



Mohamed v Ocean View Limited & 2 others (Environment & Land Case 57 of 2022) [2023] KEELC 21589 (KLR) (7 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21589 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 57 OF 2022
LL NAIKUNI, J
NOVEMBER 7, 2023**

BETWEEN

MOHAMED YUSUF MOHAMED PLAINTIFF

AND

OCEAN VIEW LIMITED 1ST DEFENDANT

NYALI VIEW LIMITED 2ND DEFENDANT

NATIONAL BANK OF KENYA LIMITED 3RD DEFENDANT

RULING

I. Introduction.

1. For the determination by this Honourable Court through this Ruling are two (2) Notices of Motion applications. The first one dated the 24th May, 2022 was brought under a Certificate of urgency by the Plaintiff herein, Mohamed Yusuf Mohamed while the second one dated 9th June, 2022 by the 1st and 2nd Defendants herein, Ocean View Limited and Nyali View Limited respectively. In a nutshell, the parties have sought on one hand to be granted injunctive orders against dealing with the suit land while on the other, for the Joint Venture matter to be referred to an Arbitration forum for adjudication and final determination.
2. Upon service each of the Respondents filed their responses accordingly. For good order, the Honourable Court will deal with each of these applications separately but simultaneously. Further, the parties are just referred to as “The Plaintiff (s)” and “The Defendants” to avoid causing any confusion.

II. The Notice of Motion application dated 24th June, 2022 by the Plaintiff’s case

3. The application is premised on the provisions of Sections 1A and 3A of the Civil Procedure Act, 2010 and Order 40 Rule 1 of the Civil Procedure Rules, 2010. It sought for the following orders: -



- a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Pending hearing and determination of this suit, there be and is hereby issued and an order of injunction to restrain the Defendants jointly and severally from selling, further charging, transferring, occupying developing or in any other manner dealing with the suit properties known as L.R. NO. 2263 (ORIGINAL NO. 1674/2) situated in Nyali, Mombasa County.
 - e. Pending hearing and determination of this suit, there be and is hereby issued and an order of injunction to restrain the 3rd Defendant from selling the properties known as L.R NO. 2263 (ORIGINAL NO.1674/1) and LR NO.2264 (ORIGINAL NO.1674/2) in realization of the security created over the same in the form of charge, further charge or any other security.
 - f. Costs of this application be provided for.
4. The Application is based on the grounds, testimonial facts and averments contained in the 27 Paragraphed Supporting Affidavit sworn by MOHAMED YUSUF MOHAMED, the Plaintiff herein and dated on 24th May, 2022 together with annexures marked as “MM” annexed hereto. He deposed that:-
- a. On or about 29th September 2011, the 1st Defendant and himself entered into a Joint Venture Agreement under which the 1st Defendant agreed to develop forty (40) housing units on his properties known as L.R NO. 2263 (ORIGINAL NO.1674/1) and L.R NO.2264 (ORIGINAL NO.1674/2) (Hereinafter jointly referred to as “The Suit Property”). Annexed herewith and marked as “MM - 1” was a true copy of the Joint Venture Agreement dated 29th September 2011.
 - b. Under the Joint Venture Agreement, his obligation was to avail the land for the development (the suit property) which was his contribution to the venture while the 1st Defendant was responsible for the full financing of the project.
 - c. It was also a term of the Joint Venture Agreement that the 1st Defendant would pay him as um of Kenya Shillings Thirty Million (Kshs. 30, 000, 000.00/=) as premium and that he was entitled to six (6) apartments on the corner frontage from the ground floor to the third floor of approximately 2500 square feet in size which was equivalent to 15% of the total venture. The number of apartments due to himself was subsequently reduced to 5 apartments after one of the apartments, Apartment B10 was sold out. However, since the number of apartments ultimately developed were fifty four (54) rather than fourty (40), the number of apartments which he became entitled to increased to seven (7) apartments being 15% of the total number of the units.
 - d. By mutual agreement of the parties dated 4th July 2013, it was agreed that the development on the suit property which was to be done by the 1st Defendant now be undertaken by the 2nd Defendant. The 2nd Defendant accordingly consequently and subsequently assumed all obligations and responsibilities of the 1st Defendant under the Joint Venture Agreement.
 - e. Pending completion and handing over of the apartments due to the Plaintiff, it was agreed that the Plaintiff would retain 15% share of the suit property while 85% share thereof was to be transferred and registered in the name of the 2nd Defendant as commitment and security for



the performance of the Joint Venture Agreement. Accordingly, on or about 16th March 2012, the Plaintiff transferred his 85% share of the suit property to the 2nd Defendant and retained 15% share thereof.

