



**Mwangi v Playstreet Kindergarten Limited (Environment & Land Case E094 of 2023) [2023] KEELC 20864 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20864 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E094 OF 2023**

**MD MWANGI, J  
OCTOBER 17, 2023**

**BETWEEN**

**SOLOMON GICHINA MWANGI ..... PLAINTIFF**

**AND**

**PLAYSTREET KINDERGARTEN LIMITED ..... RESPONDENT**

**RULING**

1. Vide his amended Notice of Motion application amended on September 26, 2023, the Plaintiff/applicant prays for orders: -
  - a. Spent
  - b. Spent
  - c. Spent
  - d. Spent
  - e. That pending the hearing and determination of this suit a temporary injunction do issue restraining the defendant, by itself, its servants or agents and or any persons acting under its control, authority, direction and or supervision from in any way whatsoever taking possession and or occupation of the property and premises situate on that piece of land known as Number LR 3734/812 situated within Lavington, Nairobi.
  - f. That upon hearing of this application inter partes, this honourable Court do stay the proceedings pending a reference of this matter to arbitration pursuant to Clause 6(j) of the Lease.





## Issues for Determination

8. The very first and fundamental issue that the court must determine is where it has the jurisdiction to consider and determine the application by the Applicant.

### a. Whether the Court has the jurisdiction to issue interim reliefs pending arbitration.

9. Section 7 of the *Arbitration Act* provides that, '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.'
10. Section 7 of the *Arbitration Act* therefore allows the Court the leeway to issue interim reliefs before the hearing and determination of arbitration proceedings. In the case of *Safari Plaza Ltd-vs- Total Kenya Ltd [2018]eKLR* it was held that the reliefs are granted only on the ground that an arbitration award to which the Applicant may become entitled to may be rendered ineffectual unless the interim reliefs are granted.
11. My finding therefore is that this court does indeed have the jurisdiction to issue interim reliefs off course in deserving cases and upon the Applicant meeting the settled parameters.
12. I will therefore proceed to assess whether the Applicant in this case has met the parameters for the grant of the interim reliefs.

### (ii) Whether the Applicant has met the parameters for the grant of the interim measure sought:

13. The parameters that the Court ought to consider were set out in the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others Civil Application No NAI 327 of 2009 [2010] eKLR* where the Court of Appeal outlined the principles governing the grant of interim measures of protection as follows: -
  - ' 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 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 the commencement of the arbitration so as to avoid encroaching on the tribunal's decision-making power as intended by the parties.'
14. The terms and conditions of the lease agreement between the parties in this case is not in contention. Both sides are in agreement that there is an arbitration clause. The only issue before the court then is whether interim reliefs sought by the Applicant should be granted. The court takes note that the Arbitral Tribunal is yet to be set up.
15. Both Parties in their submissions before the Court were also in agreement that the Defendant has substantively proceeded with the development on the suit property. Indeed, the Defendant's Advocate informed the Court that the Development was at an advanced stage;



near completion. The Defendant had expended a lot of money and stands to suffer loss should the development be stopped at that stage. She urged the Court to weigh the interests of both parties.

16. Cognizant of the fact that this dispute is proceeding to arbitration in accordance with the arbitration clause in the lease agreement, I will deliberately frugal with my words in order not to prejudice the hearing before the Arbitral Tribunal in any way.
17. I am guided in that aspect by the English arbitration case of *Channel Tunnel Group Limited v Balfour Beatty Construction Ltd [1993] AC 334* where the English Court rendered itself as follows:

' There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made and not to take out of the hands of the arbitrators (or other decision makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter considerations must prevail... If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide.'

18. Having considered the arguments from both sides, the applicable law and the above cited decisions, this Court is not persuaded that it is the interest of justice to issue the interim reliefs sought by the Plaintiff/Applicant at this point in time. The court does not see any threat to the suit property to warrant the issuance of the orders sought especially in view of the clause in the lease the binds the Respondent at the end of the lease to restore the suit property to its original condition. The court also appreciates that the Respondent has fully complied with his obligations under the lease.
19. I therefore disallow the Application herein but with no orders as to costs. The dispute between the parties is referred to arbitration in accordance with clause 6j in the lease.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTURALLY AT NAIROBI THIS 17TH DAY OF OCTOBER, 2023**

**M. D. MWANGI**

**JUDGE**

**In the virtual presence of:**

**Mr. Okello holding brief for Ms. Wachanga for the Respondent.**

**No appearance for the Applicant**

**Yvette: Court Assistant.**

**M. D. MWANGI**

**JUDGE**

