Osman v Gulaam Enterprises Limited (Environment & Land Case E013 of 2023) [2024] KEELC 7323 (KLR) (5 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7323 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT & LAND CASE E013 OF 2023

CG MBOGO, J

NOVEMBER 5, 2024

BETWEEN

ABDI NASIR OSMAN .... PLAINTIFF

AND

GULAAM ENTERPRISES LIMITED .... DEFENDANT

RULING

1. Before this court for determination is the notice of motion dated 22nd February, 2024 filed by the defendant/applicant and it is expressed to be brought under Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, Order 45 Rule 1 and Order 51 Rules 1 & 3 of the Civil Procedure Rules seeking the following orders: -

   1. Spent.

   2. That this honourable court be pleased to review, vary and/ or set aside the order of 24th January, 2024 staying the proceedings in this matter pending the hearing and determination of this application or until further orders of this court.

   3. That this honourable court be pleased to review, vary and or set aside the order dated 13th July, 2023, requiring a real estate agent with valuable reputation to be appointed to collect rent and account the same pending the hearing and determination of the dispute between the parties or until further orders of this court.

   4. That this honourable court be pleased to order the applicant, Gulaam Enterprises Limited do collect rent over Narok Township Plot Nos. 60,61 and 62 Block 4 (Original Nos. 243,244 and 245 Block 4) Narok pending the hearing and determination of the dispute referred to arbitration on 24/01/2024.

   5. That costs of this application be provided for.

2. The application is premised on the grounds on its face. It is further supported by the affidavit of Abdi Haji Gulleid, the director of the defendant/ applicant sworn on even date. The defendant/ applicant deposed that pursuant to the agreement of sale dated 1st October, 2014 entered into by the parties herein, this court in its ruling delivered on 24th January, 2024 stayed all the proceedings in this matter and referred the same to arbitration as envisaged by clause 13 of the agreement.

3. The defendant/ applicant further deposed that prior to the orders of 24th January, 2024 this court had granted an order on 13th July, 2023 directing that a real estate agent be appointed to collect rent and account for the same pending the hearing and determination of the dispute between the parties. It was also deposed that the parties have been unable to agree on a real estate agent, which has made it made it unable to access the rental payments from key tenants, Naivas Limited and Kenya Power and Lighting Limited. The defendant/ applicant further deposed that it has been in possession and ownership of the suit properties from 1st January, 2019 and until the orders were issued on 13th July, 2023, it had collected rent without any grievance from the plaintiff/ respondent.

4. The defendant/ applicant further deposed that it has been unable to meet its legal obligations, and that it has been served with a letter dated 12th February, 2024 requiring it to pay Kenya Revenue Authority (hereinafter referred to as KRA) with KShs. 12,484,460.71 within 14 days which is prejudicial to the defendant/ applicant as against the plaintiff/ respondent. It was deposed that the plaintiff/ respondent has filed a notice of motion dated 6th February, 2024 seeking leave to appeal against the decision of this court dated 24th January, 2024 which is clear that the plaintiff/ respondent is not keen on having the dispute determined by an arbitrator in terms of the agreement. Further, it was deposed that unless this court urgently allows the defendant/ applicant to access the rental income from Naivas Limited and Kenya Power and Lighting Limited, it will be unable to meets its legal obligations including the demand by the KRA to pay Kshs. 12,484,460.71.

5. In opposing the application, the plaintiff/ applicant filed his replying affidavit sworn on 19th July, 2024. The plaintiff/ respondent deposed that by a notice of motion dated 19th June, 2023 the defendant/ applicant sought that the instant proceedings be stayed, and that the parties be referred to arbitration pursuant to clause 13 of the agreement of sale dated 1st October, 2014. He went on to depose that by a ruling delivered by this court on 24th January, 2024 the application was allowed and whose effect was to stay all the proceedings and the matter referred to arbitration. That as a result of the ruling, the advocates on record wrote to the Law Society of Kenya on 3rd May, 2024 requesting for the appointment of the arbitrator for purposes of the arbitral proceedings.

