



**Primus Africa Limited v Nnebe; Mizizi Homes Limited (Interested Party) (Commercial Miscellaneous Application 025 of 2024) [2025] KEHC 264 (KLR) (Commercial and Tax) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 264 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL MISCELLANEOUS APPLICATION 025 OF 2024**

**H NAMISI, J  
JANUARY 23, 2025**

**BETWEEN**

**PRIMUS AFRICA LIMITED ..... APPLICANT**

**AND**

**FRANCIS CHARLES NOSIKE NNEBE ..... RESPONDENT**

**AND**

**MIZIZI HOMES LIMITED ..... INTERESTED PARTY**

**RULING**

1. On 14 August 2023, the Applicant filed a Notice of Motion seeking the following orders:
  - i. (spent)
  - ii. That pending the hearing and determination of this application inter partes, this Honourable Court be pleased to issue an injunction restraining the Respondent either by himself, his agents, his representatives, his servants and/or any other person authorised by him or otherwise from terminating the joint venture agreement dated 31 December 2020 and from throwing out or evicting the Plaintiff from the project site known as LR No. 3734/430 Chalbi Drive Lavington and from interfering with the plaintiff's continued implementation of the joint venture agreement or in any manner acting in breach of the express provisions of the said Joint Venture Agreement;
  - iii. That pending the hearing and determination of this Application inter partes, this Honourable Court be pleased to issue an injunction restraining the Respondent either by himself, his agents, his representatives, his servants and/or any other person authorised by him or otherwise



from violating the provisions of the Joint venture Agreement or acting in any other manner contrary to its express provisions and in particular Clause No. 19 thereof;

- iv. That an injunction do issue restraining the Respondent either by himself, his agents, his representatives, his servants and/or any other person authorised by him or otherwise in any manner whatsoever from terminating the Joint Venture Agreement dated 31 December 2020 and from throwing out or evicting the Plaintiff from the project site known as LR 3734/430 Chalbi Drive Lavington or from interfering with the plaintiff's continued implementation of the joint venture agreement or in any other way interfering with the project site pending the reference, hearing and determination of the dispute through the structured dispute resolution mechanism envisaged under Clause 19 of the Agreement dated 31 December 2020;
  - v. That the cost of this Application be borne by the Respondents.
2. By Notice dated 20 September 2024, the Respondent raised a Preliminary Objection on the following grounds:
- i. Section 7 of the *Arbitration Act* no. 4 of 1995 as read with Rule 2 of the Arbitration Rules 1997 require in mandatory terms that an application for interim measures as the Applicant's Application herein dated 14 August 2023 should be anchored in a suit;
  - ii. The Applicant's Application dated 14 August 2023 has been made vide a Notice of Motion and not vide Chamber Summons as required under Rule 2 of the Arbitration Rules 1997;
  - iii. There are no proceedings known in law in which a Notice of Motion can originate a suit hence the current application offends the provisions of Order 3 Rule 1 of the Civil Procedure Rules, 2010 as there is no substantive suit which the said application is anchored hence the orders sought are thus in vacuum;
  - iv. As a consequence, the suit herein is incompetent, frivolous, fatally defective and an abuse of the court process hence should be struck out with costs to the Respondent.
3. Parties were directed to canvass the Preliminary Objection by way of written submissions. The Interested Party did not file any submissions.

### **Respondent's Submissions**

4. The Respondent submitted that the Applicant has not properly moved the Court as required under Rules 2 of the Arbitration Rules 1997 which mandates that an application under Section 7 of the *Arbitration Act* No. 4 of 1995 be made by Chamber Summons within a suit. By failing to anchor its application in a suit, this Court lacks the requisite jurisdiction to hear and determine the application.
5. The Respondent further submitted that this Court would be void of jurisdiction to grant relief under Section 7 of the *Arbitration Act* if it is not moved in a manner provided under Rule 2 of the Arbitration Rules. The Application, having been filed in contravention of Rule 2 of the Arbitration Rules is fatally defective.
6. The Respondent relied on the cases of Scope Telematics International Sales Limited v Stoic Company Limited & another [2017] eKLR, Civil Appeal No.285 of 2015, Githaiga v Mogo Auto Limited (Miscellaneous Application E052 of 2024) [2024] KEHC 3253 (KLR) (Commercial and Tax) and Revival Holdings Limited v Grande Afrique Consulting [2021] eKLR.



