



Salim v Petro Soko Limited; Ecobank Kenya Limited (Interested Party) (Environment & Land Case E85 of 2024) [2025] KEELC 3894 (KLR) (20 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3894 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E85 OF 2024
FM NJOROGE, J
MAY 20, 2025**

BETWEEN

ASHA KAMENE SALIM PLAINTIFF

AND

PETRO SOKO LIMITED DEFENDANT

AND

ECOBANK KENYA LIMITED INTERESTED PARTY

RULING

1. This ruling is in respect of the Plaintiff's Notice of Motion application dated 20/8/2024 brought under sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010, section 68 of the *Land Registration Act*, 2012 and Section 13 (1) of the ELC Act. The orders sought are: -
 1. Spent;
 2. Spent;
 3. Spent;
 4. Pending the hearing and determination of this suit, there be an order of inhibition stopping further dealings, registration and transactions over the parcels of land known as LR No. 9122/401 and LR No. 9122/402;
 5. Pending the hearing and determination of this suit, there be an injunction restraining the defendant, its servants, agents, employees and/or anyone acting on their authority from trespassing, selling, transferring, or dealing in any way that may change ownership with the parcels of land known as LR No. 9122/401 and LR No. 9122/402;



6. Costs of this application be provided for.
2. The application is based on the grounds on its face and supported by the affidavit sworn by Asha Kamene Salim, wherein she stated that she acquired the properties known as LR No. 9122/401 and LR No. 9122/402 (the suit properties) on 4/1/2008, upon which she constructed rental apartments and in which she also resides; that she entered into an agreement dated 30/8/2023 with the Defendant to assist her obtain a loan from the Interested Party. The terms of the agreement were inter alia that she would transfer the suit property to the Defendant only as security for securing the loan and in turn, the Defendant would make the Plaintiff a signatory in its loan account so as to enable her access the funds. Upon compliance with her obligations, the Defendant declined to make her a signatory as agreed, which action or inaction crippled her ability to repay the loan. On 28/7/2024, the Defendant informed the Plaintiff's tenants within the suit property that the same had been sold and issued them with vacation notices. The Plaintiff averred that the Defendant's actions amount to a breach of contract and they are deliberately calculated to deprive her of her property. The Plaintiff is apprehensive that if the suit properties are not preserved, the Defendant may deal with them in a prejudicial manner to defeat her claim.
3. In response, the Defendant filed a replying affidavit sworn by Haitham Ali Shebe on 4/9/2024, wherein he stated that the Plaintiff is guilty of non-disclosure of material facts. The deponent asserted that the Plaintiff has failed to disclose that she defaulted in payment of monies payable to the Interested Party notwithstanding receipt of the same by her. The deponent further deposed that the Plaintiff has also failed to disclose the existence and recent withdrawal of another suit involving the parties herein being Mombasa Chief Magistrates' Court E1161 Of 2021.
4. The Interested Party also filed a replying affidavit sworn by Duncan Mutembete on 5/5/2025 stating that in view of Section 7 of the *Arbitration Act* No. 4 of 1995, and the fact that the application and suit generally seek interim measures in the nature of injunction pending arbitration, this court has no jurisdiction to grant the orders sought but the High Court.
5. He narrated that the Interested Party agreed to advance the Defendant a loan facility of Kshs. 55, 600,000/- against the suit properties as security for the said loan. Subsequently, the Defendant defaulted on the repayment action which has crystallized the Interested Party's right to exercise its statutory power of sale. To him, granting the orders sought would deny the Interested Party that right and in turn cause it to lose its right over the suit property to the detriment of the Interested Party and its depositors.
6. The application was canvassed by way of written submissions.

Plaintiff's Submissions

7. Counsel for the Plaintiff submitted that the purpose of the present suit is to preserve the suit properties pending referral of the dispute to arbitration, and that the orders sought are in turn an interim measure to protect the suit properties pending arbitration. Counsel argued that the jurisdiction of this court to grant an interim measure of protection is donated by Section 7 (1) of the *Arbitration Act*, as was discussed in the case of *Safaricom Limited v Ocean View Beach Hotel Limited, Salim Sultan Moloo & Alsai (K) Limited* [2010] KECA 346 (KLR).
8. According to counsel, the Plaintiff had met the requirements established in that case; that she had exhibited an arbitration agreement; and that she had demonstrated that the suit properties were under threat. Counsel noted that the only opposition taken by the Defendant is that the suit is misconceived as the arbitration proceedings envisioned by the Plaintiff will in no way resolve the status of the suit



properties in so far as the decision of an arbitrator will not override the charge or have any effect thereon without involving the Interested Party which is not bound by the arbitration process.

