



**Coffee Management Services Limited v Igi Holdings Limited t/a Kirimiri Estate
(Civil Case E004 of 2023) [2025] KEHC 11154 (KLR) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL CASE E004 OF 2023
FN MUCHEMI, J
JULY 24, 2025**

BETWEEN

COFFEE MANAGEMENT SERVICES LIMITED PLAINTIFF

AND

IGI HOLDINGS LIMITED T/A KIRIMIRI ESTATE RESPONDENT

RULING

1. The applications for determination are dated 26th March 2025 and 2nd April 2025. The defendant’s application dated 26th March 2025 seeks for orders of setting aside or varying of the consent order dated 27th February 2024 on the grounds that the respondent has ceased providing management services on the farm, has refused to accept or engage in arbitration proceedings and continues to insist on the subsistence of the contract despite the contract becoming void by operation of the law. The applicant further seeks that the respondent be restrained from interfering with its banking transactions, finances or third party contracts including but not limited to writing letters and issuing instructions to financial institutions or coffee exchange platforms. Further, the proceeds of sale of coffee currently held at Direct Settlement System be released to them as continued withholding of those funds is severely prejudicial to their ability to operate and that the respondent be directed to file a substantive claim in court if they seek to recover any alleged debt from them rather than weaponizing the consent order to cripple operations. The applicant seeks in the alternative, the court interpret the contested phrase “coffee at the millers and on the farm” in the consent order dated 27th February 2024 as referring solely to the coffee that was physically present on the farm and at the millers on the day the order was made and declare that such phrase does not extend to include any coffee harvested or produced after that date; and order that the consent order be construed strictly in accordance with the parties’ original intent—namely that the consent was entered into in anticipation of a quick resolution of the disputes and was not intended to impose an indefinite obligation on the defendant by capturing future coffee harvests.



2. The plaintiff's dated 2nd April 2025 seeks for orders of an injunction to issue against the defendant/respondent whether acting by itself, agents, employees or persons claiming under it or in conjunction or association with any other person whatsoever, from offering for sale, selling and/or receiving payment for coffee:- drawn from and or within the property known as Kirimiri Estate without the applicant's written consent; sold by the respondent through auction in the Nairobi coffee exchange and held by direct Settlement System for coffee drawn from and/or within the suit property without the applicant's written consent; from transporting and/or entering into milling, brokerage or direct coffee sale agreements with any persons for coffee drawn from the suit property without the applicant's written consent; from seeking and or receiving approval and or registering any contracts for direct sale with any person with the coffee directorate drawn from the suit property; from withdrawing funds held in the respondents being proceeds of sale of the coffee drawn from the suit property; uprooting, destroying, damaging, or otherwise interfering with the crops currently planted and growing on the suit property; entering upon the said property for the purpose of, or engaging in any activity likely to, cause damage or destruction to the said crops, including but not limited to the use of herbicides, pesticides or heavy machinery in a manner that would adversely affect the coffee crops and acting in any manner that would materially alter the existing condition of the coffee crops or the land upon which they are planted in a way that would diminish their value or yield, pending the hearing and determination of the matter herein through arbitration.
3. In opposition to the application dated 26th March 2025, the respondent a Replying Affidavit dated 29th April 2025. Further, in opposition to the application dated 2nd April 2025, the defendant/respondent filed a Notice of preliminary Objection dated 11th April 2025 and Replying Affidavit dated 30th April 2025.

The Defendant/Applicant's Case on the application dated 26th March 2025.

4. The applicant states that on 18th December 2023, the respondent obtained an order of injunction stopping them from milling coffee grown on its farm. Meanwhile, the applicant states that it filed an application seeking to have the matter referred to arbitration as provided by the contract between the parties. The matter came up for directions on 27th February 2024, whereby parties entered a consent regarding the proceeds of the 2022/2023 coffee harvest. The proceeds of the sale of the coffee at the millers and on the farm was to be deposited with the Direct Settlement System [DSS] while parties explored the possibility of resolving all matters in the suit. The parties pursued negotiations but they were unable to agree and thus agreed to pursue arbitration. The applicant states that its advocates on 18th December 2024 forwarded a draft copy of the reference to arbitration to the respondent's advocates for their approval. However, upon being granted 21 days by the court on 18th December 2024 within which to file a formal application, the respondent failed to do so.
5. On 5th March 2025 when the matter came up for directions, the respondent's advocate informed the court that she had been bereaved and was therefore unable to file the application. Upon applying for extension of time, the court granted a further extension of 21 days for the filing of the application. The respondent has not filed the application to date and neither have they approved the reference to arbitration.
6. The applicant avers that despite the limited scope of the consent order of 27th February 2024, the respondent has unilaterally extended its effect to the 2023/2024 harvest, which was financed by third parties and is not covered by the order.
7. The applicant argues that the respondent has unlawfully interfered by sending letters to financial institutions and third party coffee buyers, making inquiries and directing them to withhold funds due