- f. Further, it was a term of the Joint Venture Agreement that the Plaintiff would be paid Kenya Shillings Sixty Thousand (Kshs. 60,000.00) per month for vacating the subject property towards which payment was to take care of the Plaintiff's costs of alternative accommodation. The 1st and 2nd Defendants failed to pay to the Plaintiff the said amount which had now accumulated to a sum of Kenya Shillings One Million Nine Twenty One Thousand Four Hundred and Nine Hundred and Six cents (Kshs. 1,921,409.06) inclusive of interest which amount continued to accrue.
- g. Although the 1st and 2nd Defendants commenced construction of the housing units in partial fulfillment of their obligations under the Joint Venture Agreement, they deliberately failed, refused, declined and neglected to complete the construction within the agreed period of 24 months or at all.
- h. Further, the units partially constructed by the 1st and 2nd Defendants failed to meet and/or conform to the agreed standards in terms of size (built up area), finishes, workmanship and general quality. The total built up area per unit in respect of the apartments due to the Plaintiff as partially constructed by the 1st and 2nd Defendants was 2,337.34 square feet instead of 2,500 square feet which was what was agreed upon.
- i. The 1st and 2nd Defendants breached the terms of the Joint Venture Agreement and deliberately failed to discharge their obligations as agreed.
- j. Further to their breach of the Joint Venture Agreement as pleaded herein, the 2nd Defendant charged the suit property to National Bank of Kenya Limited, the 3rd Defendant herein vide a charge dated 19th August 2014 without approval, authority, consent and participation of the Plaintiff who was the registered owner of 15% share of the suit property.
- k. The charge was created by the 2nd and 3rd Defendants to secure a loan of a sum of Kenya Shillings Two Hundred and Fourty Five Million Fifty Thousand (Kshs.245,050,000.00/=) which amount was unilaterally disbursed to the 2nd Defendant by the 3rd Defendant without knowledge and participation of the Plaintiff.
- l. The 2nd Defendant charged the entire suit property to the 3rd Defendant yet the 2nd Defendant only held 85% share thereof which share in any event was only limited to securing the Joint Venture Agreement but did not give the 2nd Defendant any rights to charge the property.
- m. The charge over the suit property which led to the disbursement of a sum of Kenya Shillings Two Hundred and Fourty Five Million (Kshs. 245,000,000.00/=) by the 3rd Defendant in favour of the 2nd Defendant was created fraudulently and illegally and is therefore illegal, null and void.
- n. The 3rd Defendant unilaterally disbursed a sum of Kenya Shillings Two Hundred and Fourty Five Million (Kshs. 245,000,000.00/=) to the 2nd Defendant yet the Plaintiff held 15% share of the charged property.
- o. As a consequence of the Defendants' actions as pleaded herein, the Plaintiff had suffered loss and damage which the Plaintiff held the Defendants liable for jointly and severally.



- p. Further, the Plaintiff averred that since the Joint Venture Agreement collapsed as a consequence of the Defendants' actions as pleaded herein, the Plaintiff was entitled to a reversal and retransfer of the 85% share of the suit property held by the 2nd Defendant back to the Plaintiff.
- q. It was in the interest of justice that the application be allowed.
- r. There was a real danger that if this application was not allowed, the 1st and 2nd Defendants may sell the partially completed apartments on the suit property since they had previously sold some of the apartments to third parties.
- s. There was a further real danger that if this application was not allowed, the 3rd Defendant may move to sell the suit property in realization of the security created over the same to secure the loan of a sum of Kenya Shillings Two Hundred and Forty Five Million (Kshs. 245,000,000.00/=).
- t. It was therefore in the interest of justice that this application be allowed to avoid the eventualities described above from taking place.

III. The 3rd Respondent's Replying Affidavit to the Plaintiff's application dated 24th May, 2022

- 5. The 3rd Respondent opposed the application dated 24th May, 2022 by the Plaintiff through a 36th Paragraphed Replying Affidavit and annexures marked as "NBK" annexed hereto where they deposed that:
 - a. The 3rd Respondent was a stranger to the averments made at Paragraphs 1-10, 18-20, and 22-24 of the Supporting Affidavit. The 3rd Respondent was not a part to the Joint Venture Agreement and therefore could not speak to the same.
 - b. In strict response to Paragraphs 11-17, 21 and 25-27, the 3rd Respondent unequivocally denied the contents of the cited Paragraphs and reiterated its version of events as herein below.
 - c. The 2nd Respondent approached the 3rd Respondent seeking a Musharaka-Ending-With-Ownership facility (hereinafter "the Facility") to finance the construction of 55 apartments on the property known as Sub - division Nos 2263 (Original No.1674/1) and 2264 (Original No.1674/2) Section I Mainland North on Links Road, Nyali Area Mombasa.
 - d. A Musharaka Facility was a joint enterprise or partnership structure used in Islamic Banking. Under the Joint enterprise or partnership, the parties share in the profit and losses of the enterprise. In a diminishing Musharaka or otherwise Musharaka-Ending-With-Ownership one party's share in the enterprise was drawn down and transferred to the other party until the receiving party fully owned the enterprise.
 - e. On 26th May 2014 the 3rd Respondent issued the 2nd Respondent with a Letter of Offer on the aforesaid facility, the terms and conditions of which included but were not limited to the following: -



Value of the Facility and Facility Limit	Kshs.245,000,000
2 nd Respondent's share of the Investment	27.1% being Kshs.91,000,000
3 rd Respondent's share of the Investment	72.9% being Kshs.245,000,000
Total Investment Value	Kshs.336,000,000
Repayment Period	48 months with a moratorium on principal and profit of 18 months
Repayment method	Bullet repayment of the profit accumulated during the moratorium at the end of month 18 and thereafter monthly repayment of principal and profit from months 19 to 48
Profit Rate	15% per annum subject to annually review based on the three months average T-Bill rates.
Security to be taken	First ranking charge of Kshs. 245,000,000/- over subdivision No.2263 (Original No.1674/1) and No. 2264 (Original No. 1674/2) Section I Mainland North

