



REPUBLIC OF KENYA



**Mediratta & 17 others v Karen Hills Limited & 2 others (Environment & Land Case E047 of 2021) [2023] KEELC 18528 (KLR) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18528 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E047 OF 2021**

**OA ANGOTE, J**

**JULY 3, 2023**

**BETWEEN**

**DIPAN MEDIRATTA ..... 1<sup>ST</sup> PLAINTIFF**  
**RAAKHE MEDIRATTA ..... 2<sup>ND</sup> PLAINTIFF**  
**HOSEAH MUTHOGA ..... 3<sup>RD</sup> PLAINTIFF**  
**DAMYSYL INVESTMENT LIMITED ..... 4<sup>TH</sup> PLAINTIFF**  
**JUDY KARORI ..... 5<sup>TH</sup> PLAINTIFF**  
**HITESH MEDIRATTA ..... 6<sup>TH</sup> PLAINTIFF**  
**SHALINA MEDIRATTA ..... 7<sup>TH</sup> PLAINTIFF**  
**JEMIMAH MUTII ..... 8<sup>TH</sup> PLAINTIFF**  
**GEORGE OMBIS ..... 9<sup>TH</sup> PLAINTIFF**  
**LEAH OMBIS ..... 10<sup>TH</sup> PLAINTIFF**  
**LYMA MEADOWS LIMITED ..... 11<sup>TH</sup> PLAINTIFF**  
**NISHIT MEDIRATTA ..... 12<sup>TH</sup> PLAINTIFF**  
**RAKHEE MEDIRATTA ..... 13<sup>TH</sup> PLAINTIFF**  
**PETER MAINA KAHUTHIA ..... 14<sup>TH</sup> PLAINTIFF**  
**SAMUEL MBURU KAMAU ..... 15<sup>TH</sup> PLAINTIFF**  
**SAHARA CAPITAL VENTURES ..... 16<sup>TH</sup> PLAINTIFF**  
**MBATIA KIMANI ..... 17<sup>TH</sup> PLAINTIFF**  
**JANE NYAGATURI MBATIA ..... 18<sup>TH</sup> PLAINTIFF**

**AND**



**KAREN HILLS LIMITED ..... 1<sup>ST</sup> DEFENDANT**  
**LORDSHIP AFRICA FUND MANAGEMENT LIMITED ..... 2<sup>ND</sup> DEFENDANT**  
**KAREN HILLS MANAGEMENT COMPANY LIMITED ..... 3<sup>RD</sup> DEFENDANT**

## **RULING**

1. Vide a Notice of Motion application dated 7<sup>th</sup> September 2022, the 5<sup>th</sup> Plaintiff/ Applicant has sought for the following orders:
  - a. That pending the hearing and determination of the intended arbitration, temporary injunction do issue restraining the Defendants whether by themselves, their servants, agents, employees or in any way whatsoever from charging, levying or demanding payment of interest on the Service Charge for the period 2011 to March 2022 from the 5<sup>th</sup> Plaintiff.
  - b. That pending arbitration between the parties, a temporary injunction do issue restraining the Defendants jointly and severally from discontinuing and/or disrupting the provision of services to the 5<sup>th</sup> Plaintiff/ Applicant including but not limited to supply of water, security, electricity in the common areas, cleaning of common areas or in any way howsoever from interfering with the 5<sup>th</sup> Plaintiff's/ Applicant's right to peaceful enjoyment of the property known as Unit 60 on Land Reference No. 195/228/ Nairobi (Karen Hills).
  - c. That this Honourable do issue directions for the expeditious hearing and determination of the main suit.
  - d. That the costs of this application be awarded to the 5<sup>th</sup> Plaintiff/ Applicant.
2. The application is premised on the grounds on the face of the application and the Supporting Affidavit sworn by Judy Karori, the 5<sup>th</sup> Plaintiff/Applicant. The 5<sup>th</sup> Plaintiff deposed that the 3<sup>rd</sup> Defendant has demanded from her the sum of Kshs. 457,221; that the said sum was the disputed and unlawful interest levied on the Service Charge to be paid within 14 days and that the Defendants have threatened to discontinue provision of services including electricity and water supply to her premises.
3. It was deposed by the 5<sup>th</sup> Plaintiff that such sum is not due and there is no basis for demanding it and that unless an order is issued restraining the Defendants from levying the disputed interest, she stands to be prejudiced as there is an imminent threat to discontinue provision of services to her.
4. The 5<sup>th</sup> Plaintiff averred that at the institution of this suit, the Plaintiffs filed a Notice of Motion application dated 1<sup>st</sup> February 2021 in which they sought for interim reliefs including orders restraining the Defendants from charging and collecting Service Charge pending the provision of audited accounts for the financial years 2013-2019 and that vide a Ruling dated 3<sup>rd</sup> March 2022, this Court ordered the Defendants to furnish the Plaintiffs with audited accounts of all the service charge within 30 days from the date of delivery of ruling.
5. It is the 5<sup>th</sup> Plaintiff's case that the 3<sup>rd</sup> Defendant subsequently furnished the Plaintiffs with audited accounts on service charge and water bills for financial years 2013-2020 and further issued demands to the Plaintiffs to pay service charge, water bills and accrued interest.
6. According to the Applicant, the Defendants however failed to furnish the Plaintiffs with audited accounts on the service charge and water bills for the financial years 2011-2013 in blatant violation of