to them resulting to them being unable to meet their financial obligations including payment of wages for 800 employees and servicing of loans and supplier contracts. Further the continued withholding of funds at the DSS is unsustainable and is crippling their ability to run the farm effectively.

8. The applicant further argues that the respondent has alternative remedies including filing a debt recovery claim against them. Further, the respondent's actions amount to bad faith and a deliberate attempt to sabotage their business. Unless the court intervenes, the applicant states that their coffee estate will collapse resulting in significant financial and social consequences.

The Plaintiff/Respondent's Case.

9. The respondent states that the arbitration reference was served upon the applicant's advocates on 28th March 2025 and to date they have never received any response.
10. The respondent states that the sole purpose of the application is to ensure that their security is promptly depleted leaving them at the mercy of the applicant who has never filed any pleadings or made payments towards the debt herein. The respondent further states that it has received and consumed proceeds of sale of coffee charged to them amounting to USD 351,584 [approximately Kshs. 45,705,000/-] without remitting a single payment to them, an act of bad faith clearly demonstrating an intention not to settle the debt owed. Thus, by selling the said coffee without their consent, the respondent argues that the applicant has breached the agreements entered into with them, the court order and further violated their rights as a debenture holder.
11. The respondent avers that it is the applicant's intention to rip the fruits of their labour by harvesting and selling the coffee produced while failing to meet its obligations to them. Further, the respondent avers that their management agreement was one of the largest accounts with a current outstanding balance of USD 1,287,878 as at 28th February 2025 [approximately Kshs. 167,310,000/-] adversely affecting their business.
12. The respondent states that the applicant's allegation that its business will collapse is aimed at gaining the court's sympathy. Further, any such collapse would be due to mismanagement and the extravagant lifestyle of the directors, whose drawings during the period since their management contract well above Kshs. 61,407,073/-.
13. The respondent states that the applicant has taken advantage of the milling and sales processes for coffee to transact without regard to the dispute and existing court order. As a result, they instructed their advocates to notify the relevant institutions accordingly. The respondent further states that the consent entered into on 27th February 2024 was entered into to guard their security from being depleted, sold or proceeds of sale falling into the hands of the applicant. Further, the parties entered the consent being well aware of the facts, no fraud or collusion or non disclosure of material facts or mistake has been alleged hence setting aside the said consent would not only be unjust but also without reason.

The Plaintiff/Applicant's Case on the Application dated 2nd April 2025.

14. The plaintiff states that they entered into a management agreement with the defendant/respondent in February 2012. During the same period, they entered into a security agreement to safeguard the funds advanced by the applicant. Pursuant to the management agreement, the applicant undertook duties including managing, supervising, directing and controlling the operation of the business and tending, maintaining and otherwise managing Kirimiri Estate.
15. The applicant states that at all material times, the respondent approved all expenditures and budgets and was kept apprised of the sums owed to them. The funds advanced to the respondent were secured



by coffee produced at Kirimiri Estate under the security agreement and the applicant was to recover its investment from the proceeds of the coffee sales.

