



**Roy Hauliers Limited v Bamburi Cement Limited (Commercial Case E777 of 2024)
[2025] KEHC 2687 (KLR) (Commercial and Tax) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2687 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E777 OF 2024
JWW MONG'ARE, J
MARCH 6, 2025**

BETWEEN

ROY HAULIERS LIMITED PLAINTIFF

AND

BAMBURI CEMENT LIMITED DEFENDANT

RULING

1. The parties are currently embroiled in a dispute that is before an arbitral tribunal for determination, where the Plaintiff claims that the Defendant breached the terms of a contract for the supply of transport services and access to the Defendant's mining grounds being Title Number 199340 and L.R Number 14750/36 situated in Katani.
2. The Plaintiff is thus seeking compensation to the tune of Kshs.3,374,684,920.23/= for the alleged breach. During the pendency of the arbitration, the Plaintiff became apprehensive that the arbitration claim, if successful, would only amount to a paper judgement since the Defendant was being acquired by a foreign company in its entirety and thereby questioning their continued operation.
3. The Plaintiff thus filed an application dated 8th December 2024 seeking both exparte and inter-parties' Mareva injunction preventing the Defendant from removing and or selling any of its shares and assets outside the jurisdiction of the Court pending the hearing and determination of the arbitration proceedings. The court (Omido J.) issued the exparte orders on 11th December 2024 and directed that the exparte Mareva injunction lasts till 16th January 2025. The Defendant opposes the application through the Grounds of Opposition dated 20th February 2025 and the replying affidavit sworn on the same date by its Company Secretary and Head of Legal & Compliance, Joyce Munene.
4. The Plaintiff then filed the application dated 13th December 2024 where it sought to freeze the Defendant's bank account being Citibank Account Number 18***165. This application was



responded to by the Defendant through the replying affidavit of JOYCE MUNENE sworn on 20th February 2025. The Defendant then filed by the application dated 18th December 2024 seeking to set aside the ex parte orders of the court issued on 11th December 2024 which application was dispensed with once the said orders lapsed and the same were not extended as stated by the court on 4th February 2025.

5. Before the ex parte orders lapsed, the Plaintiff filed the application dated 15th January 2025 seeking to cite the Defendant in contempt of the said orders, which application was responded to by the Defendant's Grounds of Opposition of 20th February 2025 and the replying affidavit of Joyce Munene sworn on the same date.
6. The Plaintiff also filed applications dated 3rd & 4th February 2025 seeking reinstatement of the ex parte orders or in the alternative, that the Defendant provides security in the sum of Kshs.3,374,000,000.00/ = to be held in a joint interest-earning account or that the security be in the form of a Bank Guarantee. The applications were responded to by the Defendant's Grounds of Opposition of 13th February 2025 and 20th February 2025 and the replying affidavits of Joyce Munene sworn on the same date.
7. The instant applications were canvassed by way of written and oral submissions by their respective counsel and together with the pleadings, I have considered the same and I will make relevant references in my analysis and determination below.

Analysis And Determination

8. Upon careful consideration of the pleadings and the responses filed thereto and the rival submissions by the parties, I have identified three issues that arise for determination by the court, to wit:-
 - a. Reinstatement of Orders; - Whether the court should re-instate the orders issued on 11th December 2024.
 - b. Contempt of Court Orders; - Whether the court should cite the Defendant and Mohit Kapoor for contempt of the ex parte orders of 11th December 2024
 - c. Interim Measures by Court – what form should the interim measure of protection take? Whether the court should issue a Mareva injunction freezing the Defendant's accounts pending hearing and determination of the arbitration, OR, in the alternative, whether this court should order the Defendant to deposit the disputed Kshs 3,374,684,920.23/- in a joint interest earning account to act as security or in the alternative provide a bank guarantee for the same amount as security, to be held pending the hearing and determination of the arbitration proceedings.

We now proceed to consider the issues separately herein below:-

a) “whether the court should re-instate the orders issued on 11th December 2024.”

9. As stated in the pleadings and the submissions by the parties the court, upon considering the application by the Plaintiff when it was filed under certificate of urgency, issued ex parte injunctive orders, restraining the Defendant from selling its shares to a third party and preserved the Defendant's properties and shares that were apparently supposed to be sold on 20th December 2024. Subsequently and on 16th January 2025, when the matter was transferred to this division, there was no application made by the Plaintiff to extend the said orders and the same lapsed by operation of the law. The Plaintiff argued that there was need to reinstate the said orders as the dispute between the parties is yet to be determined.



