REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

MISC APP NO. 22 OF 2019

P.J DAVE FLOWERS LIMITED.....1ST APPLICANT/RESPONDENT

HITESH PRAVIN DAVE..... 2ND APPLICANT/RESPONDENT

-VERSUS-

LIMURU HILLS LIMITED.....1ST RESPONDENT/OBJECTOR

HIGHGROVE HOLDINGS LIMITED.....2ND RESPONDENT/OBJECTOR

KIRIT KUMAR BHAGWANDAS KANABAR.....3RD RESPONDENT/OBJECTOR

HARISH KUMAR KANABAR.....4TH RESPONDENT/OBJECTOR

AND

EQUITY BANK KENYA LIMITED.....INTERESTED PARTY

RULING

The matter for determination is the Notice of Preliminary Objection by the 1st-4th Respondents/Objectors dated **16th May 2019,** against the Application dated **11th April 2019.** The Notice of Preliminary Objection is based on the following grounds;

> **a. The High Court of Kenya in Thika has no Proximate or other connection with the subject matter of these proceedings. It ought to decline the jurisdiction to hear the said application.**
>
> **b. The Application before the court does not disclose a reasonable course of action in that it is not founded in any suit or petition. The Respondents cannot reasonable plead to a non existent cause of action.**
>
> **c. The application before the court is frivolous and vexatious for the failure to acknowledge the fact that Equity Bank Kenya limited has a chargee's interest in the suit property the subject matter of the proceedings herein(spent).**

On **29th July 2020,** the Court directed the parties to file written submissions and in compliance with the said directive, the 1st -4th respondents through the **Law Firm of Kyalo & Associates Advocates** filed the written submissions dated **28th September 2020, and submitted that the dispute herein emanates from a memorandum of understanding dated 21st May 2015, executed by both parties. That the parties freely opted to resolve their disputes through Consultation and Arbitration . That any other appropriate forum for adjudication of the parties differences would have to be at the Environment & Land Court in Nairobi. It was further submitted that the dispute herein has no proximity or any connection with this Court. The Objectors relied on the case of Equity Bank Limited…Vs…Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eklr where the Court held that;**

> **"In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under *Section 18* of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign."**

Further that the present Application is founded on a non existent cause of action as a civil suit can only be instituted via three methods namely, Plaint, Originating Summons or Petition . That it is untenable and illegal that the orders sought would be granted on an interlocutor Application . They urged the Court to dismiss the Application.

The 1st and 2nd Applicants/Respondents through the Law Firm of **Murage Juma & Co Advocates** filed their written submissions on **25th November 2020,** and submitted that the suit property is located in **Tigoni Limuru** in Kiambu County and the Environment & Land Court Thika presides over matters in Kiambu County and as **Sections 12 and 15 of the Civil Procedure Act** as read with **Article 162(2) (b) of the Constitution**, **Section 13** of the Environment & Land Court Act donates jurisdiction to this Court.

It was further submitted that **Section 7 of the Arbitration Act** empowers the Court to make orders to preserve the subject matter of the Arbitration to ensure that the Respondents do not waste the subject matter before the conclusion of the Arbitration proceedings. The Applicants/Respondents relied on the case of **Safaricom Limited …Vs…Ocean Beach Hotel Limited & 2 others (2010) eKLR.**

That the Court is empowered to make orders to preserve the subject matter of the Arbitration and or order for the maintenance of Status Quo pending the hearing and determination of the Arbitral proceedings. That the facts of the Arbitral proceedings are not the purview of this Court as was held in the Safaricom case . Further that the Preliminary Objection discloses no point of law. The Court was urged to dismiss the Preliminary Objection.