16. On 23rd October 2023, the respondent's directors entered Kirimiri Estate and instructed workers to pack and ferry away approximately 105 tons of coffee parchment valued at USD 420,000 [Kshs. 63,840,000] without their consent. The applicant states that the respondent delivered the said coffee at Umoja Specialty Coffee Millers, its milling agent, despite the fact that the coffee was subject to the security agreement, in violation of Clause 6.4 of the Management Agreement.
17. The applicant states that following the consent recorded in court on 27th February 2024, the defendant in contempt of the consent order proceeded to harvest and offer for sale coffee through direct sales. The amount owed by the defendant being USD 1,052,546 continues to accrue interest and currently stands at USD 1,287,878 while the defendant continues in its breach without making any effort to pay or disclose the whereabouts of the funds received to their detriment. The applicant states that it is the breach of court orders, sale of and receipt of the proceeds of coffee sales that has motivated them to remain non committed to the arbitration process. Further the amount owed by the respondent continues to accrue interest, yet the respondent has refused to have the proceeds of Direct Coffee Sale held by the Direct Settlement System or deposited into a joint interest earning account which would mitigate losses for both parties. Further, efforts have been made to have Direct Coffee Settlement under Co-operative Bank confirm that they still hold the entire proceeds of coffee sales have borne no fruits with letters sent to them remaining unresponded to.
18. The applicant avers that it is apprehensive that the respondent intends to proceed with the disposal of its coffee by way of sale thereby depleting their security. Thus the court ought to grant orders herein to preserve their security as the respondent has clearly demonstrated its intention to dispose of the 2024/2025 coffee harvest without making the necessary payments as required.
19. The applicant avers that it remains the legally appointed manager of the respondent's coffee estate, and the respondent's actions of engaging another miller without their consent is unlawful, as the contract remains valid and in force. Further, the respondent has never denied its indebtedness to the applicant, further affirming their entitlement to recover the outstanding sums as per the existing agreements.
20. The applicant is apprehensive that the respondent's actions of irregularly disposing of the subject coffee will deplete their security completely under the security agreement and deny them their contractual right to recover the debt, which currently stands at USD 1,287,878. Unless restrained by the honourable court, the applicant avers that the respondent will continue with its illegal and unjust conduct and dispose of the entire coffee comprising their security thus causing irreparable loss and damage to them.

The Defendant's Notice of Preliminary Objection dated 11th April 2025.

21. The defendant states that the application is incurably defective, incompetent and improperly before the court having been filed outside the 21 day period granted by the court on 5th March 2025 without leave or an application for extension of time. Further, the applicant has failed to comply with clear and express orders of the court and has not provided any explanation or sought condonation for the delay prior to filing the impugned application. Additionally, the application offends the mandatory principles of procedural regularity and fairness and is an abuse of the court process.

The Defendant/Respondent's Case on the application dated 2nd April 2025.

22. The respondent states that the Coffee Act under which the agreement was originally framed was repealed and the regulatory environment has since changed significantly following the enactment



of the Crops Act and the Crops [Coffee] [General] Regulations 2019. Under the new regulatory framework, coffee farmers are required to obtain licences from the relevant County Government to which the plaintiff has not obtained the required license from Murang'a County since 2019. The absence of the such a licence renders the applicant's continued operations on their farm non-compliant with the applicable regulations. Consequently, any agreements or claims arising from such unlicensed activities would be void and unenforceable.

23. The respondent states that while the Management Agreement provided for termination on three months' notice by either party, it also included a clause requiring them to settle any outstanding amounts before terminating the contract which has created practical difficulties in disengagement, especially in the absence of verified accounts or agreed statements of indebtedness.
24. The respondent states that on 6th June 2022, the applicant presented a security agreement purportedly creating a lien over coffee produce which was executed about 10 years after the Management Agreement, and without the applicant holding the requisite farm management licence, the document does not expressly refer to or include future harvest; it appears to have been created in a manner inconsistent with the regulatory framework governing coffee managers and the nature and enforceability of the said lien is questionable in light of the applicable legislation and the applicant's status at the time.
25. The respondent states that they have been responsible for all farming and harvesting operations following the applicant's withdrawal of services in July 2023. Further, the respondent avers that no verified statement of account has been provided by the applicant in support of the amount it claims. There has also been no reconciliation of accounts between the parties.
26. The respondent avers that the coffee currently being harvested is not the subject of any valid or enforceable security agreement which it managed and funded entirely. Further the consent order dated 27th February 2024 made reference to coffee on the farm and at the millers referring to produce that had been harvested and processed at that point. It did not apply to future crops, which are now in the field or undergoing harvesting and processing.
27. The respondent avers that the funds realised from the current harvest are being applied to meet farm operational costs including ages, inputs and general upkeep and any attempt to block their access to such funds would jeopardise the ongoing harvest and cause further loss.
28. Parties disposed of the application by way of written submissions.

The Plaintiff's Submissions.

