Kambo & another (As Duly Elected Officials of Nairobi Polo Club) v Registered Trustees of the Agricultural Society Of Kenya (Nairobi Branch) (Land Case E413 of 2024) [2025] KEELC 4298 (KLR) (30 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4298 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

LAND CASE E413 OF 2024

TW MURIGI, J

MAY 30, 2025

BETWEEN

FREDERICK KAMBO AND SIMON MUCHENE (AS DULY ELECTED OFFICIALS OF NAIROBI POLO CLUB) ..... PLAINTIFF

AND

THE REGISTERED TRUSTEES OF THE AGRICUTURAL SOCIETY OF KENYA (NAIROBI BRANCH) ..... DEFENDANT

RULING

1. Before me for determination is a Notice of Motion dated 8th October 2024 in which the Applicant seeks the following orders:-

    a. Spent.

    b. Spent.

    c. Spent.

    d. That pending the hearing and determination of the Arbitration, an injunction be issued restraining the Respondent and/or its affiliates, employees and/or agents/assigns and anybody from selling, letting, leasing or transferring the 4 cares known as Upper Pitch (Pitch A) on Land Reference Number 23351 Original Number 209/356/1 (hereinafter 'the suit property') utilized as horse stables.

    e. That the costs be borne by the Respondent.

2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Fredrick Kambo the Chairman of the Applicant sworn on even date.

The Applicant's Case

3. The deponent averred that the Applicant has been a tenant of the Respondent for over 127 years occupying part of the ASK Show ground along Ngong road. He further averred that the arrangement was formalized vide a licence agreement dated 1st January 2021. That on 8th February 2024, the Respondent notified the Applicant of its intention to relocate the Applicant's stables, accommodation and ablution block to a different part of the Respondent's property. That by a further letter dated 19th March 2024, the Respondent required the relocation to take place by 30th April 2024. That the Applicant requested for more time and it was agreed between the parties to extend the relocation deadline to September 2024.

4. That on 3rd October 2024, the Respondent wrote to the Applicant demanding its relocation within seven days failure to which they would be evicted. He further averred that this was done without due consideration of the significant investments the Applicant has made on the suit property for the 127 years it has been in occupation. He asserted that the Respondent has not provided a suitable relocation plot.

5. The deponent is apprehensive that it may take time for an arbitral tribunal to be constituted and that without the Court's intervention the Applicant's stables could be relocated to an unsuitable site while the arbitration proceedings are continuing.

The Respondent's Case

6. The Respondent opposed the application through the replying affidavit of Caren Jaguga, the Respondent's Legal Officer dated 14th October 2024. The deponent denied the allegations that there was a licence agreement for what is known as the stables area. as the licence agreement entered between the parties relates to the Upper Pitch which measures about 22.7 acres. She further averred that the agreement produced by the Applicant is a forgery as it superimposes additional terms.

7. According to the deponent, the Applicant was allowed to occupy the horse stables grounds on condition that vacant possession would be delivered when the Respondent required it. She deposed that on 8th February 2024 it was agreed that the Applicant would relocate the stables to Jamhuri Park stable grounds.

8. That on 13th March 2024 the Applicant stated that the relocation site was not suitable and they were offered 3 acres on Pitch B which is adjacent to the Upper Pitch at a cost of Kshs. 600,000 (VAT exclusive) per month. The Applicant stated that the site was also not suitable. The Respondent offered the Applicant 2 acres in the Jamhuri Park motor cross area.

9. The deponent stated that it was eventually agreed that the relocation would be done by September 2024. She further stated that the Applicant did not relocate and instead resorted to issuing threats to the Respondent who consequently wrote a letter dated 3rd October 2024 demanding the Applicant to vacate.

10. According to the deponent, the Respondent was well within its rights as the Applicant had seven months notice and was relying on a licence agreement that had expired in January 2022.

11. She stated that the Applicant has not been paying rent for the suit property. She further stated that the horse stables site has been earmarked for industrial investment as part of the Respondent's masterplan. The deponent stated that the Respondent had approached an investor who was willing to develop the suit property at a cost of Kshs. 400,000,000/= while paying rent of Kshs. 681,000/=. It was contended that the Applicant's continued occupation of the suit property is causing the Respondent to incur loss.