The Court has carefully read and considered the Notice of Preliminary Objection, the pleadings of the parties the annexures thereto together with the written submissions and finds that the issue for determination is ***whether the Notice of Preliminary Objection is merited*** ;-

For the Court to make a determination on whether the Preliminary Objection is merited, it must first determine whether what has been raised by the objectors amounts to preliminary Objection . The Court in the case of ***Mukisa Biscuits Manufacturing Co. Ltd…Vs…West End Distributors Ltd (1969) EA 696*** described a Preliminary Objection to mean:-

> **"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".**

Further Sir ***Charles Nebbold, JA*** stated that:-

> **"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop".**

Further, in the case of ***Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999***, the Court held that:-

> **"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings."**

Further a **Preliminary Objection** must stem from the pleadings and raises pure point of law. See the case of ***Avtar Singh Bhamra & Another…Vs….Oriental Commercial Bank, Kisumu HCCC No.53 of 2004***, where the court held that:-

> **"A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."**

This Court having made a finding on the description of **a Preliminary Objection**, it is not in doubt that a **Preliminary Objection** raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However it cannot be raised if any facts has to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.

In their Preliminary Objection, the Respondents/ Objectors have raised various limbs one of them calling into question the jurisdiction of this Court to hear and determine the instant suit as in the **Memorandum of Understanding** dated **21st May 2015,** parties opted to resolve their disputes through Consultation and Arbitration. Jurisdiction is everything and without it the Court has no option but to down its tools. Therefore, it follows that an issue of jurisdiction is a Preliminary Objection properly raised as the Court will not be required to ascertain any facts but would only look at what the law says and determine whether or not it has jurisdiction.

The 2nd limb on whether or not the Application by the Applicants/ Respondents discloses no reasonable cause of action as it is not found in any suit or Petition, it is the Court's considered view that for it to make a finding on whether or not there is a reasonable cause of action, parties have to adduce evidence and the Court will have to ascertain facts and thus probing of evidence. Therefore, the same does not raise a pure point of Law and does not amount to a Preliminary Objection as per the description of what amounts to a Preliminary Objection.

In its written submission, Respondents/ Objector submitted that the third limb of the Preliminary Objection had already been dealt with and it was therefore spent and there would be no need of dealing with the same.

The Court having held and found that the Respondent's/ Objectors have raised the issue of jurisdiction which is a properly raised

Preliminary Objection, the Court must thus determine whether the same is merited. There is no doubt that the instant Misc. Application is premised on a Memorandum of Understanding dated **21st May 2015**, It is further not in doubt that **CLAUSE K** of the said **Memorandum of Understanding** states that;

> **"should any dispute, controversy or claim as is referred to herein shall have not resolved such dispute, the dispute shall upon application by any party be referred for arbitration to the person acceptable to the parties……..**

It is therefore not in doubt that the parties agreed that any dispute that arises must be referred to Arbitration. While the Respondent's/ Objectors have argued that the matter ought to be referred to Arbitration and at the very least any issues in dispute ought to be determined by the Environment & Land Court in Nairobi. It is the Applicants/ Respondents contention that they are seeking for interim relief measures that this Court is empowered to grant by the Arbitration Act. Further that the suit property being in Kiambu County, this Court is well clothed with the requisite jurisdiction to deal with the same.

The Court has gone through the Notice of Motion Application by the Applicants/ Respondents and notes that the same is with regards to **L.R Numbers 4967/37 and 38 (Registered as N94 Folio 4, File 26821 located in Tigoni Limuru)**. It is not in doubt that Limuru is in Kiambu County. It is further not in doubt that the Environment & Land Court is an equal status of the High Court and therefore it has original and unlimited jurisdiction to hear and determine land matters in the whole of the Country. Further it is not in doubt that the Environment & Land Court Thika's jurisdiction extends to the whole of Kiambu County and the suit properties territorial jurisdiction falls within its purview. Therefore this Court finds and holds that in terms of territorial jurisdiction, it is clothed with the requisite jurisdiction.

On whether the Court has jurisdiction to hear and determine the instant Application, it is the court's considered view that what it has to determine is whether the High Court or this Court being **Thika Environment and Land Court** has jurisdiction to hear and determine interlocutory Applications seeking interim reliefs pending the hearing and determination of Arbitration proceedings. Having gone through the Application dated **11th March 2019** the orders sought by the Applicants/ Respondents are interim reliefs pending the hearing and determination of the arbitration.

