Maina v Francis & 10 others (Civil Case E112 of 2021)
[2025] KEHC 6322 (KLR) (Commercial and Tax) (15 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6322 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E112 OF 2021

F GIKONYO, J

MAY 15, 2025

BETWEEN

DR. SAMUEL THENYA MAINA ..... APPLICANT

AND

BRIAN MARTIN FRANCIS ..... 1ST RESPONDENT

MUIBORO ENTERPRISES LIMITED ..... 2ND RESPONDENT

KCB BANK KENYA LIMITED ..... 3RD RESPONDENT

BILHA W MWANGI & KEMBOY JULIUS KIPKOSGEI T/A KEMBOY LAW LLP ..... 4TH RESPONDENT

THE ESTATE OF THE LATE HIRAM NGARUIYA ..... 5TH RESPONDENT

NJERI BENSON NGUGI ..... 6TH RESPONDENT

ISAAC NJOROGE GITOHO ..... 7TH RESPONDENT

IGERIA ARTHUR KONYE ..... 8TH RESPONDENT

NJOROGE DAVID NGUMBU T/A IGERIA & NGUGI ADVOCATES ..... 9TH RESPONDENT

JAMES NJUGUNA GITOHO ..... 10TH RESPONDENT

KRISCO HOLDINGS LIMITED ..... 11TH RESPONDENT

RULING

1. Before me is the 1st to 6th applicants' Notice of Motion dated 26th February 2024, expressed to be brought under Section 1A, 1B, 3A, of the *Civil Procedure Act*, Order 51 Rule 1 and 6 of the

Civil Procedure Rules, 2010, Article 159 of *the Constitution*, seeking an order directing I&M Bank Limited to release the monies and accrued interest held in the joint fixed-deposit account number 0020364258581200 deposited according to the court order issued on 19th May 2022 to the firm of Gichuki King'ara & Co. Advocates for onward transmission to the Applicants.

2. The application is supported by the annexed affidavit sworn by the 3rd applicant, Isaac Njoroge Gitoho and initial and further written submissions dated 13th March 2024 and 28th February 2025 respectively. The applicants' case is that the court order directing the deposit of the funds has been overtaken by events as the arbitration between the 1st respondent and 1st to 6th applicants was concluded in April 2023. The applicant contends that the funds deposited were not the subject of the arbitration.

Responses

3. In opposing the application, the 1st Respondent, Dr. Samuel Thenya Maina, filed a replying affidavit sworn on 11th March 2024 and written submissions dated 7th June 2024. His main contention is that the funds should be released to him as the successful party in the arbitration.

4. On their part, the 7th, 8th, 9th and 11th respondents filed a replying affidavit sworn on their behalf by the 9th respondent, Benson Ngugi. They opted to rely on the 1st respondent's written submissions.

Background

5. The application emanates from a dispute which ensued from a sale of Adlife Plaza Limited ("APL") and 77% of the building it owns by the 1st to 6th applicants sold to the 1st respondent through a Share Purchase Agreement (SPA). Part of the purchase price was paid and the balance was to be financed by the 7th respondent, KCB Bank Kenya Ltd. To facilitate the release of the completion documents, the 9th to 11th respondents, acting for the 7th respondent issued a professional undertaking dated 7th May 2018 to pay the balance of the purchase price to the 8th respondent.

6. According to the 1st respondent, thereafter, he discovered that as of the completion date, the 1st to 6th applicants were in breach of some obligations in the SPA. This led to the commencement of arbitration proceedings before Hon. Martin Munyu, Arbitrator, by the 1st respondent claiming Kshs. 259,378,022.93/-.

7. The parties subsequently entered into a ring-fencing agreement of Kshs. 102,378,022.93 pending reconciliation of some amounts allegedly misappropriated by the 1st to 6th applicants from APL.

8. Afterwards, the 8th respondent filed HCCC No. 21 of 2020 against the 9th to 11th respondents seeking enforcement of their professional undertaking. The court entered judgment against the 9th to 11th respondents and directed them to pay Kshs. 102,378,022.93 plus interest. The 8th respondent started the execution process.

9. The 7th respondent informed the 1st respondent that it would proceed to make the payment to the 8th respondent and through a letter dated 10th February 2021, the 9th to 11th respondent advised the 7th respondent to proceed with the payment.

10. This is what prompted the 1st respondent's chamber summons seeking an order directing the deposit of the subject funds into a joint-interest earning account in the names of his and the 1st to 6th applicants advocates.

11. The arbitral award was published on 3rd April 2023. The 1st to 6th applicants applied to set aside the arbitral award claiming that it offends public policy in Comm. Arb. E034 of 2023. On the other hand,

the 1st respondent applied for enforcement of the award in Comm Arb E395 of 2023 respectively (now consolidated).