- f. On 25th June 2014 the 2nd Respondent accepted the 3rd Respondent's Letter of Offer dated 26th May 2014. In accordance with the terms and conditions thereto the 2nd Respondent executed a Musharaka-Ending-With-Ownership Financing Agreement, a charge over Land Reference No.2263 (Original No.1674/1) and 2264 (Original No.1674/2), a Joint Individual Guarantee and Indemnity and provided the 3rd Respondent with a Valuation Report over Land Reference No.2263 (Original No.1674/1) and 2264 (Original No.1674/2) specifying the value of the property at the time of the Agreement and the projected value of the property upon completion of construction. (Annexed hereto and marked as "NBK - 2", "NBK - 3", "NBK - 4", "NBK - 5" were true copies of the Musharaka-Ending-With-Ownership Financing Agreement, the charge dated 19th August 2014, the Joint Individual Guarantee and Indemnity dated 18th September 2014 and the Valuation Report dated 27th August 2015).
- g. Contrary to the averments by the Plaintiff, the charge dated 19th August 2014 over the property known as Land Reference No.2263 (Original No.1674/1) and 2264



(Original No.1674/2), was entered into between Nyali View Limited and Mohamed Yusuf in their capacity as “Chargors”, Nyali View Limited in its capacity as “Borrower” and National Bank of Kenya Limited in its capacity as the “Bank” and financier.

- h. The Charge was executed by the directors and secretary of Nyali View limited at Pages 33 and 35 of the Agreement. The Charge was also executed by Mr. Mohamed Yusuf; the Plaintiff/Applicant herein, and witnessed by an Advocate at page 34 of the Agreement. In addition, the Plaintiff/Applicant’s wife provided spousal consent for the charge, duly executed and witnessed by an Advocate.
- i. The Charge dated 19th August 2014, was properly registered with the Lands Registry on 9th September 2014, and all requisite duties paid.
- j. On 25th January 2016 the moratorium on the principal and profit of the facility lapsed. Accordingly, on the said date the 2nd Respondent was obligated to pay the 3rd Respondent the profit accumulated over the 18 months that the moratorium had been in effect. Thereafter, the 2nd Respondent was obligated to pay the 3rd Respondent on a monthly basis the principal and profit envisaged in the facility until completion.
- k. In breach of the terms and conditions of the Letter of Offer dated 26th May 2014 the 2nd Defendant failed to pay the 3rd Defendant a bullet payment of the profit accumulated over the 18 months that the moratorium had been in effect. The 2nd Defendant merely made payments into the escrow account which the 3rd Defendant had to allocate first towards repayment of the profit accumulated over the 18 months that the moratorium was in effect and then secondly towards the monthly repayment of the principal and profit amount envisaged in the facility until completion.
- l. In any event, the 2nd Defendant failed to repay the 3rd Defendant for the principal and profit amounts as and when they fell due in accordance with the facility and were thus in arrears.
- m. Vide a letter dated 7th September 2017, the 2nd Defendant wrote to the 3rd Defendant seeking a restructuring of the facility and additional financing in the following terms:-
 - i. The 3rd Defendant grant the 2nd Defendant an addition facility of a sum of Kenya Shillings Seventy Million (Kshs. 70, 000, 000.00/=) to enable the Applicant complete construction and sell the apartments at market price;
 - ii. Once construction was completed the 2nd Defendant was to collect the outstanding Kenya Shillings Seventy Million (Kshs. 70, 000, 000.00/=) from the buyers of the 23 units which were presold and deposit the same with the 3rd Defendant towards the reduction of the facility;
 - iii. The 2nd Defendant expected completion of construction within 4 months ending in December 2017, thereafter the 2nd Defendant would aggressively push to offload 31 units at a sum of Kenya Shillings Seventeen Million (Kshs.17, 000, 000.00/=) each;
 - iv. The 2nd Defendant sought a moratorium on both the profit and principal for 16 months with the option of bullet payment however the 2nd Defendant shall first settle the outstanding profit arrears;



- v. All the sale proceeds should have been deposited into an escrow account with the 3rd Defendant which would be utilized towards the repayment of the facility;
 - vi. The 3rd Defendant was to release the sub - leases for 23 units on each buyer clearing the outstanding balances payable i.e. a sum of Kenya Shillings (Kshs. 70, 000, 000.00/=), commencing with 4 units that have been fully paid for;
 - vii. According to these calculations the 2nd Defendant shall have a net excess buffer of a sum of Kenya Shillings Two Hundred and Eighty Million (Kshs. 280, 000, 000.00/=) which should have been used towards the settlement of profit and any price influx.
- n. Simultaneously, the parties entered into a second Charge Agreement dated 27th November 2017 over the property known as Subdivision No.20946/I/MN (C.R.69348) being a consolidation of Land Reference No.2263 (Original No.1674/1) and 2264 (Original No.1674/2) in order to reflect the change in title. The terms and conditions of the Second Charge Agreement were a replica of those contained in the first Charge Agreement dated 19th August 2014. (Annexed hereto and marked as “NBK - 7” is a true copy of the second charge agreement dated 27th November 2017).
- o. The Charge was executed by the directors and secretary of Nyali View limited at pages 33 and 35 of the Agreement. The Charge was also executed by Mr. Mohamed Yusuf; the Plaintiff herein, and witnessed by an Advocate at page 34 of the Agreement. In addition, the Plaintiff's wife provided spousal consent for the charge, duly executed and witnessed by an Advocate. The Charge dated 27th November 2017, was properly registered with the Lands Registry on 8th December 2017 and all requisite duties paid.
- p. The 3rd Defendant approved the 2nd Defendant's request for restructuring of the facility and additional financing through an offer letter of addendum dated 20th December 2017. The 3rd Respondent specified that it had approved the 2nd Defendant's request on an exceptional basis and on the following varied terms:-



