



Binsbergen v Engelmann (Environment and Land Case Civil Suit E159 of 2022) [2022] KEELC 3015 (KLR) (16 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3015 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E159 OF 2022**

**JO MBOYA, J
JUNE 16, 2022**

BETWEEN

JOHANNES VAN BINSBERGEN APPLICANT

AND

VERONICA ENGELMANN RESPONDENT

RULING

1. Vide the Notice of Motion Application dated May 4, 2022, the Plaintiff/Applicant herein has approached the court seeking for the following reliefs;
 - a. (Spent)
 - b. Pending the hearing and determination of this Application *inter-parte*, this Honourable court be pleased to issue a Temporary order of Injunction restraining the Respondent, its servants, agents and/or employees from interfering the enjoyment of quiet possession by the Applicant of the premises identified as L R No 7785/85.
 - c. Pending the hearing and determination of the Arbitral proceedings, this Honourable Court be pleased to issue a Temporary order of Injunction restraining the Respondent, its servants, agents and/or employees from interfering the enjoyment of quiet possession by the Applicant of the premises identified as L R No 7785/85
 - d. This Honourable Court be pleased to issue an order that Joint Quantification be undertaken by the Parties herein of the construction materials and measurements of the construction works on the suit premises as may be necessary or expedient for the purposes of obtaining full information to facilitate the determination of the Arbitral dispute between the parties herein.
 - e. This Honourable Court be pleased to issue any other and further orders as may be necessary to meet the ends of justice; and



- f. The Costs of this Application be provided for.
2. The subject Application is premised on the various grounds contained at the foot thereof and same is supported by three (3) sets of affidavits, namely, the supporting affidavit sworn on May 4, 2022, Supplementary Affidavit sworn on May 5, 2022 and the Further affidavit sworn on May 23, 2022, respectively.
 3. Upon being served with the subject Application, the Defendant/Respondent duly entered appearance and filed a Replying affidavit sworn on May 12, 2022 and in respect of which same has opposed the Application and essentially the issuance of the orders sought.

Despositions By The Parties:

Plaintiff's/applicant's Case:

4. Vide the various Affidavits, (details contained in paragraph 2 hereof), the Plaintiff/Applicant hereinafter referred to as the deponent, has averred that same entered into and executed a tenancy agreement with the Defendant/Respondent. For clarity, it is averred that the tenancy agreement was executed on August 30, 2019.
5. Besides, the deponent has averred that the terms of the Tenancy agreement included monthly rents which was agreed and certified in the sum of Kshs 137, 500/= Only, per month and that same was to increase to Kshs 150, 000/= only, after lapse of two years and thereafter same was to subject to annual increment of 5% starting from third year thereof.
6. Further, the deponent has averred that pursuant to and upon the execution of the Tenancy agreement, same entered upon and took possession of the suit property and thereafter expended various sums of money towards repairs and renovations of the suit property.
7. It was the deponent's further averment that the repairs and renovations that were carried out and/or undertaken in respect of the suit premises, were agreed upon and or sanctioned by the Defendant/ Respondent.
8. Other than the foregoing, the deponent also averred that the Tenancy agreement contained an Arbitration clause, which was to address and/or deal with any dispute arising from the Tenancy agreement. For clarity, the witness invoked and relied on clause 9 (iv) thereof.
9. Nevertheless, the deponent has averred that despite the existence of an arbitration clause in the Tenancy agreement, the Defendant/Respondent herein has since proceeded to and served a Termination notice upon the deponent and same is thus keen to terminate the tenancy and thereby evict the deponent, irrespective of the Arbitration clause.
10. In the premises, the deponent has averred that the issues that are raised at the foot of the termination letter constitutes and/or amounts to a Dispute in terms of the Contract and thus same ought to have been referred to arbitration.
11. Be that as it may, the deponent has averred that upon receipt of the termination letter, same indicated and/or signaled to the Defendant/Respondent their intention to commence arbitration proceedings, with a view to determining the issues/allegations of breach and violation of the terms of the tenancy agreement.



