



**Eureka Holdings v Nyachae & 5 others; Diamond Trust Bank &  
2 others (Interested Parties) (Miscellaneous Cause E872 of 2024)  
[2025] KEHC 8636 (KLR) (Commercial and Tax) (13 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8636 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CAUSE E872 OF 2024  
JWW MONG'ARE, J  
JUNE 13, 2025**

**BETWEEN**

**EUREKA HOLDINGS ..... APPLICANT**

**AND**

**MICHAEL MORAGIA NYACHAE ..... 1<sup>ST</sup> RESPONDENT**

**AMIN MOHAMED SHAMSUDIN SHAMJI ..... 2<sup>ND</sup> RESPONDENT**

**MOEZ ISMAIL JAMAL ..... 3<sup>RD</sup> RESPONDENT**

**ASSOCIATED AUTO CENTRE LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**JOHN CUMMING REGISTRARS ..... 5<sup>TH</sup> RESPONDENT**

**JOSIAH NJENGA & ASSOCIATES ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**DIAMOND TRUST BANK ..... INTERESTED PARTY**

**CREDIT BANK LIMITED ..... INTERESTED PARTY**

**SIDIAN BANK LIMITED ..... INTERESTED PARTY**

**RULING**

1. The Applicant (“Eureka”) filed this suit by way of the Originating Summons dated 25<sup>th</sup> October 2024 made, inter alia, under Article 159 (2) (c) of *the Constitution*, section 6 and 7 of the *Arbitration Act* (Chapter 49 of the Laws of Kenya), Rule 2 of the Arbitration Rules, 1997 and section 1A & 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) seeking inter alia that this suit be stayed and



the dispute between the parties be referred to arbitration and that the court directs that a sole arbitrator be appointed by the Chairperson of the Chartered Institute of Arbitrators(Kenya) Branch in respect of the dispute. It also seeks interim orders of protection pending the hearing and determination of the arbitration.

2. The application is supported by the grounds set out on its face and the affidavits of Leon Nyachae , a Director of Eureka, sworn on 25<sup>th</sup> October 2024 and 15<sup>th</sup> December 2024. The 1<sup>st</sup> Respondent(“MICHAEL”) responded to the application through his replying affidavit sworn on 6<sup>th</sup> November 2024, Grounds of Opposition of the same date and a Notice of Preliminary Objection dated 27<sup>th</sup> November 2024. The 3<sup>rd</sup> Respondent(“MOEZ”) has also responded to the application through his replying affidavit sworn on 4<sup>th</sup> December 2024.
3. MICHAEL has also filed the Chamber Summons dated 6<sup>th</sup> November 2024 made under Order 1 Rule 10(2) and (4) and Rule 25 of the Civil Procedure Rules (“the Rules”) and section 3A of the [Civil Procedure Act](#) seeking to strike his name out of this suit and that one GRACE WAMUYU NYACHAE be enjoined as one of the Respondents. The application is supported by inter alia MICHAEL’s affidavits sworn on 6<sup>th</sup> November 2024 and 27<sup>th</sup> November 2024 and it is opposed by Eureka through Leon Nyachae ’S replying affidavit sworn on 27<sup>th</sup> November 2024. The two applications have been canvassed by way of written submissions which together with the pleadings I have carefully considered and I will be making relevant references to in my analysis and determination below.

