



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. E004 OF 2021**

**EDGAR MABHIZA**

**JACQUELINE ACHIENG OWINO t/a**

**CONVEX THREE SIXTY BRANDS.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**JOSEPH EVANS WAYIERA OUNGA t/a**

**WAYIERA PROPERTIES.....DEFENDANT/RESPONDENT**

**RULING**

Before this Court is the Plaintiff/Applicant's Notice of Motion dated 18<sup>th</sup> January 2021 and filed on the same day. The same is filed under certificate of urgency and premised on Sections 1, 1A, 1B, 3, 3A and 63 (c) & (e) of the Civil Procedure Act, Article 159 of the Constitution of Kenya 2010 and Section 7(1) of the Arbitration Act and all other enabling provisions of the law and prays for Orders that pending the reference of the dispute between the parties herein to arbitration and/or pending an arbitration and/or pending the hearing and determination of arbitration proceedings and/or any further orders, this Honourable Court be pleased to issue an order of temporary injunction restraining the defendant either by himself, his authorized agents, servants, employees or otherwise whomsoever from subdividing, selling, transferring, charging, mortgaging, developing and/or carrying any developments and/or committing any other acts of waste, and/or generally interfering with **LAND PARCEL NO. KISUMU/DAGO/1138** Kisumu County.

That this Honourable Court be pleased to refer this matter for arbitration and/or order this matter to be subjected to and conclusively resolved through an arbitration as set out in clause 13 of the partnership agreement entered between the plaintiffs and the defendant on 17/1/2020. That the costs of the application be provided for.

The application is supported by the affidavit of **EDGAR MABHIZA** sworn on 14<sup>th</sup> January 2021. The following grounds of the application can be deduced from the face of the application and the supporting affidavit;

- a) That on 17/01/2020, Convex three sixty brands (plaintiff) and Wayiera Properties (defendant) entered into a partnership agreement for purposes of purchasing and selling **Land Parcel No. KISUMU/DAGO/1138** that was then registered in the name of **ELVINE LWARE MACAGER**.
- b) According to the partnership agreement, the plaintiff and the defendant were to contribute to the purchase price of the property being Kshs. 5,500,000/- in the ratio of 70:30, with the plaintiffs required to contribute Kshs. 1,650,000/- and the defendant to contribute Kshs. 3,850,000/- after which the land would be registered in the names of the defendant and the plaintiff at a proportion of 70:30; and that neither the defendant nor the plaintiffs could engage any 3<sup>rd</sup> party or purchase the land without the consent of the other. Further, the defendant was to be in charge of the partnership business and was to indemnify the plaintiffs for the loss of their capital investment.
- c) After the purchase, the suit land was to be divided into plots to be sold at a projected sum of Kshs. 12,000,000/-.
- d) Consequently, the plaintiffs contributed a total sum of Kshs. 939,000/- between 20/12/2019 and 24/01/2020 as per the annexed copies of money transfer slips, bank statements and WhatsApp messages marked EM5.
- e) The plaintiffs have since established that in breach of the partnership agreement and without the plaintiffs' knowledge and consent, the defendant secretly purchased the suit property from Elvine Lware Macager and caused the title thereof to be transferred

to his name exclusively to the exclusion and detriment of the plaintiffs as per the annexed copy of title marked EM6.

f) That Clause 13 of the partnership agreement is an arbitration clause which warrants this matter to be referred to arbitration.

g) That unless the Court grants interim measures of protection, there is real and imminent danger and/or subject matter of arbitration is under threat and/or the subject matter of arbitration shall dissipate; and that if the defendant is allowed and/or permitted to subdivide and/or sell and transfer the suit land/and or the plots to third parties, the plaintiffs will severely be prejudiced and the arbitration will be rendered nugatory.

h) That the plaintiffs stand to suffer irreparable loss and damage unless the Court grants the orders sought and that the same should be granted in the interest of justice and fairness.

i) The plaintiffs are ready and willing to furnish such suitable undertaking as to damages if any, which may be suffered by the defendants as a condition for the grant of the orders sought herein.

### **RESPONDENT'S CASE**

The Application has been opposed by the defendant vide the grounds of opposition dated 22/01/21 and filed on 05/02/2021. It is the respondents case that:

a) The application is misconceived and incompetent; is incurable defective as the same is brought under the wrong provisions of the law.

b) The application is unprocedurally drawn in breach of the relevant rules and the orders sought are an affront of the overriding objectives of the Court and can therefore not be granted.

c) The application is filed to defeat the ends of justice as the applicants have not come to court with clean hands.

d) This Honourable Court lacks jurisdiction to hear and determine this matter in light of clause (13) of the partnership agreement.