29. The plaintiff relies on the cases of J. M. Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983 and S. M. N. v Z. M. S & 3 Others [2017] eKLR and submits that although the defendant alleges that they have failed to act on the arbitration reference, the issue of arbitration was properly dealt with and it is the defendant themselves who delayed it. The plaintiff submits that it attached a letter dated 28th October 2024 which proposed the names of 5 arbitrators which letter was never responded to. Further on 28th March 2025, the plaintiff submits that its counsels sent the defendant's counsels a reference to arbitration which was 4 days before the defendant's counsel put in the current application listing non referral to arbitration as a ground for setting aside the consent order. The plaintiff submits that it is the defendant who has delayed the referral of this matter to arbitration due to inaction on their part.
30. The plaintiff submits that from 17th July 2024 to 20th August 2024, the defendant has received and consumed proceeds of the sale of coffee amounting to over USD 351,584 approximately Kshs.



45,705,000/- which is proven by the attachment of direct sales summary and auction sale transaction listing report that breaks down the details of the weight of coffee sold, the seller, buyer and gross value of the coffee and the dates in which the transactions occurred. The said amounts were paid directly to the defendant without any payment to the plaintiff in direct contravention of the Management Agreement between the parties, facts that are not denied by the defendant.

31. The plaintiff submits that any difficulties the farm is experiencing is a result of the defendant's doing as the directors have been living an extravagant lifestyle as shown from the drawing of Kshs. 10,652,151/- in the Financial Statement of the Director's Personal Expenses. A further glance at the statement shows total drawings amounting to Kshs. 61,407,073/- in the period of the management contract and financing agreement from the year 2016 till date. Thus the financial statements show that the defendant is far from the brink of collapse.
32. The plaintiff submits that the Management & Security Agreement between the parties is its largest account with an outstanding balance of USD 1,287,876 as at February 2025 and the said agreement having been entered into in the year 2012 takes precedence over any other financing agreements. The plaintiff submits that any financing agreement enforced during the duration of the Management and Security Agreements is void as the coffee is already charged to them. The plaintiff argues that in the event the court is inclined to believe the defendant's claim that cultivation of its crop was financed by third parties, the defendant is engaged in financial fraud against the alleged third parties by failing to disclose that the coffee crop was already charged to them until payment in full.
33. The plaintiff argues that it filed its substantive claim on 22nd December 2023 and served the defendant's director and return of service filed on 1st February 2024. Thus it is the defendant who has failed to file any pleadings and continue to delay the determination of the matter through filing frivolous applications.
34. The plaintiff argues that the defendant has not denied the debt owing to them and the consent was entered into by both parties without any duress and having been aware of the facts. There is no fraud, non disclosure of material facts, mistake or any sufficient reason that has been advanced in support of the defendant's application. The plaintiff argues that if the court varies the consent order, they will continue to suffer as they continue to suffer since the court will have been used to perpetrate a fraud.
35. The plaintiff relies on Order 40[1][a] and [b] of the Civil Procedure Rules and the cases of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR and Mrao Ltd v First American Bank of Kenya Ltd [2003] eKLR and submits that they continue to manage the defendant's estate vide the management agreement and a right to the coffee produced by the defendant's estate vide the security agreement. Thus the said right has been threatened and continues to be threatened by the defendant's actions of harvesting, selling or milling the coffee without their consent hence establishing a prima facie case.
36. The plaintiff further relies on the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR and submits that the defendant's intent is to progress its breach without making any efforts to pay or disclose the whereabouts of the funds received and unless the court grants interim orders to preserve their security, the defendant is keen to dispose off the 2024/2025 coffee harvest without making any payments, evade liability and completely exhaust their security as they continue to incur costs in running and managing the farm and the amounts owing will continue to accrue interest to its detriment.
37. On the issue of balance of convenience, the plaintiff submits that lies in the court preserving the subject matter in terms of maintaining the status quo pending the hearing and determination of the suit.