Repayment Period	Moratorium on principal for 12 months up to 15 th December 2018. Profit repayment shall continue on a monthly basis
Covenants	The 2 nd Respondent shall appoint a marketing manager immediately and not later than 3 months
The discharge of sub leases will be against receipt of full purchase price or/ and suitable professional undertaking supported by a Bank undertaking	
All the sales proceeds shall be banked in an Escrow Account held by the 3 rd Respondent	
The sale agreements for the remaining units shall be undertaken by a lawyer appointed by 3 rd Respondent with Bank interest duly noted	
The 2 nd Respondent shall settle default damages at 2% for the period in which they have been in default	
On acceptance of this offer the 3 rd Respondent shall charge an appraisal of 1%	
All other terms and conditions remain as stipulated in the Letter of Offer dated 26 th May 2014	

- q. The 2nd Defendant consciously executed the Letter of Addendum in full knowledge and acceptance of the terms and conditions contained therein and in consideration of its current arrears, project development and state of business. The 2nd Defendant again failed to adhere and fulfil its obligations under the Letter of Addendum. Through a letter dated 29th January 2019, the 2nd Defendant again approached the 3rd Defendant seeking to have the tenure of the facility extended for an additional 12 months and the profits accrued waived.
- r. The 3rd Defendant denied the 2nd Defendant's request vide a letter dated 19th February 2019 on account that the 2nd Defendant had failed to settle its debt when previously issued with extensions on numerous occasions. As at the date of the 3rd Defendant's letter the moratorium issued in the Letter of Addendum had since lapsed and as such the 2nd Defendant was obligated



to have repaid the 3rd Defendant the principal amount. Instead, the 2nd Respondent remained in arrears of a sum of Kenya Shillings Two Hundred and Fourty Three Million Fifty Three and Four Thousand and Thirty Seven Cents (Kshs. 243,053,004.37/=) in breach of the terms and conditions of the Letter of Addendum. As a result, the 3rd Defendant demanded the repayment of the outstanding sums within 30 days. (Annexed hereto and marked as “NBK - 9” is a true copy of the letter of demand dated 19th February 2019).

- s. Clause 9 of the Musharaka-Ending-With-Ownership Financing Agreement and Clause 7 of the Charge dated 27th November 2017 stipulated that an event of default included failure to pay back on the due date any amounts payable under or pursuant to the Agreements and the failure to comply with any term, condition, covenant or provisions of the Agreements. Further, Clause 8 of the Charge provides that the 3rd Defendant had the right to serve notice pursuant to the provision of Section 90 of the Land Act as a result of default. In the premises, the 3rd Defendant possessed a legal right to exercise statutory sale.
- t. A similar Application and Complaint, to the one pleaded herein by the Plaintiff, was equally filed by the 2nd Defendant on 5th February 2020 in the Commercial and Admiralty Division of the High Court at Mombasa in HCCC No.07 of 2020 - Nyalı View Limited – Versus - National Bank of Kenya. The above-mentioned Complaint and Application were subsequently withdrawn by the 2nd Defendant on or about 13th May 2021.
- u. The 2nd Defendant being indebted to the 3rd Defendant, was now inadvertently forum shopping through the Plaintiff, in a bid to prevent the 3rd Defendant from realizing its debt and exercising its lawful right of sale. The Plaintiff consciously executed the Charge dated 19th August 2014 and the Charge dated 27th November 2017 and was thereby estopped from alleging otherwise in respect of the validity and legality of the charges.
- v. The monies from the facility were dispensed to the 2nd Defendant in its capacity as the borrower. This was within the knowledge of the Plaintiff as it read as much on the Charges. The 2nd Defendant had filed the application for the facility and provided its accounting details as such. Accordingly, the 2nd Defendant had the responsibility of repaying the loaned facility. Had the Plaintiff wanted otherwise, nothing would have been easier than to request the Bank to deposit the borrowed sums into his account, and have him service the facility as well, which he did not.
- w. The 3rd Defendant was not entangled in the internal dealings between the Plaintiff and the 2nd Defendant. The 3rd Defendant was merely mandated to obtain the requisite approvals in order to secure its investment. In any event and without prejudice to the foregoing the Plaintiff had expressed in his Supporting Affidavit at Paragraphs 3 and 5 that under the Joint Venture, he was obligated to avail the suit property for development as his contribution to the venture, while the 2nd Defendant was to be responsible for the full financing of the project.
- x. The 3rd Defendant was a stranger to any losses or damages alleged to be incurred by the Plaintiff. Nevertheless, it was inconceivable, how the 3rd Defendant could by any stretch of the imagination be liable jointly, severally or at all for the alleged losses and damages of the Plaintiff.
- y. He believed that through the instant application the Plaintiff sought to have this Honourable Court enable the 2nd Defendant further delay in repayment of its outstanding arrears and/or further deprive the 3rd Defendant of its lawful right to recover its debt in accordance with the



mutually agreed provisions of the Musharaka-Ending-With-Ownership Financing Agreement and the Charge dated 27th November 2017.