Section 7(1) of the Arbitration Act provides that;-

> **"(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.**

In the case of ***Safaricom Limited…Vs…Ocean Beach Hotel Limited & 2 others (2010) eKLR*** the Court held that;

> **"Although the right of intervention was specified in section 7 and the limit of intervention defined in the section, …... By determining the matters on the basis of the *Giella* principles the Superior Court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. 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.* However, where the arbitral tribunal has the power, it cannot issue interim measures until the tribunal itself has been established. On the facts before the court, no arbitral tribunal had been established hence the invocation of section 7 of the Arbitration Act by one of the parties. 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. Thus, under the Model Law system an arbitral tribunal may only order any party to take such interim measures of protection as the arbitral tribunal may consider necessary. On the other hand a national court would not necessarily be restricted to the parties when giving relief for example a temporary order attaching a debt due from a third party. An interim measure of protection such as that sought in the matter before the court is supposed to be issued by the court under section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for the grant of injunctions as the High Court purported to do in this matter. To illustrate the point Article 26-3 of the UNICTIRAL Arbitration rules states that a request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement. Section 7 of the Arbitration Act is modelled on this. However, in the matter before the court the learned Judge contravened the above principles by firstly either declining to issue any measure of protection or granting such a measure. The Court also failed to correctly address the principles for the issue of any such measures and worse still, the Supreme Court took over the subject matter altogether and ruled on the merits of the subject matter of the arbitration thereby prejudicing the outcome of the arbitration. This explains why in the special circumstances of this matter, this Court must take extraordinary measures to rectify an extraordinary illegality. 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? In the matter before the court,**

the Judge went on to make orders which undermined the arbitration and the outcome of the arbitration contrary to section 17 of the Arbitration Act. A court of law when asked to issue interim measures of protection must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration. There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made and not to take out of the hands of the arbitrators (or other decision makers) a power of decision which the parties have entrusted to them alone.

Further in the case of ***Elite Earthmovers Limited …Vs… Machakos County Government & another [2020] eKLR*** the Court held that;-

"In the case of Carzan Flowers (Kenya) Ltd & Others vs. Tarsal Koos Minck B V & Others Nairobi (Milimani) HCCC No. 514 of 2009 Kimaru, J recognised the powers of the High Court in that regard when he said that the High Court has jurisdiction under section 7 of the Arbitration Act. He further lamented the fact that in Kenya, it is evident that the law is not settled in regard to the principles which should be considered by the court in granting interim measure of protection where the parties have agreed to have the dispute between them resolved by arbitration. In his view:……..

In considering an application under section 7(1) of the Arbitration Act, the court is not being called upon to determine the merits of the matters in dispute but rather it is being called upon to aid the arbitration process by putting the disputing parties at a footing that will ensure none of the parties would be prejudiced during the hearing of the dispute by the arbitral tribunal. Of course, as is apparent from some arbitral proceedings, a party to such proceedings who considers himself to have been put at a position of disadvantage and therefore likely to be prejudiced, prior to or during the arbitral proceedings, may have no option but to seek the coercive jurisdiction of the court in order to protect the essence of the arbitral proceedings…The position in Kenya is that for a party to succeed in an application under section 7 of the Arbitration Act, 1995 for interim measure of protection pending hearing of the dispute by arbitration, he must firstly establish that there exists an arbitration clause in the agreement between the parties that is capable of being invoked to have the dispute referred for determination by arbitration."

From the above provision of law and decided cases, It is thus not in doubt that this Court has jurisdiction to hear and determine Applications seeking interim reliefs. As the Application before Court by the Applicants/ Respondents seeks temporary injunction pending the hearing and determination of the Arbitral proceedings, this Court finds and holds that it has jurisdiction to deal with the same. The merits or demerits of the Application and whether the said orders are merited, would be dealt with when the Court is determining the said Application on merit. At this stage the Court finds and holds that it has the requisite jurisdiction to hear and determine the said application.

The Upshot of the foregoing is that the Court finds the Notice of Preliminary Objection dated **16th May 2020,** is not merited and Consequently the same is dismissed entirely with costs to the Plaintiff/Respondent.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS *15TH* DAY OF APRIL 2021.

L. GACHERU

JUDGE

15/4/2021

Court Assistant - Phyllis

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiff/Applicant

M/s Gichuki holding brief for Kyalo Mbobu for 1st – 4th Defendants/Respondents/objectors

Mrs Omutimba for the Interested Party

L. GACHERU

JUDGE