6. The plaintiff/ respondent further deposed that the Law Society of Kenya through their letter dated 24th May, 2024 appointed Mr. Kenneth Wyne Mutuma as the sole arbitrator to determine the dispute herein. He deposed that the defendant/applicant is attempting to seek a final order determining proprietorship over the suit property through the instant application. He deposed that the instant application is seeking interim measures of protection under Section 7 (1) of the *Arbitration Act*, and no special circumstance have been presented in evidence to warrant the grant of the order. He further deposed that the defendant/ applicant wants the order to operate perpetually thus interfering with the jurisdiction of the arbitrator to determine the dispute and issue an appropriate award.

7. The plaintiff/ respondent further deposed that despite collecting a total sum of Kshs. 260,000,000/-, from the year 2018 to the year 2023, the defendant/ applicant has never accounted for the same and is keen on wasting the suit properties before the suit can be considered by the Arbitral Tribunal. He deposed that the defendant/ applicant has deliberately frustrated the efforts to appoint a real estate agent despite efforts from his advocates to adequately resolve this issue in compliance with the

directions of the court. He also deposed that his previous advocates had written to the defendant's/ applicant's previous advocates on 21st July, 2023 proposing the names of estate agents but the same is yet to elicit any response from either the defendant/ applicant or its advocates.

8. The plaintiff/ respondent deposed that if there was no consensus on the preferred estate agent, the defendant/ applicant would have made an application to this court requesting for the court to appoint one on behalf of the parties. He deposed that this court cannot issue the orders sought as such an order can only be issued as a final order after the Arbitral Tribunal has considered the evidence before it. It was further deposed that the tax arrears or obligations claimed by KRA have no relation to the suit property and the same arose from the defendant's/ applicant's other businesses, and the defendant/ applicant cannot seek to utilize rental proceedings from the suit properties to meets its obligations as it has no interest over the same.

9. The plaintiff/ respondent also deposed that he received demands from KRA which necessitated him to appoint Westminster Consulting who responded to KRA explaining the ensuing circumstances including the present suit between the parties. He deposed that since the Commissioner of Domestic Taxes is seized of the matter before the court, it is misleading for the defendant/ applicant to state that KRA would proceed to enforce the alleged arrears on it. That in the unlikely event that any enforcement was to be made on the alleged rental income arrears, the same would be upon him as the registered proprietor of the suit properties and not the defendant/ applicant.

10. The plaintiff/ respondent deposed that neither the defendant/ applicant nor himself are collecting the rental income and as such, he would be greatly prejudiced if the orders are varied as it would allow the defendant/ applicant to utilize the rental income from his property without any recourse or remedy to him. He deposed that considering that the parties have already initiated the process of arbitration, any application to vary this court's orders should be filed before the arbitrator to be considered on its merits as the tribunal is already constituted. He deposed that if the court pronounces itself on a matter that it had referred to arbitration, then it will defeat the purpose of the arbitral tribunal to hear and determine the dispute extensively.

11. The defendant/applicant filed its supplementary affidavit in response thereto sworn on 13th August, 2024. The defendant/ applicant deposed that it is surprised that the plaintiff/ respondent who has challenged the ruling delivered on 24th January, 2024 would state that he is happy with the ruling without filing any application withdrawing the application dated 6th February, 2024 and that this court should take note of the position taken by the plaintiff/ respondent which is contradictory to the reliefs sought in his application. Further, the defendant/ applicant deposed that while Mr. Kenneth Wyne Mutuma has been appointed as an arbitrator in the matter, there are no formal arbitral proceedings that have commenced, and that this court has jurisdiction to deal with the present application. That contrary to the plaintiff/ respondent's averments, it is the defendant/ applicant who has executed the lease agreements with the tenants, and that their failure to remit any payment to the parties is detrimental. It was also deposed that it would be a travesty of justice for the tenants to continue to enjoy the services and the rental premises without meeting their rental obligations during the pendency of the arbitration proceedings. It was also deposed that there would be no prejudice if it is allowed to collect the rent as it had undertaken for the period 1st January, 2019 to 13th July, 2023.

