REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E112 OF 2021

IN THE MATTER OF THE ARBITRATION ACT, CAP 49 LAWS OF KENYA

AND

IN THE MATTER OF THE DISPUTE BETWEEN

DR. SAMUEL THENYA MAINA.....APPLICANT

AND

BRIAN MARTIN FRANCIS.....1ST RESPONDENT

ESTATE OF HIRAM NGARUIYA.....2ND RESPONDENT

ISAAC NJOROGE GITOHO.....3RD RESPONDENT

JAMES NJUGUNA GITOHO.....4TH RESPONDENT

KRISCO HOLDINGS LIMITED.....5TH RESPONDENT

MUIBORO ENTERPRISES LIMITED.....6TH RESPONDENT

KCB BANK KENYA LIMITED.....7TH RESPONDENT

BILHA W. MWANGI & KEMBOY

JULIUS KIPKOSGEI t/a

KEMBOI LAW ADVOCATES LLP..... 8TH RESPONDENT

NJERI BENSON NGUGI.....9TH RESPONDENT

IGERIA ARTHUR KONYE.....10TH RESPONDENT

NJOROGE DAVID NGUMBU t/a

IGERIA & NGUGI ADVOCATES.....11TH RESPONDENT

R U L I N G

1. By a Summons in Chambers dated 26/2/2021, brought under ***section 7 of the Arbitration Act, 1995 Rule 2 of the Arbitration Rules, 1997, sections 1A & 3A of the Civil Procedure Act and Article 159(2)(c) of the Constitution of Kenya,*** the applicant sought three principal orders.

2. The orders were to restrain the 7th, 9th, 10th and 11th respondent from releasing a sum of Kshs. 102,378,022/98 to the 8th respondent or any other party to the suit pending the hearing of the application and suit. The applicant also sought an order that the said sum of Kshs. 102,378,022/98 be held in a joint interest earning account in the names of the advocates for the applicant and the advocates for the 1st to 6th respondent pending the determination of arbitration.

3. The grounds upon which the application was predicated upon were set out in the body of the Summons and in the supporting affidavit of the applicant sworn on 26/2/2021.

4. It was contended by the applicant that, by a Share Purchase Agreement (SPA) between the 1st to 6th respondent and the applicant dated 19/6/2017, the former sold to the latter 77% of a building owned by Adlife Plaza Ltd ("APL"). Part of the purchase price amounting to Kshs. 940,000,000/- was to be financed by the 7th respondent.

5. In order to facilitate the release of documents and perfect the transfer, the 9th to the 11th respondent gave a professional undertaking to the 8th respondent to pay the balance of the purchase price on completion of the transaction. It would later turn out that the 1st to 6th respondent were in breach of some of their warranties under the SPA. In terms of the contract between the parties, the applicant commenced arbitral proceedings before Mr. Martin Munyua, Arbitrator claiming Kshs. 259,563,073/69.

6. It was agreed by the parties that the balance of the purchase price be paid while a sum of Kshs. 102,378,022/93 be ring-fenced pending reconciliation of some amounts allegedly misappropriated by the 1st to 6th respondent from APL.

7. Subsequently, the 8th respondent filed suit, **HCCC No. 21 of 2020 (formerly HCCC No. 233 of 2018)** against the 9th to 11th respondent on the latter's professional undertaking claiming the said sum of Kshs. 102,378,022/93. Judgment for the said amount was entered against the 9th to 11th respondent in favour of the 8th respondent on 5/2/2021 and the latter had commenced execution therefor.

8. For the foregoing reasons, the applicant contended that if payment of the said amount is made, it would occasion him irrevocable harm as well as the substantive claim pending before the arbitrator. That the substratum of the dispute between the applicant and the 1st to 6th respondent is inextricably linked to the settling of final account which is the subject of the arbitral proceedings. That the arbitral proceedings will be rendered nugatory if the payment is made as the said respondents are individuals and it would be difficult to trace them and recover the said sum from them. Finally, that no prejudice will be occasioned if the said sum is held in joint interest earning account.