12. Owing to the foregoing, the deponent has therefore sought that the court be pleased to intervene and grant Interim Protection Measures, aimed at protecting and preserving the suit property and the Applicants tenancy, pending reference to arbitration and conclusion of the arbitration proceedings.

Response By The Defendant/respondent:

13. Vide Replying Affidavit sworn on May 12, 2022, the Defendant/Respondent has averred that same is the registered proprietor and owner of the suit property known as L R No 7785/85, located along Ruaka within the City of Nairobi.
14. Further, the deponent has averred that or on about August 30, 2019 same entered into a Tenancy agreement with the Plaintiff/Applicant herein, which tenancy agreement was reduced into writing and thereafter signed by the parties.
15. According to the deponent, it was mutually agreed that the Monthly rents for the first 2 years was to be Kshs 137, 500/= only and thereafter, upon lapse of 2 years, the monthly rent was to increase to Kshs 150, 000/= only, per month.
16. Further, it was averred that with effect from the 3rd year, the Monthly rent was to escalate at 5% annually.
17. Other than the foregoing, the deponent has also averred that it was also agreed that the Applicant was at liberty to carry out and/or undertake repairs and/or renovations in respect of the suit property over the first 2 years of the tenancy and that the repairs were not to be less than Kshs 1,500,000 Only.
18. The deponent has averred that despite the clear terms of the tenancy agreement and more particularly, the clause relating to payment of monthly rent, the Plaintiff/Applicant has breached and/or violated same, by failing to pay the sum of Kshs 150, 000/= only, per month w e f October 1, 2021.
19. Owing to the breach and/or violation of the terms of the tenancy agreement, the deponent has averred that same proceeded to and issued a letter dated April 16, 2022 calling upon the Plaintiff/Applicant to rectify and/or remedy the breach.
20. However, it has been averred that despite being served with the notice to remedy the breach, the Plaintiff/Applicant has failed and/or neglected to do so and as a result of the failure, same was obliged to and indeed issued a tenancy termination notice.
21. On the other hand, the deponent has further averred that other than the breach of Clause 4 of the Tenancy agreement, relating to payment of the contractual monies, the Plaintiff herein also breached and/or violated Clause 7 of the tenancy agreement by undertaking and/or carrying out extensive structural alterations on the suit property, albeit without the consent and permission of the Deponent.
22. Based on the foregoing, the deponent has contended that the termination of the tenancy agreement was lawful and legitimate and that the Plaintiff/Applicant is at liberty to pursue the issue of compensation and reimbursement, if any, is due, owing and payable.
23. Finally, the deponent has averred that same is not in breach of the contract and to the contrary it is the Plaintiff/Applicant that has breached and violated the contract herein. In this regard, the Deponent has contended that the Plaintiff/ Applicant is therefore the Author of his misfortune and ought not to benefit from own fault(s).

Submissions By The Parties

24. The subject Application came up for hearing on June 13, 2022 and same was canvassed and/or disposed of by way of oral submissions, rendered and or tendered by counsel for respective parties.