38. The plaintiff submits that at all material times, the milling and marketing agreements were in place, they had obtained all necessary licenses and requirements. In any case, the plaintiff submits that they were and are no license requirements for farm managers which is the basis for the Management and Security Agreements and any case regulations came into force on 14th December 2023 vide legal Notice No. 221 of 2023 their earlier effective date of 1st July 2016 having been suspended. Furthermore, there were sufficient safe guards in the management agreement to allow the parties to appoint a mutually acceptable miller and marketer, a fact that the defendant has failed to disclose and operationalize instead choosing in bad faith to move and sell the coffee without their knowledge.
39. The plaintiff further submits that the defendant has not faced any practical difficulties that made termination difficult. The defendant does not wish to tell the court that they were unable to terminate the agreement because it provides all dues owing to the plaintiff must be cleared before termination, which they do not want to do. The said agreements have been in subsistence for 12 years and in the year 2023 is when the defendant started breaching the said agreements. The plaintiff further submits that the defendant cannot allege that they have not been served with any verified accounts or agreed statements of indebtedness without providing evidence to show that they requested for the same numerous times and their request was denied yet both parties have audited accounts.
40. The plaintiff argues that they have not withdrawn from managing the farm as statements of accounts produced by their director, Kamau Kuria show payments up until February 2025 made to their farm manager who is still in situ on the defendant's estate. The plaintiff further submits that both parties signed the consent order dated 27th February 2024 which made reference to "coffee at the farm and at the millers" to mean all the coffee that is present at the farm, at all stages of growth and whether harvested or not, which is present continuous and creates a lien over current and future coffee on the farm. The plaintiff argues that the defendant's allegations that it does not apply to future crops is untrue.
41. The plaintiff submits that the defendant does not deny the existence of debt. Further the plaintiff states that it is only interested in protecting its interests and getting paid its dues meanwhile the defendant continues to operate in bad faith, contempt of court and with an intention to dispose of coffee unlawfully.
42. The plaintiff relies on the case of Oraro v Mbaja [2005] KEHC 3182 [KLR] and submits that the preliminary objection cannot stand as it does not raise any point of law. The plaintiff further submits that there were no timelines by which a party to litigation has to file an application before the court.

The Defendant's Submissions

43. The defendant submits that the consent order contemplated referral to arbitration in accordance with Clause 12.5 of the Management Agreement. The said order was not global or a final settlement and it did not conclusively resolve all disputes between the parties. It was intended to preserve arbitration rights and facilitate the arbitral process but the plaintiff's slow and inconsistent conduct hindered that objective.
44. The defendant submits that the plaintiff sent them their reference to arbitration on 28th March 2025, indicating a clear attempt to simultaneously litigate and arbitrate which is contrary to well established legal and contractual principles. Further the defendant states that they responded to the plaintiff's draft reference on the same date forwarding proposed changes but no further communication has been received by the plaintiff.



45. Relying on the cases of *Flora Wasike v Destimo Wamboko* [1998] eKLR and *Purcell v F.C Trigell Ltd* [no citation given], the defendant submits that the court retains the power to vary or set aside such orders for sufficient cause. The defendant argues that the plaintiff's failure to honour undertakings to initiate or progress arbitration undermines the foundation of the consent. The defendant submits that its ability to manage its farm is constrained by its non access to the deposited monies and lack of movement in the arbitration. Thus, the plaintiff's repeated extensions, unfulfilled commitments and shifting positions constitute sufficient cause to revisit the consent terms.
46. The defendant submits that the claims by the plaintiff about their directors' expenses are speculative, irrelevant and unsupported by any evidentiary affidavit. No clause in the contract prohibits their directors from receiving drawings or remuneration. Further the defendant submits that the plaintiff fails to demonstrate that any such drawings were from funds due to the plaintiff. The defendant further submits that they have consistently challenged the plaintiff's unilateral and fluctuating accounting and no verified, reconciled statement of account has been provided neither has any independent audit been submitted. The defendant submits that pursuant to Section 6 of the *Arbitration Act*, they did not file a defence and the merits of the debt can only be determined by the arbitral tribunal.
47. The defendant relies on the cases of *Nicholas Kiptoo arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR and *Abdirahman Abdi v Safi Petroleum Products Ltd & 6 Others* [2011] eKLR and submits that the plaintiff did not file the application and submissions on time neither did they seek and extension or offered any convincing explanation. The defendant further relies on the case of *Utalii Transport Company Ltd & 3 Others v NIC Bank & Another* [2014] eKLR and submits that the plaintiff has displayed a pattern of procedural noncompliance and only takes steps when prompted or overtaken by events which is prejudicial to them. The defendant submits that they have acted promptly and responsibly as on 27th March 2025, they filed their application upon confirming the plaintiff's failure to meet the extended deadline. The application was time sensitive, tied to the start of the coffee harvest season and filed with due urgency. The defendant further submits that their advocates had a telephone conversation with the plaintiff's advocates and they agreed to first deal with the reference to arbitration.
48. The defendant relies on the cases of *Safaricom Ltd v Ocean View Beach Hotel Ltd* [2010] eKLR, *Onyango v Ng'ang'a* [2024] KEHC 12557 and *Kenya Shell Ltd v Kobil Petroleum Ltd* [2006] eKLR and submits that once an arbitration agreement is invoked, parallel litigation should be stayed. Further, the defendant argues that pursuant to Section 7 of the *Arbitration Act*, the court can only grant interim measures to preserve the subject matter pending arbitration and not to usurp the jurisdiction of the arbitral award. Thus an injunction cannot be granted at this stage of the proceedings.