9. When the matter came up ex-parte on 1/3/2021, the Court granted an ex-parte conservatory order and directed the same be served for hearing inter-partes on 8/3/2021. On the hearing day, **Mr. King'ara,** Learned Counsel for the 1st to 6th respondent and the 8th respondent, informed the Court that he had lodged a Preliminary Objection to the Summons. The Court directed the parties to argue the same through written submissions which are on record and which the Court has considered. The preliminary objection is dated 18/2/2021 (sic) in respect of which this ruling relates. The 7th, 9th, 10th and 11th respondents did not respond to the application.

10. The objection was to the effect that; this Court lacks jurisdiction to entertain the suit as it cannot set aside or interfere with the decision of another Judge in a freshly filed suit and cannot stop the 9th to 11th respondent from honouring their professional undertaking as ordered by the court; that no injunction can issue against a judgment of a court or to stop a party from complying with a judgment of a court; that the court is *functus officio* and the application *res judicata* the ruling and judgment made in **HCCC No. 18 of 2020 (previously HCCC No.233 of 2018).**

11. That the application amounts to an appeal/review of the judgment in **HCCC No. 18 of 2020 (previously HCCC No.233 of 2018)**, ("the said suit"). That save for the 9th to 11th respondents, the others are not parties to the said suit; that there is no judgment against the 7th respondent to warrant the orders sought and finally that the orders sought are beyond the scope of the jurisdiction under ***sections 7 and 10 of the Arbitration Act.*** That the suit and application amounted to forum shopping the applicant having withdrawn **HCCC No. 092 of 2021** between the same parties having failed to obtain interim orders and that the proceedings herein are likely to prejudice the arbitral proceedings.

12. Vide their submissions, the parties summarized the issues for determination as being; whether the court has jurisdiction to entertain the application/suit; whether the Court is *functus officio* and the issues raised *res judicata;* whether the orders sought are within the scope of section 7 of the ***Arbitration Act;*** whether the application and suit are likely to prejudice the arbitral proceedings; what is the fate of the Originating Summons should the application be struck out under ***section 7 of the Arbitration Act*** and who should bear the costs.

13. It was submitted for the 1st to 6th and 8th respondent ("the respondents"), that it was common knowledge that a judgment had been entered against the 9th to 11th respondent by a court of concurrent jurisdiction in the said suit; that the applicant is seeking to halt the payment ordered therein; that there is no jurisdiction to restrain the 9th to 11th respondents from complying with the said judgment.

14. The decisions in **Bilha W. Mwangi & Another v. NjeriBenson Ngugi & 2 0thers [2021] Eklr, Invesco Assurance Co. Ltd & 2 Others v. Auctioneers Licensing Board & Another [2020] Eklr, Johnson Ondimu v. Elkana Moenga Ondieki & 2Others [2020] Eklr, John Muthee Ngunjiri & 4 Others v. KPLC & Anor [2019] Eklr,** among others were relied in support of those submissions.

15. It was further submitted for the respondents that by virtue of the ruling and judgment in **Bilha W. Mwangi & Another v. Njeri Benson Ngugi & 2 0thers,** the Court was *functus officio* and application *res judicata.* That in view of the fact that what is before the arbitrator is a claim for damages, on the authority of **Seven Twenty Investments Limited v. Sandhoe Investment Kenya Limited [2013] Eklr,** the Court could not curtail the right of the 1st to 6th respondent from receiving their purchase price and the 8th respondent his fees.

16. Finally, that since there was no judgment against the 7th respondent no injunction against it could be made. That the entire suit should be struck out on the authority of **Safaricon Limited v. Ocean View Beach Hotel Ltd & 2 Others [2010] Eklr.**

17. On his part, the applicant attacked the preliminary objection on the basis that it pre-dated the Summons and the suit. That the objection run foul the principles set out in **Mukisa Biscuits Manufacturing Co Ltd v. West End Distributors Ltd [1969] EA 696** since the issues between the parties are in dispute.