- this Court's order and that the accounts for the financial years of 2013-2020 are unacceptable to the Plaintiffs as they are qualified by the Defendants' auditors.
7. According to the 5<sup>th</sup> Plaintiff, while the Plaintiffs are ready and willing to pay service charge, such sum ought to be based on records and acceptable audited accounts on sums actually due; that as a sign of good faith, she has paid the sum of Kshs. 622,593 indicated in the auditor's statement, being service charge for the period of 30<sup>th</sup> March June 2022.
  8. The 5<sup>th</sup> Plaintiff further deposed that the Defendants have failed or ignored to disclose and furnish to the Plaintiffs the contracts and agreements it has entered into with various service providers, which contracts ought to have been the basis of the audited accounts and that the Plaintiffs are entitled to this information as a matter of right, being plot owners in Karen Hills Estate.
  9. It was the 5<sup>th</sup> Plaintiff's deposition that they are keen to pursue arbitration in accordance with the Agreement of Lease dated 20<sup>th</sup> March 2013 and have sought the conservatory orders herein to preserve the subject matter, namely the disputed interest on the service charge; that they have sought the appointment of an arbitrator through a letter dated 13<sup>th</sup> July 2022 to the Chairman of the Chartered Institute of Arbitrators of the United Kingdom- Kenya Branch and that there is no right or power reserved in the lease agreements for the Defendants to withdraw services on account of interest.
  10. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' director deposed that the application is an abuse of the process of this court because all the Plaintiffs, including the 5<sup>th</sup> Plaintiff, lodged an application dated 1<sup>st</sup> February 2021 seeking injunctive relief against the Defendants pending trial, in respect to service charges and the interest charged upon default of their payment.
  11. It was deposed that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs lodged another application dated 21<sup>st</sup> September 2021 seeking injunctive relief to restrain the Defendants from terminating any common services offered to them on account of non-payment of service charge and that the 5<sup>th</sup> Plaintiff is seeking to relitigate the same issues.
  12. The Defendants' Director deposed that vide a Ruling dated 3<sup>rd</sup> March, this court gave directions on the provision of audited accounts and dismissed both injunctive applications; that the issues which the 5<sup>th</sup> Plaintiff proposes to raise in her proposed arbitration are similar to some of the issues raised by the Plaintiffs in these proceedings; that by instituting these proceedings, the Plaintiff forfeited her right to refer the matter to arbitration and lastly, that the 5<sup>th</sup> Plaintiff is proposing the arbitrator to sit in judgement over the findings made by this court in its March Ruling.
  13. According to the Defendants' Director, they provided all plot owners with the audited accounts for 2013 to 2020; that the 3<sup>rd</sup> Defendant was not incorporated in 2012 and did not incur any expenditure prior to 2013; that in the Agreement of Lease, the property was sold to the 5<sup>th</sup> Plaintiff subject to the terms and conditions contained in the lease and that the 5<sup>th</sup> Plaintiff also agreed to be bound by the Home Owner's Manual by virtue of Clause 10 of the Agreement.
  14. It was deposed that as per Clause 3.11 of the Lease and Rule C of the Home Owner's Manual, the Applicant is responsible for payment of service charge to the Lessor and/or the management company and that upon failure to pay service charge, penalty interest accrues on the arrears from the due date at the rate of 5% per annum as per Clause 3.1.2(d) of the Lease and Rule C (3.4) of the Home Owner's Manual.
  15. The Defendants' Director averred that the audited accounts shows that the Applicant defaulted from paying service charge from 2018 despite the 3<sup>rd</sup> Defendant's provision of services to the property and that due to the persistent non-payment of service charge by the Applicant and other plot owners and



their expectations for the provision of services, the 3<sup>rd</sup> Defendants had to borrow funds from related companies so as to meet the costs of provision of services.