Issue for determination

49. The main issue for determination is whether the applications have merit.

The Law

Whether the applications have merit.

50. The defendant argues that the consent ought to be set aside for sufficient reasons being that it was entered into on the basis that the plaintiff would expedite the initiation of arbitral proceedings which they failed to do and their continued delays and extensions warrants the court to set aside the consent.



51. There is currently a dearth of authorities on the law governing the setting aside of a consent judgment or order. The case of *S. M. N v Z. M. S & 3 Others* [2017] eKLR summaries the case law and grounds upon which a consent may be varied or set aside as follows:
- i. Where the consent was obtained fraudulently;
 - ii. In collusion between affected parties;
 - iii. Where an agreement is contrary to the policy of the court;
 - iv. Where the consent is based on insufficient material facts;
 - v. Where the consent is based on misapprehension or ignorance of material facts;
 - vi. Any other sufficient reason.
52. Generally, a court will not interfere with a consent judgment except in circumstance such as would provide a good ground for varying or rescinding a contract between parties.
53. In *Flora N. Wasike v Destimo Wamboko* [1988] eKLR Hancox JA held the view that:-
- It is now settled law that a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.
54. The Honourable Judge went further and cited *Setton on Judgments & Orders* 7th Edition Vol. 1 page 124 and reiterated that:-
- Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them.....and cannot be varied or discharged unless obtained by fraud, or collusion or by an agreement contrary to the policy of the court....or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.
55. Lastly in *Brooke Bond Liebig v Mallya* [1975] EA 266 where Mustafa Ag. VP stated:-
- “The compromise agreement made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstance, e.g on grounds of fraud, collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case, the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”
56. Essentially, the above-cited authorities are clear that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason, which would enable a court to set it aside. From the record, parties entered into a consent on 27th February 2024 and amended it on 10th March 2024. By consent, the parties herein referred the instant dispute to arbitration in accordance with Clause 12.5 of the Management Agreement and agree on the arbitrator within 14 days. Further, that the coffee on the farm at Umoja Specialty Coffee Millers Limited be milled and sold and proceeds retained by Direct Settlement System until further agreement by the parties or by orders of the court.



