



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oltukai Mara Limited v Tuyu & 7 others (Environment & Land Case  
E004 of 2022) [2022] KEELC 12664 (KLR) (26 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12664 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE E004 OF 2022  
CG MBOGO, J  
SEPTEMBER 26, 2022**

**BETWEEN**

**OLTUKAI MARA LIMITED ..... APPLICANT**

**AND**

**SAMSON OLE TUYA ..... 1<sup>ST</sup> RESPONDENT**

**DANIEL OLE MPOE ..... 2<sup>ND</sup> RESPONDENT**

**MAKOI OLE KYRINGOT ..... 3<sup>RD</sup> RESPONDENT**

**STANLEY OLE LENJIR ..... 4<sup>TH</sup> RESPONDENT**

**ROBERT OLE TIPIS ..... 5<sup>TH</sup> RESPONDENT**

**NOAH OLE SAYAGIE ..... 6<sup>TH</sup> RESPONDENT**

**SAMSON OLE LETURA ..... 7<sup>TH</sup> RESPONDENT**

**PAUL OLE LAPORE ..... 8<sup>TH</sup> RESPONDENT**

**RULING**

1. Before this court for determination is an oral application made by the defendant's counsel on 20<sup>th</sup> September, 2022 seeking to set aside and or vary the orders issued by the court on the same date granting prayer 2 of the Notice of Motion application dated 27<sup>th</sup> May, 2022.
2. Both parties were directed to file skeleton submissions to the said oral application. Mr Maina Ngauriya, counsel for the respondents filed skeleton submissions dated 20<sup>th</sup> September, 2022. Counsel, while highlighting his submissions, submitted that the applicant purposely failed to adhere to the settled exhaustion doctrine in view of the lease agreement herein expressly providing a clear dispute resolution mechanism which makes arbitration the first port of call as the applicant ignored the said clause and sought refuge in court in order to obtain the extension of their lease and in view of the strict provisions



of Section 6 of the Arbitration Act, once that issue has been raised, the court must stay the proceedings so that parties can avail themselves to the proper forum which is arbitration and therefore the issue at hand is purely a jurisdictional.

3. Counsel for the respondents further submitted that it is also clear from the various authorities cited that the role of the court is to enforce the agreement and in granting the injunction, the court is allowing the applicant to remain on the suit property and that would be rewriting the contract as to what terms the parties will be engaging as the current lease expires on 27<sup>th</sup> September, 2022. Counsel further submitted that the court would have granted the orders once it has considered the two preliminary objections as it is a settled procedure by the Supreme Court that once a preliminary objection has been raised, the court must address itself to the preliminary objection where a jurisdictional issue arises. Counsel relied on the case of Owners of the motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR1 and Blue Limited v Jaribu Credit Traders Limited Nairobi (Milimani)HCCS No. 157 of 2008.
4. In response, Mr Atonga, counsel for the applicant, while relying on the skeleton submissions dated 21<sup>st</sup> September, 2022 submitted that under Order 40 Rule 7 of the Civil Procedure Rules, the rules provide that for this application to succeed, there has to be fundamental change in the circumstances at the time the application is made vis a vis the order that was made. Further that the rule also provides that where the order was granted ex-parte or in instances where the order was obtained through fraud or material concealment of facts which is not the case herein. The applicant submitted that the respondents are dissatisfied with the decision to preserve the substratum of the case as they are not alleging any fraud or concealment of material facts.
5. Further, there has not been any change in the circumstances between the time the order was made and the time the application was made. The applicant further submitted that the facility under Order 40 Rule 7 of the Civil Procedure Rules is not available to a party merely dissatisfied with an order of the court and it is also not available where the grounds is that the court arrived at an erroneous conclusion for whatever reason. Counsel submitted that the grounds made by the respondents are ripe for appeal and cannot be accommodated under Order 40 Rule 7 of the Civil Procedure Rules. He further submitted that the court having judiciously exercised its jurisdiction to preserve the substratum of the suit, litigation must be conducted sequentially and not back and forth and if the contention such as those advanced by the respondents in the instance, any order made by this court would be reopened as if it was an appeal. The contention on jurisdiction is what the court is set to rule on 11<sup>th</sup> October, 2022 and therefore cannot be the correct legal position that a jurisdiction issue once merely raised or pleaded, the court becomes dysfunctional to a point that it cannot exercise its inherent powers.
6. Counsel for the applicant further submitted that the court's role is to balance the conflicting rights of parties and in doing so, the court exercises its inherent discretion in order to obviate the undermining of justice and while at it, inconveniences may arise to one of the parties and these inconveniences do not amount to grounds entitling the inconvenienced party to set aside the impugned order unless the strict grounds under Order 40 Rule 7 of the Civil Procedure Rules have been adhered to. Further, Section 3A of the Civil Procedure Act preserves the inherent jurisdiction to make such orders as may be necessary to prevent an abuse of the court process. The applicant relied on the following authorities:-
  1. Robert Nyangaresi Omwonga (Suing as administrators of the estate of Zakayo Ondara Nyandoro) v Mark Nyabayo Ratemo [2016] eKLR.
  2. Yusuf v Nokrach Kampala HCCC No. 44 of 1970 [1971] EA 104.
  3. Godfrey Ajuang Okumu v Nicholas Odera Opinya Kisumu HCCC No. 337 of 1996.



4. *Sara Lee Household and Body Care (K) Ltd v Danji Pramji Mandavia* Kisumu HCCC No. 114 of 2004.
7. In rejoinder, the respondents' counsel submitted that they approached the court on the basis that the order was granted suo moto and on the basis of concealment of arbitration clause and based on that the court is still within its powers to vary the order that will cause an injustice to one party and further granting an injunctive order as opposed to orders of status quo presents parties to a new world whose terms of engagement are not clear.
8. I have considered the application and the submissions made by counsel for both parties. The respondents' counsel made an oral application on 20<sup>th</sup> September, 2022 seeking to set aside and/or vary the orders issued on even date granting prayer 2 of the notice of motion application dated 27<sup>th</sup> May, 2022 which orders were made pursuant to hearing the submissions made by counsel on the notice of preliminary objections dated 27<sup>th</sup> June, 2022 and 6<sup>th</sup> July, 2022 respectively. This court while granting the orders did so in exercise of its discretion and bearing in mind that interlocutory injunctions are meant to preserve the substratum of the suit pending the hearing and determination of the application. The grant of interlocutory injunctions is not meant to occasion prejudice to any party. In this particular case the respondents would be able to be compensated by way of damages if the court finds that the applicant did not deserve the grant of the injunction. Having said that I find that it would be in the interest of justice to order that the order of injunction to be in place pending the hearing and determination of the two preliminary objections, this court finds that the setting aside or varying of the temporary order of injunction would not be appropriate at this time.
9. Arising from the above, orders granted by this court on 20<sup>th</sup> September, 2022 are hereby extended until 11<sup>th</sup> October, 2022. It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY AT NAROK THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**HON. MBOGO C.G.**

**JUDGE**

**26/9/2022**

**In the presence of:**

CA:Chuma

Mr Tuya holding brief for Mr Maina Ngaruiya for the respondents/applicants

Mr Lawrence Atonga for the plaintiff/respondent

