



**Mwikali v Sauti Savings & Co-operative Limited (Environment & Land Miscellaneous Case E060 of 2023) [2023] KEELC 21613 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21613 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND MISCELLANEOUS CASE E060 OF 2023  
EK WABWOTO, J  
NOVEMBER 9, 2023**

**BETWEEN**

**ANGELA MWIKALI ..... APPLICANT**

**AND**

**SAUTI SAVINGS & CO-OPERATIVE LIMITED ..... RESPONDENT**

**RULING**

1. This ruling is in respect to the Applicants' application dated 22<sup>nd</sup> August 2023 which was accompanied by a supporting affidavit sworn by Angela Mwikali. The Applicant sought the following:
  - i. ...Spent.
  - ii. That there be an interlocutory injunction against the Directors and committee members of Sauti Savings and Credit Cooperative Limited, their agents and/or servants restraining them from commencing, continuing or concluding any transactions for the selling, transferring, leasing or utilizing the real, movable and cash assets of the SACCO including the lands registered LR. No. 209/3693 now Nairobi Block 69 (South B)/ 180 pending the hearing and determination of this Application.
  - iii. That there be an interlocutory injunction against the Directors of Sauti Savings and Credit Cooperative Limited, their agents and/or servants restraining them from commencing, continuing or concluding any transactions for the selling, transferring, leasing or utilizing the real, movable and cash assets of the company including the lands registered as LR. No. 209/3693 now Nairobi Block 69 (South B)/ 180 pending the completion of the arbitral proceedings.
  - iv. That there be and is hereby issued an order directing the Respondent do deposit the amount of Kenya Shillings Ten million Five Hundred thousand (Kshs 10,500,000 which is the market value of the two plots as per the sale agreement. The money should be put in a in a joint



interest-bearing account opened in the names of the advocates of the Parties pending hearing and determination of this Application.

- v. That there be and is hereby issued an order directing the Respondent do deposit the amount of Ten million Five Hundred thousand (Kshs.10,500,000) in a joint interest-bearing account opened in the names of the advocates of the Parties pending hearing and determination of the arbitral proceedings.
  - vi. That the Applicants be at liberty to apply for such further Orders and/or directions as this Honourable Court may deem fit and just to grant.
  - vii. That costs of this Application be provided for
2. The application was premised on several grounds including:
- a. The Applicant entered into a contract with the Respondent on 2<sup>nd</sup> November 2009 for the sale of land from two parcels Plot Numbers 554(1338) and 555(1339).
  - b. The Respondent has failed to transfer the two parcels. In the alternative the respondent compensates the applicant with an equivalent of the market value of the plots which is Kenya Shillings Five Million Five Hundred Thousand (Kshs.5,250,000.00) as the market value of each plot totalling to Kenya Shillings Ten Million Five hundred thousand shillings (Kshs.10,500,000). The valuation amount is Kenya Shillings nine million (kshs.9,000,000) as per the valuation report dated 8th November 2022 owing to default in issuing the Applicant with certificates of Title for the two parcels of land she had purchased from the Respondents.
  - c. That in keeping with clause XIII of the Contract, the matter was referred to arbitration at the application of the Applicant and Mr. Kairu Mbuthia MCIArb has been appointed the arbitrator.
  - d. That the Applicant is apprehensive and has reasonable grounds to believe that the Respondents have now disposed of the property of the Respondent in order to defeat the interest of the Applicant herein.
  - e. That the Respondent continued to sell the property registered as Nairobi/ Block82/8760 to unknown third parties despite there being court orders that bar the selling, transfer of the Property pending the hearing and determination of the suit in ELC Civil Suit No 106 /2021.
  - f. That the Respondents had licensed the registered as Nairobi/ Block82/8760 to a church for five years to earn some much-needed revenue. The Respondents are now claiming that they have now sold that property not only in contravention of the ruling in ELC Civil Suit No. 106 of 2021 but also to defeat the subject of the arbitration.
  - g. That despite licensing the property to a church for 5 years the Respondents have never declared any incomes. Similarly, since the Applicant is not a member of the SACCO she never enjoyed the dividends from that transaction nether has she enjoyed the benefits from low interest loans enjoyed by members of the SACCO.
  - h. That the Respondents have been dishonest by claiming that the Applicant is a member of the SACCO. They falsely claimed that the Applicant is a member of the SACCO, which she is not. The Applicant is concerned that the Respondents will deny her rights, as they have the economic advantage and will use it to their own benefit to the detriment of the Applicant.



