



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC CASE NO. E323 OF 2021**

**GURVIR BHABRA.....1<sup>ST</sup> APPLICANT**

**RASHMINDER BHABRA.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**JOHN MALOGO NDIRITU.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicants herein filed a Notice of Motion Application dated 1<sup>st</sup> September 2021, whereby the Plaintiffs/Applicants' herein have sought for the following Reliefs;

i. ....(Spent)

ii. *An order do issue directing the Respondent to clear all rent arrears as at September 2021 in the sum of Kes.1,456,000/= and continue paying the rent when due and in default the Applicant be at liberty to re-enter and re-take possession of unfurnished House No. 42 in the building erected on Land Reference Number 209/7153/42 pending the hearing and determination of this application.*

iii. *An order do issue in terms of prayer 2 hereof pending the hearing and determination of the arbitration proceedings.*

iv. *In the event of default by the Respondent in complying with order granted in terms of prayer 2 and/or 3 herein, the Officer Commanding Muthangari Police Station in Nairobi do ensure the enforcement of the re-entry orders issued herein and that peace and order prevails.*

v. *The costs of this application be borne by the Respondents*

2. The Subject Application is premised and/or anchored on the grounds enumerated at the foot thereof and same is supported by the affidavit of the 1<sup>st</sup> Applicant sworn on the 1<sup>st</sup> September 2021, to which the Deponent has annexed a total of 8 annexures.

3. It is imperative to note that the subject Application was filed under Certificate of Urgency and on the basis of the Certificate of urgency, same was placed before the judge, namely, Honourable Lady Justice K. Bor, on the 7<sup>th</sup> September 2021, when same was dealt with and the honourable judge Suo motto ordered and/or directed that the subject Application and/or matter be transferred to the Magistrate's Court for hearing and disposal.

4. Suffice it to Note, that the aforesaid orders, which were made by the honorable judge on the 7<sup>th</sup> September 2021, were made in the absence of the Applicant and therefore the Applicant being the party who had moved the court did not have the opportunity to address the court and better still, did not have an opportunity to draw the mind and/ or attention of the judge to the import and tenor of the provisions of **Section 7 of the Arbitration Act, 1995.**

5. Confronted with the unilateral order made by Honourable lady Justice K. Bor, Judge, on the 7<sup>th</sup> September 2021, the Applicants herein filed the Notice of Motion Application dated the 14<sup>th</sup> September 2021, and in respect of which the Applicant sought the following Reliefs.

a. ....Spent

b. There be a stay of execution of the orders of this honourable court made on the 7<sup>th</sup> September 2021, pending the hearing and determination of this Application.

c. This honourable court be pleased to Review and revoke its orders made on the 7<sup>th</sup> September 2021.

d. Any other order be made as this honourable court may deem fit and/or expedient.

6. The latter Application is anchored on the grounds contained at the foot thereof and same is further supported by the Affidavit of the first Applicant sworn on the 14<sup>th</sup> September 2021.

7. Following the filing of the latter Application, namely the Application dated 14<sup>th</sup> September 2021, same was placed before me under Certificate of Urgency and upon consideration of the grounds contained at the foot thereof, as well as the perusal of the contents of the supporting affidavit, this honourable court was enjoined to and indeed granted prayer 2 of the said Application, essentially, the honourable court granted an order of stay of enforcement and/or execution of the orders made on the 7<sup>th</sup> September 2021.

8. Pursuant to and in line with the order of stay of execution that was granted by this honourable court on the 16<sup>th</sup> September 2021, the subject file has not been transferred to the Magistrate's court, in terms of the Orders made on the 7<sup>th</sup> September 2021.

**DEPOSITIONS BY THE PARTIES:**

9. The 1<sup>st</sup> Applicant herein Swore the Affidavit in support of the Subject Notice of Motion Application and in respect of same, the Deponent averred as hereunder;

10. On or about the 1<sup>st</sup> September 2021, the Applicants herein filed and/or lodged an Application before this honourable court, whereby same sought for the grant of Interim order of protection in line with the provisions of **Section 7 of the Arbitration Act, 1995**.

11. It was further averred that upon the subject Application being placed before the Honourable Judge, the Judge proceeded to and directed that the Application and the entire file be transferred to the Magistrate's Court for hearing and determination.

12. It is further averred that the said order by the Honourable Judge was made at the ex-parte stage and without affording the Applicants and/or their advocates an opportunity to be heard. In this regard, the Applicant has thus averred that there was a serious Error and/or mistake on the part of the Judge.

13. Owing to the foregoing the Applicants have thus sought for an order for Review premised and/or predicated on the import and/or tenor of the **Provisions of Section 7 of the Arbitration Act 1995**.

