



Lake Naivasha Crescent Camp Limited v Wagiciengo Holdings Limited & another (Environment & Land Case E38 of 2023) [2023] KEELC 20906 (KLR) (23 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20906 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E38 OF 2023
FM NJOROGE, J
OCTOBER 23, 2023**

BETWEEN

LAKE NAIVASHA CRESCENT CAMP LIMITED PLAINTIFF

AND

WAGICIENGO HOLDINGS LIMITED 1ST DEFENDANT

ANASTACIA WAIRARA WAGICIENGO 2ND DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's Chamber Summons application dated 8/05/2023 which is expressed to be brought under Section 7(1) of the *Arbitration Act*, Rule 2 of the Arbitration Rules and Article 159 (2)(C) of *the Constitution* of Kenya which sought the following prayers:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That pending the hearing and determination of the intended arbitration, the honorable court be pleased to issue an interim injunction against the 1st and 2nd defendants/respondents jointly and severally restraining themselves, their agents, servants and/or employees from evicting, entering into, trespassing, blocking, locking and/or interfering in any manner whatsoever with the plaintiff's/Applicant quiet and peaceful possession of all that parcel of land known as Land Reference Number 396/9 and 396/10 situate at Naivasha within Nakuru County.
 - e. That in the alternative and without prejudice to prayers 3 and 4 above, the honorable court be pleased to issue an interim protection order through an order of status quo protecting the plaintiffs'/applicants' contractual rights accruing from the lease agreement dated 2/12/2011



entered between the plaintiff/applicant and the defendants/respondents pending the hearing and determination of the intended arbitration.

- f. That the honorable court do issue such other orders as it may deem fit and necessary in the circumstances.
 - g. That the costs of this application be provided for.
2. The application is supported by the grounds on the face of the application and the supporting affidavit of Samuel Warugu Kimotho one of the directors of the plaintiff. The grounds on the face of the application and the supporting affidavit are that on 2/12/2011 the plaintiff entered into a lease agreement with the 1st and 2nd defendants with effect from 01/01/2012 to the year 2027; the rent was payable quarterly and that it has an escalation clause; the plaintiff paid its quarterly rent to include the month of July 2023; the leased premises is a tented camp pursuant to the provisions of the lease agreement; the plaintiff had taken loans from banks amounting to Kshs. 200,000,000/= to invest in the said tented camp; on 24/04/2023 he was called by someone alleging to be the new landlord; on 26/04/2023 he met 2nd defendant who informed him that she was the new landlord; on 04/05/2023 a notice of termination of lease was served on the plaintiff. The applicant avers that the lease agreement had not been terminated within the provisions of the law and that the defendants have to compensate the plaintiff for the remainder of the lease. On 05/05/2023 the plaintiff's advocate responded to the defendants' letter and informed them that it will not honour the purported notice; that in November 2013, the 2nd defendant tried to terminate the lease under the pretext of rent arrears and the plaintiff filed ELC No. 621 of 2013; after filing, the dispute was referred to arbitration and the defendants were found to have received Kshs. 2 million in terms of excess rent; the said award was adopted as the judgement of the court; in 2020 the defendants tried to evict the plaintiff but the plaintiff filed ELC No. E032 of 2020; Article 12 of the lease provides for dispute resolution through negotiations and then arbitration; the plaintiff's directors instructed their advocates on record to initiate arbitral proceedings as the threat of eviction was imminent; the plaintiff stands to suffer irreparable harm if the orders sought are not granted; the plaintiff is still servicing the loans it took and if the defendants are allowed to take possession of the leased premises without fully compensating the plaintiff for the remainder of the term, the plaintiff will suffer substantial loss. The applicant states that the respondents have breached the conditions of the lease agreement by purporting to terminate the lease without prior notice or compensation and the defendants will suffer no prejudice if the orders sought herein are granted.
3. The defendants filed grounds of opposition dated 17/05/2023 on 18/05/2023. The said grounds are as follows:
- a. The application filed herein dated 8/5/2023 Is fatally and incurably defective, hopelessly incompetent, frivolous, mischievous and an abuse of the court process, the same having been filed prematurely as no termination notice has been issued and there is no particularization of dispute for the intended arbitration upon which the application and/or the orders sought are founded.
 - b. The application herein is based on an apparent pending arbitration process which arbitration does not exist as the Applicant has not provided evidence of procuring the appointment of such an arbitrator. There is no evidence placed before this Honourable Court that the arbitration process has started or is pending. There is no letter or request to the Chairman of the Chartered Institute of Arbitrators requesting for an appointment of an Arbitrator.
 - c. The Respondents' letter dated 3/5/2023 is a formal notification to the Applicant that the Respondents are no longer owners of the property as the ownership of the property has passed



following a successful sale. The reading of the said letter explicitly communicates the changes of ownership and the conclusion of sale which the Respondents are obligated to inform the Applicant as their tenant.