10. I have considered the said arguments and note that the orders so issued were to preserve the status quo at that time. Having thereafter lapsed, the Defendant confirms that the sale of shares that was sought to be stopped took place and therefore the status quo has changed in form and substance. It is therefore, in my view, futile to reinstate the orders issued previously by the court. Therefore, an order reinstating the already lapsed orders would be an exercise in futility and would be equivalent to locking the kraal when the cow has already bolted. This limb of the application therefore fails.

b) Contempt of Court Orders by the Defendant

11. The second issue that this court identified for determination was “Whether the court should cite the Defendant and Mohit Kapoor for contempt of the ex parte orders of 11th December 2024”. The Applicant has argued that the Defendants disobeyed the court orders of 11th December 2024 and that as a result this court should punish the said disobedience by holding the Defendant and Mohit Kapoor in contempt for disobedience of orders as issued by the court. In responding to the issue as to whether the Defendant was in contempt of the ex parte orders, the Defendant stated that the orders were served upon it 7 days after they were made, in contravention of Order 40 Rule 4(3) of the Civil Procedure Rules which provides that: ‘In any case where the court grants an ex parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse’. Indeed, the Plaintiff annexed the affidavit sworn by one Brenda Abutika which confirmed that the orders was served on 18th December 2024, 7 days after they were issued. I am in agreement with the Defendant’s submission that this court has held that an infraction of the aforementioned Rule is fatal and that the order automatically lapses by operation of law and a party cannot be held to have been in contempt of the said orders that had since lapsed (see *Pevans Est Africa Limited & 4 others v Nation Media Group Ltd & 7 others* [2022] KEHC 692 (KLR)) and *Nyayo Embakasi Residents Association Suing through Its Registered Officials Goerge Ochola, Antony Sang, Aloise Lumutu and Wilson Wambua v National Social Security Fund & another* [2015] KEHC 6867 (KLR). It is therefore my finding that there was no valid order upon which the contempt application by the Plaintiff is based on, I find that this argument is without merit and it is therefore dismissed.

c) Interim Measures by Court-

12. In determining this issue, the court is being called to determine what form should the interim measure of protection take? Whether the court should issue a Mareva injunction freezing the Defendant's accounts pending hearing and determination of the arbitration; OR, in the alternative, whether this court should order the Defendant to deposit the disputed Kshs.3,374,684,920.23/- in a joint interest earning account to act as security or in the alternative order the Defendant to provide a bank guarantee for the same amount as security, to be held pending the hearing and determination of the arbitration proceedings before the arbitral tribunal.
13. The Plaintiff has urged the court to grant a Mareva injunction to preserve the assets of the Defendant from being either disposed off or being removed from the jurisdiction of this court by the new owners once the ongoing sale of the shares is completed. The Plaintiff in the alternative seeks for an order for deposit of security pending the hearing and determination of the arbitral proceedings. The Plaintiff’s reasons for seeking these orders are that it is apprehensive that the Defendant might remove its assets from the jurisdiction of the court and render the execution of any success from the arbitration, meaningless.
14. In sum, the Plaintiff is seeking an interim measure of protection as provided for under section 7 of the *Arbitration Act* which states as follows:



7. Interim measures by court

- (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.

15. I agree with the parties' submissions that the leading case in which the Court of Appeal outlined the principles governing the grant of interim measures of protection is *Safaricom Limited v Ocean View Beach Hotel Limited, Salim Sultan Moloo & Alsai (K) Limited* [2010] KECA 346 (KLR) where Nyamu JA., observed as follows:-

“By determining the matters on the basis of the [Giella] principles the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names. In the case of Kenya, the *Arbitration Act* is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as “interim measures of protection” under section 7 of the *Arbitration Act*. On the other hand, in the English version of the ICC Rules for example, they are known as “interim conservatory measures”. Whatever their description however, they are intended in principle to operate as “holding” orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation.

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An interim measure of protection such as that sought in the matter before us is supposed to be issued by the court under section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for the grant of injunctions as the High Court purported to do in this matter.

To illustrate the point Article 26-3 of the UNICTRAL Arbitration rules states:-

“A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement.”

