



REPUBLIC OF KENYA



Samatar & 13 others v Delta Holdings Limited & 2 others (Environment & Land Case E085 of 2024) [2025] KEELC 3749 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3749 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E085 OF 2024**

YM ANGIMA, J

MAY 8, 2025

BETWEEN

FATUMA MOHAMED SAMATAR 1ST PLAINTIFF
CEDAR DEVELOPMENT COMPANY LTD 2ND PLAINTIFF
JENNIFER NAFULA BARASA 3RD PLAINTIFF
LIVINGSTONE WILLIAM MILLER 4TH PLAINTIFF
JALALUDIN JS JAMAL 5TH PLAINTIFF
GENERAL ABDIKADIR BURJE 6TH PLAINTIFF
CYRUS NJIRU 7TH PLAINTIFF
ROZMINA RANA 8TH PLAINTIFF
OSCAR MACARA MUKURIA 9TH PLAINTIFF
BOBY THOMAS ELMIRA 10TH PLAINTIFF
ROBIN MUNYUA KIMOTHO 11TH PLAINTIFF
AMINA ABDIKADIR 12TH PLAINTIFF
BETH WANGECHI NJOGO 13TH PLAINTIFF
DIANA KILONZO 14TH PLAINTIFF

AND

DELTA HOLDINGS LIMITED 1ST DEFENDANT
PENDA LIMITED 2ND DEFENDANT
ALYSSA LIMITED 3RD DEFENDANT



RULING

A. Plaintiffs' application.

1. By a chamber summons dated 27.09.2024 expressed to be grounded upon Sections 6 and 7 of the Arbitration Act, Rule 2 of the Arbitration Rules and Order 40 Rules 1 and 2 of the Civil Procedure Rules, the plaintiffs sought the following orders;
 - a. Spent
 - b. Spent
 - c. That pending reference of the dispute herein to arbitration and or pending arbitral proceedings or process between the Plaintiffs on one part and the Defendants on the other part an interim measure of protection do issue preserving or conserving the status quo in terms of maintaining the prevailing development in respect of parcel of land L.R. No. 9X5/1 /MN (C.R 4XX50/1)
 - d. That pending reference of the dispute, between the Plaintiffs on one part and the Defendants on the other part, to arbitration and or pending arbitral proceedings and or process an order of injunction do issue against the Defendants whether by themselves, their agents and or servants from altering, changing or reviewing Development Plan, Architectural Plan, Building Plan and or Sectional Plan or undertaking any structural changes and or undertaking any development in parcel of land C.R. No. 9X5/1 [MN (C.R 46XX0/1).
 - e. That an order of inhibition do issue restricting any dealings, undertakings or registration in respect of parcel of land L.R. No. 9X5/1 (MN (C.R 46XX0/1)).
 - f. That the dispute between the Plaintiffs on one side and the Defendants on the other side over long term leases registered against title L-R. 9X5/1 /MN (C.R 4XX50/2) be referred to arbitration in line with the arbitration clause No. 3 (b) as contained in the Standard Lease Agreements.
 - g. That costs be in the cause.
2. The application was based upon the grounds out in the body of the motion and the contents of the supporting affidavit sworn by Fatuma Mohamed Samatar on 27.09.2024 and the annexures thereto. The plaintiffs pleaded that they were the registered proprietors of long term leases of apartments and cottages located on LR. No. 9X5/I/MN (the suit property) of which the 3rd defendant was the current registered proprietor. It was pleaded that the 1st defendant was the initial registered proprietor and that it subsequently transferred the suit property to the 2nd defendant which ultimately transferred it to the 3rd defendant.
3. The plaintiffs stated that each of their leases contained a standard arbitration clause for referral of all disputes in respect of the terms and conditions of the leases to a single arbitrator to be appointed by the Chairperson of the Law Society of Kenya. The plaintiffs contended that the 3rd defendant had violated various terms and conditions of their leases in the it had failed, inter alia, to register a management company to hold ownership of the common area and the reversionary interest.
4. The 3rd defendant was also accused of having entered into agreements with third parties for the sale and development of parts of the suit property which shall alter the existing plans. It was thus contended



that unless an interim measure of protection was granted pending arbitral proceedings the substratum of the proceedings shall be adversely affected.

B. 3rd defendant's response.

5. The 3rd defendant filed grounds of opposition dated 11.10.2024. It was contended that the plaintiffs lacked any proprietary rights over the suit property or the common areas; that the plaintiffs had no locus standi to sue over the use and development of common areas; and that there was no arbitrable dispute among the parties.
6. The 3rd defendant further contended that the developments objected to were provided for in the plaintiffs' leases hence there was no breach of any contractual terms and conditions as alleged by the plaintiffs. It was thus contended that the application was misconceived, frivolous, vexatious and an abuse of the court process. As a result, the court was urged to strike it out in limine.

C. Directions on submissions.

7. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their submissions. The record shows that the plaintiffs filed written submissions dated 23.10.2024 whereas the 3rd defendant's were dated 19.11.2024. There is no indication on record of the 1st and 2nd defendants having filed any responses or submissions.

D. Issues for determination.

8. The court has perused the plaintiffs' chamber summons dated 27.09.2024, the 3rd defendant's grounds of opposition and the material on record. The court is of the view that the following are the key issues which arise for determination;
 - a. Whether the plaintiffs' suit is fatally defective and should be struck out.
 - b. Whether the dispute among the parties should be referred to arbitration.
 - c. Whether the plaintiffs have made out a case for the grant of interim measures of protection.