When the matter came up for *inter partes* hearing on 22/03/21, parties were directed to file submissions. Only the plaintiffs/applicants have filed their submissions. The Plaintiffs/applicants submissions are dated 19/04/21 and filed on 23/04/21 and its their submissions that an application for interim measure for protection under section 7 of the arbitration act ought to be made in a suit as provided for under rule 2 of the Arbitration Rules, 1997. On this, they have relied on the case of ***Scope Telematics International Sales Limited v Stoic Company Limited & Another [2017] eKLR***. Further, that the filing of a plaint (as provided for in Section 19 of the Civil Procedure Act) was the basis upon which the plaintiffs have sought the interim measure of protection, and as such, this Court has jurisdiction to entertain the application.

That Section 7(1) of the Arbitration Act empowers the High Court to grant an interim measure of protection before or during arbitral proceedings upon request by a party to the arbitration agreement and the parameters to consider when dealing with such an application were set out in the case of ***Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009***.

That under section 7 of the Arbitration Act, the key factors to be taken into consideration when deciding whether or not an injunction can be granted is whether or not there is a valid arbitration agreement and if the subject matter of the arbitral proceedings is under threat and/or danger of being wasted or dissipated so as to preserve it.

That the defendant has not denied the existence of the partnership agreement or alleged that the same is a forgery and he has in his pleadings and in particular paragraph 15 of the defence admitted that there is an enforceable arbitration clause in paragraph 13 of the partnership agreement.

That the existence of an enforceable arbitration clause constitutes prima facie case in the context of ***Giella v Cassman Brown Case*** warranting this Court to issue an order of interim measure of protection to safeguard the subject matter of the arbitral proceedings as was held in ***BABS Security Limited v Theothermal Development Limited [2014] eKLR***.

That as per the partnership agreement, the subject matter of arbitration is **Land Parcel No. KISUMU/DAGO/1138** which is under threat of being subdivided and/or sold and transferred to third parties which shall render the proceedings before the arbitral tribunal nugatory and which will occasion the plaintiffs grave injustice, immense and severe prejudice hence the need to issue interim measures to preserve the subject matter.

In respect to prayer 3 of the application, it is the applicants' submissions that since there is an enforceable arbitration clause in the partnership agreement, and the dispute between the parties' is arbitrable, the same should be referred to arbitration as that is what the parties bound themselves into under clause 13 of the partnership agreement.

### **ANALYSIS AND DETERMINATION**

In my considered view, the only issue that arises for determination is whether the Plaintiffs are deserving of an interim measure of protection under **Section 7 of the Arbitration Act, 1995** pending arbitration.

The said **Section 7** of the Act empowers the High Court to protect arbitral proceedings by issuing interim orders protecting the subject matter

of arbitration. It provides thus:

## 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.”**

The Court in *Coast Apparel Epz Limited v Mtwapa Epz Limited & another [2017] eKLR* held that the said provision clearly empowers the High Court to protect arbitral proceedings by issuing injunctive orders protecting the subject matter of arbitration, and that the same can be issued before arbitration or during arbitration. See also the case of *Carzan Flowers (Kenya) Ltd & Others vs. Tarsal Koos Minck B V & Others Nairobi (Milimani) HCCC No. 514 of 2009* and *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others [2010]* where it was stated that;

**‘...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...’**

It therefore follows that the respondent’s argument that this Court lacks jurisdiction to entertain this application on the basis of clause 13 of the partnership agreement fails.

As regards the conditions to be satisfied before the said injunctive orders are granted, the Court of Appeal in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others [2010]* set down four conditions necessary for the grant of an interim measure of protection under Section 7 of the Act. It pronounced itself on the same as follows:

**‘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: -**

**i. The existence of an arbitration agreement;**

**ii. Whether the subject matter of the arbitration is under threat;**

**iii. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?**

**iv. For what period must the measure be given especially if requested for before commencement of the arbitration so as to avoid encroaching on the tribunal’s decision making powers as intended by the parties?’**

In the instant application, it is not disputed that there is a binding arbitration agreement between the Plaintiffs and the Defendant as contained in clause 13 of the partnership agreement. The said clause 13 provides:

**‘Any dispute or question in connection with the partnership or this deed shall be settled amicably by the partners themselves alone with the assistance of their Advocates. However, if such settlement cannot be reached within a reasonable time the dispute shall be referred to a single arbitrator appointed by the Kenya Chambers of Commerce under the provisions of the Arbitration Act and his decision shall be final. In the alternative to arbitration, the partners may decide unanimously that the dispute be referred to a Court of Law.’**

The Plaintiffs averred that a dispute has arisen which is arbitrable and requires arbitration as agreed. The defendant has not denied that a dispute has arisen. However, there is no indication that the parties have already commenced arbitration or the process of engaging a sole arbitrator to determine the alleged dispute as provided for in the clause.