57. It is therefore clear that parties entered a consent to refer the matter to arbitration. Hence the reasons adduced by the defendant that the plaintiff's failure to honour, to initiate or progress arbitration undermined the foundation of the consent does amount to a sufficient reason to warrant the setting aside of the consent.
58. The defendant further raised a preliminary objection on the application dated 2nd April 2025 on the grounds that the application is incurably defective, incompetent and improperly before the court having been filed outside the 21 - day period granted by the court without leave or an application for extension of time. On perusal of the record, the plaintiff informed the court that the defendant had sold coffee without their knowledge for a sum of USD 349,000. Counsel for the plaintiff then sought time of 14 days to file an application for contempt or take any other legal action. The court did not grant time to file the application but directed that parties to discuss the matter and confirm the information given by the plaintiff's counsel. On 18/12/2024, the plaintiff's counsel sought 21 days to file an application to prevent the defendant from further selling the coffee. The court then granted the order sought. On 5/3/2025 when the matter came up for mention, counsel for the plaintiff informed the court that she had been bereaved and was out of the office for a while and requested for 14 days to file and serve. The plaintiff filed their application on 2nd April 2025 which was two weeks after the timelines set the court. It is my considered view that 14 days is not inordinate delay. Furthermore it would not be in the interests of justice if the court struck out the application because it was filed two weeks late. This court has discretion to admit the application and to deem it as properly filed. This is a common practice in courts provided a satisfactory reason is given by the defaulting party. The plaintiff explained itself on the delay. The court finds the reasons for delay acceptable and hereby deems the application dated 2nd April 2025 as properly filed.
59. Section 7 of the Arbitration Act permits intervention by courts to preserve the subject matter and/or maintain status quo so as to ensure that there is a dispute for hearing and determination before the arbitrator. It provides;-
- i. 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.
 - ii. 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.
60. The principles governing grant of interim orders for protection under the Arbitration Act where spelt out in the court of Appeal decision in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR where the court held:-
- 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 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 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 power as intended by the parties.
61. It is not disputed that an arbitration clause exists at Clause 12.5 of the Management Agreement dated 1st February 2012 to the effect that parties resolve disputes through mediation before approaching the court. On the issue of whether the subject matter of arbitration is under threat, the plaintiff argues that the defendant sold coffee and was paid directly without making any payments to the plaintiff in direct contravention of the Management Agreement. Furthermore, the plaintiff argues that the defendant owes them a sum of USD 1,287,878 and irregularly disposing off the subject coffee will deplete their security and deny them their contractual right to recover the debt. The defendant contests the debt allegedly owed by it to the plaintiff arguing that the plaintiff withdrew its services in July 2023 and since then they have been responsible for all farming and harvesting operations. The defendant further argues that the coffee currently being harvested is not the subject of any valid or enforceable security agreement. Furthermore, the consent order dated 27th February 2024 made reference to coffee on the farm and at the millers referring to produce that had been harvested and processed at that point. It did not apply to future crops, which are now in the field or undergoing harvesting and processing.
 62. It is trite that in protecting the subject matter of the proceedings of the arbitrator, this court should ensure that the arbitrator's jurisdiction is not ousted by any illegal conduct by any of the parties herein.
 63. On perusal of the consent dated 27th February 2024 and amended on 11th March 2024, the consent was amended to read that "the coffee on the farm at Umoja Specialty Coffee Millers Limited be milled and sold and proceeds retained by Direct Settlement System until further agreement by the parties or by orders of the court."
 64. Thus, it is not disputed that the defendant did sell coffee and was paid directly without paying the plaintiff its dues as agreed by the parties. It is therefore clear that if the breach of consent is allowed to continue, the subject matter of the arbitration will be under threat. Thus for the court to ensure that there is a dispute for hearing and determination before the arbitrator, an injunction ought to ensue to preserve the subject matter of the arbitration. As such, having found that there exists a substantial dispute between the parties herein and that the subject matter of the arbitration is under threat, it is only fair and just to issue an interim order of protection pending resolution of the dispute.
 65. I find no merit in the applications of the parties dated 26th March 2024 and 2nd of April 2024. Similarly the Preliminary Objection has no merit in that the reasons for delay in filing the plaintiffs application dated 2nd April 2025 had been addressed in court in presence of both parties.
 66. For meaningful resolution of this dispute, it is important that the parties go for arbitration in pursuance of clause 12.5 of their agreement which was fortified in their consent.
 67. It is also important to note that consent recorded by the parties on 27/03/2024 and Amended on 10/03/2024 is still valid and has not been set aside. As such, both parties are under a legal obligation to comply with the terms of the consent.
 68. Having made the above observations, I hereby give the following orders in the interest of justice: -



- a. That the applications dated 27/03/2024 and 02/04/2024 as well as the Notice of Preliminary Objection dated 11th April 2025 are hereby dismissed for lack of merit.
- b. That the parties do appoint an arbitrator between themselves and have their dispute arbitrated on within 45 days.
- c. That pending the resolution of the dispute, the parties do comply with the terms of their consent executed on 27/02/2024 and amended on 10/03.2024.
- d. That pending the resolution of the dispute, the defendant do abstain forthwith from selling the coffee on the farm Umoja Speciality Tea Coffee millers Ltd and expending the proceeds thereof without giving the plaintiff its share.
- e. Considering the facts of this case, I hereby order that the defendant do meet the costs of the applications dated 26th March 2025 and 2nd April 2025 as well as the Notice of Preliminary Objection dated 11th April 2025.

69. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24TH DAY OF JULY 2025.

F. MUCHEMI

JUDGE

