



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MISC CIVIL APPLICATION NO. E187 OF 2021

ROXBOROUGH INVESTMENTS LIMITED.....APPLICANT

=VERSUS =

MONICA WANJIRU MBURU & ANNE SUSAN

WANJIRU MBURU AS ADMINISTRATORS TO

THE ESTATE OF LEAH WANDIA MBURU.....RESPONDENTS

RULING

1. This ruling is in respect of the Notice of Motion dated 28th October, 2021 brought under Article 159 (2) (c), 162 (2) (b) as read with Article 262(7) of the Constitution of Kenya ,2010, Sections 1A & 1B of the Civil Procedure Act (Cap 21), Sections 7 (1) & (2) of the Arbitration Act, 1995, and Order 40 and 51 of the Civil Procedure Rules and all other enabling provisions of the law. The Applicant is generally seeking for temporary orders of protection against the Respondent from taking any adverse actions which include entering into an agreement for sale, selling, alienating, leasing, charging, transferring or in any other way interfering against their quiet enjoyment and possession in respect to all the portion of land of LR. No. 25732/44 (Original Number 25732/32), LR No. 25732/16 and a portion of L.R. No. 25732/39 (Original Number 25732/33/7) (Together with the leased properties) and from terminating the lease dated 13th December, 2019 in relation to the suit premises pending the hearing and determination of the arbitration proceedings between the parties. The application is premised on grounds thereon and supported by the affidavit sworn by **Edwin Nginya Kuraru** a director of the Applicant.

2. It is the applicant's case that it is a tenant of the respondent in respect of the suit premises. That the lease dated 13th December 2019 has an elaborate dispute resolution mechanism. The applicant avers that Clause 6 of the Offer to Lease granted the Applicant right of purchase over the leased property. Following this, a notice was issued on 20th September 2021 giving the applicant an option to purchase the property. The notice was to run for ninety days thus expiring on 20th December 2021. That before the expiry of the said notice of right to purchase and without any reference to it, the Respondents Advocates issued a letter dated 25th October, 2021 purporting to terminate the offer to lease and giving the applicant seven days to vacate the property. That the said notice regards the applicants accrued rights over the property in terms of the investments made therein amount to close to Twenty Million Kenya Shillings as well as the right of purchase, which is yet to elapse. That clause 10 of the Offer to Lease contains an arbitration clause. That following the circumstances, the applicant has declared dispute though a letter dated 27th October 2021 issued to the Landlord/ Respondent through registered posts and an advanced copy through their advocates. That further it is important that orders of interim protection sought are granted as the landlord/respondent threaten to re-enter the leased property and dispossess the Applicant of the property. That the courts should grant the interim orders sought to ensure the Applicant's interests are safeguarded pending determination of the dispute referred by arbitration.

3. The Respondent aver that they were appointed as the administrators of the estate of Leah Wandia Mburu (Deceased) pursuant to the Grant Letters of Administration Intestate issued by the High Court in Succession Cause No. 32 of 2019. That before they obtained the Grant of Letters of Administration Intestate, the Applicant approached them with the intention of leasing part of the suit property, and were informed that the Respondent has not obtained the grant. However, after the Grant Letters of Administration Intestate were issued by the High Court, the parties herein agreed on several terms and the offer dated 13th December 2019. That the Applicant failed to follow the terms of the agreement and failed to honour their promises towards the settlement including paying the negotiated monthly sum of Ksh 100,000/= towards offsetting the accrued rent arrears and hence therefore the instant application lacks merit.

4. The Applicant submitted that by failing to execute the lease, the were unable to register the school on the said premises and generate any income. They pleaded with the court to grant interim orders of protection to preserve the subject matter of the dispute pending the resolution of the dispute through arbitration.

5. I have considered the application and the submissions made. In this case, it is evident that there existed an arbitration clause in the lease agreement. In my view, it is not desirable for the court to go into the merits of the dispute. The issue that presents itself for this court's

determination, is whether the Applicant is entitled to the interim orders sought pending the commencement, hearing and determination of the intended arbitration.

6. Section 7(1) of the Arbitration Act provides as follows:

“(1) It is not incompatible with an arbitration agreement for a party to request the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”

7. The principles that should guide the court in determining an application for interim measure of protection under Section 7 of the Arbitration Act were clearly laid down in the case of *Portlink Limited –v- Kenya Railways Corporation (2015)eKLR* as follows:

“In issuing an interim measure of protection as provided in Section 7 the court’s determination of the parties dispute is restricted. The court’s role was eloquently outlined in the decision of J. G. Nyamu JA, in the case of *Safari Limited –v- Ocean View Beach Hotel Limited & 2 Others (2010) eKLR* where it was stated that the court faced with such application should take into account the following: -

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.”

8. The Respondent has not argued that the agreement to refer the matter to arbitration is null and void. This means that the clause in the lease is a valid agreement between the parties on disputes arising from the lease.

9. The second factor for consideration is whether the subject matter is under threat. The Applicant has submitted that they have received a notice to terminate the lease and that the Respondents has also threatened to take possession of the said lease property. Following the issuing of the threatened eviction, the subject matter is indeed under threat.

10. Another factor to consider is whether the Applicant has established the third guiding principle, “in the special circumstances which is the appropriate measure of Protection after an assessment of the merits of the application” Although my answer to the question of whether the subject matter of arbitration is under threat is in the affirmative, I am also to consider whether the applicant has established the third guiding principle (in the *Portlink Limited Case (supra)*, “in the special circumstances which is the appropriate measure of Protection after an assessment of the merits of the application” which special circumstances favour the applicant to warrant the granting of the orders sought. In order to balance of the interests of both parties, it is only fair to order for interim protection on terms. However, I also note that the Applicant has failed to comply and honour its commitment of paying the Ksh 100,000/- monthly towards offsetting the pending rent arrears. A fact which was not controverted.

11. In the end, I allow the application dated 28th October, 2021 in terms of prayers (4) and (5) on the following terms:

i) The applicant to deposit a sum of Ksh 1,200,000/- (which is an annual sum derived from the agreed monthly payment of Ksh 100,000/- that was meant to offset the pending rental dues) in a joint interest earning account in the names of the advocates for both parties pending the outcome of the arbitration proceedings within thirty (30) days from the date of this ruling.

ii) Arbitration in terms of the dispute resolution mechanism to commence within thirty (30) days from the date of this ruling.

iii) Failure to comply with clause (i) and (ii) above, the orders of interim protection to lapse automatically.

iv) Costs of the application to abide the outcome of the arbitration.

12. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF FEBRUARY 2022

E. K. WABWOTO

JUDGE

In the presence of:

N/A for the Applicant.

N/A for the Respondents.

Court Assistant; Caroline Nafuna.