



**Makosir v Aluha & 3 others (Miscellaneous Application E415 of 2023)
[2024] KEHC 3410 (KLR) (Commercial and Tax) (3 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3410 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E415 OF 2023
JWW MONG'ARE, J
APRIL 3, 2024**

BETWEEN

FREDRICK OTIENO MAKOSIR APPLICANT

AND

JAMES ALUHA 1ST RESPONDENT

ANTONY MUNIALO LWANGU 2ND RESPONDENT

HUMPREY LUMADEDE 3RD RESPONDENT

BUSINESS REGISTRATION SERVICES 4TH RESPONDENT

RULING

1. Before the court for determination is the Notice of Motion dated 24th May 2023, brought under Section 3A and Order 40 of the *Civil Procedure Act*, Section 7 of the *Arbitration Act*. The application seeks the following orders:-
 - i. spent
 - ii. an interim injunction order restraining the Respondents jointly and severally by themselves, their servants and/or agents and/or any other person or body of persons or any other person acting as executive management, from representing themselves or acting as President, Vice-President, Secretary, Treasurer and Company Secretary of the Magharibi Economic Development Corporation Ltd.
 - iii. an interim injunction order restraining the Respondents jointly and severally by themselves, their servants and/or agents and/or any other person or body of persons or any other person acting as executive management from accessing and utilizing any money from the bank



accounts held by Magharibi Economic Development Corporation Ltd, including but not limited to the bank account held with Kenya Commercial Bank.

- iv. interim injunction order restraining the Respondents jointly and severally by themselves, their servants and/or agents and/or any other person or body of persons or any other person acting as executive management from accessing and utilizing any money from the Money Market Fund held by Magharibi Economic Development Corporation Ltd, with CIC Money Market.
- v. interim injunction restraining the Respondents jointly and severally by themselves, their servants and/or agents and/or any other person or body of persons or any other person acting as executive management from accessing and utilizing any money from the Mpesa Paybill Account held by Magharibi Economic Development Corporation Ltd, with Safaricom.
- vi. an interim injunction restraining the Respondents jointly and severally by themselves, their servants and/or agents and/or any other person or body of persons or any other person acting as executive management from disposing and/or dealing with the property of Magharibi Economic Development Corporation Ltd registered as Title Number N/Wanga/Lunganyiro/2577.
- vii. An order directed to the Registrar of Companies not to register any dealings on the Company register of Magharibi Economic Development Corporation Ltd, held with the Companies Registry, pending hearing and determination of this application.
- viii. An Order of temporary injunction do issue to restrain the Respondents jointly or severally, whether by themselves, or through any agents, or otherwise from interfering with the operation of Magharibi Economic Development Corporation Ltd, pending the inter-parties hearing and determination of this Application.
- ix. Order of temporary injunction do issue to restrain the Respondents jointly and severally, whether by themselves, or through any agents, or otherwise from tampering with the Company registers, Books of Accounts and Minute book of the Company, which are in their possession, pending the inter- parties hearing and determination of this Application.
- x. An Order of temporary injunction do issue to restrain the Respondents whether by themselves, or through any agents, or otherwise from tampering with the Company register held at the companies' registry, pending the inter-parties hearing and determination of this Application.
- xi. An Order of temporary injunction do issue to restrain the Respondents whether by themselves, or through any agents, or otherwise from confiscating, withholding, destroying, or otherwise utilizing any of the property, records, registers and equipment belonging or in use by Magharibi Economic Development Corporation Ltd pending the inter-parties hearing and determination of this Application.
- xii. An interim mandatory injunction do issue compelling the 1st Respondent to transmit to the Applicant herein the passwords, access codes, or any other electronic codes and signals needed to access the online accounts and platforms for Magharibi Economic Development Corporation Ltd and cease solely communicating with the said accounts and platforms with regard to the Company.
- xiii. An interim mandatory injunction do issue compelling the Respondent to relinquish and hand over admin rights to the Applicant, for all social media platforms of Magharibi Economic Development Corporation Ltd including but not limited to the Company Tele-gram group,



in working order to the Applicant, pending the inter-parties hearing and determination of this Application.

- xiv. the costs of the Application to be borne by the Respondents.
2. The application is premised on the grounds set out on its the face as well as on the supporting affidavit and supplementary affidavit sworn by Fredrick Otieno Makosir, a shareholder and director in Magharibi Economic Development Corporation Limited on 24th May 2023, and 10th October 2023 respectively. In a nutshell, the issue in dispute revolves around the alleged tampering of the shareholding in the Company by the 1st, 2nd and 3rd Defendant's, purported illegal elections conducted on 22nd April, 2023 to fill the executive management positions in the Company, and the request by the 1st Defendant through letters to access the Company's bank accounts money held in the Money market fund and Mpesa.
 3. The Applicant further argues that the Articles and Constitution of the Company provide for an arbitration clause to resolve disputes arising in the management and running of the affairs of the Company. The Applicant argues that the Company's continuity is at stake. The Constitution of the Company in Article 4.6 provides for tenure of directors as 3 years.
 4. In response to the application the 1st, 2nd and 3rd Defendant filed their Replying Affidavits sworn on 30th June, 2023, 23rd July, 2023, and 7th July, 2023 by James Aluha, Antony Munialo Lwangu, and Humprey Lumadede respectively opposing the Application together with a Notice of Preliminary Objection dated 2nd October, 2023 on the following grounds that:-
 - i. Section 7 of the *Arbitration Act* as read with Rule 2 of the *Arbitration Rules 1997* requires in mandatory terms that an application under Section 7 for interim measures should be anchored in a suit.
 - ii. That the Applicant's application for interim reliefs under the above section was made vide a Notice of Motion and not vide Chamber Summons as envisaged under Rule 2 of the *Arbitration Rules 1997*.
 - iii. That the Applicant's application dated 23rd May 2023 is scandalous, frivolous, vexatious and amounts to an abuse of court process because, by the time of filing, there were no proceedings in court.
 - iv. That the application is incurably bad and defective and should be struck out in limine with costs to the Respondent.
 5. The application was canvased by way of written submissions. The Applicant filed submissions dated 4th October, 2023 while the Respondents filed submissions dated 27th December, 2023.