16. According to the Defendants, this court at paragraph 53 of its Ruling, upheld that the Defendants are well within their rights to charge interest on the unpaid arrears; that the amount of service charge payable is not unascertainable and that Clause 3.11.1(a) of the Lease is clear that in the event that no certificate is available, then service charge shall be increased by not less than 10% over the service charge amount payable in the previous year.
17. The 5<sup>th</sup> Plaintiff filed a Further Affidavit in which she deponed that the Defendants' allegations that the statements of account produced by the Plaintiffs are incomplete is false; that the audited accounts furnished to the Plaintiffs on 13<sup>th</sup> April 2022 are different from those produced as JAJ-2 in the Defendants' Replying Affidavit and that the Defendants have produced statements alleging to be a breakdown of apportionment of service charge which were not provided to the plot owners.
18. The 5<sup>th</sup> Plaintiff deponed that as a plot owner, she has invoked Clause 6.10.2 of the Lease to declare a dispute and referred the matter of the disputed and unlawful demand for interest on service charge to arbitration; that an arbitrator has been appointed and the parties appeared before him on 23<sup>rd</sup> March 2023 to take directions on the reference; and that the sole arbitrator will not be sitting on appeal of this court's Ruling.

### Submissions

19. Counsel for the 5<sup>th</sup> Plaintiff submitted that despite the orders of this court in its Ruling dated 3<sup>rd</sup> March 2022, the Defendants failed to furnish the Plaintiffs with the audited accounts on the service charge and water bills for the financial years 2011-2013 and that as the Defendants did not appeal against or apply for a review, they are bound by the orders of this court.
20. It was the Applicant's Counsel's submission that this application is brought under Section 7 of the *Arbitration Act* seeking conservatory orders to preserve the subject matter of the arbitration, namely the disputed interest charged by the 3<sup>rd</sup> Defendant in the sum of Kshs. 457,221.000 pending the hearing and determination of the arbitration proceedings.
21. Counsel submitted that on the first limb, an arbitration contract exists between the 5<sup>th</sup> Plaintiff and the 1<sup>st</sup> Defendant, as provided for under Clause 3.11.2 (e) of the Lease dated 20<sup>th</sup> March 2013. Counsel relied on the case of *Zhongxing Construction Company Ltd v Eden Development Limited (K)*; *Highland Carriers Limited v National Oil Corporation of Kenya Limited*.
22. On the second limb, counsel submitted that the subject matter of the arbitration is the demand by the Defendants of the unlawful interest levied on the service charge; that the arbitration reference is in threat because should the 1<sup>st</sup> Defendant be permitted to arm-twist the 5<sup>th</sup> Plaintiff into paying the purported interest by disrupting or withdrawing provision of services, this will render the ongoing arbitration nugatory and that in the circumstances, orders maintaining status quo and restraining the 3<sup>rd</sup> Defendant from disrupting services and provision of water is merited.
23. Counsel submitted that the 5<sup>th</sup> Plaintiff did not waive the right to refer the dispute to arbitration; that the issue of unlawful interest levied on the service charge is not an issue in the suit before this court and that such dispute would be best resolved by an Arbitral Tribunal as envisioned in the registered lease.
24. Counsel for the Defendants submitted that there is no agreement between the 5<sup>th</sup> Plaintiff and the 3<sup>rd</sup> Defendant as it was not party to the March 2013 agreement; that even assuming there was an arbitration agreement, by commencing the present suit, the 5<sup>th</sup> Plaintiff has forfeited/waived such right



and that the issue of payment of interest on the service charge is still pending before this court and cannot therefore be referred to arbitration at this stage.

25. The Defendant's counsel submitted that the application is an abuse of process as the 5<sup>th</sup> Plaintiff is attempting to relitigate issues over and over again, seeking another determination from this court and that the Plaintiff's contention that the service charge was not properly demanded due to failure to keep proper records was considered and rejected by this court in its first Ruling.
26. Counsel submitted that this Court already found that notwithstanding the lack of audited accounts, the 3<sup>rd</sup> Defendant acted within its rights in charging interest on arrears.
27. Counsel submitted that the Defendants did not seek to stay the proceedings under Section 6 of the *Arbitration Act* and have the matters referred to arbitration, but have instead filed a joint defense; that the parties waived the arbitration clause and submitted to the jurisdiction of this court and that this matter has been in court for over two years and the two applications seeking injunctive reliefs have been determined.