12. In conclusion the deponent averred that the Applicant has not met the threshold for grant of an interim measure of protection as: there is no valid licence agreement between the parties, the Applicant does not pay rent for the suit property, the Applicant was offered several relocation sites but refused to take them up and it was not the Respondent's obligation to find a new site.

13. She further averred that there is no arbitral dispute between the parties as there is no valid licence agreement between them. The application was canvassed by way of written submissions.

The Applicant's Submission

14. The Applicant filed its submissions dated 18th February 2025. On behalf of the Applicant, Counsel submitted that the issue for determination is whether the Applicant is entitled to an interim measure of protection under Section 7 of the *Arbitration Act*.

15. Counsel relied on Section 7 of the *Arbitration Act* and on the cases of Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] KECA 346 (KLR), Carzan Flowers (Kenya) Ltd & Others v Tarsal Koos Minck B V & Others Nairobi [2009] eKLR, Infocard Holdings Limited v Attorney General & 2 others [2014] KEHC 1984 (KLR) and Blue Limited v Jaribu Credit Traders Limited Nairobi [2008] eKLR to submit that the Applicant has met the threshold for grant of the interim measures sought. Counsel further submitted that the dispute relates to the Upper Pitch(Pitch A) which is utilised by the Applicant as horse stables.

16. It was submitted that the parties herein entered into a licence agreement that provided for arbitration under clause 28 which states that any dispute should be referred to arbitration first.

17. In conclusion, Counsel urged the court to allow the application as prayed.

The Respondent's Submission

18. The Respondent filed its submissions dated 10th March 2025. On behalf of the Respondent, Counsel outlined the following issues

    a. Whether this matter is an abuse of the court's process

    b) Whether the Applicant is entitled to an interim measure of protection under Section 7 of the *Arbitration Act*.

19. On first issue, Counsel relied on Section 6 of the *Civil Procedure Act* to submit that the instant suit is sub-judice as it raises similar issues to ELC L MISC 210 of 2024 which was filed a day prior to this suit and ought to be struck out.

20. With regards to the second issue, Counsel submitted that the Applicant is forum shopping as the suits were instituted just a day after submitting the dispute to arbitration.

21. Counsel relied on Section 10 of the *Arbitration Act* and on the cases of Equity Bank Limited v Adopt A Light Limited [2015] KEHC 8142 (KLR), Anne Mumbi Hinga v Victoria Njoki Gathara [2009] KECA 466 (KLR) and Lawrence Gumbe & Another v Honourable Mwai Kibaki & Others High Court Miscellaneous No. 1025 of 2004 to submit that the jurisdiction of the Court was ousted when the dispute was referred to arbitration and an arbitrator appointed.

22. It was further submitted that while under Section 7 of the *Arbitration Act* the Court can grant an interim measure of protection, the same does not allow the Court to make substantive and final orders like those sought by the Applicant in the plaint.

23. With regards to the second issue, Counsel relied on Sections 6 and 7 of the *Arbitration Act* and on the cases of Safaricom v Ocean View (Supra), Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] KECA 376 (KLR), UAP Provincial Insurance Company Ltd v Michael John Beckett [2013] KECA 205 (KLR) and Carzan v Tarsal Koos (Supra), to submit that while the interim measures are not granted based on Giella principles, the Applicant must satisfy the Court that there exists an arbitration clause in the agreement between the parties and the party seeking the measure must demonstrate irreparable loss such that by the time the arbitration is complete they will not have an appropriate remedy.

24. Counsel submitted that there is no agreement between the parties relating to the suit property. Counsel maintained that the agreement produced by the Applicant was a forgery that superimposed the suit property on a licence that related to a different property (Upper Pitch A). Counsel further submitted that even if the Court were to find that the impugned agreement was valid, there would still be no arbitrable dispute.

25. Counsel submitted that the Applicant was intentionally misrepresenting the identities of Upper Pitch A and the suit property (horse stables area). It was further submitted that while Upper Pitch A was the subject of a 10 year licence agreement, the suit property was the subject of a 1 year agreement that lapsed on 1st January 2022. Counsel argued that there is no valid agreement between the parties herein.

