



North Stream Limited v Registered Trustees of the Comboni Sisters (Enviromental and Land Originating Summons E063 of 2024) [2025] KEELC 3061 (KLR) (2 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3061 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E063 OF 2024
CA OCHIENG, J
APRIL 2, 2025**

BETWEEN

NORTH STREAM LIMITED APPLICANT

AND

REGISTERED TRUSTEES OF THE COMBONI SISTERS RESPONDENT

RULING

1. What are before Court for determination are two applications. The first application is the Applicant's Notice of Motion dated the 7th October 2024 where he seeks the following Orders:
 1. Spent.
 2. Spent.
 3. Spent.
 4. That pending the hearing and final determination of the arbitral proceedings, this Honourable court be pleased to issue a temporary injunction restraining the Respondent, whether by itself, its employees, servants, agents, assigns, or any other persons acting on its behalf, from evicting the Applicant, demolishing any structures, harassing, alienating, transferring, disposing of, or otherwise interfering with the property known as Land Reference No.4857 /22, Nairobi, in any other manner whatsoever, including but not limited to sale, auction, or appointment of receivers, pending the hearing and determination of this application.
 5. Spent.
 6. Spent.
 7. That thus Honourable Court does issue any other orders it deems fit.
 8. That costs of this application be borne by the Respondent.



2. The application is premised on the grounds on the face of it and the supporting affidavit of Fuad Salim, the Applicant's director. He avers that by a Lease Agreement dated the 29th January 2021 between the parties herein, the Applicant leased Land Reference Number 4857/22 hereinafter referred to as the 'suit land' for a term of 27 years, for purposes of developing, constructing and operating a commercial complex comprising of a fuel station and a retailing building.
3. He explains that it was a term of the said Lease that concurrently with execution and delivery of the Lease, the Applicant was to deliver to the Respondent a suitable irrevocable bank guarantee from a reputable bank for the sum of Kshs.50 million.
4. He contends that prior to execution of the Lease, he was advised by the agent representing the Respondent, one Ms. Kornellia that the Respondent would not be open to leasing the property to a Muslim thus he was compelled to bring in one Mr. David Mahinda as a Director and Shareholder of the Applicant.
5. He claims that up until December 2023, the parties herein maintained a cordial relationship and amicably managed to settle issues surrounding the suit land including the conversion process of the title, which the Applicant awaited before registering the Lease and obtaining a bank guarantee. Further, that following the Respondent's confirmation of completion of the title conversion process in November/December 2023, the Applicant requested the title for Lease registration purposes but the same was denied.
6. He states that he subsequently met with the Respondent's lawyer who assured him that the Lease would not be terminated as long as he paid Kshs.3 million over and above all payments made previously but after paying, the said lawyer declined to release the Lease and wrote to the Applicant demanding that it vacates the suit land.
7. He avers that efforts to resolve the dispute regarding Lease registration and rent remittance failed thus the Respondent invoked the arbitration clause under clause 33.2 of the Lease Agreement and at its request, the Chairman of the Chartered Institute of Arbitrators nominated Nyambura Musyimi, to be the sole arbitrator in the proceedings.
8. Further, that while the Applicant is not opposed to the arbitration, it wrote to the nominated arbitrator challenging her appointment as the sole arbitrator based on legitimate doubts regarding her ability to exercise impartiality and objectivity in conducting the arbitral proceedings on grounds that she was the Chair of Human Resources and Spiritual Nurture Committee at Daystar university, which entails matters of Christian spiritual inclination, fears based on the fact that the Applicant's beneficial owners are of Muslim faith.
9. He states that the Applicant also filed an application challenging the arbitrator's impartiality but she dismissed it vide a Ruling delivered on 10th September 2024.
10. He contends that on 23rd August 2024, the Applicant received an eviction notice to vacate the suit land by 30th August 2024 notwithstanding the fact that it had paid over Kshs.15 million in rent, about Kshs.100 million in advance rent, architectural plans, construction permits from the Nairobi City County and the Energy & Petroleum Regulatory Authority, and legal fees, among other expenses and suffered losses exceeding Kshs.200 million in anticipated fuel sales.
11. The application is opposed by the Respondent vide a replying affidavit sworn by its Trustee Susan Murugi Ng'ang'a. She contests the allegations that the Respondent is averse to dealing with persons of different faiths and admits that parties entered into the Lease Agreement dated the 29th January 2021. Further, that in the said Agreement, it stipulated the events of default in Clause 17.1, which include