12. Through a ruling dated 31st January 2025, Justice P. J. Otieno set aside the arbitral award and held that the award in favour of the 1st respondent was made without jurisdiction.

13. They posited that the funds held were not the subject of the arbitration and were not adjudicated by the arbitrator.

Applicant's Submissions

14. According to the applicants, the funds held in the joint account comprise of the balance of the purchase price for the share sale in 2018 and is part of the judgment and decree of the Court in HCCC No. 21 OF 2020, Bilha W Mwangi & Kemboy Julius Kipkosgei T/A Kemboy Law Llp v Igeria Arthur Konye Njoroge David Ngumbu T/A Igeria & Ngugi Advocates.

15. The applicants thus argued that they have been prejudiced by failing to receive the balance of the purchase price for the last 6 years despite transferring their shares and assets in the company to the 1st respondent. They further argued that the respondents are in contempt of court for failure to deposit the sum of Kshs. 53, 270, 698 in the joint account as ordered on 13th July 2022. They highlighted that the failure to deposit the said amount has resulted in the loss of millions in interest that could have accumulated from 13th July 2022.

16. The applicants submitted that the arbitral award, which was the only basis for the objection to the release of the decretal sum/ balance of the purchase price by the 1st respondent, has been set aside. They therefore, contended that this court has no jurisdiction to hold the funds any further under section 7 of the *Arbitration Act* post conclusion of arbitral proceedings. They further advanced that the ruling has not been stayed or set aside.

17. The applicants asserted that the claims of breach by the 1st respondent in the arbitration fell outside the scope of the governing agreements (share purchase agreement and deed of amendment). They asserted that any other arbitrator that is to deal with the dispute between the parties will have to abide by the court's decision and disregard the claim by the 1st respondent. They added that the only claim remaining and falling within the scope of the arbitration agreement that applicants intend to pursue as directed in the ruling, is the applicants' funds received and held by the 1st respondent. They also submitted that the respondent cannot now mutate his objection as done in his supplementary submissions.

18. In closing, the applicants pointed out that they have been kept away from the fruits of their judgment in HCCC No. 21 of 2020 and from enjoying the balance of the purchase price from 30th June 2018, 7 years from when they transferred the ADL plaza to the 1st respondent.

1st Respondent's Submissions

19. The 1st respondent submitted that he has filed a notice of appeal against the ruling of 31st January 2025 and is in the process of filing his application for leave to appeal. He also submitted that the dispute between the parties is still unresolved and that this is depicted in the impugned ruling. He therefore asserted that the funds in the joint fixed deposit account should not be released.

20. The 1st respondent also submitted that there is no dispute that the applicants were in breach of the terms of the agreements between the parties. He pointed out that even at para. 134 of the impugned ruling, the court found that breaches of the terms of the SPA and the deed of amendment were

proved. He asserted that he is entitled to seek a remedy for the proved breaches through fresh arbitral proceedings as ordered by the court or an appeal.

21. The 1st respondent further submitted that it is indisputable that the sums deposited being the balance of the purchase price under the SPA were intricately linked to the arbitration. In support, he relied on the court's ruling of 8th April 2021 to that effect.

22. The 1st respondent argued that there is no basis for the release of the funds in question as the arbitration proceedings have not been concluded, the court has ordered a fresh referral to arbitration and the dispute remains unresolved.

23. Finally, the 1st respondent submitted that the interest of justice weighs towards maintaining status quo and the sums deposited not being released. He pointed out that the funds attract interest and that no prejudice whatsoever will be occasioned to either party until the dispute is resolved.

Analysis and Determination

24. I have considered the application, the opposing affidavits and written submissions. There are two issues for determination: a) whether the subject funds should be released to the firm of Gichuki King'ara & Co. Advocates for onward transmission to the applicants; and b) whether the 1st respondent is in contempt of court in no depositing the sum of Kshs. 53, 270, 698 in the joint account as ordered on 13th July 2022.

25. The record shows that on 19th May 2022, the court issued an interim measure of protection pending the hearing and determination of an arbitration matter between the 1st respondent and the 1st to 6th applicants. The court directed that Kshs. 102,378,022.98 be deposited in a joint interest-earning account in the names of the advocates for the applicant and the 1st to 6th respondents pending the hearing and determination of the arbitration.

26. The applicants contended that the funds were not the subject of the arbitration and were not adjudicated upon by the arbitrator.