12. The defendant/ applicant further deposed that it is aware that parties were unable to agree on a real estate agent, and that it is in its interest that it is allowed to continue to collect rent as it had previously done. It was deposed that the plaintiff/respondent has not demonstrated through evidence the prejudice he will suffer if the rent payments are not made to it. It was deposed that it is willing to subject itself to the arbitral proceedings for purposes of vigilantly defending its proprietary rights

over the suit properties. That save for the letter dated 21st July, 2023 the plaintiff/ respondent has not exhibited any evidence of follow up of the real estate agent and the opposition to its application has no basis whatsoever.

13. Further, it was deposed that having collected the rental payments over the suit property from 1st January, 2019 to the year 2023, the liability can only accrue to the defendant/ applicant and not the plaintiff/ respondent who has received the purchase price. That save for the letter dated 11th April, 2024 which is yet to be acknowledged by the relevant authorities, the plaintiff/ respondent has not provided evidence that the applicant is gravely at risk of being followed by the KRA. It was deposed that this court cannot re-write the contract executed by the parties which provided that the defendant/ applicant would collect rent on the suit properties from 16th September, 2018 which it did until the orders were issued by this court on 13th July, 2023.

14. In further response, the plaintiff/ respondent filed his supplementary affidavit sworn on 4th October, 2024. The plaintiff/ respondent deposed that the notice of motion dated 6th February, 2024 does not constitute an appeal but to ensure that the notice of appeal dated 5th February, 2024 is validly on record which is meant to reserve his right of appeal. He deposed that in a letter dated 30th August, 2024 the defendant/ applicant objected to commencement of the arbitral proceedings on grounds that there were interlocutory application pending in court and it is apparent that the defendant/ applicant is not intent on the resolution of the dispute. He deposed that the defendant/ applicant is set on defeating the jurisdiction of the Arbitral Tribunal to determine his right of ownership over the suit properties, and that should the court allow the application, the defendant/ applicant will deliberately delay the arbitral proceedings to ensure that it collects rental income to his prejudice.

15. The plaintiff/ respondent deposed that this court issued appropriate orders regarding collection and preservation of rental income and that there exists no basis to vary or review these orders. He also deposed that the defendant/ applicant has not met the threshold to warrant an order of review of the orders issued on 13th July, 2023. He deposed that the application is without merit and the same should be dismissed with costs.

16. The application was canvassed by way of written submissions. The defendant/ applicant filed its written submissions dated 13th August, 2024. The defendant/ applicant submitted that there is not only sufficient cause for the need to review the two orders of the court, but also, the letter dated 12th February, 2024 was not within its knowledge before the ruling was delivered on 24th January, 2024. Reliance was placed in the cases of Utalii Transport Company Limited & 3 Others versus Nic Bank Limited & Another [2014] eKLR, Khalif Sheikh Adan versus Attorney General [2019] eKLR, and Abdalla & 6 Others versus Khansa Developers Limited & 3 Others (Constitutional Petition 16 of 2022) [2024] KEELC 3667 (KLR) (30 April 2024) (Ruling).

17. The defendant/ applicant further submitted that the appointment of an arbitrator cannot be a cogent reason to object the grant of the orders since these orders are sought pending the determination of the dispute before this court or other fora. It was also submitted that the plaintiff/ respondent should have also demonstrated that he has been deliberate in the appointment of a real estate agent in the matter. The defendant/applicant went on to submit that as per the agreement, the defendant/ applicant was required to collect rent from the year 2018, but it has not done so since the orders were issued on 13th July, 2023. It was further submitted that the parties having voluntarily agreed on the payment and the extent of the court's intervention, the plaintiff/ respondent cannot object to the very prayers contained in the present application. Further reliance was placed in the case of Revital Healthcare (EPZ) Ltd versus Barclays Bank of Kenya Ltd [2020] eKLR.