- d. The Respondents being previous owners have no capacity to issue a termination notice to the Applicants as ownership of the property has passed to the purchasers.
 - e. The orders sought against the Respondents will be in vain as the orders cannot be enforced against the Respondents in the event the new owners issue a notice to vacate upon the Applicant.
 - f. The Respondents have a right to sale their property despite having a tenancy lease agreement with the Applicant. The lease agreement does not bar the Respondents from selling their property.
 - g. The application is frivolous and an abuse of the court's process and as such the application should be dismissed with costs.
4. The application was canvassed by way of written submissions. The plaintiff filed its submissions on 30/05/2023 while the defendants filed their submissions on 08/06/2023.
 5. The plaintiff in its submissions gave a background of its application, relied on the case of *Safaricom Limited vs Ocean View Beach Hotel & 2 Others* [2010] eKLR and submitted that Article 12 of the lease agreement it entered into with the defendants provides for arbitration. The plaintiff also submitted that the lease agreement that the defendants are purporting to terminate is set to expire on 31/12/2027 and given the massive investment it has done on the property; the court should grant the orders sought so that the arbitration is not rendered nugatory.
 6. The plaintiff relied on the case of *Don-woods Company Limited vs Kenya Pipeline Company Limited* [2005] eKLR and submitted that the defendants are trying to defeat its rights as a lessee by introducing a third party as the owner in order to terminate a fixed term contract. The plaintiff further submitted that unless the court grants the orders sought, it stands to be evicted before the intended arbitration is determined. The plaintiff in conclusion sought that the court grants prayer No. 3 in order to preserve the substratum of the intended arbitration and that prayer No. 4 be granted for a period of three months and the parties to come back after three months to confirm the status of the intended arbitration.
 7. The defendants in their submissions identified the following issues for determination:
 - a. Whether there is a pending arbitration process between the parties;
 - b. Whether the interim orders of injunction should issue against the defendants/respondents as prayed in the application;
 - c. Whether there is a dispute capable of referral to the alleged arbitration process.
 8. On the first issue, the defendants submitted that the plaintiff is in breach of Article 12 of the lease agreement dated 2/12/2011 and has commenced the present proceedings seeking orders pending arbitration proceedings that are yet to commence. The defendants further submit that no arbitrator has been appointed and no evidence has been adduced before this court to indicate compliance with Section 12(3) of the *Arbitration Act*.
 9. With regard to the second issue, the defendants reiterated that there are no arbitration proceedings pending and so the court cannot issue orders on non-existent proceedings. On the third issue, the



defendants submitted that they have no capacity to issue a termination notice since the ownership of the suit property has changed hands, and that the letter dated 3/05/2023 that they sent to the plaintiff was meant to notify it of the change of ownership and inform it to communicate with the new owners. The defendants relied on the cases of Vishva Builders Ltd v Koskei [2004] eKLR, UAP Provincial Insurance Company Ltd vs Michael John Beckett [2013] eKLR and submitted that under Section 7(1) of the Arbitration Act, the court has to make an inquiry as to whether there is a dispute between the parties and if there is, whether it is among the matters agreed to be referred to arbitration. The defendants then reiterated that there is no dispute between the parties and the prayer to submit the matter to arbitration does not require the court's time for consideration. The defendants concluded their submissions by seeking that the plaintiff's application be dismissed with costs.

Analysis and determination

10. After considering the application, the response thereto and the submissions, the only issue that arises for determination is whether the plaintiff should be granted the orders sought.
11. The plaintiff has moved the court under Section 7(1) of the Arbitration Act and Rule 2 of the arbitration rules seeking that the court issues an interim injunction against the defendants pending the hearing and determination of an intended arbitration to restrain them from interfering with its quiet possession of LR No. 396/9 and 396/10 or in the alternative an order of status quo protecting its contractual interests' accruing from the lease agreement dated 2/12/2011 pending the hearing and determination of the intended arbitration.
12. The plaintiff argued that it received the notice dated 3/05/2023 purporting to terminate the fixed term lease that it had entered into with the defendants. The plaintiff further argues that the said lease dated 2/12/2011 was set to expire on 31/12/2027. Further, Clause 12 of the said lease agreement provided that in case of any dispute, the matter was to go for arbitration which is the basis upon which the plaintiff filed the application under consideration. In response, the defendants argued that the said arbitration proceedings are non-existent and its letter dated 3/05/2023 merely informed the plaintiff that there was a change of ownership.
13. The lease agreement entered into by the plaintiff and the defendants provided for arbitration in case of any dispute. Clause 12 of the lease agreement dated 2/12/2011 provided as follows:

“The parties agree that should a dispute arise with respect to this lease, they shall make good faith efforts to resolve the dispute on a business basis through negotiations. Such consultations shall begin immediately after either of the parties has delivered to the other written request for such consultation.