- z. If this Honourable court were inclined to restrain the 3rd Defendant from realizing its debt by exercising its statutory right of sale, the same would amount to a re-writing of the Agreements between the parties and an infringement of party autonomy and privity of contract. For the reasons outlined herein above, he believed that the instant application was unmerited, an abused of court and the same ought to be dismissed with costs.

IV. The Notice of Motion application dated 9th June, 2022 by the 1st and 2nd Defendants

- 6. The Notice of Motion application dated 9th June, 2022 by the 1st and 2nd Defendants sought for the following: -
 - i. That this Honourable Court be pleased to Stay this Suit and refer the matter and or dispute to Arbitration.
 - ii. That cost of this Application be provided for.
- 7. The application was brought under the provision of Section 59 of the Civil Procedure Act, Cap. 21 of the Law of Kenya, Order 46 Rule 1 of the Civil Procedure Rules, 2010 and Section 6 of the Arbitration Act 1995. It was premised on the grounds, testimonial facts and averments made out in the 6 Paragraphed Supporting Affidavit sworn by Abdulhakim Hamdi Abdi and dated on 9th June, 2022 and annexures annexed thereto. He deponed that:
 - a. He was one of the Directors of the 1st Defendant Company.
 - b. The Plaintiff's claim herein was based "inter alia on a Joint Venture Agreement executed on 29th September, 2011.
 - c. The said Joint Venture Agreement provided under Clause 11 thereof that any and all disputes arising shall be referred to Arbitration and or Alternate Dispute Resolution;
 - d. The Suit herein should not have been filed contrary to the Arbitration Clause in the Agreement;
 - e. The Suit herein was an abuse of the Court process.
 - f. There was need to Stay this Suit forthwith so as to allow the matter to be referred to Arbitration and or Alternative Dispute Resolution method.

V. 1st and 2nd Defendants' Replying Affidavit to the application dated 9th June, 2022

- 8. The 1st and 2nd Defendants' responded to the Notice of Motion application dated 9th June, 2022 and response to the Replying affidavit by the Plaintiff sworn on 27th June, 2022 where the Mohamed Yusuf Mohamed averred that:
 - a. He strongly opposed the application.
 - b. From the onset, the application was and vexatious and was only brought to delay the just and expedient determination of this case.
 - c. This case could not be referred to arbitration because of the following reasons:
 - i. The issues of fraud pleaded in the Plaintiff could not be determined through arbitration.



- ii. The 2nd Defendant was not a party to the Joint Venture Agreement and was not bound by the arbitration clause therein. This case involving the 2nd Defendant could not therefore be referred to arbitration.
- d. Further, there was no arbitrator who could adjudicate the matter because the arbitrator appointed by consent of the parties under Clause 11 of the Joint Venture Agreement one Mr. Mohammed Balala, stepped aside leaving him with no option but to resort to court. This was explained in the subsequent paragraphs.
- e. Vide a letter dated 4th April 2022 written on his behalf by his advocates on record, he challenged the competence of Mr. Mohammed Balala to act as an arbitrator since he was the one who prepared the Joint Venture Agreement and was a potential witness.
- f. Vide a letter dated 4th April 2022, Mr. Mohammed Balala responded to his advocates on record and indicated that he never had instructions to act for any party in an arbitration and was not aware of a dispute between the dated 4th April 2022 by Balala & Abed Advocates.
- g. Vide a letter dated 6th April 2022, he instructed his advocates on record to push on and get confirmation from Mr. Mohammed Balala that he had ceased being the arbitrator due to conflict of interest.
- h. Vide a letter erroneously dated 4th April 2022 as it was in response to a letter dated 6th April 2022, Mr. Mohammed Balala confirmed that he was no longer the arbitrator and had ceased being the arbitrator in 2013.
- i. Since Mr. Mohammed Balala, the arbitrator had been disqualified and ceased to hold office, it was not possible to invoke Clause 11 of the Joint Venture Agreement which was very specific that the dispute was to be referred to Mr. Mohammed Balala and not any other person for arbitration.
- j. The 1st and 2nd Defendants had not disclosed who would do the arbitration since the arbitrator appointed in the Joint Venture Agreement ceased to hold office.
- k. An arbitration clause which was no longer applicable for want of arbitrator and could not be invoked.
- l. They urged the Court to dismiss this application.

VI. Submissions

- 9. The Court directed that the Notices of Motion application dated 24th May, 2022 and 9th June, 2022 be disposed of by way of written submissions. Pursuant to that, apparently none of the parties obliged and a ruling date was reserved on Notice by Court accordingly and the Court retired to write the ruling without the written submissions.