26. Counsel relied on the cases of JM v SMK & 4 others [2022] KEHC 2265 (KLR), Portside Freight Terminals Limited v Kenya Ports Authority [2023] KEHC 23632 (KLR) and Multichoice Kenya Limited v Cementers Limited & another [2023] KEHC 24543 (KLR) to submit that the Applicant has not demonstrated that it will suffer irreparable loss that can neither be quantified nor compensated in monetary terms.

27. It was further submitted that the Applicant is faced by a temporary inconvenience of being relocated to another part of the Respondent's property which does not amount to irreparable loss.

Analysis And Determination

28. Having considered the application, the respective affidavits and the rival submissions, the following issues arise for determination:

    a) Whether the Applicant is entitled to an interim measure of protection under Section 7 of the *Arbitration Act*.

    b) Whether this suit is sub-judice

29. Section 7 (1) of the *Arbitration Act* provides:

> 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.

30. In the case of Seven Twenty Investments Limited v Sandhoe Investment Kenya Limited [2013] KEHC 7038 (KLR) the court stated as follows with regards to Section 7 of the *Arbitration Act*:-

> Perusal of Section 7 of the *Arbitration Act* clearly shows that the issue of whether or not there is a dispute or whether or not there would be losses by either side would not be a factor for a court to take into consideration when deciding whether or not it should grant an order from interim measure of protection or injunction to safeguard the subject matter of the arbitral proceedings. All that a court would be interested in is whether or not there was a

valid arbitration agreement and if indeed the subject matter of the arbitral proceedings was in danger of being wasted or dissipated so as to preserve the same. Pending the hearing and determination of the arbitral reference.

31. The Applicant contends that the parties herein entered into a valid agreement with an arbitration clause and that the suit property is the same as the Upper Pitch A. The Respondent on the other hand maintained that there is no valid agreement between the parties relating to the suit property which is different from Upper Pitch A. The parties agree that the current dispute relates to the area where the stables are located.

32. A perusal of the licence agreement entered into by the parties on 1st January 2021 FK-1 shows that the Applicant was to use 4.70 acres of the Respondent's property as a horse stables area.

33. Clause 1 of the Agreement states as follows:

> " The Licensor hereby grants a Licence to the Licensee to occupy and use the Premises for a period of 1 year starting from 1st January 2021."

34. No evidence was presented to show that the agreement was renewed following its expiry on 1st January 2022. It therefore follows that there was no valid agreement between the parties when the instant suit was filed on 9th October 2024.

35. The Applicant argued that the suit property is the subject of an agreement that is valid for ten years beginning 1st January 2021. The said agreement relates to the sporting ground (Upper Pitch A) measuring 22.7 acres and not to the horse stables which was the subject of the expired agreement.

36. In the case of Safaricom Limited v Ocean View Case (Supra) the court stated 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?

37. The Court must be satisfied that the subject matter is under threat. Having perused the documents on record, I am not convinced that is the case. The Applicant by a letter dated 6th May 2024 agreed to vacate the suit property by the end of September 2024. The Applicant also agreed to relocate the stables to the motor cross area and requested the Respondent to grant it 2 acres in addition to the initial 2 acres that had been offered. The Applicant even agreed to negotiate and finalize the costs of the same. When the Applicant had not vacated by 3rd October 2024, the Respondent issued a letter of eviction.

38. The Applicant had given its word in writing that it would move the stables from the suit property and therefore it cannot renege on its promise. I find that the subject matter is not under threat as the Applicant had already agreed to move the stables on a date before the instant application was filed.

39. In view of the foregoing, I find that the Applicant is not entitled to the interim measures sought as there is no valid agreement between the parties and there is no threat to the suit property.

Whether the Suit is Sub-Judice

40. This issue will be determined in ELC L MISC 210 OF 2024.

41. In the end, I find that the application dated 8th October 2024 is devoid of merit and the same is hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF MAY, 2025.

HON. T. MURIGI

JUDGE

IN THE PRESENCE OF:

Brian Okoth for the Applicant

Willy holding brief for Ligamie for the Respondent

Court assistant – Ahmed