25. Briefly, the Plaintiff/Applicant submitted that same has filed the substantive suit, containing the various and/or assorted reliefs, based on the tenancy agreement and which reliefs form the basis of what the Plaintiff/Applicant shall wish to be determined by the arbitrator.
26. On the other hand, the Plaintiff/Applicant has further submitted that having filed the suit, same has similarly filed an application premised on Section 7 of the Arbitration Act, 1997 as read together with rule 2 of the Arbitration Rules, 1997.
27. In the premises, the Plaintiff/Applicant has contended that the filing of the substantive suit is with accordance with the law and same has not breached and/or infringed upon the provisions of the Arbitration Act 1995.
28. In support of the foregoing submissions, the Plaintiff/Applicant has relied upon the decisions in the case of Scope Telematics International Sales Limited versus Stoic Company Limited & another [2017] eKLR and Civicon Limited versus Fuji Electronics company Ltd & Another (2020)eKLR.
29. Secondly, the Plaintiff/Applicant has also submitted that the issues of breach and/or violation of the tenancy agreement, in the manner alleged and/or alluded to by the Defendant/Respondent in the tenancy termination notice, as well as in the pleadings herein are issues that ought to be dealt with by an arbitrator in line with Clause 9 of the Tenancy Agreement.
30. In support of the foregoing submission, the Plaintiff/Applicant relied in the decision in the case of Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 Others (2010)eKLR.
31. Lastly, the Plaintiff/Applicant submitted that the clause pertaining to and/or concerning arbitration in the event of dispute between the parties survives the termination of the Contract.
32. In this regard, the Plaintiff/Applicant has contended that irrespective of termination by the Defendant/Respondent, the arbitration clause remains in existence and is therefore valid.
33. Based on the foregoing, the Plaintiff/Applicant therefore sought to be granted the relief contained at the foot of the Application dated May 4, 2022, pending reference to arbitration and conclusion of the arbitral proceedings.
34. On his part, counsel for the Defendant/Respondent has submitted that the Plaintiff/Applicant herein is admittedly in rent arrears in violation of clause 4 of the tenancy agreement, which was signed and executed by the Parties.
35. Secondly, the Defendant/Respondent has also submitted that the Plaintiff/Applicant has also carried out and undertaken substantial structural alterations of the suit property, albeit without the consent and/or permission of the Defendant/Respondent. Consequently, the Defendant/Respondent has further reiterated that the Plaintiff/Applicant is in breach of clause 7 of the tenancy agreement.
36. Thirdly, the Defendant/Respondent has submitted that the Plaintiff/Applicant herein is a victim of his own fault and same ought not to complain.
37. Besides, the Defendant/Respondent has also submitted that the conduct of the Plaintiff/Applicant ought to be considered prior to and before granting the relief sought. In this regard, the Defendant/Respondent has contended that the conduct of the Plaintiff herein dis-entitles same from partaking of equitable discretion.
38. Finally, the Defendant/Respondent submitted that the tenancy agreement which was executed between the parties herein, provides a clause for compensation and therefore, the Plaintiff/Applicant can very well pursue compensation, if any, arising out of the termination of the tenancy agreement.



39. In support of the foregoing submission, counsel for the Defendant/Respondent has relied in the decision in the case of *Lagun Developers Ltd v Beijing Industrial Designing & Research institute* (2015)eKLR.

Issues For Determination:

40. Having reviewed the Notice of Motion Application dated May 4, 2015, the affidavit in support thereof, as well as the Replying affidavit filed in opposition thereto and having similarly considered the submissions by the respective Parties, the following issues do arise and are thus germane for determination;
- a. Whether the Tenancy Agreement contained an Arbitration Clause and if so, whether the Arbitration clause survives the termination of the contract.
 - b. Whether the Breach or issues of Breach which have been alluded to by the Defendant/Applicant ought to be dealt with by arbitrator.
 - c. Whether the Applicant herein is entitled to Interim Arotection.

Analysis And Determination :

Issue Number 1

Whether the Tenancy Agreement contained an Arbitration clause and if so, whether the arbitration clause survives the termination of the contract.