18. That the Summons was not a review or setting aside of the judgment in the said suit. The definition of 'review' in **The Concise Oxford Dictionary, 9th Ed,** the Court's jurisdiction under ***Order 45 of the Civil Procedure Rules*** and the case of **Bellevue Development Company Ltd v. Francis Gikonyo & 7 Others [2018]** were cited to distinguish the matter before Court from one for review.

19. That there was jurisdiction under ***section 7 of the Arbitration Act*** for the Court to intervene and give an interim measure of protection on the authority of **Safaricom Ltd v. Ocean View Beach Hotel Ltd & 3 Others (supra).** That the jurisdiction exercised by Odero J in the said suit was different from the one invoked in this suit. That what the applicant seeks here is to temporarily suspend the execution of the judgment in the said suit to meet the ends of justice.

20. It was further submitted that the Court was not *functus officio* or *res – judicata* as the matter did not satisfy the essentials in ***section 7 of the Civil Procedure Act.*** In conclusion, it was submitted that the monies ordered to be paid in the said suit is part of the amounts in dispute before the arbitral tribunal. That in the premises, the orders sought are not beyond the jurisdiction under ***section 7 of the Arbitration Act.***

21. I will first deal with the applicant's objection to the preliminary objection as being incurably defective for being pre-dated the suit and application. The Court agrees with the submission that a party is bound by its pleadings. However, the issue of the objection having a date of 18/2/2021 while the suit and application having been filed and dated on 26/2/2021 is to me technical in nature. That must have been a typing error or just a mistake that does not go to the route of the matter.

22. In any event, the objection seems to address the suit and application The same is curable under the overriding objective under ***section 1A of the Civil Procedure Act*** and ***Article 159 of the Constitution of Kenya.*** To this Court's mind, that is a technical objection that does not address substantive justice between the parties. The same is hereby rejected.

23. This is a preliminary objection. The principles applicable were set out in the case of **Mukisa Biscuits Manufacturing Co Ltd v. West End Distributors Ltd (supra)**. It raises a pure point of law which is argued on the assumption that the facts pleaded and alleged by the other side are correct. It cannot be raised if any facts are to be ascertained or the facts are disputed.

24. In **Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others [2015] Eklr,** after examining the **Mukisa Biscuits case,** the Supreme Court observed: -

> ***"Thus a preliminary objection may only be raised on a "pure question of law". To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented".***

25. In the present case, the respondents did not file any affidavit to contradict the averments made by the applicant. They only tried to introduce facts meant to contradict the statements made on oath by the applicant through their lengthy submissions. Firstly, those facts that are contained in the submissions that were not introduced in the proceedings by way of affidavit cannot be relied on. Secondly, if they are to be considered, then the preliminary objection fails *in limine* as it would be based not on a pure point of law, but on disputed facts.

26. Be that as it may, this Court will consider the objection on the basis of the facts sworn to in the supporting affidavit since that is the evidence that is on record. These are that; the 1st to 6th respondents were in a contractual relationship with the applicant. That contract had an arbitral clause; the parties disagreed and the applicant preferred an arbitration which is pending before **Mr. Martin Munyu.**

27. That because of some breaches by the respondents on their contractual obligations, the parties agreed that part of the purchase price be with-held, or in the words of the applicant be 'ring-fenced'. This is the amount of Kshs. 102,378,022/93, the subject of these proceedings. In the meantime, the 8th respondent as advocate for the 1st to 6th respondent who was given a professional undertaking by the 9th to 11th respondent, moved to Court in the said suit to enforce the same and has obtained judgment for payment to him by the 9th to 11th respondent of the said sum of Kshs. 102,378,022/93.