### **Analysis and Determination**

28. Having considered the application, the pleadings filed by the parties, the annexures and the submissions filed herein, the following issues are for this court's determination:
  - a. Whether the 5<sup>th</sup> Plaintiff is relitigating issues already addressed by this court.
  - b. Whether the 5<sup>th</sup> Plaintiff waived her right to arbitration
  - c. Whether the 5<sup>th</sup> Plaintiff's application for interim remedies is merited.
29. Under Article 159 (2) (c) of the *Constitution*, this court is to be guided by the principles of alternative dispute resolution including arbitration, which the 5<sup>th</sup> Plaintiff herein seeks to pursue. Section 20 of the Environment and and Act enjoins this court to adopt and implement alternative dispute resolution mechanisms either on its own motion, or at the request of the parties.
30. The 5<sup>th</sup> Plaintiff has sought to stay orders pending the hearing and determination of its intended arbitration, wherein a sole arbitrator was appointed and the parties appeared before him on 23<sup>rd</sup> March 2023 for directions. The Applicant has particularly sought to stop the Defendants from charging, levying or demanding payment of interest on the service charge for the period 2011 to March 2022 from the 5<sup>th</sup> Plaintiff, and from disconnecting/disrupting the provision of services to the Applicant's property, including supply of water, provision of security and electricity in the common areas.
31. The Defendants have opposed the application on three grounds: first, that the Applicant is seeking to relitigate issues addressed by this court vide its Ruling dated 3<sup>rd</sup> March 2022. Secondly, that by instituting this suit, the 5<sup>th</sup> Plaintiff forfeited her right to arbitration and lastly, that the Defendants are well within their rights to charge interest on the unpaid arrears.
32. As to whether the 5<sup>th</sup> Plaintiff/Applicant is seeking to relitigate settled issues, this court has to relook at its Ruling of 3<sup>rd</sup> March 2022. The subject of the Ruling were two applications for injunction by the Plaintiffs dated 1<sup>st</sup> February 2021 and 21<sup>st</sup> September 2021.
33. In its determination, this court noted that while the Defendants failed to account for the service charge received and failed to issue certificates pursuant to Clause 3.11 of the Lease Agreement, the Plaintiffs did not adduce evidence to show that the Defendants have been lax in maintaining the premises.



34. This court further held that the Defendants are well within their rights to charge interest on unpaid arrears. Further, this court found that a dispute as to accounts cannot form the basis for the grant of an injunction. Consequently, this court directed the Defendants to furnish the Plaintiffs audited accounts in respect of service charge received from all property owners within Karen Hills Estate and the expenses incurred from the years 2011 to date within 30 days.
35. It is pursuant to the said orders that the Defendants availed audited accounts from 2013 to 2020. The 5<sup>th</sup> Plaintiff has faulted the Defendants for failing to avail accounts for the financial years of 2011 to 2013. She has also averred that the presented accounts are unacceptable as they are qualified by the Defendants' auditors.
36. The Defendants on their part, have asserted that the 3<sup>rd</sup> Defendant was incorporated in 2012 and did not incur any expenditure prior to 2013. Although the Defendants have not presented evidence of the incorporation of the 3<sup>rd</sup> Defendant, the 5<sup>th</sup> Plaintiff has not impugned this claim.
37. The 5<sup>th</sup> Plaintiff's intended arbitration is on the basis of the notice issued to it for the payment of interest of Kshs. 457,221 levied on the service charge by way of a letter dated 1<sup>st</sup> September 2022. This letter was pursuant to the audit of the 3<sup>rd</sup> Defendant's accounts which this court ordered the Defendants to furnish.
38. The direction for the Defendants to furnish the Plaintiffs with audited accounts was with the understanding that such accounts would be the basis for the Plaintiffs to seek further appropriate orders. It is therefore clear that the 5<sup>th</sup> Plaintiff's application is not an attempt to relitigate issues settled by this court.
39. The 1<sup>st</sup> Defendant's assertion that the 5<sup>th</sup> Plaintiff has forfeited her right to arbitration is based on Section 6 of the *Arbitration Act*, wherein a party may seek stay of legal proceedings and referral of a dispute to proceedings. Indeed, the Court of Appeal in *Eunice Soko Mlagui v Suresh Parmar & 4 Others* [2017] eKLR held as follows:
- “The provisions, for example, of section 6 which require parties to make an application for referral of a dispute to arbitration at the earliest opportunity and before taking any other action, or those that require the court not to refer a dispute to arbitration if the arbitration agreement is null and void, or is incapable of being performed, or if there is no dispute capable of being referred to arbitration, cannot be described as inconsistent with the constitutional principle of promoting alternative dispute resolution because the court is also obliged to take into account the equally important constitutional principle that justice shall not be delayed, by for example sending to arbitration a non-existent dispute, or allowing a party who has otherwise elected to pursue proceedings in the court, to belatedly purport to opt for arbitration.”
40. In this matter, the Applicant is not seeking to refer this dispute to arbitration. In fact, arbitration proceedings are ongoing having commenced on 23<sup>rd</sup> March 2023. What the Applicant is seeking is for an interim measure of protection by the court under Section 7 of the *Arbitration Act*. In the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR, the Court of Appeal considered the rationale of interim measures as follows:
- “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. Such orders take different forms and