18. The plaintiff/respondent filed his written submissions dated 7th October, 2024 where he raised two issues for determination as listed below: -

    i. Whether the court has jurisdiction to hear and determine the present application.

    ii. Whether the defendant/applicant has met the threshold for review.

19. On the first issue, the plaintiff/ respondent submitted that this court is deprived of jurisdiction to consider the application, as per Section 10 of the *Arbitration Act*, and that once a matter is referred to arbitration the court's role is restricted and its jurisdiction can only be triggered by the appropriate provisions under the *Arbitration Act*. The plaintiff/ respondent relied on the case of Nyutu Agrovet Limited versus Airtel Networks Kenya Ltd [2024] KECA 523 (KLR). He further submitted that the provisions of the *Civil Procedure Act* and Rules are not applicable in this case where a matter has been referred to arbitration, and the *Arbitration Act* does not extend the power to review the orders referring a matter to arbitration and grant subsequent orders. It was submitted that while the defendant/ applicant pleaded that the orders in the present suit are sought as an interim order of protection subject to Section 7 of the *Arbitration Act*, the defendant/ applicant abandoned this line of argument and has not submitted on this issue. The plaintiff/respondent relied on the cases of Anne Mumbi Hinga versus Victoria Njoki Gathara [2009] eKLR, and Safaricom Limited versus Ocean View Beach Hotel Limited [2010] eKLR.

20. The plaintiff/ respondent further submitted that the orders sought would not serve the purpose intended under Section 7 (a) of the *Arbitration Act* since to determine who should collect the rent, it would be required to determine the disputed issue of proprietorship. It was submitted that the Arbitral Tribunal having been constituted, this court does not have jurisdiction to grant the orders which are final orders that can only be issued upon the determination of the dispute on merits.

21. On the second issue, and while relying on the cases of D.J & Company Limited versus Banque Indosue [1998] eKLR, and Rose Kaiza versus Angelo Mpanjuiza [2009] eKLR, the plaintiff/ respondent submitted that the application is more than an appeal camouflaged as an application for review, and that the defendant/ applicant has not met the threshold to warrant a review. He submitted that the letter dated 12th February, 2024 does not meet the criteria for new evidence as the defendant/ applicant was aware that the tax obligations were due and the demand for the arrears cannot be regarded as new evidence. It was also submitted that there is no bearing between the tax obligations demanded and that the suit property, and that the same cannot be regarded as important evidence.

22. The plaintiff/ respondent submitted that the onus of proving that there exists sufficient cause to review the orders rests with the defendant/ applicant, while the court retains the discretion of determining whether the reasons adduced are sufficient. That the court vested with discretionary power, ought to exercise the power judiciously. To buttress on this submission, the plaintiff/ respondent relied on the cases of Peter Gichuki King'ara versus Independent Electoral and Boundaries Commission & 2 Others [2014] eKLR and Shah & Parekh Advocates versus Apollo Insurance Co. Ltd [2005] eKLR.

23. In conclusion, the plaintiff/ respondent submitted that there has been substantial delay in filing the application since the ruling was delivered on 13th July, 2023, which is six months later, and that the delay has not been explained or substantiated. Further reliance was placed on the case of Mugumoini Farmers Company Limited versus Inshwill Builders Engineers Limited; Ephraim Waithaka Ruitha & Another (Interested Parties [2020] eKLR.

24. I have carefully analysed and considered the application, the replies thereof and the written submissions as well as the authorities cited. I am of the considered view that the issue for determination is whether the defendant/applicant has met the threshold for the grant of the orders of review.

25. Order 45 Rule 1 of the Civil Procedure Rules, provides as follows: -

> “ Rule 1 (1) Any person considering himself aggrieved-
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> (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

26. In Republic versus Public Procurement Administrative Review Board & 2 others [2018] e KLR it was held: -

> “ Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

27. Also, in the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR, the Court of Appeal held that, “The main grounds for review are therefore; discovery of new and important matter or evidence, mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.”