27. The applicants had earlier advanced a similar argument that the Kshs. 102,378,022.93 deposited was not the subject matter of the arbitration. In its ruling of 19th May 2022, the court stated as follows: -

> " 32. The view the Court takes is that, the 1st to 6th respondent are out to circumvent the agreement for ring-fencing of the sum of Kshs. 102,378,022.98. Although the said suit was brought by the 8th respondent on the professional undertaking given to him by the 9th to 11th respondent, it is not lost to the Court that the same was for the benefit of the 1st to 6th respondent to escape responsibility under that agreement."

28. The foregoing was the basis upon which the Court gave the orders of 19th May 2022. On this basis, the funds are inextricably tied to the arbitration.

29. The outstanding question now being; whether the arbitral dispute has been resolved to warrant the release of the funds to the applicants. The applicants and the respondent have taken divergent views on this issue.

30. Let us harvest relevant aspects to the issue in the ruling of 31st January 2025, (P. J. Otieno J) which stated as follows: -

> " 134. Flowing from the above discussions and deductions, the court is satisfied and finds that the proved breaches were during the period between the date of expiry and that of amendment, when there was no SPA in force. In the absence of a reigning contract between the parties, the covenant to arbitrate was equally non-existent and to subject happenings during that period was to delve outside the mandate of the reference and scope of the arbitration. This conclusion takes into account the position of the respondent that the breaches were between 19th June 2017 and 23rd July 2018. The court however finds that there was never demonstration on the exact dates which payments were made and of what amount. The Court finds that in absence of such proof, there was no disproval of the applicant's uncontested claim that the breaches were between the period 31st July 2017 and 7th May 2018.
>
> 135. The court thus finds and holds that the arbitrator exceeded his mandate by resolving a dispute beyond the scope of authority donated by the parties. That satisfies the requirement of section 35(2) (iv) of the Act and as a matter of duty invites the courts interference as a way of supervision upon the tribunal with a reminder that its jurisdiction is not limitless nor unfettered but subject to the extent of the powers donated by the parties. In the circumstances of this case, the court is duty bound to do the exception other than the rule, the duty never to interfere but enforce the award to meet the dictates of party autonomy. The award is thus set aside.
>
> 136. The award is set aside in its entirety with clear appreciation of the proviso to section 35(2) iv because the court finds it not impossible to severe any part of the award as salvageable.
>
> 137. This decision however leaves the initial dispute between the parties, which both desired and chose to be resolved by arbitration, unresolved. It ought to be resolved for which reason, the (court) directs that it be referred afresh, to a new arbitrator appointed by the parties within 30 days of this decision."

31. From the above, I gather that the underlying dispute between the parties remains unresolved. The court found that there were proved breaches during the period between the date of expiry and that of amendment, when there was no SPA in force. However, the court also found that there was no demonstration on the exact dates which payments were made and of what amount. It also found that there was no disproval of the applicant's uncontested claim that the breaches were between the period 31st July 2017 and 7th May 2018.

32. From the foregoing, the court did not pronounce that the funds deposited was not the subject matter of the arbitration.

33. In Brian Martin Francis & 5 others v Samuel Thenya Maina & Martin Munyu (Arbitrator) [2021] eKLR, the court observed that: -

> 61. Having regard to the arbitration clause and the agreement as a whole, it is my view that the parties envisaged and intended, at the time of concluding the agreement, that all their disputes regarding the agreement or questions arising out of or relating to or in consequence of the agreement

would be determined by way of arbitration. To view it differently would give the agreement a commercially insensible meaning. In any event, the arbitration clause in effect constituted a separate self-standing agreement to refer ANY disputes such as the one that featured in the matter before the arbitrator whatever the ultimate consequence or outcome thereof might be. To me this clause constituted an irrevocable agreement to go to arbitration, from which agreement the parties could not withdraw. The parties clearly intended to isolate and ring-fence their agreement to go to arbitration for determination of ANY Dispute arising in connection with the agreement. The arbitration clause was therefore immunized from any attempt to isolate some claims arising from the agreement. The clause covers consequential disputes. The applicants' attempt to bar the disputes referred to arbitration is unattainable and it cannot stand on the face of the clear arbitration clause. My reading of the arbitration clause and the Amended Statement of Claim leaves no doubt that the claims fall within the ambit and scope of the arbitration clause. The merits of the claims will be determined during the arbitration."

34. Section 7 of the *Arbitration Act* provides that: -

> " 7(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 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 this 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."

35. From the above provision, it shall not be incompatible with an arbitration agreement for a party to seek interim measures of protection before an arbitration. Even though the earlier arbitration award has been set aside, the court directed that the unresolved dispute be referred to a new arbitrator. Therefore, contrary to the applicants' submission, this court has jurisdiction to order and maintain the interim measures of protection pending the arbitration of the dispute between the parties.