41. It is common ground that the Plaintiff/Applicant and the Defendant/Respondent entered into and executed a tenancy agreement over and in respect of the suit property, whereupon the Plaintiff/Applicant, was authorized and/or otherwise allowed to enter upon and take possession of the suit property, albeit on terms.
42. On the other hand, the tenancy agreement which was entered into and executed by the parties contained various terms and clauses, inter-alia clause 9 thereof which embodied arbitration, in the event of a dispute arising between the parties.
43. Suffice it to note, that on or about April 16, 2022, the Defendant herein generated and issued a notice to the Plaintiff/Applicant, whereby the Defendant/Respondent contended that the Plaintiff/Applicant was in breach and/or violation of the terms of the tenancy agreement.
44. On the other hand, the Defendant/Respondent herein also called upon the Plaintiff/Respondent to remedy and/or rectify the breach, that were alluded to vide the letter under reference.
45. Notwithstanding the foregoing, the Defendant/Respondent has also contended that premised on the breach by and or at the instance of the Plaintiff/Applicant, same was constrained to and issued a termination notice, whose import and tenor was to bring the tenancy to an end.
46. Based on the issuance and service of the tenancy termination notice, a question has thereby arisen, whether the arbitration clause survives the termination of the contract.
47. In view of the foregoing, it is therefore appropriate to make a determination by authenticating that indeed the tenancy agreement under reference embodied an arbitration clause and therefore the parties were enjoined to subscribed to and or abide by the arbitration clause.



48. Other than the foregoing, it is my finding and holding that the arbitration clause, which was freely and voluntarily embodied in the tenancy agreement by the parties, does survive the termination of the contract and hence either party can still implead, invoke and rely upon the arbitration clause.

Issue Number 2

Whether the Breach or issues of Breach which have been alluded to by the Defendant/Applicant ought to be dealt with by arbitrator.

49. Pursuant and according to the terms of the tenancy agreement, it was mutually agreed that any dispute arising from and or attendant to the execution of the tenancy agreement, including breach thereof, were to be referred to arbitration.
50. In respect of the subject matter, the Defendant/Respondent generated and issued a letter dated April 16, 2022, whereby same contended that the Plaintiff/Applicant was in breach and/or violation of various clauses of the tenancy agreement.
51. Further, the Defendant/Respondent also contended that despite issuance and service of the notice to rectify and/or remedy the breaches and/or violations, which were alluded to, the Plaintiff/Applicant failed to do so and hence same was constrained to issue and serve a tenancy termination notice.
52. Based on the foregoing, what becomes apparent is that there is a contention of breach and/or violation of the terms or clauses of the tenancy agreement and the question that begs the answer is who is to adjudicate, determine and/or otherwise arbitrate on the issues of breaches of the tenancy agreement, if any.
53. According to the Plaintiff/Applicant, where there exist allegation of breach or violation of clauses of the tenancy agreement then such a dispute, if any, ought to be referred to arbitration for adjudication and determination.
54. In the premises, the Plaintiff/Applicant has contended that immediately upon receipt of the Defendant's/Respondent's letter dated April 16, 2022, same signaled to and in favor of the Defendant/Respondent, her desire to have the dispute referred to arbitration in accordance with clause 9 thereof.
55. Further, it has been contended that despite the expression of a dispute and intention to refer the matter to arbitration, the Defendant/Respondent proceeded to and issued a tenancy termination notice, without regard to the arbitration clause.
56. In view of the foregoing, the question which belies determination herein is whether there exists basis to warrant reference to arbitration and if so, whether interim protection ought to issue and/or be granted pending the reference to arbitration thereof.
57. In my humble view, the issue of breach and violation of the clause of the tenancy agreement, the extent and scope of such violation and who is culpable for such violation, if any, are issues that were admittedly to be referred to and determined by the arbitrator.
58. In the premises, it was not open for the Defendant/Respondent, to proceed and issue a termination notice, immediately same was notified of the intention by the Plaintiff/Applicant to refer the dispute to arbitration.
59. Simply put, whether the Plaintiff/Applicant has lapsed into default in the payments of rents, costs and/or occasioned substantial structural adjustment to the premises or generally committed breach in respect of the tenancy agreement, such issues ought to be canvassed and/or addressed before the arbitrator and not otherwise.