- the tenant's failure to pay any item of rent or any part thereof. Further, it provided the manner of termination of the Lease following the occurrence of the default events, by requiring service of a thirty (30) days' notice on the tenant.
12. She avers that at the time of commencement of the Lease between the parties herein, it was expected that the Applicant would have already furnished a bank guarantee of Kshs.50 million as stipulated in the Lease Agreement but this did not happen.
 13. She claims that on 20th April 2021, the Respondent's advocates released the original title of the suit land to the Applicant's advocates to facilitate the registration of the Lease against the title but its advocates surrendered the original title back to the Respondent's advocates without an explanation on why registration was not undertaken.
 14. Further, that the process of title conversion cannot excuse the Applicant's inaction since conversion of titles within the Nairobi City County only arose in April 2022 which was more than one (1) year since the execution of the Lease between the parties and eight (8) months since the original title was given to the Applicant's Advocates.
 15. She pointed out that from the commencement date of the Lease, the Applicant paid the agreed rent of Kshs.1 million in February-June 2021, then it was granted a four (4) month reprieve (July –October 2022) under the condition that the rent for that period be paid within six (6) months, starting January 2023 but it failed to pay the subsequent rent after the reprieve and did not pay the reprieve amount, when it fell due.
 16. She insists that following persistent breaches, the Respondent instructed its advocates to issue a notice of termination of the Lease dated the 14th December 2023 but the Applicant neither remedied the breach nor challenged the termination notice before it expired thus it took effect on 13th January 2024.
 17. She acknowledges that the Applicant paid Kshs.3 million on 15th January 2024, after the Lease had terminated contending that the money was applied towards the months in which the Applicant was in arrears but it did not cover all outstanding arrears. She insists that the Applicant remained in breach of the Lease Agreement and despite termination, the Applicant failed to vacate the suit land and settle outstanding arrears yet it continues to occupy the said land. Further, granting it an injunction order would be unfair considering the Respondent is not in any breach. She reiterates that rent paid by the Applicant so far is Kshs.11 million and there is no proof of the amount alleged to have been spent on acquiring approvals.
 18. The second application is the Respondent's Chamber Summons application dated the 28th October 2024 where it seeks the following Orders:
 - a. Spent.
 - b. The Honourable court be pleased to grant an order of mandatory injunction directed at the Applicant, its agents, servants or employees to immediately vacate and hand over vacant possession of land parcel Nairobi/Block 22/313 (Formerly known as Land Reference Number 4852/11 Nairobi) in default, the Respondent be at liberty to evict the Applicant without further notice or at all.
 - c. Costs of the application be provided for.
 19. The application is based on the grounds on its face and the supporting affidavit by its trustee Susan Murugi Ng'ang'a. Her averments in support of the Chamber summons application mirror those of her replying affidavit filed in opposition to the Applicant's instant Notice of Motion application herein.



20. She avers that continued trespass onto the suit land is causing loss to the Respondent pointing out that as at February 2024, the Applicant owed it Kshs.14,350,625/=. She contends that orders to vacate can issue, since this is a clear case where there is breach and failure to pay rent culminating in issuance of a termination notice.
21. The Applicant opposed the application by filing a replying affidavit sworn by its Director Fuad Salim, on 22nd January 2025. He avers that that the crux of the dispute before the arbitrator is centered on the Respondent's refusal to release the converted title to the Applicant (Respondent), which was necessary for the registration of the Lease. Further, that the said refusal caused delays in the commencement of business on the suit land, leading to a disruption of the Applicant's cash flow and consequently, it was unable to pay rent to the Respondent/Applicant and could not secure the guarantee as contemplated in the agreement.
22. He avers that the arbitration proceedings are ongoing and the Applicant remains in lawful possession of the suit land pursuant to the Lease agreement. Further, that the issues surrounding the validity of the Lease termination remain unresolved in the tribunal and the question as to whether or not the Applicant should be evicted is within the jurisdiction of the said tribunal. He reiterates that the Respondent has not met the threshold for the grant of a mandatory injunction at this interlocutory stage as there are no exceptional circumstances demonstrated.
23. Both applications were canvassed vide written submissions.