Defendant's Submissions

9. According to Mr. Mwakisha, the orders sought pending arbitration are very similar in nature to the usual Order 40 applications for injunction pending determination of a suit. Counsel submitted that the prayers stand to be thus determined within the principles established in the renowned case of *Giella v Cassman Brown*. He argued that the Plaintiff did not have a prima facie case that may well succeed before the arbitrator. He explained that this was because the Plaintiff admits to have received the money from the Interested Party and equally that she has never made any payment in return.
10. On irreparable injury, counsel submitted that an injunction if granted would only grant the Plaintiff a short-lived respite, as the Interested Party will continue with the process of realizing the security in so far as the Defendant will be unable to pay the monthly instalments. To counsel, allowing the Defendant to step in and take responsibility by receiving the rents to pay back the loan may, in the long run, be of greater benefit to the Plaintiff. Counsel reiterated this argument in discussing balance of convenience. To him, it would be contrary to the letter and spirit of the primary agreement that one party keeps both the money from the bank, the monthly rentals and have effective control and possession of the suit properties, while expecting the other to repay the sums due to it.

Analysis And Determination

11. Before delving into the merits or otherwise of the present application, it is pertinent to first address the Interested Party's objection regarding this Court's jurisdiction, raised and restricted to the provisions of Section 7 of the *Arbitration Act*. Although the wording of Section 7 specifically refers to the High Court, it does not necessarily limit jurisdiction to that Court alone. Under Article 162 of *the Constitution* of Kenya, 2010, the ELC, established as a court of equal status to the High Court, possesses jurisdiction to hear and determine all matters relating to environment and land. This position was affirmed in *Mungai Ngaruiya & 8 others v Maha Properties Limited* [2018] eKLR, where the Court observed:

“The *Arbitration Act* is a pre-2010 statute that pre-existed our current court architecture. *The Constitution* of Kenya 2010 redesigned and reconstructed Kenya's judiciary. Suffice to say that under Section 33 of the Sixth Schedule to *the Constitution* of Kenya 2010, the Environment and Land Court is the constitutional and legal successor institution to the pre-2010 High Court of Kenya in all disputes relating to the environment and the use and occupation and title to land in Kenya. On this account, the “High Court” which is contemplated under the *Arbitration Act* in relation to the above disputes is the Environment and Land Court.”

12. Therefore, the only issue that arises for determination is whether the Plaintiff is deserving of an interim measure of protection under Section 7 of the *Arbitration Act*, 1995 pending arbitration.
13. Section 7 of the said Act empowers the Court to protect arbitral proceedings by issuing interim orders protecting the subject matter of arbitration. It provides thus:

“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.”

14. The subject agreement provides for arbitration of any dispute arising between the parties hence the Plaintiff’s invocation of Section 7 of the *Arbitration Act* for interim relief pending arbitration is extremely plausible in the given circumstances. Clause 12 of the agreement dated 30/8/2023 provides: -

“All disputes or differences which shall at any time arise between the parties whether during the term of the agreement or afterwards touching on or concerning the agreement or its construction or effect or rights and duties or liabilities of any party or any other matter in any way connected with or arising out of the subject matter of the agreement shall be referred to a single arbitrator to be agreed upon between the parties or in default of agreement to be nominated by the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch in accordance with the *Arbitration Act* 1995 or any statutory modification or re-enactment thereof for the time in force.”

15. The purpose of the interim measure orders are to preserve evidence, to protect assets or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. The Court of Appeal in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [supra] stated: -

“It takes time to establish an arbitral tribunal and during the time between the arising of the dispute and the tribunal’s establishment vital evidence or assets may disappear unless a national court (in our case, the High Court) is urgently asked to intervene. Moreover, even where an arbitral tribunal has the power to issue interim measures such powers are generally restricted to the parties involved in the tribunal itself.”

16. The Court of Appeal further discussed what the court must consider before issuing interim measures of protection as such:

“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: -

- a) The existence of an arbitration agreement.
- b) Whether the subject matter of arbitration is under threat.
- c) In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.



- d) 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 powers as intended by the parties.”