**THE RESPONDENT'S CASE:**

14. Upon being served with the Application dated the 14<sup>th</sup> September 2021, the Respondent herein chose to file a Notice of Preliminary Objection and in respect of which same averred as follows;

I. The application should be struck out as this court has no jurisdiction to hear and determine this matter at the first instance.

II. The matter is Sub-judice, as the same is currently active and pending before the Rent Restriction Tribunal.

III. The Application is an abuse of the Due Process of the Court.

**SUBMISSIONS:**

15. On the 12<sup>th</sup> October 2021, the Application dated the 14<sup>th</sup> September 2021, came up for hearing and on which date counsel for the Respondent pointed out that same had filed a Notice of Preliminary Objection, which counsel proposed to be heard and disposed of beforehand.

16. Be that as it may, the Honourable court directed that both the Notice of Motion Application and the Preliminary Objection be canvassed and/or disposed of simultaneously.

17. On the other hand, the honourable court also directed that the Notice of Motion Application and the Preliminary objection be canvassed by way of written submissions to be filed and exchanged by the parties. For clarity, the parties were ordered to file and exchange submissions within stipulated timelines.

18. Pursuant to and in line with the directions issued on the 12 October 2021, the parties herein proceeded to and filed their respective submissions with the Applicants filing their written submissions on 18<sup>th</sup> October 2021, whereas the Respondent filed his submissions on the 26<sup>th</sup> October 2021.

19. For the avoidance of doubt, the two sets of written submissions are on record and same have received due consideration by the Honourable court. In this regard, I shall rely on the submissions and apply the quoted case law, *albeit* where relevant and appropriate.

**ISSUES FOR DETERMINATION:**

20. Having evaluated the Notice of Motion Application dated the 14<sup>th</sup> September 2021, the affidavit in support thereof, as well as the written submissions filed on the 18<sup>th</sup> October 2021, on one hand and the Notice of Preliminary Objection and the written submissions filed on the 26<sup>th</sup> October 2021, I am of the considered opinion that the following Issues are pertinent for determination;

*I. Whether this honourable court has jurisdiction to hear and determine an Application pursuant to section 7 of the arbitration act 1995.*

*II. Whether the unilateral transfer of the subject matter to the magistrate's court by the honourable court (differently constituted) constituted an Error and Mistake on her part and if so, whether the order merits Review.*

**ANALYSIS AND DETERMINATION:**

**ISSUE NUMBER ONE**

21. It is Common ground that the Application dated the 1<sup>st</sup> September 2021, which came before the honourable court under certificate of urgency and which was thereafter unilaterally transferred to the Magistrate's court, was premised and/ or brought pursuant to the provision **of Section 7 of the Arbitration Act 1995.**

22. Before venturing to address the issue of jurisdiction, it is appropriate to reproduce the provision of **section 7 of the Arbitration Act, 1995, which provides as hereunder:**

*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.*

23. My reading of the aforesaid provisions of the Law, drives me to the conclusion that a party to a dispute which has an arbitral clause and/ or one that is subject to the arbitration proceedings, is at liberty to approach the high court, either before or during the arbitral proceedings, for an Interim Measure of Protection and that in such a scenario, the honourable court is enjoined, subject to exercise necessary discretion, to grant that Interim measure of Protection.

24. It is apparent that the said provision of the Law only speaks to the High court and not otherwise and in this regard the question then arises, whether the Environment and land court, is seized of similar powers and/or mandate, as pertains to matters that fall under the exclusive jurisdiction of the said court, in line of **Article 162 (2) (b) of the Constitution, 2010.**

25. It is imperative to note that **the Arbitration Act 1995**, was enacted prior to and/or before the promulgation of the constitution of Kenya 2010 and at the time of the enactment of the said Act, the Superior court that had original and unlimited jurisdiction was the High court. For clarity, the High court was vested with powers to handle and/or adjudicate upon all Civil Disputes, Environment and land matters, not *excepted*.

26. However, upon the enactment of the Constitution 2010, there was created the Environment and land court and same was conferred with specific and delineated jurisdiction in line with **Article 162 (2) (b) of the constitution, 2010**, which provides as hereunder;

System of courts.

162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

27. It is worthy to note that the subject Dispute touches on and/or concerns a Tenancy Relationship and/or ownership rights over and in respect of the property known as L.R No. 209/7153/42, hereinafter referred to as the suit property.

28. Being a matter that touches on and/or concerns a claim over and in respect of title to, occupation of and use of land, the subject matter

therefore falls within the exclusive jurisdiction of the Environment and Land court. **See section 13(7) of the environment and land court Act 2011.**

29. In any event, as concerns the extent and scope of the jurisdiction of the Environment and land court, it is sufficient to rely on and/or apply the Decision in the case of **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] Eklr.**

30. On the other hand, the issue essentially relates to whether the reference to the High court bears a corresponding meaning or ought to be read *mutatis mutandis*, where the subject dispute touches on an issue of Environment and land.

