal to renew the plaintiff's lease go against the plaintiff's legitimate expectation to have his lease renewed more so after the defendant represented to the plaintiff that his lease would be renewed if the plaintiff paid to the defendant Kshs 1,000,000 towards rent arrears and the plaintiff duly paid the sum on 1<sup>st</sup> March 2021.
  - v. Unless this application is certified urgent and interim restraining orders are granted, the suit and the application herein will be rendered nugatory.
  - vi. The defendant has threatened to evict the plaintiff if he does not vacate the demised premises by 31<sup>st</sup> March 2021 hence the urgency of this application.
4. The respondent opposed the application through the replying affidavit of its Chairman Mr. Francis Mwikya Kalinzoya who states that the defendant owns the rental building erected on L.R No 209/4285 known as agriculture house wherein the plaintiff was a tenant for a lease period of eleven years. He states that the said lease however lapsed on 28<sup>th</sup> February 2021 but that prior to its expiry, the respondent informed the applicant that they would not renew the lease. He states that the applicant has rent arrears of Kshs 6,057,312.90. He further states that the lease agreement was specific that arbitration would apply only be applicable during the currency of the lease.
  5. The application was canvassed by way of written submissions which I have carefully considered. The main issue for determination is whether the applicant is entitled to the orders sought in this application.
  6. The applicant invoked Section 7(1) of the Arbitration Act on interim measures of protection which provides that; -
    7. Interim measures by court
      - (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.
  7. The applicant argued that the matter should be referred to arbitration as a dispute has arisen between the parties with regard to the extension of the lease agreement. According to the applicant, the respondents informed him that they do not intend to renew the lease. The applicant maintained that he had legitimate expectation that the lease would be extended. He therefore sought an interim measure of protection pending referral for arbitration.
  8. The respondent however disputed the applicant's claims and stated that there was no dispute between the parties that warrants the reference of the matter to arbitration. The respondent's case is that the relationship between the parties was extinguished upon the expiry of the lease.



9. Clause 7 of the lease agreement provides that; -

“If any dispute or difference shall arise, either before or after the expiration or termination of this lease, between the lessor and the lessee or those claiming under them, touching or resting upon the construction of these presents or to the lease every such dispute or differences shall be referred for arbitration. Before entering upon such reference seven days after either party notifying the other party the lessor or the lessee may write to the chairman for the time being of the Kenya branch of the chartered institute of Arbitrators to appoint the sole arbitrator and such appointment shall be made within seven days from the date of first request for such appointment. Such arbitration shall be in accordance with the arbitration Act of the laws of Kenya in force at the time of such arbitration. The arbitration award shall be final and conclusive”.

10. The principles governing the grant of interim orders of protection under the Arbitration Act were outlined by the Court of Appeal in *Safaricom Limited vs Ocean View Beach Hotel Limited & 2 others Civil Application No. NAI 327 of 2009 [2010] eKLR* where Nyamu JA., observed as follows; -

By determining the matters on the basis of the [GIELLA] principles the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. 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. In the case of Kenya, the Arbitration Act is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as “interim measures of protection” under section 7 of the Arbitration Act. On the other hand, in the English version of the ICC Rules for example, they are known as “interim conservatory measures”. Whatever their description however, they are intended in principle to operate as “holding” orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation.

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An interim measure of protection such as that sought in the matter before us is supposed to be issued by the court under section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for the grant of injunctions as the High Court purported to do in this matter.

To illustrate the point Article 26-3 of the UNICTRAL Arbitration rules states: -

“A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement.”

Section 7 of the Arbitration Act is modeled on this. However, in the matter before us and with due respect, the Commercial Court (Koome, J.) contravened the above principles by firstly either declining to issue any measure of protection or granting such a measure. The Court also failed to correctly address the principles for the issue of any such measures and worse still, the supreme court took over the subject matter altogether and ruled on the merits of the subject matter of the arbitration thereby prejudicing the outcome of the arbitration. This explains why in the special circumstances of this matter, this Court must take extraordinary measures to rectify an extraordinary illegality. 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: -

1. The existence of an arbitration agreement.
  2. Whether the subject matter of arbitration is under threat.
  3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.
  4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties.
11. I have perused the lease agreement that is the subject of this suit and I find it is not disputed that the parties herein entered into a lease agreement whose terms were that the lease would expire after a period of 11 years. Needless to say, the contract contained a dispute settlement mechanism through arbitration. The question before the court is whether there is a dispute capable of being referred to arbitration so as to warrant the granting of the orders sought.
12. A perusal of the lease agreement also shows that the 11-year period has already expired. The lease did not provide an avenue for the extension of the lease and any other discussion as to legitimate expectation on extension of the lease falls outside the scope of the lease. The applicant invites the court to stop his eviction from the premises. I however find that such an order would amount to rewriting the contract of the parties.
13. The Court of Appeal in *Husamuddin Gulambusein Potbiwalla Administrator, Trustee and Executor of the Estate of Gulambusein & Ebrahim Potbiwalla vs. Kidogo Basi Housing Corporative Society Limited and 31 Others Civil Appeal No. 330 of 2003* stated that: -
- “A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.”
14. The applicant's case is that the respondent has threatened to forcefully evict him from the leased premises despite having promised to renew the lease if he paid Kshs. 1,000,000. The applicant contends that he paid the said sum and therefore expected his lease to be renewed. I note that the arbitral clause of the lease agreement stipulates that arbitration is the first port of call for any disputes that may arise, either before or after the expiration or termination of this lease, between the lessor and the lessee or those claiming under them. The wording of the arbitral clause is clear that the parties can go to arbitration even after the expiry of the lease.
15. Having regard to the above position, I am satisfied that the applicant has established the existence of an arbitration agreement and that the threatened forceful eviction places the subject matter of arbitration is under threat. I therefore find that, in the circumstances of this case there is need to grant the applicant the interim measure of protection but on condition that the dispute shall be placed before



the appointed arbitrator within 45 days from the date of this ruling failure of which the preservation orders issued herein shall be vacated. The costs of this application shall abide the outcome of the arbitration.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 16<sup>th</sup> day of December 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of: -**

Mr. Amuga for Plaintiff/Applicant

Court Assistant: Margaret

