



**Ali & 8 others v Simba Foam Limited & 2 others; Chief Land Registrar,
Kajiado & another (Interested Parties) (Commercial Case E135 of 2024)
[2025] KEHC 5562 (KLR) (Commercial and Tax) (5 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5562 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E135 OF 2024

AA VISRAM, J

MAY 5, 2025

BETWEEN

ABUKAR ELASAW ALI 1ST PLAINTIFF
ELMI DINAREH GUESSOD 2ND PLAINTIFF
SHUAYB YASSIN 3RD PLAINTIFF
HOUSSEIN TURAYARE AHMED 4TH PLAINTIFF
MOHAMED SALAA ABDULLE 5TH PLAINTIFF
YUSUF TUARYARE OSMAN 6TH PLAINTIFF
ISMAIL ABDI YERROW 7TH PLAINTIFF
MAHDII WORSEME ALI 8TH PLAINTIFF
ADAWI ABDIWAHAB MOAHMMUD 9TH PLAINTIFF

AND

SIMBA FOAM LIMITED 1ST DEFENDANT
DEVELOPMENT BANK OF KENYA 2ND DEFENDANT
COMFORM FOAM LIMITED 3RD DEFENDANT

AND

CHIEF LAND REGISTRAR, KAJIADO INTERESTED PARTY
REGISTRAR OF COMPANIES INTERESTED PARTY



RULING

1. I have considered the Preliminary Objection dated 3rd April, 2024, together with the submissions of the parties, and the applicable law.
2. The Applicants/Plaintiff filed a Notice of Motion dated 15th March, 2024, (hereinafter the “Application”), and supported by the Affidavit of one Mohamed Salaa Abdulle, sworn on even date. In the said Application, the Applicants sought several interim orders against the 2nd Respondent, 1st Interested Party and 2nd Interested Party pending referral of a dispute to Arbitration.
3. More particularly, the Applicant sought the following orders: an injunction directing the 1st Interested Party to install a restriction over the subject property to forestall any dealings on the parcel of land; an injunction directing the 2nd Interested Party to add back on the Applicants as directors of the 3rd Respondent and retain only individuals representing the 1st Respondent; and an order directing the 2nd Respondent to deposit the sum of \$441, 986.80 in an escrow account to be held by the Advocates, pending determination by the arbitral tribunal.
4. In response to the said Application, the 1st, 2nd and 3rd Respondent filed a Notice of Preliminary Objection dated 3rd April, 2024 (hereinafter the “Preliminary Objection”), challenging the jurisdiction of this Honourable Court to hear and determine the Application and suit before it.
5. The Applicants submitted that the Application and suit is anchored on a Settlement Agreement dated 15th March, 2022, between the Applicants and 1st Respondent herein. The said Agreement at Clause 18 provides for resolution of disputes, and parties therein agreed to resolve all disputes arising therefrom through negotiations in the first instance. Further, that where such negotiations fail to achieve a resolution within fifteen (15) days, such dispute shall be referred to arbitration. The Applicants herein instituted the instant proceedings in blatant disregard of the dispute resolution mechanisms provided for in Clause 18 of the aforesaid Settlement Agreement.
6. The 1st Respondent submitted that the Applicants have improperly invoked the jurisdiction of this Honourable Court, and that this Court lacks jurisdiction to hear and determine the Applicants’ Notice of Motion and Plaint both dated 15th March, 2024.
7. The 1st Respondent argued that it is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the courts to rewrite such contracts. The primary task of the court is to construe and enforce contracts, freely and voluntarily entered into by parties. It relied on the decision of the Court of Appeal (Tunoi, Shah & Keiwua JJ A) in National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Limited (2001) eKLR, where the Court in affirming that parties are bound by the terms of their contract stated that:-

“A court of law cannot rewrite 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.” (Emphasis mine)
8. The Respondents argued that parties mutually agreed that any and all disputes arising between them be resolved through negotiation in the first instance, and finally arbitration where negotiations fail. The said clause expressly provides that:-



18. Should such negotiations fail to achieve a resolution within fifteen (15) days, either party may declare a dispute by written notification to the other, whereupon such dispute shall be referred to arbitration under the following terms:-
9. Secondly, and in addition to the above, the Respondent invited the Court to note that Clause 18 (e) of the Settlement Agreement, is clear and unambiguous as to when the parties could seek interim relief from court, and particularly that any relief to be sought from court ought to have been preceded by arbitration proceedings. The said clause stipulates that: -
- 18(e) Notwithstanding the above provisions of this clause, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from any court of competent jurisdiction pending the final decision or award of the arbitrator. (Emphasis mine)
10. The 1st Respondent submitted that the Applicants herein were bound to initiate arbitral proceedings prior to approaching this Honourable Court for any reliefs. However, in blatant disregard of this provision, the Applicants moved this Honourable Court seeking interim reliefs, despite not taking any steps to commence the arbitration proceedings, and which is a breach of the terms of the Settlement Agreement.
11. The Respondent submitted that the doctrine of exhaustion of available remedies provides that, where an elaborate mechanism for dispute resolution has been agreed upon by parties, the same ought to have been pursued and exhausted before parties can approach the court.
12. The 2nd and 3rd Respondent submitted that they are not parties to the purported Settlement Agreement (hereinafter “the Agreement”) and therefore not privy to the contents nor are they bound by the terms of the said Agreement.
13. They submitted that the doctrine of privity of contract (privity doctrine) stipulates that a contract affects and binds only the parties to it, and it cannot confer rights or impose obligations on any person other than the parties to the contract. They further submitted that the essence of the privity doctrine is that only the parties that actually negotiated and executed a contract (who are privy to it) are bound by, and are entitled to enforce its terms.
14. On the other hand, the Applicant submitted that before the Settlement Agreement was signed by parties, the 1st Defendant committed clear fraud by transferring LR.NO. Kajiado/Kaputiei North/101188 and LR.NO Kajiado/Kaputiei North/104282 to themselves without the Applicants’ approval, and ousted them from Directorship of the 3rd Defendant without any plausible reason.
15. The Applicant submitted that the facts pleaded imputes clear fraud and misrepresentation that have been orchestrated by the 1st Defendant to steal a match from the Applicants. They submitted that this Court has the jurisdiction to entertain this matter because the injunctive order sought relates to rights in rem. The Applicants relied on the decision in *Booz Allen & Hamilla Inc –vs- SBI Home Finance Limited and others 2011 5 SCC 532*, where the court cited approvingly in the case of *Gerick Kenya Limited v Honda Motorcycle Kenya Limited [2019]e KLR* where the Court held that:-

