



**Kathenge & another v Shamalla (Environment and Land Appeal E209 of 2023) [2024] KEELC 699 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 699 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E209 OF 2023**

**J OMANGE, J**

**FEBRUARY 8, 2024**

**BETWEEN**

**NELSON KIEMA KATHENGE ..... 1<sup>ST</sup> PLAINTIFF**

**JUMA ABDALLA KATHENGE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**STELLA GALAGATI SHAMALLA ..... DEFENDANT**

**RULING**

1. In the amended Notice of Motion application dated the 12<sup>th</sup> July 2023 the Applicants sought the following orders:
  - a. That this court be pleased to issue an order of injunction stopping the termination of the agreement for sale entered into between the plaintiffs and the defendant dated 27th December 2020 respectively and restraining the defendants from wasting, damaging, alienating, selling, disposing of or transferring the suit properties Land Reference No. 2259/519 and Land Reference No. 2259/520 comprised in the certificate of title Number I.R 117618 to Jane Mumbi Chuma and or Joshua Mutisya Musyimi And Shireen Nzau Mutua respectively and or to any other person whatsoever pending the hearing and determination of this application.
  - b. That this court be pleased to issue an order of injunction stopping the termination of the agreement for sale entered into between the plaintiffs and the defendant dated 27th December 2020 respectively and restraining the defendants from wasting, damaging, alienating, selling, disposing of or transferring the suit properties Land Reference No. 2259/519 and Land Reference No. 2259/520 comprised in the certificate of title Number I.R 117618 to Jane Mumbi Chuma and or Joshua Mutisya Musyimi And Shireen Nzau Mutua respectively and or to any other person whatsoever pending hearing and final determination of the arbitration



proceedings as per the terms set out in clause 23.2 of the Agreement for Sale dated 27th December 2020 entered into between the plaintiffs and defendants.

- c. Costs of the application.
2. The Application is supported by an Affidavit sworn by the 1<sup>st</sup> Applicant in which he depones that he the co-plaintiff entered into contracts for sale in respect of Land Reference No. 2259/519 and reference No. 2259/520, comprised in the certificate of title Number I.R 117618 both dated 27<sup>th</sup> December 2020. He states that they were fully committed to paying the whole purchase price having paid Ksh 14,952,000/= on the 1<sup>st</sup> parcel and the 2<sup>nd</sup> plaintiff having paid Ksh 9,296,000/= on the second parcel. It is his case that whilst the sale agreement was still subsisting the defendant without their consent purported to transfer the said parcels to third parties with the intention of defrauding the plaintiffs and unjustly enriching herself.
3. It is his contention that the agreement had an arbitration clause which they intend to explore. If injunctive orders are not issued to preserve the suit property the arbitration proceedings will rendered an academic process hence this application.
4. The Applicants in their submissions reiterate that the defendant is in breach of the arbitration clause and as such this court is mandated by section 7 of the *arbitration Act* No 4 of 1995 to step in and offer interim measure of protection to prevent the subject matter from being disposed of.
5. The court was referred to the case of *Safaricom Limited v Oceanview beach hotel Ltd & 2 others* [2010] eKLR wherein Justice Nyamu J.A stated that the court had erred in not granting the Appellant interim orders as mandated to facilitate the arbitral process. The Applicants argue that they have proved that the court should step in and offer temporary relief to protect the subject matter of the arbitration proceedings pending the intended arbitration in that they have shown that there is a dispute which is to be determined in accordance to the sale agreements.
6. The Respondent responded to the application vide a replying affidavit dated 23<sup>rd</sup> June 2023 indicating that the notice for termination was occasioned by unreasonable delay on the plaintiffs' part to perform their obligations under the agreement. She averred that the allegations in the application that there was no mutual consent to terminate were false as there was a meeting on the 28<sup>th</sup> January 2023 regarding the same and correspondence that followed suit. The defendant further stated that the plaintiffs were refunded the principal amounts, which amounts they accepted. The only bone of contention is on the interest which has accrued on the principal amount and this was the only issue that would be forwarded to an arbitrator.
7. The Respondent submitted that the Plaintiffs do not warrant the orders sought as against the 3<sup>rd</sup> parties as the parties would be condemned unheard affecting their proprietary interest in the suit property given that the Applicants' rights over the same had been terminated with full refund of the amounts due.
8. The Respondent argued that given that the only issue to be determined is the issue of interest, there was no need to give orders for preservation as the Arbitrator could determine the outstanding issue even without orders for preservation. Further the Respondents argue that the Applicants had failed to demonstrate how irreparable loss will be occasioned to them if the orders sought are not granted owing to the fact that the monies they had committed have been refunded in full and the proprietary rights vested in other third parties.
9. Having considered the pleadings and submissions, it is common ground that there were two separate sale agreement between the Plaintiffs and the Defendant. It is equally not contested that there was an