Submissions

24. The Applicant submits that the fulcrum of the dispute herein revolves around occupation of the suit land, which issue is governed by the Lease Agreement between the parties and the arbitrator is seized of it.
25. It submits that it is a cardinal principle that courts should exercise restraint and avoid interfering with ongoing arbitration except in limited instances as provided under Section 10 of the *Arbitration Act*, 2010. Further, that the Lease Agreement dated the 29th January 2021, between the parties remains valid and enforceable as the Respondent's termination notice is ineffective since despite issuing a termination notice dated the 14th December 2023, the Respondent's subsequent actions of continuing to engage the Applicant and accepting Kshs. 3 million covering the period from January-March 2024 demonstrates a clear waiver of any right to enforce termination.
26. It contends that the invocation of the arbitration clause reinforces the binding nature of the Lease Agreement thus the Respondent cannot approbate and reprobate by purporting to terminate a contract. Further, it cannot claim that the contract does not exist while simultaneously relying on its dispute resolution mechanism. It insists that once parties submit to arbitration, the question of the validity or termination of the Lease falls within the purview of the arbitrator.
27. It reiterates that Section 7 of the *Arbitration Act* gives this court authority to intervene and give an interim measure of protection to preserve the subject matter of the dispute, protect assets and maintain the status quo pending arbitration. Further, that it has met the threshold for grant of injunctions as stipulated in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and has invested substantial resources in the excess of Kshs.50 million in the procurement of necessary approvals for the development of the suit land.
28. It reaffirms that there are substantial grounds to challenge the arbitrator's impartiality and independence. To buttress its averments, the Applicant relied on various decisions including: *National Bank of Kenya Ltd v Pipe Plastic Samkolit (k) ltd* (2002) 2 E.A 503, [2011] eKLR, *F.K Holdings v*



Commissioner of Lands & Another [2011] eKLR, South Western Enterprises Limited v Ola Energy Limited (Civil case 176 of 2003) [2023] KEHC 27122 (KLR), Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others [2010] eKLR and Dhanjal Investments Limited v Kenindia Assurance Company Limited [2016] eKLR.

29. The Respondent in its submissions contends that the Applicant's Notice of Motion dated the 7th October 2024 should be struck out to the extent that the claimant has premised its application under the *Civil Procedure Act* and Rules and not the *Arbitration Act*. Further, that the Applicant is not entitled to injunctive orders as it did not demonstrate a prima facie case as it is in arrears and never challenged the termination notice.
30. It insists that the Applicant has failed to demonstrate that it would suffer irreparable loss and that damages due to it, are capable of being measured with a fair degree of accuracy and exactitude. It reiterates that the balance of convenience tilts in favour of declining an injunction since the Respondent is in arrears and has not even complied with orders issued on 29th October 2024 directing it to deposit all rent arrears and subsequent monthly rent in a joint interest earning account.
31. It reaffirmed that granting a stay of arbitral proceedings will be tantamount to interfering with the arbitration process and an affront to the principle of party autonomy forming the backbone of arbitration proceedings.
32. On its prayer for a mandatory injunction, the Respondent submits that it has made a case for a mandatory injunction as section 7 of the *Arbitration Act* allows court to entertain a plea for interim measure and that the prayer is premised upon clear grounds being that the Applicant has breached the Lease Agreement herein and is in rent arrears. To support its averments, it relied on the following decisions including: Ndarugu Stones Limited v Wakigwe Holdings Limited [2012] eKLR, Nation Media Group & 2 Others v John Harum Mwau [2014] eKLR and Kenya Medical Research Institute v Jenifer Muthoki Mbuvi [2022] eKLR.