17. In light of the above, I find that this court would have had, in a suitable case, jurisdiction to hear and determine the issue of whether or not the interim measure of protection under Section 7 of the *Arbitration Act*, 1995 should be granted pending arbitration. However, even where a court may be possessed of jurisdiction to exercise power under the law in granting interim orders, it is the duty of this court to evaluate any suit even at the interlocutory stage and establish whether it is possessed of jurisdiction over the entire claim; where the court lacks jurisdiction over the entire suit, it would be amiss for it to grant any interim orders sought under that suit.
18. The Plaintiff's case as presented in her Plaint dated 20/8/2024 is on breach of contract. She sought inter alia reliefs that the dispute between the Plaintiff and the Defendant be subjected to alternative dispute resolution as per the terms of the subject agreement, and an injunction restraining the Defendant from dealing with the suit properties pending resolution of the dispute between the parties through the alternative dispute resolution process. As already established, the agreement contains an arbitration clause. It is thus safe to say that there exists an arbitration agreement.
19. The subject matter of the agreement and intended arbitration is immovable property, which is at the verge of being repossessed by the Interested Party. Be that as it may, the Plaintiff does not deny that she has been in breach of repayment of the loan facility and in fact states that her failure to service the loan was occasioned by the Defendant's failure to make her a signatory to the loan account.
20. Although Clause 2.11 of the agreement stipulates that the Plaintiff was to be made a signatory as averred, it was only for purposes of transparency and accountability. How the plaintiff was to repay the loan was a matter solely within her knowledge, but she undertook to do that. In return for the securing of the loan monies for her, she was to pay the defendant a consideration. It is presumed that the same was paid. It should be presumed that the plaintiff knew from the beginning the sums payable to the interested party as loan repayment instalments. Payment into an account is different from being made signatory to an account; the two are not interdependent. Whether the plaintiff was a signatory or not she had to repay the loan sums to the Interested party. To this court, the alleged failure of the Defendant to make her a signatory is a very lame excuse for not servicing the loan as required.
21. In addition, Clause 2.6 in the agreement is the most outstanding feature thereof which shows that there was no sale of the suit property to the defendant. The defendant was to sign blank transfers in favour of the plaintiff which were to be retained by an advocate on the undertaking that they would not be registered or released until the plaintiff had paid all the sums due to the Interested Party; there is no evidence that he never complied with that requirement. The issue of ownership does not thus arise in this matter: the purported transfer was a singularly effective, alluring cosmetic application to cover the hideous face of the plaintiff's adverse Credit Reference Bureau listing, devised to seduce the clueless Interested Party to wed through proxy a bride it would have otherwise casually and contemptuously spurned for want of creditworthiness. And the wedding was glamorous, and though the Interested Party, through the defendant's account, released funds for the plaintiff's use, the prenuptial contractual commitments guaranteed that the suit property remained the plaintiffs' at all material times, who must discharge her obligations incurred on her behalf by the defendant with the Interested Party in the form of a loan. The defendant is in the circumstances just an agent of the plaintiff in the acquisition of the loan and the repayment of the loan moneys it acquired for the plaintiff is the dominant issue in this suit. The Interested Party is only interested in realizing her security in the suit property by way of exercise of statutory power of sale. Even the alleged intended eviction of the plaintiff by the defendant



from the suit premises is ancillary to the main issue of accounts between the plaintiff and the Interested Party. In this court's view there is no dispute raised in this matter that falls within the definition of "the environment and the use and occupation of, and title to, land" as envisaged in Article 162(2)(b) of *the Constitution* of Kenya 2010. The dispute is only regarding the charge and the repayment of the charge monies. *Cooperative Bank of Kenya v Patrick Kangethe Njuguna & another* [2017] eKLR held as follows: -

"... By definition, a charge is an interest in land securing payment of money or money's worth or the fulfilment of any condition. (see section 2 of the *land Act*). It gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money's worth. The rights so acquired are limited to the realization of the security so advanced (see section 80 of the *Land Act*). The creation of that relationship therefore, has nothing to do with the use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the charge is assured of the repayment of the money he has advanced."

22. In the circumstances, and even without laboring to establish whether or not the Plaintiff has not made out a prima facie case to warrant this court's discretion in her favour, I find that the dispute between the parties is purely a commercial dispute over which this court can not exercise jurisdiction without going contrary to the provisions of the Section 13 of the *Environment and Land Court Act* and Article 162(2) (b) of *the Constitution* of Kenya 2010, and consequently I see no basis to grant an injunction as prayed.
23. The outcome is that the application dated 20/8/2024 and the entire suit commenced by way of plaint of even date are improperly before this court. I ought to ordinarily dismiss such misplaced litigation but in the light of the overriding objective as embodied in Sections 1A and 1B of the *Civil Procedure Act* as to facilitating the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the said Act, the just determination of the present proceedings, the efficient use of the available judicial and administrative resources and the timely disposal of the proceedings at a cost affordable by the respective parties, I order that this suit is hereby be transferred to the High Court at Malindi for hearing and final disposal.

Dated, signed and delivered at Malindi via electronic mail on this 20th day of May 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