“.....whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property”.



16. In the Applicants' view, matters that involve fraud ought to be determined at court of law and not an arbitral tribunal. The Applicants relied on the *Booza Supra*, where the court stated:-

“When the case involves serious allegations of fraud, the dicta contained in the aforesaid judgments would be understandable. However, at the same time, mere allegation of fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration and should be decided by the civil court. The allegations of fraud should be such that not only these allegations are serious that in normal course these may even constitute criminal offence, they are also complex in nature and the decision on these issues demand extensive evidence for which civil court should appear to be more appropriate forum than the Arbitral Tribunal. Otherwise, it may become a convenient mode of avoiding the process of arbitration by simply using the device of making allegations of fraud and pleading that issue of fraud needs to be decided by the civil court. The judgment in *N. Radhakrishnan* does not touch upon this aspect and said decision is rendered after finding that allegations of fraud were of serious nature”. (Emphasis mine)

17. Having considered the above, the starting point is that, it is not in dispute that the parties agreed to refer disputes arising out of the Settlement Agreement to arbitration. This is evident from the nature of the prayers sought in the application, which refers expressly to an injunction pending hearing and determination by the arbitral tribunal.

18. Accordingly, the next question is whether or not the *Arbitration Act* provides for interim relief pending a determination by the tribunal? The answer to the above is affirmative, and the same is found at Section 7(1) of the *Arbitration Act*, 1995 (“the Act”), which provides as follows:-

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. (Emphasis mine)

19. Guided by the above, I am satisfied that a party may seek interim measures of protection from a court of law prior to the commencement of the arbitral proceedings, for the preservation of the subject matter of the arbitral proceedings.

20. However, that is not the end of the matter. Section 10 of the *Arbitration Act* states that “Except as provided in this Act, no court shall intervene in matters governed by this Act.” My understanding, therefore, is that a party seeking such interim relief ought to make such an application in accordance with the provisions of the *Arbitration Act*, and further, ought to demonstrate that it has met the applicable criteria relevant to Section 7 of the Act.

21. I do not think that an Applicant who has admitted that the parties are subject to an arbitration clause, may ignore Section 7 of the *Arbitration Act* and file an application grounded under the provisions of Order 40 Rule 1 of the Civil Procedure Rules. That rule is intended to apply to proceedings in court, and in circumstances in which the parties have chosen the court as the appropriate forum for dispute resolution. That is not the case here. Because the parties have chosen arbitration as the forum for dispute resolution, they are governed by the provisions of the *Arbitration Act*.

22. Section 10 of the *Arbitration Act* is express, and there is a clear provision provided in the Act governing the procedure relating to interim relief that is sought prior to the commencement of the arbitral proceedings.



- 23. Further to the above, the criteria the court must consider in granting such an application seeking injunctive relief, is different from the considerations applicable to Order 40 Rule 1 of the Civil Procedure Rules. In my view, the filing of a Plaint and an Application under Order 40 Rule 1 of the Civil Procedure Rules seeking interim relief pending the eventual determination by an arbitral tribunal is irregular, and bad in law. The application is fatally defective.
- 24. Finally, as regards the allegations pertaining to fraud, and misrepresentation, and the submission stating that such allegations ought to be decided by a court, rather than an arbitral tribunal; I am of the view that it is for the tribunal to determine, in the first instance, if the matters fall within its jurisdiction. This position is in line with Section 17 of the Arbitration Act which gives an arbitral tribunal competence to rule on its own jurisdiction. I do not think that it would be appropriate for this court to usurp the jurisdiction of the tribunal in the first instance, and in present circumstances, based on allegations, and at this stage of the proceedings.
- 25. Based on the reasons set out above, I find that the Application is fatally defective. The same is struck out with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 5TH DAY OF MAY, 2025

ALEEM VISRAM, FCI Arb

JUDGE

In the presence of;

- Court Assistant
- 1st Plaintiff/Applicant
- 2nd Plaintiff/Applicant
- 3rd Plaintiff/Applicant
- 4th Plaintiff/Applicant
- 5th Plaintiff/Applicant
- 6th Plaintiff/Applicant
- 7th Plaintiff/Applicant
- 8th Plaintiff/Applicant
- 9th Plaintiff/Applicant
- 1st Defendant/Respondent
- 2nd Defendant/Respondent
- 3rd Defendant/Respondent
- 1st Interested Party
- 2nd Interested Party