#### **Analysis and Determination.**

4. I propose to first deal with MICHAEL’s application and Objection as they raise technical issues that can preliminarily dispose of this suit. MICHAEL states that Eureka has no locus standi as there is no resolution or valid resolution empowering the deponent to commence these proceedings or swear the said deposition and that Eureka has no interest in the 4<sup>th</sup> Nominal Respondent (AAC), its shareholding having been transferred to a third party who is not a party to these proceedings. In opposition, Eureka’s deponent has stated that he is a director in AAC in his replying affidavit and that he has authority to swear the affidavit on behalf of Eureka.
5. It is trite that for one to succeed in putting forth a Preliminary Objection, the facts pleaded by the other party are assumed to be correct; it must be a matter of law which is capable of disposing off the suit; it must not be blurred by factual details calling for evidence and it must not call upon the Court to exercise discretion(see *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696*). In this case, it is clear and obvious that the Objection calls for evidence and it is in respect of disputed facts about MICHAEL’s shareholding in AAC. This brings the Objection outside of the confines in *Mukisa*(supra) above and such, the same is dismissed.
6. Turning to MICHAEL’s application, he seeks that his name be struck off from the suit and that one GRACE WAMUYU NYACHAE be enjoined herein as one of the Respondents. He depones that he should not be part of this proceedings because Eureka, by a Deed of Transfer dated 15<sup>th</sup> March 2017, transferred all of its shares to a third party and ceased to be director/shareholder of AAC and that as a further result of the transfer, MICHAEL also ceased to be a director of AAC. He states that the said GRACE NYACHAE is the only surviving director of AAC after the demise of the other director, the late SIMEON NYACHAE and that she will be required to be cross-examined on multiple issues. He avers that the Companies’ Registry has not been updated to reflect the changes made after the aforementioned transfer because of the scanning process that is ongoing at the Business Registration Service (BRS). In response, Eureka has stated that MICHAEL and Eureka remain a directors and shareholders in AAC as evidenced by the Annual Returns and CR-12 annexed.



7. I do not think it is in dispute that Order 1 Rule 10(2) of the Rules grants the Court discretion to order joinder of any party to a suit at any stage of the proceedings so long as the presence of that party before the Court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute. I am in agreement with Eureka's submission that in *Joseph Njau Kingori v Robert Maina Chege & 3 others* [2002] KEHC 1192 (KLR) Nambuye J., (as she was then) added that in the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff.
8. Going through the parties' depositions, while I can appreciate that Eureka's shareholding in AAC is in the process of being transferred to a third party, MICHAEL admits that the position at the moment is that this transfer is not complete and that Eureka and MICHAEL remain as directors and shareholders in AAC as evidenced by the CR 12 dated 7<sup>th</sup> November 2024 annexed by Eureka. As a shareholder in AAC and considering that Eureka has claims against him, I find that he is a necessary and proper party to this suit and that any order or decree issued by the court cannot be enforced without his presence in this matter.
9. On the flipside, I am yet to establish a nexus that makes the said GRACE WAMUYU NYACHAE a necessary party to this suit. Eureka seeks no reliefs against her and MICHAEL has not stated what reliefs have been sought against her by Eureka to make her a Respondent in this suit. The fact that MICHAEL seeks to cross-examine her does not make it necessary to have her as a Respondent herein. He can always call her as a witness and then cross-examine her without making her a Respondent. It is for these reasons that I decline to allow MICHAEL's application dated 6<sup>th</sup> November 2024.
10. I now turn to Eureka's application seeking a referral of the dispute to arbitration and interim orders of protection pending the arbitration. Eureka has accused its co-directors and shareholders of breach of fiduciary duties in their running and management of AAC. The Respondents do not deny that AAC's Memorandum & Articles of AAC provides for a dispute resolution mechanism at clause 37 as follows:

Any dispute, controversy or claim arising between the company on the one hand and any of the members, their executor, administrators, or assigns on the other hand, or between the shareholders, touching the true intent or contraction, or the incidents, or consequences of these Articles, or the statutes or touching any breach, or alleged breach, or otherwise relating to the premises, or to these articles or any other statutes affecting the Company, or to any of the affairs of the Company, shall be resolved by way of consultation held in good faith between the shareholders. Such consultation shall begin immediately after one Shareholder has delivered to the other written request for such consultation. If within fifteen (15) days following the date on which such notice is given the dispute cannot be resolved, the dispute, controversy or claim shall be submitted to arbitration upon request of any Shareholder by written notice to the other Shareholder.
11. MOEZ depones that Eureka has not utilized the internal mechanisms provided for above in settling the parties' disputes and barring directors from dealing on behalf of AAC and that the present application is premature. The import of the aforementioned clause is clear. In the event of a dispute parties must first attempt to resolve the dispute through consultation where a written request for such a consultation ought to be given. Should such consultation fail to be resolved within 15 days from the date of the request, then any party would be at liberty to refer the matter to arbitration by written notice. Going through Eureka's depositions, I find that there is no notice or request evidencing that it sought consultations from the other shareholders to resolve the issues and disputes between them prior to the filing of the present application. The use of the word "shall" in Clause 37 above connotes the mandatory nature of this step and it was therefore obligatory for Eureka to request for consultations first before seeking to refer this matter to arbitration. I therefore find merit in MOEZ's contention that



this application is premature as Eureka has not exhausted the internal dispute resolution mechanisms provided for under the dispute resolution clause.