E. Analysis and determination

Whether the plaintiffs' suit is fatally defective and should be struck out

9. The court has noted that in its written submissions the 3rd defendant raised some issues challenges the challenging the competency of the suit. It was submitted that the authority to the 1st plaintiff to represent the rest of the plaintiffs was not signed by all the plaintiffs and that the verifying affidavits were defective is that they were not signed by all the plaintiffs.
10. It is strange that the 3rd defendant was raising those issues in its written submission for the first time. They were not even raised in the grounds of opposition to enable the plaintiffs respond thereto or take any possible remedial measures. Be that as it may, the court takes the view that the objection raised by the 3rd defendant is merely a procedural technicality which is curable both under Article 159 (2) (d) of *the Constitution* and Section 19 (1) of the ELC Act. As a result, the plaintiffs shall be granted leave to regularize the procedural infirmities alluded to by the 3rd defendant.



b.

Whether the dispute among the parties should be referred to arbitration

11. Although the 3rd defendant contended in its grounds of opposition that there was no arbitrable dispute as between the plaintiffs and the 3rd defendant, it conceded in its written submissions that there existed an arbitration clause in the plaintiffs' respective leases. In paragraph 19 of its written submissions the 3rd defendant submitted that;

“.....there is no gainsaying that the parties herein covenanted that whatever disputes or differences arising between them concerning the leases or the construction, application and/or interpretation thereof be referred to arbitration. That fact is not disputed. The real question is whether there is a subject matter that is at risk of being dissipated, wasted, or is under threat so that the court can invoke the special jurisdiction donated to it under Section 7 of the Act”.

12. Clause 21 of the lease agreements which the plaintiffs signed stipulates that;

“Any dispute arising out of or in connection with this agreement shall be referred to and finally settled by arbitration under Arbitration Act 1995 and the rules made thereunder by one arbitrator appointed in accordance with the Rules. The place of arbitration shall be Nairobi in the Republic aforesaid. The language of the arbitration proceedings shall be English.”

13. The court is thus satisfied that the dispute among the parties is referable to arbitration in accordance with the terms of the leases executed by the parties. The 3rd defendant rightly conceded in its submissions that the dispute is arbitrable.

c.

Whether the plaintiffs have made out a case for the grant of interim measures of protection

14. The court has considered the material and submissions on record on this issue. Whereas the plaintiffs submitted that the substratum of the arbitral proceedings may be destroyed in the absence of some interim orders the 3rd defendant contended otherwise. It was the submission of the 3rd defendant that the plaintiffs had received a written assurance through its advocates that all shall be fine.

15. In the case of *CMC Holdings Ltd & Another vs Jaguar Land Rover Exports Ltd* [2013] eKLR the purpose of an interim measure of protection was stated thus;

“The measures are intended to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral. The court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.”



16. In the case of *Safaricom Limited vs Ocean View Beach Hotel Ltd & 2 Others* [2010] eKLR which was cited by the 3rd defendant, the principles to be considered in such an application were summarized by the Court of Appeal as follows;

“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;

- i. The existence of an arbitration agreement.
 - ii. Whether the subject matter of the arbitration is under threat;
 - iii. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?
 - iv. For what period must the measure be given especially if requested for before commencement of the arbitration so as to avoid encroaching on the tribunal’s decision making powers as intended by the parties?
17. The court has taken into account the nature of the dispute and the apprehension of the plaintiffs. They fear that they might lose their interest (or perceived interest) in the common areas of the suit property. They are apprehensive that the 3rd defendant may sell and develop the common areas thereby altering the existing plans. They are apprehensive that they might lose their reversionary interest in the suit property.
18. The 3rd defendant’s grounds of opposition make things worse by declaring, inter alia, that it holds “exclusive” proprietary rights over the suit property and that the plaintiffs have no locus standi to question the use and development of the common areas. The court is of the view that the defendants have demonstrated a serious threat to their investments if the common areas are developed and sold to third parties without reference to them. The court is further of the view that any alteration to existing plans of the suit property shall adversely affect the plaintiffs as registered proprietors of long term leases.
19. The court is thus satisfied that the plaintiffs are entitled to some interim measures of protection pending the conduct of arbitral proceedings. However, the court is not inclined to grant an order of inhibition to prevent all dealings with the suit property. The court is aware that the 3rd defendant may not have sold all the units hence a blanket order of inhibition may cause undue hardship to the 3rd defendant by preventing registration of partial discharges.

F. Conclusion and disposal order.

20. The upshot of the foregoing is that the court finds merit in the plaintiffs’ application for interim orders. As a consequence, the chamber summons dated 27.07.2024 is allowed in the following terms only;
- a. That the dispute among the parties is hereby referred to arbitration in accordance with arbitration clauses contended in the lease agreements.



- b. That pending the hearing and conclusion of arbitral proceedings an interim measure of protection is hereby granted for preservation of the current status quo regarding developments on LR No. 9X5/I/MN (LR 46XX50/I).
- c. That pending the hearing and conclusion of the arbitral proceedings an interim injunction is hereby granted restraining the defendants from altering, changing or reviewing the development plan, architectural plan, building plan, sectional plan, or undertaking any structural changes or developments on LR 9X5/I/MN) CR 466XX0/I).
- d. The plaintiffs are hereby granted leave to regularize the anomalies in their authority to act and verifying affidavits within 30 days from the date thereof.
- e. Costs of the application shall be in the cause.
- f. Mention on 29.9.2025 to ascertain the status of the arbitral proceedings.

Orders accordingly

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 8TH DAY OF MAY, 2025.

Y. M. ANGIMA

JUDGE