28. Before I delve into the merits of the application, it is necessary to point out the status of the matter before this court. In a ruling delivered on 24th January, 2024 this court stayed the proceedings in this matter and referred the matter to arbitration pursuant to clause 13 of the agreement for sale dated 1st October, 2014. It follows that for the instant application to succeed, this court is required to first stay the orders issued on 24th January, 2024 before dealing with any other issue. The prayers as sought in the application are drafted in such a manner to exclude this same prayer for stay of the orders issued on 24th January, 2024 during the inter-partes hearing of the application. Prayer 2 of the application sought this order, at the ex-parte stage and which was not granted. In other words, having passed the ex-parte stage, and to a great extent, this court cannot deal with the issue at this stage for the said prayer is spent.

29. On the other hand, and if say for example that the court is to look at the merit of the application, Section 7 (1) of the *Arbitration Act* provides that: - “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. Rule 2 of the Arbitration Rules provides that "Applications under sections 6 and 7 of the Act shall be made by summons in the suit."

31. Having looked at the application, it is clear that the application was triggered by the letter dated 12th February, 2024 from KRA addressed to the defendant/applicant over tax in arrears. The defendant/ applicant argued that in view of the letter dated 12th February, 2024 it is thus necessary for this court to vary or set aside its orders issued on 13th July, 2023. According to the defendant/applicant, there is need for it to collect rent so as to meets its tax obligations. In the ruling delivered on 13th July, 2023 and with regard to tax obligations, there was reference that was made over the suit properties as can be seen from paragraphs *12* and *22*. From this, I see that the parties particularly the defendant/ applicant knew about the tax obligation arising out of the suit properties. This court went ahead and directed the parties to appoint a real estate agent to collect rent and account for the same pending the hearing and determination of the dispute between the parties.

32. On 25th July, 2023 the matter came up for mention to confirm whether the parties agreed on a proposed estate agent to collect the rent. From the proceedings, Mr. Kilele, the learned counsel who was on record for the plaintiff/respondent at the time had forwarded his proposal on 24th July, 2023. Mr. Mwangi, the counsel for the defendant/applicant who acknowledged receipt of the email and informed the court that he will require instructions from his client on the proposed estate agent. He requested for 21 days and the same was granted. On 21st September, 2024 and in the subsequent court proceedings, the status of the proposed estate agent pursuant to the court's ruling delivered on 13th July, 2023 did not arise and neither of the parties addressed the court on this issue. From this, the court can deduce that the defendant/applicant did not respond to the plaintiff/respondent's proposal and neither did it make any proposal of an estate agent. This court is in doubt whether the defendant/applicant has indeed come to court with clean hands for the reason that for it to claim that the parties are unable to agree on an estate agent to collect the rent, there was also need to show effort on its end which there is none.

33. Certainly, there is no new information and sufficient cause to persuade this court to set aside its orders issued on 13th July, 2023. Equally, the said orders were made on 13th July, 2023 and the instant application was made on 22nd February, 2024, seven months after the ruling was delivered. Can the court really say that the delay was unreasonable? I don't think so. The defendant/ applicant must have realized that it has not made any step or effort in ensuring that there is an estate agent thus sought to come to court camouflaged in the instant application premising the same on the ruling delivered on 24th January, 2024.

34. In addition to the above and based on the plaintiff/respondent's averments as well as the documents relied on, there is progress made pursuant to the ruling delivered on 24th January, 2024. An arbitrator has been appointed and from the evidence adduced, there is clear indication that the matter is ongoing.

35. From the above, the notice of motion dated 22nd February, 2024 lacks merit and it is hereby dismissed with costs to the plaintiff/respondent. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 5TH DAY OF NOVEMBER, 2024.

HON. MBOGO C.G.

JUDGE

05/11/2024.

In presence of: -

Mr. Meyoki Pere – C. A