- i. That under the *Arbitration Act*, 1995, this court is empowered to make such orders as may be necessary to meet the ends of Justice, before and during arbitration in order to ensure that the arbitral proceedings are not rendered a nugatory.
  - j. That if this Honourable court does not intervene and grant the orders sought herein, the Applicant will be left with a right but with no remedy and the envisioned arbitral proceedings will be rendered useless.
  - k. That it is only fair and in the interests of justice that this Application be allowed.
3. The application was canvassed by way written submissions pursuant to the directions issued by this court on 26<sup>th</sup> September 2023, the applicant filed written submissions dated 9<sup>th</sup> October 2023 while the Respondent filed written submissions dated 27<sup>th</sup> October 2023.
  4. In submissions dated 9<sup>th</sup> October 2023, the Applicant enumerated six issues for determination including:
    - i. Whether the Court has power to issue interim measures pending the outcome of the arbitral proceedings?
    - ii. Whether the Applicant had a right to approach the Court using Chamber Summons application?
    - iii. Whether the claim is time barred?
    - iv. Whether this Honourable Court should issue interlocutory injunction against the directors and committee members of Sauti Sacco savings and Co-operative Ltd, their agents and or servants or agents restraining them commencing, continuing or concluding any transactions for the selling, transferring, leasing or utilizing the real, movable and cash assets including the land registered number 209/ 2693 now Nairobi / Block 69(south B)/180 pending the heeding the hearing of the arbitral proceedings.
    - v. Whether the Court should issue an order directing the Respondent do deposit an amount of KSH. 10,500,000 which is the market value of the two plots per the sale agreement. The monies be deposited in a joint interest account opened in the names of the Advocates of the parties pending the hearing of the arbitral proceedings.
    - vi. Cost be in the cause
  5. It was submitted that the interim measures sought would preserve evidence, protect assets or in some way maintain the status quo pending the outcome of the arbitral proceedings. In specific, it was emphasized that the applicant was primarily interested in vacant possession of the plots which the Respondent have maintained to have disposed of the Land without providing any evidence of transfer.
  6. Relying on the case of *Mrao versus First American bank of Kenya and 2 others* (2003) KLR, 125, it was argued that there was a high probability of success in the application since it was discernible that the Applicant's rights have been infringed upon. In the event the Arbitral award allows the Applicant to have vacant specific performance it will be unenforceable since the Land known as Nairobi / Block 82/8760 is alleged to be sold to 3rd parties.
  7. It was also submitted that the Respondent has refused to issues vacant possession to Applicant and since she is opposed to compensation, there shall be no prejudice visited upon if their land known as Nairobi Block 69 (South B)/180, which is the respondent known asset is preserved for purposes of enforcing the arbitral award. It was also submitted that the Respondent scheme on the sale of Nairobi/



Block 82/8760 was a fraudulent scheme ab initio. The SACCO was established a long of time ago and ever since its initiation it has been in the business of collecting innocent purchasers monies and denying them rights to ownership. Relying on public test principle it was argued that the interest of justice would be met if injunctive orders are granted. It was submitted that the criteria set out in *Safaricom Limited versus Ocean Viva Beach Hotel Limited and 2 others*, Civil Application No. 327, (2019) eKLR had been meet and as such issuance of the interim orders was aimed at ensuring parties enjoy equal footing before the arbitration is concluded.

8. The application was opposed by the Respondent's submissions dated 27<sup>th</sup> October 2023. It was submitted that the interim orders are untenable and would not fall within the Court's consideration since it can usurp the jurisdiction of the arbitrator. Relying on the case of *American Cynamid v Ethicon* [1975]1 ALL ER 504, it was argued that the Applicant has not proved that the Respondent would be adequately compensated in the event she succeeds at the arbitration. It was also argued that there was no indicative signs that the Respondent was frustrating the Applicant's rights. As an organization that was in operation since 1972 with an active membership of 1500 members and regulated by SASRA, it was submitted that the Applicant did not prove the possibility of failure to honour any decrees of the Court.
9. Having considered the said application, it is not desirable for the court to go into the merits of the dispute but only determine whether a prima facie case has been established. Upon perusing the application and rival submissions, the main issue for determination is whether interim orders sought in the application dated 22<sup>nd</sup> August 2023 are merited pending the hearing and determination of the intended arbitration?
10. Section 7(1) of the *Arbitration Act* provides as follows:
  - “(1) It is not incompatible with an arbitration agreement for da party to request the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”
11. The principles that should guide the court in determining an application for interim measure of protection under Section 7 of the *Arbitration Act* were clearly laid down in several authorities including the case of *Portlink Limited -v- Kenya Railways Corporation* (2015) eKLR as follows:
  - “...In issuing an interim measure of protection as provided in Section 7 the court's determination of the parties dispute is restricted to take the following into account: -
  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....”
12. In the instant case, there exists an arbitration clause in the respective sale agreements. The perusal of the evidence placed before us confirms that an arbitrator has been appointed and the matter was scheduled to commence. The letter dated 11<sup>th</sup> May 2023 suggests that the Respondent acknowledges



the Applicant's claim and is willing to settle the same. For this reason, I am convinced that it is prudent to preserve the the suit property.

13. In the foregoing, the Court hereby finds that the Application dated 22<sup>nd</sup> August 2023 is merited and the same is allowed in the following terms:
- i. An order of injunction is hereby issued against the Directors of Sauti Savings and Credit Cooperative Limited, their agents and/or servants restraining them from commencing, continuing or concluding any transactions with regards to LR. No. 209/3693 now Nairobi Block 69 (South B)/ 180 pending the completion of the arbitral proceedings.
  - ii. The Respondent is hereby directed to deposit the amount of Ten million Five Hundred thousand (Kshs.10.500,000) in a joint interest-bearing account opened in the names of the advocates of the parties within 30 days from today.
  - iii. Each party is at liberty to apply.
  - iv. Each party shall bear own costs of the application.
14. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF NOVEMBER 2023.**

**E. K. WABWOTO**

**JUDGE**

In the presence of: -

Ms. Shamila for the Applicant.

Ms. Mutu for the Respondent.

Court Assistant; Caroline Nafuna.