arbitration clause in the two agreements. The only dispute seems to be on whether this court should grant injunctive orders or not. On one hand the Plaintiffs aver that the court should grant injunctive orders so that the suit properties are not wasted, transferred or disposed of by the Defendants. On the other hand, the Defendant argues that the agreements were mutually terminated by the parties the only outstanding issue is the issue of interest which does not necessitate issuance of an injunction. The only issue for determination before this court is; Whether the application has met the threshold for issuance of injunctive orders

10. All parties agree that the two sale agreements had an arbitration clause. All parties are willing to subject themselves to the arbitration proceedings. This automatically ousts this court of the jurisdiction except under the limited window provided by Section 7(1) of the [Arbitration Act](#) which reads:

“It is not incompatible with an arbitration agreement for a party to request from the High Court before or during the arbitral proceedings, an interim measure of protection and for the High Court to grant the same.

11. Black’s Law Dictionary 9<sup>th</sup> Edition, defines interim measure of protection as “An international tribunal’s order to prevent a litigant from prejudicing the final outcome of a lawsuit by arbitrary action before a judgment has been reached. This measure is comparable to a temporary injunction in national law.”

A party who seeks an interim protection order needs to establish that if the order sought is not granted, the final outcome of the arbitration will have been prejudiced. The applicant thus has to prove that if the court does not grant the order sought then the final outcome of the arbitration proceedings will be prejudiced. The interim measure sought must be one to preserve the subject matter of the dispute so that the proceedings before the arbitral tribunal are not rendered nugatory.

12. In the instant case the Applicants aver that the court should strike out the Replying Affidavit and grant the orders sought as the Respondent has not filed a defence. This argument would have been relevant if the application were appropriately filed under Order 40 of the [Civil Procedure Act](#) in which case the court considers the grant of an interlocutory injunction pending the hearing of the main suit. In the circumstances of this case, the application properly lies within the ambit of the [Arbitration Act](#) hence should have been brought under Rule 2 of the Arbitration Rules. These Rules do not envisage filing of a plaint and defence as the main decision is to be made by the Arbitrator not the court which only grants temporary relief.
13. In the interest of determining the matter substantively, the court will then consider the merits of the application. The question to be determined then is whether the applicant has proved that this is a matter in which the court should intervene. The applicant asks the court to intervene at two levels. One to issue an injunction stopping the termination of the agreement and two to restrain the transfer of the suit properties.
14. In the NCC International AB vs Alliance Concrete Singapore Pte Ltd (Supra), the court held that “the granting of an interim measure of protection or injunction pending the determination of an arbitral reference was a discretionary measure that should be exercised cautiously so as not to usurp the role of the arbitral tribunal and that could decline to grant such orders where an arbitration tribunal has concurrent jurisdiction to make such orders. The court should therefore come in under very exceptional circumstances.” I concur with this view. In a case in which the parties had willingly bound themselves to have any dispute determined outside the court, the court should exercise restraint in adjudicating in the dispute except in the clearest of cases. Such a clear case would include instances



where a grave injustice is likely to result or whereas envisaged by Section 7 the subject matter is likely to be wasted if the court does not intervene.

15. The Respondents uncontroverted evidence vide the Replying Affidavit filed in court is that the agreements were terminated after the applicant failed to complete the purchase price and it is on this basis that the Applicants were refunded the balance which they had paid. The only outstanding issue is the issue of interest. The issue of interest is an issue that is quantifiable and that does not require interim protection measures. These averments were not controverted as the Applicants did not file a Further Affidavit to challenge the facts against them which are; that they were unable to pay the purchase price; were involved in discussions to terminate the agreement and have accepted refund of the balance they had paid.
16. Having considered the foregoing, I find that the Applicants are not entitled to the prayers sought in the amended application. Consequently, the application is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 8<sup>TH</sup> DAY OF FEBRUARY 2024.**

**JUDY OMANGE**

**JUDGE**

In the presence of:

Mr. Ombati for Plaintiffs/Applicants

Mr. Okunya for Mr. Simiyu for Defendant/Respondent

Steve - Court Assistant