31. In my humble view, **the Arbitration Act, 1995**, having been enacted prior to the constitution 2010, same must be read with necessary alterations, adaptation, qualifications and exception necessary to bring it in conformity with the Provisions of **the Constitution, 2010**.

32. In support of the foregoing observation, it is sufficient to invoke and rely on the provisions of **Section 7 of the 6<sup>th</sup> schedule of the Constitution, 2010**, which provides as hereunder;

“7.

*(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.*

*(2) If, with respect to any particular matter—*

*(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and*

*(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.*

33. Be that as it may, I have also come across the decision in the case of **Graystones Development ltd vs Peter Tracilla Wangare & Another (2017) eKLR, where the court Honourable observed *inter-alia*:**

.....

34. On the basis of the foregoing analysis, I come to the conclusion that though the provisions **of Section 7 of the Arbitration Act 1995**, **does** not allude to the Environment and land court, pursuant to and in line of Section 7 of the sixth [6<sup>TH</sup>] schedule, the Environment and land court ought and should be read into and thus be deemed to be incorporated therein.

35. In the premises, I find and hold that in matters touching on and/or concerning Environment and land disputes, a Party who is subject to Arbitral Proceedings, can very well access the jurisdiction of this Honourable court, for purposes of Interim protection.

36. *In nutshell*, I find and hold that this court has jurisdiction to entertain the subject matter and where appropriate, to grant the Interim Measure of Protection.

#### **ISSUE NUMBER TWO:**

37. On the 7<sup>th</sup> September 2021, the Notice of Motion Application dated the 1<sup>st</sup> September 2021, was placed Honourable Lady Justice K. Bor, who proceeded to and transferred same to the Magistrate’s Court for hearing and disposal.

38. The question that needs to be addressed, is whether in view of **Section 7 of the Arbitration Act 1995**, the order transferring the Application dated the 1<sup>st</sup> September 2021, and by extension the suit to the Magistrate’s Court, was lawful and in accordance with the obtaining legal positions.

39. In my humble view, Section 7 of the Arbitration Act, 1995, confers jurisdiction in the High Court and by dint of Section 7 of the sixth schedule, in the Courts Of Equal Status, including the Environment and Land Court.

40. Consequently, when the learned judge *suo motto* transferred the suit to the Magistrate’s Court, obviously without affording the Applicants an opportunity to be heard, there was an Error and/or Mistake apparent on the face of Record. For clarity, the Mistake and/or Error on the face of Record was so evident that same was discernable without a belabored and/ or detailed examination of the Record. Simply put, the Error was capable of being sighted while running and thus deserving of Review.

41. In support of the foregoing observation, I adopt and reiterate the Decision of the court in the case of **National Bank Of Kenya Ltd v Ndungu Njau (1997) eKLR, where the court held as hereunder:**

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on

an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

42. Given that the subject Application is meant to Review the unilateral order made by the Honourable judge, whereby same transferred the Application dated the 1<sup>st</sup> September 2021, to the Magistrate’s Court, which does not have jurisdiction, the order Was/ is thus amendable to Review.

43. Consequently, I come to the Conclusion that there existed an Error and/or Mistake so evident and/or apparent and in this regard, I am constrained to and do hereby Review the orders made on the 7<sup>th</sup> September 2021.

**FINAL DISPOSITION:**

44. The Respondent herein filed the Notice of Preliminary Objection and has canvassed same as if the court was dealing with the hearing and determination of the Notice of Motion Application dated the **1<sup>st</sup> September 2021.**

45. Suffice it to say, that is the Application which was ordered to be transferred to and be heard by the Magistrate’s court. In this regard, the said Application is not before this Honourable Court, save for the fact that this Honourable Court, granted the Orders of Stay of Execution of the Orders of Transfer thereof to the Magistrate’s Court.

46. In the premises, no legal arguments can accrue and/or be made in respect of the Application dated the **1<sup>st</sup> September 2021,** until and unless the order for transfer is reviewed, varied and/or set aside. For clarity, that is the import of the Application dated **14<sup>th</sup> September 2021.**

47. *In a nutshell,* I have found and held that the order transferring the subject matter to the Magistrate’s court, was made in Error and without due regard to the provisions of **Section 7 of the Arbitration Act, 1995.**

48. Accordingly, the Notice of Motion Application dated the **14<sup>th</sup> September 2021,** is merited and same is hereby allowed. Consequently, the Notice of Motion Application dated **1<sup>st</sup> September 2021,** shall now be heard on merits.

49. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF NOVEMBER 2021.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**ENVIROMENT AND LAND COURT.**

**MILIMANI.**

In the Presence of;

**June Nafula Court Assistant**

.....For the Applicants.

.....For the Respondent.