The second test is whether the subject matter for arbitration is under threat. The applicants submitted that the subject matter of the arbitration is Land Parcel No. Kisumu/Dago/1138 and that the same is in danger of being interfered with materially by the defendant by subdividing and/or selling and/or transferring the suit land to a third party or third parties hence it will not be in the same state at the time of the arbitral reference is concluded and this will in turn render the proceedings before the arbitral tribunal nugatory.

I have looked at the partnership agreement. It is in regard to purchase and sale of parcels of land to be subdivided from Land Parcel No. Kisumu/Dago/1138. The defendant has already purchased the property and had it registered exclusively in his name as per the annexure EM-6. Though an issue to be deliberated on by the arbitrator who might come up with a different finding, it appears on the face of it that the defendant’s act is against the partnership agreement which states that the land will be registered in favour of the plaintiffs and the defendant in proportions of invested share capital. Land Parcel No. Kisumu/Dago/1138 therefore forms the main subject of arbitration.

From the partnership agreement, the purpose of buying the land was to further subdivide and sell to other third parties. It is therefore likely that that is what the defendant intends to do and if he proceeds to do so the subject matter of arbitration being Land Parcel No. Kisumu/Dago/1138 will cease to exist and hence jeopardize the arbitration proceedings. In light of the above, I find that the subject matter for the arbitration is under threat. It then follows that the applicant is worthy of interim protective measures to protect the subject matter of

arbitration.

As stated above, I have noted that there is no indication that the parties have already commenced arbitration or the process of engaging a sole arbitrator to determine the alleged dispute as provided for in the clause. The Courts have held time and again that Orders for interim protection are not to be issued at large. They should be specific and time bound to avoid abuse. See the case of **Coast Apparel Epz Limited v Mtwapa Epz Limited & another (supra)** held that an interim measure of protection is for a limited time.

The applicants have in prayer 3 of the application sought an order that the Court be pleased to refer this matter for arbitration and/or order this matter to be subjected to and conclusively resolved through arbitration as set out in clause 13 of the partnership agreement. It is my view that this prayer was not necessary as clause 13 of the partnership agreement entitled the plaintiff being the aggrieved party to refer any dispute to an arbitration forum using the process provided in the agreement. The Court in **Coast Apparel Epz Limited v Mtwapa Epz Limited & another (supra)** held that:

**‘...A party to an arbitration agreement cannot come to court, in the manner the Plaintiff has done, to seek an order to refer a dispute to arbitration. Inherent in every agreement with an arbitration clause is the requirement for any aggrieved party to refer any dispute to an arbitration forum using the process provided in the agreement...**

**... the plaint in a matter like the one before this court is merely a vehicle for accessing the court. It bears no cause of action by itself. Once the application for an interim order of protection is dispensed with, the plaint becomes a shell.**

On the above basis and the fact that the Plaint herein becomes a shell after the grant or refusal to grant interim order of protection, it is proper that the Plaintiffs refer this matter to arbitration as provided for in clause 13 of the partnership agreement.

Pursuant to the above, it is in the interest of justice that prayer 2 of the application be allowed as prayed and therefore I do grant a temporary injunction restraining the defendant either by himself, his authorized agents, servants, employees or otherwise whomsoever from subdividing, selling, transferring, charging, mortgaging, developing and/or carrying any developments and/or committing any other acts of waste, and/or generally interfering with **LAND PARCEL NO. KISUMU/DAGO/1138** Kisumu County pending the reference of the dispute between the parties herein to arbitration and/or pending an arbitration and/or pending the hearing and determination of arbitration proceedings and do further order that the arbitral proceedings be commenced in terms of the partnership agreement within 30 days of the date herein, failure of which the orders will automatically lapse. The cost of the application to abide the arbitral proceedings.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 3<sup>RD</sup> DAY OF SEPTEMBER, 2021**

**ANTONY OMBWAYO**

**JUDGE**

*This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.*

**ANTONY OMBWAYO**

**JUDGE**