



REPUBLIC OF KENYA



**Nicmac Crest Limited v Ng'ang'a & another (Environment and Land Miscellaneous Application E010 of 2025) [2025] KEELC 2977 (KLR) (1 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 2977 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E010 OF 2025**

**JA MOGENI, J**

**APRIL 1, 2025**

**BETWEEN**

**NICMAC CREST LIMITED ..... APPLICANT**

**AND**

**PETER MBARU NG'ANG'A ..... 1<sup>ST</sup> RESPONDENT**

**ELIZABETH NUNGARI MBARU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Plaintiff/Applicant approached the Court vide a Chamber Summons dated 29/01/2025 that was brought under Section 7 (1) of the *Arbitration Act* 1995, and Rule 2 of the Arbitration Rules 1997 and Article 159 (2) of *the Constitution* of Kenya and all other enabling provisions of the law.
2. The Application sought the following primary Orders:
  1. Spent
  2. Spent
  3. That a temporary injunction be granted to restrain the Respondents by themselves, their agents, servant and/or any other person claiming and/or acting on their behalf from selling, disposing, alienating, transferring and/or sub-dividing or in any other way interfering with Land parcels numbers Kiamba/Ruaka/6872, Kiambaa/Ruaka/6873, Kiambaa/Ruaka/6874, Kiambaa/Ruaka/6875, Kiambaa/Ruaka/6876 Kiambaa/Ruaka/6877, Kiambaa/Ruaka/6878 pending the referral of the dispute to an arbitration tribunal.
  4. That a temporary injunction be granted to restrain the Respondents by themselves, their agents, servant and/or any other person claiming and/or acting on their behalf from selling, disposing, alienating, transferring and/or sub-dividing or in any other way interfering with Land parcels numbers Kiamba/Ruaka/6872, Kiambaa/Ruaka/6873, Kiambaa/



Ruaka/6874, Kiambaa/Ruaka/6875, Kiambaa/Ruaka/6876 Kiambaa/Ruaka/6877, Kiambaa/Ruaka/6878 pending the referral of the hearing and determination of the arbitration between the parties

5. That the costs of this Application be borne by the Respondents.
3. The Application is supported by the Affidavit of Francis Machira Wanjau sworn on 29/01/2025. The Applicant avers that he is one of the Directors of the Applicant Company which is a land buying Company. That around 22/06/2020 the Applicant Company entered into an agreement for sale with the Respondents for sale of property number Kiambaa/Ruaka/330 for a consideration of Kenya Shillings 13,000,000.
4. Following the sale agreement the Applicant Company paid Kesh 2,000,000 to the Respondents once they signed the sale agreement. It is the Applicant's contention that before the completion dated the Respondents started demanding for the balance of the purchase price without fulfilling the terms of the sale agreement.
5. That the Applicant Company declined to make any further payments and consequently the Respondent proceeded and sub-divided the suit property into ten parcels as shown vide annexure FMW-3 being the approved mutation. Further that the Respondents engaged prospective purchasers and disposed off three parcels out of the ten which defeated the Applicant's contractual rights under the agreement.
6. That despite attempts to settle the matter amicably the Respondents through a firm of Advocates Njehu Ndirangu & Company went ahead to demand a sum of Kesh 7,620,000 from the Applicant. That despite the demand notice from the Respondent, the Applicant in line with the Arbitration Clause 18 of the Sale Agreement requested for a sit down with the Respondent's Advocate and they held a successful meeting on 14/04/2023.
7. Despite the resolutions made at the meeting of 14/04/2023 the Respondents issued two other demand notices to the Applicant as evidenced by annexures FWM-6 and FWM-7. Thus the Applicant seeks to have the dispute referred to an Arbitrator as provided for under Clause 18 of the Agreement but are apprehensive about the preservation of the substratum of the suit property. They therefore seek interim injunctive orders pending execution and implementation of the arbitral outcome. The Applicant contends that the injunction will not prejudice the Respondent in any way.

### **Analysis and Determination**

8. In my considered view, the only issue that arises for determination is whether the Applicant is deserving of an interim measure of protection under Section 7 of the *Arbitration Act*, 1995 pending arbitration.
9. The said Section 7 of the Act empowers the High Court to protect arbitral proceedings by issuing interim orders protecting the subject matter of arbitration. It provides thus:

“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.”

10. The Court in *Coast Apparel Epz Limited v Mtwapa Epz Limited & Another* [2017] eKLR held that the said provision clearly empowers the High Court to protect arbitral proceedings by issuing injunctive orders protecting the subject matter of arbitration, and that the same can be issued before arbitration or during arbitration. See also the case of *Carzan Flowers (Kenya) Ltd & Others v Tarsal Koos Minck B V & Others Nairobi (Milimani) HCCC No. 514 of 2009* and *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* [2010]eKLR where it was stated that;

‘... 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 ...’

11. It therefore follows that the Respondent’s argument that the Applicant has gone to slumber and not pursued for the last five years does not hold water since the Applicant has engaged him through several meetings through their Advocate.

12. The Court of Appeal in the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR held as follows:

“It takes time to establish an arbitral tribunal, and during the time between the arising of the dispute and the tribunal’s establishment vital evidence or assets may disappear unless a national Court (in our case, the High Court) is urgently asked to intervene. Moreover, even where an arbitral tribunal has the power to issue interim measures such powers are generally restricted to the parties involved in the arbitration itself...Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. 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?”