12. It should not be lost that as long as the contracting parties' intention to subject disputes arising from their contract to alternative dispute resolution is discernable from the wording of the contract, courts will be quick to giving effect to that intention by staying any proceedings already filed in court and give the parties an opportunity to pursue alternative dispute resolution as provided for by Article 159(1)(c) of *the Constitution*. Indeed, contracts belong to parties and it is them who negotiate and agree on the terms of their contracts before they finally put ink to paper. Courts cannot re-write those terms, but will give effect to them if and when the contracts become the subject of litigation (see *748 Air Services Limited v Theuri Munyi* [2017] KECA 419 (KLR))
13. Flowing from the foregoing, I am therefore inclined to give the parties a chance to consult on their dispute before choosing to refer the same to arbitration in line with their agreement under the arbitration clause. In any case, I find that pending this consultation and/or arbitration it will be apposite to determine whether orders of interim measures of protection should be granted. I do not think it is in dispute that the power of the court to grant these orders is grounded in section 7 of the *Arbitration Act* which provides 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.
14. One of the leading cases that 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) by the Court of Appeal 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. [Emphasis mine]

15. Eureka seeks Mareva injunctions against MICHAEL’s, the 2<sup>nd</sup> Respondent’s (“AMIN MOHAMED”) and MOEZ’s accounts, orders barring them from acting as directors and dealing in any transaction on behalf of AAC and Anton Pillar orders allowing Eureka to obtain information and financial records of AAC from the year 2014 to date. Going through the record, I find that in as much as Eureka accuses the said Respondents of impropriety and breach of fiduciary duty, this is not apparent from the face of the record and that no basis has been formed to freeze their accounts or stop their dealings as directors and shareholders of AAC. That AAC is indebted to the Interested Parties and that the Respondents issued guarantees for the loans the subject of the debts is not prima facie proof of wrongdoing. Whereas it is possible that AAC’s assets could be seized because of the outstanding debt, this is not attributable to the Respondents at least on a prima facie basis and it would be unfair to freeze their personal accounts and shares or limit their involvement in AAC’s affairs. In any event, I find that it would not be appropriate to bar them from acting as directors in the circumstances as this would cripple and negatively affect AAC’s operations further.
16. I also agree with MOEZ’s submission that Eureka has not fulfilled the conditions of granting the Anton Pillar orders set out in Anton Piller KG v Manufacturing Processes Ltd and Others [1976] Ch. 55 where it was held that “There are three essential pre-conditions for the making of such order in my judgment. First, there must be an extremely strong prima facie case. Secondly, the damage, mental or



actual, must be very serious for the Plaintiff. Thirdly, there must be clear evidence that the Defendants have in their possession incriminating documents or things, and that there is real possibility that they may destroy such material before any application inter parties can be made.” I have already found that Eureka has not set out a prima facie case against the Respondents, there is no evidence that they are likely to cause damage to AAC or that they are about to destroy such material in their possession that relates to Eureka’s claim.

**Conclusion and Disposition.**

17. In the upshot, I find no merit in Eureka’s Originating Summons dated 25<sup>th</sup> October 2024 and the same is dismissed. For avoidance of doubt, the 1<sup>st</sup> Respondent’s application dated 6<sup>th</sup> November 2024 and Notice of Preliminary Objection dated 27<sup>th</sup> November 2024 are dismissed. There is no order as to costs. The parties are at liberty pursue the consultation and arbitration mechanisms available to them in the 4<sup>th</sup> Nominal Respondent’s Memorandum & Articles of Association. It is so ordered.

**DATED SIGNED AND DELIVERED virtually this 13<sup>th</sup> DAY OF JUNE 2025**

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**J.W.W. MONGARE**

**JUDGE**

IN THE PRESENCE OF

Mr. Ouma for the Applicant.

Dr. Kenyariri for the 1<sup>st</sup> Respondent.

Mr. Kimani for the 3<sup>rd</sup> Respondent.

Amos- Court Assistant