If within fourteen (14) days following the date such notice is served the dispute cannot be resolved, the parties agree to submit the matter to a single arbitrator to be appointed by the parties jointly and failing agreement by the Chairman for the time being of the Kenya Chapter of the Chartered Institute of Arbitrators. Such arbitration shall be conducted in Nairobi and resolved in accordance with the provisions of the Arbitration Act 1995 as amended from time to time...”
14. Section 7(1) of the Arbitration Act provides as follows:

“(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.”



15. The Court of Appeal in the case of *Safaricom Limited – Versus - Ocean View Beach Hotel Limited & 2 others* [2010] eKLR held as follows:

“It takes time to establish an arbitral tribunal, and during the time between the arising of the dispute and the tribunal’s establishment vital evidence or assets may disappear unless a national court (in our case, the High Court) is urgently asked to intervene. Moreover, even where an arbitral tribunal has the power to issue interim measures such powers are generally restricted to the parties involved in the arbitration itself..

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?”

16. The plaintiff annexed to its application a copy of the lease agreement dated 2/12/2011 and the letter dated 3/05/2023. The letter dated 3/05/2023 was written by S. K. Oloo & Co. Advocates addressed to the plaintiff informing it that LR No. 369/9 and 369/10 had changed ownership and so the lease between the plaintiff and the defendant stood terminated.

17. A letter dated 5/05/2023 was also annexed to the plaintiff’s application. The said letter is written by Oyugi & Co. Advocates addressed to S.K. Oloo Advocates and states as follows:

“...our client will not honour your client’s purported termination notice as the same is null and void and consequently a dispute has arisen and pursuant to the terms of the lease and in particular Clause 12 of the Lease, our client will proceed to refer the matter to arbitration...”

18. The court in the case of *Progressive Credit Limited v Mombasa Trade Centre Limited* [2022] eKLR held as follows:

“18. The roadmap to arbitration has been invoked by the Plaintiff in its letter to Defendant dated 7th August 2021, which says, ‘Take Notice that of you fail to accede to our notice we will have no option other than to refer this dispute to arbitration as per clause 3.18 of the lease agreement. For the avoidance of doubt, consider this as our notice to intent to refer this dispute to arbitration under the aforesaid clause.’ Clause 3.15 of the lease provides for Service of Notices under the lease; in my view, the plaintiff’s letter dated 7th August 2021 was in accordance with the clause and suffices as duly served notice. I



find that the letter was the first avenue, stem and clear “Modus Operandi” in commencing the process of putting in place an arbitration process.

19. The parties agreed to have all their disputes, questions touching on the lease its construction or application or their rights and liabilities towards it be heard and determined by a single arbitrator, whose decision shall be final, conclusive and binding on the parties. I find that the dispute on how to terminate the lease and the rights and liabilities of either parties during termination can only be determined by a single arbitrator pursuant to the terms under Clause 3.18 of the Lease Agreement.
 20. The upshot of the above detailed analysis and looking at the material presented before this Honourable Court by the Plaintiff, I am persuaded that the conditions for grant of a protective measures pending arbitration have been well established.”
19. Similarly, in the present case, the parties had agreed to have all their disputes on issues touching the lease be determined by way of arbitration. It is my view that the plaintiff has established that conditions requisite for the grant of protective measures pending arbitration exist and therefore the application dated 8/05/2023 has merit and consequently, I allow the application and I issue the following orders:
- a. An interim injunction for a period of ninety (90) days from the date of this ruling is hereby granted restraining the defendants whether by themselves, their agents, servants, assigns and/or employees from evicting, entering into, trespassing, blocking, locking and/or interfering in any manner with the plaintiff’s quiet possession of LR No’s 396/9 and 396/10 pending the commencement and final determination of the arbitration proceedings before a single arbitrator to be agreed upon by the parties and in case no such agreement is reached to be appointed by the Chairman of the Kenya Chapter of the Chartered Institute of Arbitrators in line with clause 12 of the Lease Agreement dated 2/12/2011.
 - b. The costs of the application shall be in the cause.
 - c. This matter shall be mentioned on 26/10/2023 for directions before the Judge at Nakuru.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 23RD DAY OF OCTOBER 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