Analysis and Determination

6. I have carefully considered the application and the affidavits filed in support and in opposition thereto by the parties together with the rival submissions. To my mind, only one issue that arises for determination, to wit; "whether the Application seeking to preserve the subject matters pending the arbitral proceedings is merited."
7. From the Record, the Applicant argues that the law at 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.
8. 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.
9. The Applicant further argued that all the parties to the dispute were members of Magharibi Economic Development Corporation Ltd, which is governed by its Constitution as well as the Articles of Association, both of which provide for mediation and thereafter Arbitration as the mode of dispute resolution in the Company. He further stated that he had sought to resolve the dispute between the parties through mediation as well as negotiation, but the same has been met with a lot of resistance from the 1st Respondent, and as such the only remaining available forum to resolve the dispute in the Company was through arbitration. He urged the Court to preserve the Company by issuing the injunctive reliefs sought in the Application pending the matter being resolved through arbitration in accordance with the Constitution of the Company and its Articles of Association. He sought to have the court direct the matter to arbitration.
10. On the other hand, the Respondents were opposed to the application to have the matter resolved through arbitration. The Respondents argued that the Applicant had not produced any evidence to show that he had attempted to use the above two means (Negotiation and Mediation) to resolve his disputes with the Respondents before seeking preservation orders before this court nor has made any steps to start the same arbitral proceedings. The Respondents contend the interim orders issued have now paralyzed and interfered with the operations of the Company.
11. Having heard both parties, I am guided by the Court of Appeal decision of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* Civil Application No. NAI 327 of 2009 [2010] eKLR which outlined the principles governing grant of interim orders of protection under the *Arbitration Act* 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 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.
12. The above-cited case cautions the court to consider that interim reliefs take various forms and the court must be cautious in preserving the subject matter of arbitration and avoid interfering with the jurisdiction of the Arbitral Tribunal. In any event, the court is alive to the fact that interim measures under Section 7 of the Arbitration Act are to be granted where the subject matter of the arbitral proceedings is under threat as was held in the case in Fresco Bushlands (K) Ltd V Agricultural Development Corporation (2014) eKLR where the court stated as follows:-

“The power to protect the suit property pending the hearing and determination of a dispute by arbitration is donated to the High Court by the provisions of the Arbitration Act and not the Civil Procedure Act and Rules.”
13. The second argument by the Respondents was that the Applicant was supposed to approach this court by way of Chamber Summons as envisaged under Rule 2 of the Arbitration Rules 1997 and not by Notice of Motion and urged the court to find the application is fatally defective. They urged this court to be guided by the Court of Appeal case in Scope Telemantics International Sales Limited v Stoic Company Limited NRB Civil Appeal No 285 of 2015 [2017] eKLR and find that Article 159 of the Constitution should not be seen as a panacea to cure all manner of indiscretions relating to procedure.
14. In its defence, the Applicant submitted that the omission can be cured by Article 159 of the Constitution. Article 159 of the Constitution has been used as a cure by the courts to indeed determine matters on natural justice as opposed to dismissing them on a procedural technicality.
15. From the record, the parties admit to the existence of an arbitration clause in the Constitution and Articles of Association of the Company. A glance at the pleading as filed clearly illustrates there is a dispute that has befallen the Company that needs to be addressed by an Arbitral Tribunal.
16. Having considered at length the above arguments by both parties and taking into consideration that a Company is a separate entity from its shareholders and directors, I am apprehensive that to issue the preservation orders sought may lead to an outright crippling of the Company. The Company has set in its governance instruments the modalities upon which disputes arising between the shareholders are to be determined and they cite Arbitration as one such form. I will therefore allow the application to have this matter referred to arbitration to find a solution to the dispute at hand between the parties but allow the Company to continue to operate its accounts to avoid crippling the same and therefore defeating the purpose for which it was set up.
17. The upshot of the above finding is that the application partly succeeds to the extent that this matter is now referred to arbitration before an Arbitrator to be appointed in the manner set out in the Company's Articles of Association and the Constitution. The Application for freezing of the Bank Accounts and Mpesa Accounts of the Company is denied. Each party is directed to bear its own costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF APRIL, 2024

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J.W.W. MONG'ARE

JUDGE



In the Presence of:-

1. Mr. Oduor holding brief for Mr. Okubasu for the 1st, 2nd & 3rd Respondent.
2. No appearance for the Applicant.
3. Amos - Court Assistant