Section 7 of the *Arbitration Act* is modeled on this. However, in the matter before us and with due respect, the Commercial Court (Koome, J.) contravened the above principles by firstly either declining to issue any measure of protection or granting such a measure. The Court also failed to correctly address the principles for the issue of any such measures and worse still, the supreme court took over the subject matter altogether and ruled on the merits of the subject matter of the arbitration thereby prejudicing the outcome of the arbitration. This explains why in the special circumstances of this matter, this Court must take extraordinary measures to rectify an extraordinary illegality. Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example)



and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-

1. The existence of an arbitration agreement.
 2. Whether the subject matter of arbitration is under threat.
 3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.
 4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision-making power as intended by the parties.
16. I am satisfied that the matter before this court meets the principles set out above in the decision by the Court of Appeal, which binds me. I am in further agreement with the parties' submission that an interim order of protection can only be granted to preserve the status quo of the subject matter of the arbitration (see *China Young Tai Engineering Co Ltd v L G Mwacharo T/A Mwacharo & Associates & another* [2015] KEHC 6771 (KLR)). The parties acknowledge that they are engaged in a dispute where the Applicant is seeking compensation for breach of contract and the Plaintiff is claiming damages to the tune of Kshs.3,374,000,000.00/=.
17. The applicant has argued that the Defendant is in the process of disposing its shares to a foreigner and that there is likelihood that at the conclusion of the arbitral proceedings before the arbitral tribunal, there shall be nothing left and if successful, the Plaintiffs success may be meaningless and the same may amount to a paper judgment. The Plaintiff's claim is for the sum of Kshs.3,374,000,000.00/= and although this claim is yet to be proved, it is for a substantial sum of money. The Plaintiff has urged this court to grant an interim measure of protection either by granting it a Mareva injunction to forbid the sale of the Defendant's shares or the removal of the Defendant's shares from being taken outside the jurisdiction of this court, should it emerge successful in the arbitration proceedings between the parties.
18. The Defendant admits indeed there is ongoing a sale of its shares of the company to a foreign owned entity registered in Tanzania and outside the jurisdiction of this court. The Defendant in its submissions confirmed indeed there has been partial payment for these shares and a further payment was being processed and that the Capital Markets Authority had approved the sale. This confirms that the Plaintiffs fears are legitimate, that it not inconceivable that, indeed the Defendant, once acquired by foreign owned entity, may pack and leave the jurisdiction of this court and set up shop elsewhere.
19. I am therefore persuaded that there is legitimate fear on the part of the Plaintiff and as espoused in the pleadings before this court, that once the sale is completed, nothing stops the new owners from stripping the assets of the company and spiriting them outside the country and away from the reach of the jurisdiction of this court. I am therefore persuaded that it is necessary, in the circumstances, to accord the Plaintiff the interim measure of protection to preserve and protect his rights under the law as a litigant before the court.
20. I find therefore that this court has power to grant the prayer sought for an interim measure of protection. I decline to grant a Mareva injunction as sought by the Plaintiff as an alternative measure of the protection, since the defendant has confirmed that the shares have already been sold off and paid



for by a third party, who is a stranger to the dispute in the arbitral proceedings, subject matter of this application. Instead, I direct that the Defendant does provide security for costs in the event the Plaintiff emerges successful in the arbitration proceedings.

21. I order that the Defendant makes available, from the sale of the shares herein, the sum equivalent to the claim by the Applicant of Kshs.3,374,000,000.00/= to be deposited in an interest earning escrow account in the joint names of the advocates for both the Applicant and the Respondent, in a local Kenyan banking institution, pending the hearing and the determination of the arbitral proceedings. In the alternative, the Defendant may provide a bank guarantee for the said sum of Kshs.3,374,000,000/= from a reputable local Bank as security for the duration of the hearing and determination of the Arbitral proceedings. The Bank guarantee shall be issued to the Deputy Registrar, Commercial and Tax Division, High Court of Kenya.

Conclusion and Disposition

22. In the upshot, I find that the Plaintiffs application is partly successful. I direct that the sum of Kshs.3,374,000,000.00/= from the sale proceeds of the shares of the Defendant be retained in Kenya and be held in an interest earning account in the joint names of the Advocates for the Plaintiff and the Defendant in a local Kenyan banking institution, pending the hearing and disposal of the Arbitral proceedings. The other prayers sought in the applications by the Plaintiff dated 8th December 2024, 13th December 2024, 15th January 2025, 3rd February 2025 and 4th February 2025 are hereby declined. I direct that each party bears its own costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF MARCH 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Ms. Msando holding brief for Prof. Ojienda SC for the Plaintiff/Applicant.

Mr. Kiragu Kimani and Ms. Glory Kimani for the Defendant/Respondent.

Amos - Court Assistant