36. The court is acutely aware that: -

> " A court of law when asked to issue interim measures of protection must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration'. Safaricom Limited v Ocean View Beach Hotel Limited, Salim Sultan Moloo & Alsai (K) Limited (Civil Application 327 of 2009) [2010] KECA 346 (KLR), Court of Appeal."

37. Thus, will setting aside the interim measures of protection herein prejudice the outcome of the arbitration?

38. In one sense, routing an interim measure of protection may prejudice the outcome of the arbitration. The interim measure of protection consists in the deposit of funds made herein. Release of the funds herein at this stage would pose a risk to, and prejudice the outcome of the arbitration. A balanced safeguard nonetheless: the sums deposited attract interest greatly mitigating any prejudice to the party who will ultimately be entitled to the funds upon resolution of the dispute between the parties in arbitration.

39. The latter bringing the court to ponder the next step. In light of the history of this matter, and the finding by the court that the 1st respondent staked a claim in the initial arbitration which was outside the scope of the arbitration agreement, and in the interest of justice, the interim measure of protection will be on conditions.

40. Otieno J in the ruling gave succinct directions thus: -

> "....the (court) directs that it be referred afresh, to a new arbitrator appointed by the parties within 30 days of this decision."

41. It appears the 1st respondent was not keen on pursuing the directions by the court although he haughtily relies on the referral of the dispute to arbitration by the court to support his objections to the release of the funds.

42. The first condition therefore, is that the 1st respondent will declare and lodge a competent dispute in arbitration in accordance with the arbitration agreement and the *Arbitration Act* within reasonable time, but in any event not later than 21 days from today. The arbitrator be appointed within the same period of time. Other conditions will be stated after the court has determined the question of contempt of court.

Contempt of court

43. The next issue is whether the 1st respondent is in contempt of court for failure to deposit the sum of Kshs. 53, 270, 698 in the joint account as ordered on 13th July 2022. The applicants highlighted that the failure to deposit the said amount has resulted in the loss of millions in interest that could have accumulated from 13th July 2022.

44. The 1st respondent took the position that the applicants are not entitled to interest on the deposited sum since they are not entitled to the decretal amount.

Legal context

45. The law applicable for contempt proceedings is set out in Section 5 of the *Judicature Act*, that:-

> "(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts."

46. Jurisprudence has developed to the effect that knowledge of the order of the court is sufficient for purposes of contempt of court.

Facts

47. The record shows that on 13th July 2022, the court issued an order to the effect that the 1st respondent deposits the sum of Kshs. 53, 270, 698/- in the same joint account. The sum was accumulated interest in respect of the decretal amount.

48. The 1ST Respondent was acutely aware of the order of the court requiring him to deposit a sum of Kshs. 53, 270, 698/- in the same joint account.

49. But, the 1st respondent did not make the deposit as was ordered. He purports to provide the reason for non-compliance; that the applicants are not entitled to interest on the deposited sum since they are not entitled to the decretal amount.

50. A person cannot unilaterally and without an order of the court discharging the impugned order, determine not to obey a court order. Feeling or holding a view, however strong it may be, that a person is not entitled to the order, are mere excuses which will not avail any relief to the contemnor.

51. Accordingly, the 1st respondent is in contempt of court.

52. I will however, give him reprieve; to purge the contempt by depositing the Kshs 53, 270, 698/- in the same joint account within 30 days of today which failing he may be sentenced to a punishment that the court will determine upon expiry of the period allowed for purging the contempt.

53. This will also have a bearing on the interim measure of protection herein.

Conditions for the interim measure of protection

54. The sums of Kshs 53, 270, 698/- to be deposited by the 1st respondent in the joint account is part of the funds which constitute the interim measure of protection. Accordingly, the interim measure of protection will lapse if, the 1st respondent: -

    a. Fails to commence competent arbitration proceedings in accordance with the arbitration agreement and the *Arbitration Act* within 21 days of this order; the arbitrator be appointed within the same period; or

    b. Fails to deposit the sum of Kshs 53, 270, 698/- in the same joint account within 30 days of today.

Disposal

55. In the upshot, the 1st to 6th applicants' application dated 26th February 2024 succeeds partially in the terms set out above. Thus, each party shall bear own costs of the application.

DATED, SIGNED AND DELIVERED THROUGH MICROSOFT ONLINE APPLICATION THIS 15TH DAY OF MAY, 2025

F. GIKONYO M

JUDGE

In the presence of: -

Oyoo for 1st Respondent

Ms. Wamuyu for 7, 9, 10 & 11th Respondent

Kingara for Applicant

CA Kinyua