VII. Analysis and determination

- 10. I have carefully read and put into account all the filed pleadings, the authorities relied on and the relevant provisions of the appropriate and enabling laws with regard to the applications filed in this court.
- 11. In order to arrive at an informed decision, I have framed the following three (3) salient issues for determination. These are:-



- a. Whether the court should refer this matter to arbitration in accordance with provisions of Section 6 of the [Arbitration Act](#) of 1995.
- b. Whether the Notice of Motion application dated 24th May, 2022 by the Plaintiff meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010
- c. Who will bear the Costs of the two Notice of Motion applications 25th May, 2022 and 9th June, 2022.

ISSUE NO. a). Whether the court should refer this matter to arbitration in accordance with provisions of section 6 of the [Arbitration Act](#) of 1995?

12. Under this Sub heading, the Honourable Court feels it imperative to dispose off the preliminary issue of staying this proceedings so as to have the matter referred for arbitration as provided for from the provisions of the Joint venture Agreement herein. The 1st and 2nd Defendant urged the Court to give effect to the intentions of the parties herein expressed in their Joint venture agreement. According to the 1st and 2nd Defendants, Clause 11 of the Agreement provides that all disputes shall be resolved through Arbitration and or Alternative Dispute Resolution methods and they sought for a stay of this suit to be able to resort to arbitration.
13. Principally, it is a hallowed principle in law that the duty of the court is purely to enforce contracts between parties. The courts have no business re-writing contracts for parties. This legal position was well founded in the case of:- “Housing Finance Company of Kenya Limited – Versus - Njuguna LLR No. 1176, Hon Justice Mwera (retired) held that:

“ Courts shall not be the fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they chose. This they must do together with the meeting of minds.....”
14. From the surrounding facts and inferences herein, the Plaintiff and the 1st Defendant in this matter voluntarily entered into and executed a Joint Venture Agreement dated 29th September, 2011, by mutual agreement of the parties dated 4th July 2013, it was agreed that the development on the suit property which was to be done by the 1st Defendant now be undertaken by the 2nd Defendant. This Honourable Court takes note that the 3rd Defendant was not a party to this agreement.
15. To further this point, I am compelled to cite the case of: ”Nyutu Agroviet Limited – Versus -s Airtel Networks Ltd (2015) eKLR , the Court of Appeal was emphatic that Courts should uphold the party autonomy concept’ where parties have incorporated an arbitration clause in their contract. The court stated that where parties incorporate the arbitration clause in the contract between them, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails.
16. The 1st and 2nd Defendant contends that the Court lacks the jurisdiction to handle this mater at this stage as it was instituted before exhaustion of the alternative dispute resolution mechanism being arbitration. They urge the court to lay down its tools and not to make one more step in this matter. The Plaintiff’s position is that this court has the jurisdiction to hear this matter. An arbitration clause according to the Plaintiff, does not necessarily oust the jurisdiction of the court but only prescribes arbitration as a procedure that parties intend to adopt in settling their grievances.



17. Additionally, the Plaintiff argued that the issues of fraud pleaded in the Plaintiff cannot be determined through arbitration. The 2nd Defendant was not a party to the Joint Venture Agreement and is not bound by the arbitration clause therein. This case involving the 2nd Defendant cannot therefore be referred to arbitration. Further, there is no arbitrator who can adjudicate the matter because the arbitrator appointed by consent of the parties under Clause 11 of the Joint Venture Agreement one Mr. Mohammed Balala, stepped aside leaving me with no option but to resort to court. This is explained in the subsequent paragraphs and evidenced by letters provided for by the Plaintiff as annexure MY 1 to MY 4.
18. The legal position is that a party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.
19. On that issue, I agree with the Court's holding in the case of:- "Eunice Soko Mlagui – Versus - Suresh Parmar and 4 others (2017) eKLR. The Court stated that the provision of Section 6 of the Arbitration Act is a specific statutory provision on stay of proceedings and referral of a dispute to arbitration where parties had entered into an agreement with an arbitration clause. The said provision of the law prescribes the conditions under which a court can stay proceedings and refer a dispute to arbitration. Its intention is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution. The Court stated that there was nothing in that provision that could be said to be derogating or subverting the constitutional edicts as regards alternative dispute resolution.
20. In the case of "Raila Odinga – Versus - IEBC & 3 Others , the Supreme Court observed that Article 159 (2), (d) of the Constitution simply means that a court of law should not apply undue attention to procedural requirements at the expense of substantive justice. The provision of Article 159 was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the courts.
21. The Honourable Court is also put on notice that a contract being a voluntary obligation the law places a high value on ensuring parties have truly consented to the terms that bind them. The law also grants parties broad freedom to agree on the content of the agreement whose terms are incorporated through express promises. Those terms, in case of a disagreement are interpreted by the courts to seek out the true intention of the parties, from the perspective of an objective observer and, in the context of the parties' bargaining environment.
22. In the case of: "National Bank of Kenya Limited – Versus - Pipleplastic Samkolit (K) Limited & Another [2002] EA 503 as follows:-

“ A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”
23. According to the Plaintiff since Mr. Mohammed Balala, the arbitrator had been disqualified and ceased to hold office, it was not possible to invoke Clause 11 of the Joint Venture Agreement which was very specific that the dispute was to be referred to Mr. Mohammed Balala and not any other person for arbitration.
24. It is trite law that courts cannot re-write contracts for parties and the court cannot start speculating about the intention of the parties to the contract. The Court has had the pleasure of going through Clause 11 of the Joint Venture agreement which appointed Mr. Balala as the arbitrator and by virtue of the fact that he no longer holds that office and there being no alternative clause to counteract the



said clause that appointed Mr. Balala as the arbitrator for any dispute among the Plaintiff and the 1st Defendant, the Honourable Court cannot interfere with the terms of the agreement.