go under different names. In the case of Kenya, the *Arbitration Act* is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as “interim measures of protection” under section 7 of the *Arbitration Act*. On the other hand, in the English version of the ICC Rules for example, they are known as “interim conservatory measures”. Whatever their description however, they are intended in principle to operate as “holding” orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation...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.”

41. The application has been made pursuant to Section 7 of the *Arbitration Act* for interim orders, which provides as follows:

- “(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.”

42. The 5<sup>th</sup> Plaintiff has relied on the Court of Appeal’s decision in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR, where the court articulated the test for interim reliefs 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?”

43. In this case, an arbitration agreement inheres between the parties, as provided by Clause 10(U) Of the Agreement of Lease dated 20<sup>th</sup> March 2013, which states as follows:

“Any dispute, difference or question whatsoever which may arise between the parties including the interpretation of rights and liabilities of either party shall be referred to an arbitrator under the rules of the *Arbitration Act* 1995 of Kenya as amended by the Arbitration (Amendment) Act 2009 or any statutory modification or re-enactment for the time being in force, such arbitrator shall be appointed by agreement of both parties and in the absence of agreement within fourteen (14) days of the notification of the dispute by



either party to the other then on the application of any one party by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) and the decision of such arbitrator shall be final and binding on the parties hereto.”

44. Counsel for the Defendants has argued that the 3<sup>rd</sup> Defendant was not a party to the agreement of lease above. Indeed, while the 3<sup>rd</sup> Defendant was not a signatory to the agreement, the lease agreement referred to its formation, and its duties and obligations under the agreement. This court further notes that Jonathan Adrian Jackson, who swore the Defendants’ Replying Affidavit is a Director of all the three of the Defendants, and that he has been a Director of the 3<sup>rd</sup> Defendant since 2013.
45. In any case, this court is persuaded by the finding in *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* [2021] eKLR where it was held that an arbitrator, and not the court has the authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of the agreement including, but not limited to any claim that all or any part of the agreement was void or voidable.
46. This corresponds with the provision of Section 17 of the *Arbitration Act* which articulates “the competence/competence principle” as follows:
- “(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose—
- (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
- (b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.”
47. The second limb of the test for interim measures is whether the subject matter of the appeal is under threat. The 5<sup>th</sup> Plaintiff has argued that the arbitration reference is in threat because should the 1<sup>st</sup> Defendant be permitted to arm-twist her into paying the purported interest by disrupting or withdrawing provision of services, it will render the ongoing arbitration nugatory.
48. Indeed, the question of the chargeable interest on the service charge is an issue before the arbitrator. The payment of the interest on the service charge should be stayed pending the hearing of the determination of the arbitration.
49. For those reasons, the application dated 7<sup>th</sup> September 2022 is allowed as follows:
- a. Pending the hearing and determination of the intended arbitration, temporary injunction do issue restraining the Defendants whether by themselves, their servants, agents, employees or in any way whatsoever from charging, levying or demanding payment of interest on the Service Charge for the period 2011 to March 2022 from the 5<sup>th</sup> Plaintiff.
- b. That pending arbitration between the parties, a temporary injunction do issue restraining the Defendants jointly and severally from discontinuing and/or disrupting the provision of services to the 5<sup>th</sup> Plaintiff/ Applicant including but not limited to supply of water, security, electricity in the common areas, cleaning of common areas or in any way howsoever from interfering with the 5<sup>th</sup> Plaintiff’s/ Applicant’s right to peaceful enjoyment of the property



known as Unit 60 on Land Reference No. 195/228/ Nairobi (Karen Hills), on Condition that the 5<sup>th</sup> Plaintiff pays the chargeable service charge.

- c. Costs of the application to be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3<sup>RD</sup> DAY OF JULY, 2023.**

**O. A. ANGOTE**

**JUDGE**