Analysis and Determination

33. Upon consideration of the instant Notice of Motion and Chamber Summons applications including the respective affidavits and rivalling submissions, the following are the issues for determination: Whether an order of interlocutory injunction should issue restraining the Respondent from evicting the Applicant from the suit land pending the determination of the arbitral proceedings. Whether a mandatory injunction should issue directing the Applicant to vacate the suit land or be evicted therefrom.

As to whether an order of interlocutory injunction should issue restraining the Respondent from evicting the Applicant from the suit land or if the Applicant should vacate the suit land pending the determination of the arbitral proceedings.

34. The Applicant has sought for injunctive orders to restrain the Respondent from evicting it from the suit land while the Respondent has sought for eviction orders as against the Applicant, pending the outcome of the arbitral proceedings.
35. On issuance of interim orders during an arbitral process, I will rely on the principles as established in the case of *Giella v Cassman Brown* (1973) EA 358 as well as section 7 of the *Arbitration Act* which provides that:

‘7. Interim measures by court



- (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.
- (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

36. In the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR, it was held 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: - 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 It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names. Whatever their description however, they are intended in principle to operate as ‘holding’ orders, pending the outcome of the arbitral proceedings.”

38. Erick Ogola J stated as follows in *Itabuild Imports Limited v A.I.C Kijabe Hospital* [2015] eKLR:

“Section 7 of the *Arbitration Act* allows the court to issue interim measures of protection to the suit property pending arbitration. The existence of an Arbitration Clause in a contract, and the fact that in this case the arbitration process is almost underway, are in themselves prima facie evidence that the Applicant could have a case to be protected in much the same way as the principles established under *Giella – Vs – Cassman Brown & Company Limited Case*. However, that alone is not enough. The court must look into the nature of the subject matter to be protected in relation to the totality of the agreement or contract allowing the arbitration process. The court in exercising jurisdiction under Section 7 must satisfy itself that the subject matter to be protected is one which will dissipate if not protected, and also one which once lost, would not be recovered. That is to say, the Applicant must show a possibility of irreparable loss which cannot be compensated for by way of damages. The court must also consider the inconvenience to be suffered by either of the parties in considering whether or not to grant the interim measures of protection.”

38. While in the case of *Kenya Breweries Ltd v Washington Okeyo* [2002] eKLR, it was held that:

“The test whether to grant mandatory injunction or not is correctly stated in *Halsbury Laws of England 4th Edition* paragraph 948 that: “a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary



out, which can be easily remedied, or if the defendant attempted to break a contract on the plaintiffs, a mandatory injunction will be granted on an interlocutory application.”

38. Based on the facts before Court including relying on the legal provisions cited and associating myself with the decisions quoted, I find that it would be pertinent to grant orders of interlocutory injunction pending the determination of the arbitral proceedings so as not to interfere with the fulcrum of the dispute herein, which was the terms of the Lease Agreement. Further, I note since the Applicant is already on the suit land, has invested thereon while the Respondent insists that the Applicant has rent arrears and being issues before the arbitrator, it would hence be putting the subject matter of arbitration under threat.
38. In the circumstances, I find the Applicant’s Notice of Motion application dated the 7th October, 2024 merited and will allow it. I however find the Respondent’s Chamber Summons application dated the 28th October, 2024 unmerited and will disallow it. I will proceed to make the following orders:
- a. That pending the hearing and final determination of the arbitral proceedings and for not more than one year, an order of temporary injunction be and is hereby issued restraining the Respondent, whether by itself, its employees, servants, agents, assigns, or any other persons acting on its behalf, from evicting the Applicant, demolishing any structures, harassing, alienating, transferring, disposing of, or otherwise interfering with the property known as Land Reference No. 4857/22, Nairobi, in any other manner whatsoever, including but not limited to sale, auction, or appointment of receivers.
 - b. The Applicant be and is hereby directed to continue paying rent to the Landlord or in the alternative deposit it in a joint interest earning account pending outcome of the arbitral proceedings.
 - c. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2nd DAY OF APRIL 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Gitau for Respondent

Pamba for Respondent

Court Assistant: Joan