13. The Applicant annexed to its Application a copy of the lease agreement dated 22/06/2020 and three letters written from the Advocates of the Respondents dated 13/02/2023, 11/05/2023 and 1/10/2023, the last one stating that the vendor had terminated the sale agreement. It was written by Kibebo and Company Advocates addressed to the Applicant informing it that the sale agreement between the Applicant and the Defendant stood terminated and that the Applicant was to hand



over the original title deeds of three plots registered in the Respondent's name being LR Kiambaa/Ruaka/6872, 73 and 74 being a resultant subdivision of LR No. Kiambaa /Ruaka/330.

14. The Defendant on his part contended that the Applicant has come to equity with unclean hands for failure to issue a notice of dispute as such, the orders being sought are premature since the Applicant has not complied with paragraph 18 of the Sale Agreement which requires negotiations to happen and written notification issued before any reference to arbitration.
15. He further argues that the Applicant never issued a written notification to declare a dispute nor requested the appointment of the arbitrator either by consent or by the President of the Law Society of Kenya. Thus an injunctive order being granted to the Applicant would serve only to aid his indolence at the expense of the Respondents.
16. That the Respondents in line with Clause 5 of the Sale Agreement have terminated the contract thus there is nothing to refer to arbitration and that there have been no negotiations as alleged by the Applicant. That if there were negotiations, there would have been a Settlement Agreement which would have varied the Sale Agreement dated 22/06/2020.
17. It is the contention of the Respondents that since the purchaser was to pay Kesh 2,000,000 which he paid as per Clause 2.1 and another Kesh 6,000,000 by 16/09/2020 and a further Kesh 5,000,000 on or before 16/09/2020 in compliance with Clause 2.3 of the sale agreement, he neither fulfilled these requirements. Thus the Respondents are entitled as per Clause 5.1.4 to withhold Kesh 1,300,000 in case of any breach without issuance of a rescission notice. This amount was to as damages in case of breach of the sale agreement by the Applicant. Therefore the Applicant is only entitled to a claim of Kesh 700,000 and which claim is subject to debt collection.
18. It is the Respondent's averment that the Applicant as per annexure PNM-1 is which are letters dated 11/05/2023 and 1/10/2023 was informed of the termination of the Sale Agreement having been alerted about the intention to terminate in 2021. Thus that the Respondent took approximately five years to institute the current proceedings despite being aware of the notice of termination.
19. That since the Sale Agreement was not completed on or before 16/12/2020 as had been provided for that it is exactly 180 days from the execution of the Sale Agreement, the Applicant had the liberty to move the necessary dispute resolution mechanism.
20. *The Constitution* of Kenya 2010 at Article 159 recognizes arbitration as one of the alternative forms of dispute resolution. Secondly, promotion of arbitration is one of the principles that guide Kenyan Courts when exercising judicial authority. Thirdly, under Article 2(5) of *the Constitution* of Kenya 2010, the general rules of international law form part of the law of Kenya. Fourthly, under Article 2(6) of *the Constitution* of Kenya 2010, any treaty or convention ratified by Kenya forms part of the law of Kenya.
21. As a country, Kenya ratified the United Nations Commission on International Trade Law (Uncitral Model Law) which obligates Courts to uphold the principle of party autonomy in resolving commercial disputes. The essence of the principle of party autonomy is that, where parties to a contract have consensually and in unequivocal terms provided for the forum through which to resolve their disputes, the Courts are obligated to give effect to that choice of forum of dispute resolution. The Court of Appeal in *Nyutu Agrovet Ltd Vs Airtel Networks Limited* (2015)eKLR reaffirmed



the supremacy of the principle of party autonomy in the resolution of commercial disputes in the following words:-

“Our Section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan Courts refused to recognize this autonomy, we would become a pariah state and would be isolated internationally.”

22. In the instant Application the parties willingly covenanted to go the arbitration way in the event that they had a dispute. They first embraced mediation which I note that they engaged in following the sub-division of the suit property whilst the sale agreement had not been rescinded by the vendor. The agreement has also provided for a clear mechanism for rescission. The Respondent has contended that at this point there is nothing to refer to arbitration.
23. At this point I must caution myself against delving deep into the merits of the parties’ respective cases in considering this issue. This is because, there is need to avoid exposing any party to prejudice when ventilating their respective cases before the Arbitral Tribunal. Therefore since the parties chose arbitration these are issues they will raise before the arbitrator.
24. The Applicant has presented to the Court letters from the Respondent about rescission of the sale agreement, mutation form showing sub-division and correspondence of purchase of some of the sub-divided parcels. Thus the sub-divisions are the subject matter of the arbitral proceedings. If the remainder of the subdivided parcels of land are sold to other purchasers and the arbitral process thereafter makes an award in favour of the Applicant, the proceedings and the award will be rendered nugatory. For this reason, I am satisfied that there is need to preserve the subject matter of the arbitral proceedings.
25. I also rely on the case of Progressive Credit Limited v Mombasa Trade Centre Limited [2022] eKLR that the purpose of the interim measure orders are to preserve evidence, to protect assets or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves.
26. The upshot of this Ruling is that the Applicant’s Chamber Summons dated January 29, 2025 is allowed in terms of prayer 4.
27. I do further order that the arbitral proceedings be commenced within 60 days of the date herein. The cost of the Application to abide the arbitral proceedings. Mention on June 16, 2025 to confirm compliance and progress.

**DATED, SIGNED AND DELIVERED AT THIKA LAW COURTS THROUGH MICROSOFT TEAMS ON THIS 1<sup>ST</sup> DAY OF APRIL, 2025.**

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**MOGENI J.**

**JUDGE**

In the presence of:

Mr. Kinuthia for the Applicant

1<sup>st</sup> Respondent – Absent

2<sup>nd</sup> Respondent - Absent



Mr. Melita - Court Assistant

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**MOGENI J.**

**JUDGE**