25. However, I must bring to the attention of the parties to the effect that the court is not at all persuaded to allow the prayer made on arbitration reason being that the Joint Venture Agreement which forms the subject issues in this suit was not entered into by all the parties in this suit and therefore they were not privy to it. Therefore the prayer for stay of these proceedings in order to refer matter for arbitration, therefore must fail.

ISSUE NO. b). Whether the Notice of Motion dated 24th May, 2022 by the Plaintiff meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010?

26. Under this Sub heading, the Honourable Court notes that the application dated 24th May, 2022 by the Plaintiff herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst numerous other provisions of the law. Which provides as follows: -

Order 40, Rule 1

Where in any suit it is proved by affidavit or otherwise—

- a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

27. Ideally, the principles applicable in an application for an injunction were laid out in the celebrated case of “Giella – Versus - Cassman Brown & Co Ltd (1973) EA, 358”, where it was stated:-

“First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

28. The above three (3) conditions set out in “Giella (supra)”, in a sequential manner need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others (2014) eKLR”,

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be



satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

29. In dealing with the first condition of "prima facie case", the Honorable Court guided by the definition melted down in "MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 others (2003) eKLR",

"So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

30. The Plaintiff contended that on or about 29th September 2011, the Plaintiff and the 1st Defendant entered into a Joint Venture Agreement under which the 1st Defendant agreed to develop forty (40) housing units on the Plaintiff's properties known as L.R NO. 2263 (ORIGINAL NO.1674/1) and L.R NO.2264 (ORIGINAL NO.1674/2). It was a term of the Joint Venture Agreement that the Plaintiff's obligation was to avail the suit property as his contribution to the venture while the 1st Defendant was responsible for the full financing of the project.
31. It was also a term of the Joint Venture Agreement that the 1st Defendant would pay the Plaintiff Kshs. 30 million as premium and that the Plaintiff was entitled to 6 apartments on the corner frontage from the ground floor to the third floor of approximately 2500 square feet in size which was equivalent to 15% of the total venture. The number of apartments due to the Plaintiff was subsequently reduced to 5 apartments after apartment B10 was sold out. However, since the number of apartments ultimately developed were 54 rather than 40, the number of apartments which the Plaintiff became entitled to increased to 7 apartments being 15% of the total number of the units.
32. By mutual agreement of the parties dated 4th July 2013, it was agreed that the development on the suit property which was to be done by the 1st Defendant now be undertaken by the 2nd Defendant. The 2nd Defendant accordingly consequently and subsequently assumed all obligations and responsibilities of the 1st Defendant under the Joint Venture Agreement. Pending completion and handing over of the apartments due to the Plaintiff, it was agreed that the Plaintiff would retain 15% share of the suit property while 85% share thereof was to be transferred and registered in the name of the 2nd Defendant as commitment and security for the performance of the Joint Venture Agreement. Accordingly, on or about 16th March 2012, the Plaintiff transferred his 85% share of the suit property to the 2nd Defendant and retained 15% share thereof.
33. Further, it was a term of the Joint Venture Agreement that the Plaintiff would be paid Kenya Shillings Sixty Thousand (Kshs. 60,000.00) per month for vacating the subject property towards which payment was to take care of the Plaintiff's costs of alternative accommodation. The 1st and 2nd Defendants failed to pay to the Plaintiff the said amount which has now accumulated to a sum of Kenya Shillings One Million Nine Twenty One Thousand Four Hundred and Nine Six cents (Kshs. 1,921,409.06/=) inclusive of interest which amount continues to accrue. Although the 1st and 2nd Defendants commenced construction of the housing units in partial fulfillment of their obligations



under the Joint Venture Agreement, they deliberately failed, refused, declined and neglected to complete the construction within the agreed period of 24 months or at all.

34. The 3rd Defendant in response to the Application argued that the 2nd Defendant approached the 3rd Defendant seeking a Musharaka – Ending with ownership facility to finance the construction of 55 apartments on the property known as Subdivision Nos 2263 (Original No.1674/1) and 2264 (Original No.1674/2) Section I Mainland North on Links Road, Nyali Area Mombasa. A Musharaka Facility is a joint enterprise or partnership structure used in Islamic Banking. Under the Joint enterprise or partnership, the parties share in the profit and losses of the enterprise. In a diminishing Musharaka or otherwise Musharaka-Ending-With-Ownership one party's share in the enterprise is drawn down and transferred to the other party until the receiving party fully owns the enterprise which the 3rd Defendant issued the 2nd Defendant with on 26th May, 2014 evidenced by a letter of offer for the aforesaid facility dated the same day which the 2nd Defendant accepted on 25th June, 2014. Contrary to the averments by the Plaintiff, the charge dated 19th August 2014 over the property known as Land Reference No.2263 (Original No.1674/1) and 2264 (Original No.1674/2), was entered into between Nyali View Limited and Mohamed Yusuf in their capacity as “Chargors”, Nyali View Limited in its capacity as “Borrower” and National Bank of Kenya Limited in its capacity as the “Bank” and financier.
35. The Charge was executed by the directors and secretary of Nyali View limited at pages 33 and 35 of the Agreement. The Charge was also executed by Mr. Mohamed Yusuf; the Plaintiff/Applicant herein, and witnessed by an Advocate at page 34 of the Agreement. In addition, the Plaintiff/Applicant's wife provided spousal consent for the charge, duly executed and witnessed by an Advocate. In breach of the terms and conditions of the Letter of Offer dated 26th May 2014 the 2nd Respondent failed to pay the 3rd Respondent a bullet payment of the profit accumulated over the 18 months that the moratorium had been in effect. The 2nd Respondent merely made payments into the escrow account which the 3rd Respondent had to allocate first towards repayment of the profit accumulated over the 18 months that the moratorium was in effect and then secondly towards the monthly repayment of the principal and profit amount envisaged in the facility until completion.
36. In the case of “Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1”, the court held that:-
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”
37. Similarly, in the case of “Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd” the court held that:-
- “In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”
38. Regarding this first condition, the Plaintiff being the registered owner of the 15% share of the suit property and the 2nd Defendant charged the property without his knowledge and consent is enough to warrant the grant of an interlocutory order, I find that the Applicant has established that they have a prima facie case with a probability of success.
39. With regards to the second limb of the Court of Appeal in “Nguruman Limited (supra)”, held that,
- “On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an



injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

40. On the issue of whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. The Plaintiff have to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (supra)” provides an explanation for what is meant by irreparable injury and it states:-

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

41. It is not hidden that the suit property is at risk of being disposed of by the 3rd Defendant as it was charged in favor of the 2nd Defendant who had defaulted in making the loan repayments and the charge was without the knowledge and consent of the Plaintiff. Quite clearly this Honourable Court is alive to the fact that the Applicant may not be able to be compensated through damages as he has shown the court that its rights to the suit property by the by the continuous occupation . He has therefore satisfied the second condition as laid down in “Giella’s case”.

42. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of “Pius Kipchirchir Kogo vs Frank Kimeli Tenai (supra)” which defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff’ is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

43. In the case of “Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR”, the court dealing with the issue of balance of convenience expressed itself thus:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature



of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

44. The Plaintiff has contended that the balance of convenience tilts in his favour because he has stake in the suit property and if the same is sold he will lose his investment. Further it has equally been demonstrated that present application is premised on unfounded fear and apprehension. Therefore, a finding in favour of the Plaintiff would be the option that guarantees the lower risk of injustice. The balance of convenience therefore tilts in the Plaintiff’s favour.
45. The decision of “Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR” where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated
- “ The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”
46. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. In the case of:- “Robert Mugo Wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019] eKLR” where the Court in deciding on an injunction application stated;
- “ circumstances for consideration before granting a temporary injunction under Order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...”
47. Based on the facts and circumstances herein, I am convinced that if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff. In view of the foregoing, I find that the Plaintiff has met the criteria for granting of orders of temporary injunction.

ISSUE NO. c).Who will bear the Costs of Notices of Motion applications 25th May, 2022 and 9th June, 2022.?

48. Previously, I have well stated in my own precedents and most especially in the case of: “Sagalla Lodge Limited – Versus - Samuel Mazer Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR”, where I elaborately held:-

“

- “ 58. The Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.



The provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21st December, 2021.”

49. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. In this case, as Court finds that the Plaintiff has fulfilled the conditions set out under Order 40 Rule 1 of the Civil Procedure Rules, 2010, this application shall be deemed to have merit and is hereby allowed with costs to the Plaintiff as against the 1st, 2nd and 3rd Defendants jointly and severally.

VIII. Conclusion and Disposition

From the foregoing detailed analysis of the framed issues, the Honourable Court based on the principles of Preponderance of Probabilities and the balance of convenience, I do proceed to order as follows: -

- a. That the Notice of Motion application dated 25th May, 2022 be and is hereby found to have merit, hence it is allowed in its entirety.
- b. That the Notice of Motion application dated 9th June, 2022 be and is hereby found to lack merit hence it is dismissed.
- c. That an order of Temporary Injunction do hereby issue restraining the 1st, 2nd and 3rd Defendants herein jointly and severally from selling, further charging, transferring, occupying developing or in any other manner dealing with the suit properties known as L.R NO. 2263 (ORIGINAL NO.1674/1) and L.R NO.2264 (ORIGINAL NO.1674/2) situate in Nyali, Mombasa County pending hearing and determination of this suit.
- d. That for expediency sake this matter be fixed for full trial on 30th May, 2024. There be mention on 25th February, 2024 for purposes of conducting a Pre – Trial Conference and ascertaining full compliance under the provisions of Order 11 of the Civil Procedure Rules, 2010.
- e. That the Costs of the Notice of Motion application dated 25th May, 2022 and the Notice of Motion application dated 9th June, 2022 are awarded to the Plaintiff as against the 1st, 2nd & 3rd Defendants jointly and severally.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 7TH DAY OF NOVEMBER 2023.

.....
HON. JUSTICE LL NAIKUNI (MR.)

ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:-

- a. M/s. Yumna – the Court Assistant**
- b. No appearance for the Plaintiff.**
- c. No. appearance for the 1st Defendant**
- d. No appearance for the 2nd Defendant**



e. Mr. Dennis Nkareshia Advocate for the 3rd Defendant