## **Applicant's Submissions**

7. The Applicant submitted that the Preliminary Objection is misconceived. The Applicant contended that the preliminary objection is aimed at undermining the overriding objective of ensuring expeditious disposal of the instant application. It was the Applicant's submission that courts of law are constitutionally obligated to adopt an approach which prefers determination of cases on merits as opposed to procedural technicalities. The overriding objective is designed to ensure that the cases are dealt with justly. This includes ensuring that the parties are on an equal footing; saving expense; ensuring that the case is dealt with fairly and expeditiously; and dealing with the case in a way that is proportionate to the amount of money involved, the importance and complexity of the case and the parties' financial positions.
8. The Respondent relied on the cases of *Elite Earthmovers Limited v Machakos County Government & another [2020] eKLR High Court Miscellaneous Application No. 425 of 2019*, Joseph Kibowen Chemjor v William C Kiseru [2013] eKLR Environment and Land Court Miscellaneous Case No. 2 of 2013 and *Jetways Airlines Limited v Ocean Airlines Limited [2021] eKLR MISC. COMM. APPL. No. E521 of 2021*.

## **Analysis & Determination**

9. I have considered the Preliminary Objection and submissions filed by the respective parties. I have noted that the Applicant did not file a response to the Preliminary Objection but filed submissions.
10. The case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696* is notorious on the issue of what constitutes a preliminary objection where their Lordships observed thus:

“----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 a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

11. Going by the law as settled above and on the material before court, the preliminary objection raised herein is on the face of it a pure point of the law capable of finally disposing the application before the court.
12. Section 7 of the *Arbitration Act* provides for Interim measures by court 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.
13. Rule 2 of the Arbitration Rules provides that applications under sections 6 and 7 of the Act shall be made by summons in the suit.
14. I have considered the authorities cited by the Applicant. In the case of *Elite Earthmovers Limited v Machakos County Government & another [2020] eKLR High Court Miscellaneous Application No. 425 of 2019*, the Applicant referred this Court to the following paragraph:
- “In accordance to Section 7 of the *Arbitration Act*, that it is not incompatible with an arbitration agreement for a party to request from the High Court, before ordering arbitral proceedings, an interim measure of protection and for the High Court to grant the measure.”
15. In my view, this particular paragraph is of little assistance in the determination of the issue at hand.
16. The Applicant also referred to two other cases. In *Joseph Kibowen Chemjor v William C Kisera [2013] eKLR Environment and Land Court Miscellaneous Case No. 2 of 2013*, the Court opined thus:
- “There are times when all that a person wants is an order of court where the rights of the parties are not going to be determined. There is no action being enforced or being tried. Now, the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no action. In such instances, I think it is permissible for such a person to file a miscellaneous application. This is common and permissible where all that the party wants is a mere order from the court.”
17. In *Jetways Airlines Limited v Ocean Airlines Limited [2021] eKLR Misc. Comm. Appl. No. E521 of 2021*, in a matter similar to this, instituted by way of a miscellaneous application, the Court stated as follows:
- “As long as an applicant establishes a basis for the grant for an order for furnishing security that may protect or preserve the substance of the arbitral proceedings or prevent such proceedings from being rendered useless, then a court may make such an order under section 7 of the *Arbitration Act*.”
18. Similarly, I have considered the authorities cited by the Respondent in support of the Preliminary Objection. Of importance is the Court of Appeal case of *Scope Telematics International Sales Limited v Stoic Company Limited & another [2017] eKLR, Civil Appeal No.285 of 2015*, in which the Court dealt with the compliance with mandatory procedures in arbitral proceedings under the Act. The court observed as follows:
- “It must be borne in mind that the substantive provision that the 1st respondent invoked was Section 7 of the Act. The 1st respondent was seeking an interim measure of protection pending arbitration. The procedure applicable in such circumstances is clearly spelt out by Rule 2 of the Arbitration Rules, 1997. Suffice it to say, that the rule is couched in mandatory terms. Our jurisprudence reflects the position that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or Statute, that procedure should be strictly followed (See *Speaker of National Assembly vs. Njenga Karume [2008]*



1 KLR 425). The 1st respondent did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on Article 159 of *the Constitution* for the proposition that justice is to be administered without undue regard to technicalities. That Article also provides that alternative forms of dispute resolution mechanisms like arbitration should be promoted by the courts. There are however many decided cases to the effect that Article 159 of *the Constitution* should not be seen as a panacea to cure all manner of indiscretions relating to procedure.”

19. The above pronouncement by the Court of Appeal is the prevailing jurisprudence on the interpretation of Rule 2 of the Arbitration Rules, 1997. The decision is binding on this Court. The question and facts in the application herein are exactly the same as what was considered by the Court of Appeal in the above authority. Therefore, the result is that the Preliminary Objection is upheld.

20. The Notice of Motion dated 14 August 2023 is hereby struck out, with no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 23 DAY OF JANUARY 2025**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

**Delivered on virtual platform in the presence of:**

.....for the Applicant

.....for the Respondent

N/A.....for Interested Party

Libertine Achieng .....Court Assistant