60. To buttress the foregoing position, it is appropriate and timely to take cognizance of the holding in the case of *Safaricom Ltd v Ocean View Beach Hotel & 2 Others* [2010]eKLR, where the court held as hereunder;

Although the English Arbitration Act 1996 is not exactly modeled on the Model law unlike our Act, I fully endorse the principles as outlined in the Channel Case (*supra*) because they are in line with the arbitral tribunal's jurisdiction as set out in section 17 of the Arbitration Act of Kenya. The section gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under section 17(6) of the Arbitration Act as the Commercial Court in this matter purported to do. In this regard, I find that the superior court did act contrary to the provisions of section 17 and in particular violated the principle known as "Competence/Competence" which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this means is "Competence to decide upon its competence" and as expressed elsewhere in this ruling in German it is "Kompetenz/Kompetenz" and in French it is "Competence de la Competence". To my mind, the entire ruling is therefore a nullity and it cannot be given any other baptism such as "acting wrongly but within jurisdiction."

For the above reasons, because extraordinary wrongs call for extraordinary remedies, in my opinion, it would be unjust not to invoke section 3A to strike out a ruling which has so openly subverted the arbitral process which is intended to act as an alternative to litigation so as to ease pressure on the court system and to assist in the fight against backlog of cases and appeals. The act of usurpation of the arbitral jurisdiction by the High Court has resulted in the improper use of court resources both in the High Court and this Court and has further made the parties incur extra cost and unnecessary delay contrary to the overriding objective.

Under the doctrine of Kompetenz/Kompetenz a tribunal can rule on both the validity of the arbitral clause and the underlying contract. In the circumstances of the matter before us, once appointed it would for example be entitled to rule on who are the parties to the arbitration agreement and on the validity of the agreement to lease and whether it has jurisdiction over the other two respondents who contend that they are not parties to the agreement to lease. The Commercial Court has no business acting against an Act of Parliament and ruling on a matter it was not competent to rule on in law. Such a ruling is a nullity period.

Issue Number 3_

Whether the Applicant herein is entitled to Interim protection.

61. Premised on the existence of the arbitration clause, the Plaintiff/Applicant herein is keen to pursue arbitration and to have the issues in dispute between himself and the Defendant/Respondent dealt with and/ or attended to by the arbitrator.
62. However, during the pendency of the appointment of the arbitrator and commencement of the arbitral proceedings, the Defendant/Respondent has threatened to terminate the tenancy and to recover vacant possession of the suit property.
63. Essentially, what the Defendant/Respondent anticipate to do is to defeat the purpose and intendment of the arbitral proceedings and thereby render same futile and/or an exercise in vanity.



64. Owing to the imminent threat to the arbitral proceedings and the likely consequence that the substratum of the arbitration would be defeated, the Plaintiff/Applicant has therefore approached the court seeking interim measures of protection pending arbitration.
65. In the premises, the question that then arises is whether in the circumstance herein the Plaintiff/Applicant herein is entitled to such measures and what then is the purpose and tenor of an order of interim measure of protection.
66. To my mind, the position of the law underlining the circumstance where interim measure of protection can and do arise, was ably deliberated upon vide decision in the case of *Elite Earthmovers Limited v Machakos County Government & another* [2020] eKLR, where the Court observed as hereunder;
- 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? In the matter before the court, the Judge went on to make orders which undermined the arbitration and the outcome of the arbitration contrary to section 17 of the *Arbitration Act*. A court of law when asked to issue interim measures of protection must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration.

Final Disposition:

67. Having reviewed the issues for determination, it is my finding and holding that the Plaintiff/Applicant herein has met and/or satisfied the requisite conditions to warrant the grant the interim measures of protection pending reference to arbitration and determination of the intended of arbitral proceedings as pertains to the subject dispute.
68. Premised on the foregoing, I therefore proceed to and allow the application in terms of prayer 3 of the Application dated May 4, 2022.
69. For clarity, the interim measures of protection, in terms of the preceding paragraph herein shall subsist pending the hearing and determination of the arbitral proceedings, subject however, to the condition that the Intended arbitral Proceedings are commenced within the next Ninety (90) days from the date hereof.
70. The Costs of the Application shall abide the outcome of the arbitral proceedings.
71. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2022.

HON JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr Davison Makau for the Plaintiff/Applicant

No Appearance for the Respondent

