



REPUBLIC OF KENYA



**Jr Miles Construction Ltd v Bomi Engineering and Construction Limited & another
(Civil Suit E460 of 2024) [2025] KEHC 3286 (KLR) (Civ) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3286 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL SUIT E460 OF 2024
PM MULWA, J
MARCH 13, 2025**

BETWEEN

JR MILES CONSTRUCTION LTD APPLICANT

AND

BOMI ENGINEERING AND CONSTRUCTION LIMITED ... 1ST RESPONDENT

FIDELITY SHIELD INSURANCE COMPANY LIMITED 2ND RESPONDENT

RULING

1. The court is tasked with determining the 1st Respondent's Preliminary Objection filed on 24th June 2024, which challenges the court's jurisdiction. The 1st Respondent asserts that the dispute is subject to arbitration, as stipulated in clause 28 of the underlying agreement, and claims that the application before the court constitutes an abuse of the court process. The 1st Respondent seeks for the application and the plaint to be dismissed with costs.
2. The preliminary objection was heard by way of written submissions. The 1st Respondent filed its submissions dated 16th September 2024, and the Applicant responded on 17th September 2024. The court has carefully considered these submissions in determining the preliminary objection.
3. The 1st Respondent raises the issue of jurisdiction, which is a pure point of law. In the case of Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 others, Petition No. 10 of 2013 [2014] eKLR the Court held 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 the contract giving rise to the suit to refer



the dispute to arbitration...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.”

4. Based on the above cited authority I am satisfied that the preliminary objection as raised meets the threshold. I will thus determine the merit of the objection.
5. It is a well-established principle that jurisdiction is everything and without it a court has no power to make one more step but to down is tools (see Owners of the Motor Vessel “Lillian S” v Caltex Oil Kenya Ltd (1989) KLR).
6. In the case of Samuel Kamau Macharia & Anor v Kenya commercial Bank Ltd & 2 others (2012) e KLR. the court held:

“A Court’s jurisdiction flows from either the constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
7. The Respondent argues that the Applicant has failed to exhaust the dispute resolution mechanism provided for in the agreement. This failure, according to the Respondent, renders the suit premature. The Respondent contends that the dispute should be referred to arbitration in accordance with the agreement, and the court should not entertain the matter at this stage.
8. The Applicant counters this objection by referring to Section 7(1) of the Arbitration Act, which permits the court to grant preservatory orders even during the pendency of arbitral proceedings. The Applicant argues that, while the dispute may be subject to arbitration, the court retains the jurisdiction to issue interim measures, such as injunctions, to protect the subject matter of the dispute during the arbitration process. Thus, the Applicant maintains that the court has jurisdiction to hear the application for interim relief.
9. It is undisputed that the parties entered into an agreement that contains a clause 28 on dispute resolution. I will reproduce the provisions of clause 28.2 hereinbelow:

“any dispute arising out of or in connection with this agreement which cannot be resolved within 14 business days by negotiations between the parties as provided under clause 28.1 shall be referred to arbitration”
10. Further the provisions of Clause 28.7 of the agreement allows any party to seek urgent injunctive or interlocutory relief in any court with jurisdiction pending the resolution of the dispute.
11. The Applicant filed a Notice of Motion on 29th May 2024, seeking interim measures of protection under Section 7(1) of the Arbitration Act. The application seeks various orders, including injunctions to restrain the Respondent from engaging in certain actions pending the determination of the application. It is this application that gives rise to the current Preliminary Objection.
12. Section 7 of the Arbitration Act is clear in its provisions regarding interim measures. It allows a party to request interim protection from the High Court, even before or during arbitral proceedings. The section provides that the court may grant such orders if it is not incompatible with the arbitration agreement. Furthermore, if the arbitral tribunal has already ruled on a matter related to the application, the court is required to treat that ruling as conclusive for the purposes of the application.
13. Section 7 of the Arbitration Act provides as follows:



1. It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.
 2. Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.
14. The arbitral proceedings have not commenced and the applicant seeks to preserve the subject matter pending the arbitral proceedings. In Civil Case 752 of 2012 CMC Holdings Ltd & Another vs Jaguar Land Rover Exports Limited [2013] eKLR, Kamau, J. held as follows:
- “...The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.”
15. The Applicant seeks interim measures to ensure that the 2nd Respondent does not pay the Advance Payment Bond No. 15826 to the 1st Respondent due to the alleged frustration and breach of the contract by the 1st Respondent. Both parties have attributed fault to each other regarding the breach of the contract, and this breach is subject to arbitration. The Court is satisfied that such interim measures are necessary to protect the subject matter of the dispute. The fact that arbitral proceedings have not yet commenced does not deprive the Court of its jurisdiction to grant these interim orders under Section 7 of the *Arbitration Act*. It is only fair and just for the Court to issue preservatory orders to safeguard the subject matter. The Court has unlimited original jurisdiction in both Criminal and Civil matters, as provided under Article 165(3) of *the Constitution* of Kenya, 2010.
16. The Court of Appeal in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR interpreted the meaning of interim measures of protection in arbitration law as follows:
- “It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names...whatever their description, however, they are intended in principle to operate as ‘holding’ orders, pending the outcome of the arbitral proceedings.”
17. Based on the foregoing analysis, this court is satisfied that it has the requisite jurisdiction to hear and determine the claimant’s Notice of Motion dated 29th May 2024.
18. In conclusion, I find that the 1st Respondent’s Notice of Preliminary Objection dated 24th June 2024 is unsustainable and is dismissed accordingly with no cost orders.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF MARCH 2025.

PETER M. MULWA

JUDGE

In the presence of:



Mr. Midamba h/b for Mr. Maroa for Applicant

Mr. Ochola for 1st Respondent

Court Assistant: Carlos