28. Those then are the undisputed facts upon which the objection is predicated on. It is also on the aforesaid undisputed facts that the applicant has approached this Court for an interim measure of protection by way of securing the aforesaid sum of Kshs. 102,378,022/93 by having the same held and not released pending the conclusion of the arbitral proceedings. It was also stated on oath that, if the sum of Kshs. 102,378,022/93 is paid out, the substratum of the arbitration would have been removed and/or defeated.

29. On the foregoing facts, does this Court have jurisdiction? The respondents contend that the application and suit is an attempt to review or set aside the judgment of Odero J in the said suit.

30. There is no dispute that this Court, as a Court of concurrent jurisdiction with that which determined the said suit has no jurisdiction at all to second guess the determination in that suit. That will not only be deplorable but an affront to the well-known principle that, a decision of a court can only be re-looked at only on two scenarios. Either on review by the same court under ***Order 45 of the Civil Procedure Rules*** or on appeal by a higher Court.

31. This Court cannot exercise any of the aforesaid jurisdictions. It cannot attempt to determine whether or not the judgment of Hon. Odero J

was correct or should be stayed or how it should be executed. That is completely out of question. Any attempt along those lines will be an affront to our Constitution and the law. **See Bellevue Development Company Ltd v. Francis Gikonyo & 7 Others [2018] Eklr.** The judgment by Odero J, is by all means lawful and is to be respected and enforced as per the law provided.

32. What is before this Court is an application by the applicant that this Court do exercise the jurisdiction given to it under ***section 7 of the Arbitration Act***. That in exercising that jurisdiction, the Court does give an interim measure of protection by restraining the release of the aforesaid monies.

33. ***Section 7 of the Arbitration Act*** provides: -

> ***"(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 the High Court to grant that measure.***
>
> ***(2) When 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".***

34. This Court agrees with the respondents that, to the extent that the injunction is sought against the 9th to 11th respondent against releasing the decretal sum to the 8th respondent, the application is flawed. That would be to hamstring the execution of a lawful judgment in the said suit.

35. Were the application limited only to firstly, prayer nos. 2 and 3 and secondly, against the 9th to 11th respondent only, the objection would be valid and the application would be for striking out.

36. However, the application is much wider. It involves a third party, the 7th respondent which is the bank that is holding the subject money that is the subject of the professional undertaking that the 9th and 11th respondents have been ordered to honour. Secondly, there is also prayer no. 4 which would do no violence to either the judgment in the said suit or its execution. That prayer perfectly falls on the definition of *'an interim measure of protection'*.

37. The jurisdiction to strike out a pleading and unseat a litigant from the seat of justice is one to be sparingly exercised. A pleading which can be saved by an amendment is not to be struck out. This Court is quite aware that it is not dealing with an application to strike out a pleading but the gist and effect of the objection is to summarily determine the rights of the parties without hearing them.

38. No doubt there is jurisdiction under ***section 7 of the Arbitration Act*** to give an interim measure of protection. There is no doubt that the amount of Kshs. 102,378,022/93 which the 9th to 11th respondents have been ordered to pay under their professional undertaking to the 8th respondent is intricately intertwined with the arbitral proceedings that are still pending.

39. To the extent that the orders sought, if the offending parts are removed through amendment, can be granted and properly directed at the holding of the monies without necessarily directing the 9th to 11th respondents to disobey the judgment, this Court holds that it has jurisdiction to entertain the application and suit. That in entertaining the application and suit, the Court would not be reviewing or re-looking at the judgment of Odero J aforesaid.

40. In any event, prayer 4 of the application can be granted on its own and independent of the other prayers without offending the judgment of Odero J.

41. The other objection was that this Court is *functus officio* as the issues raised herein are *res – judicata*. That the matters raised in the application and suit had been determined in **Bilha W. Mwangi & Another v. Njeri Benson Ngugi & 2 Others [2021].**

42. A Court becomes *functus officio* when it has dealt with a matter with finality and nothing else is to be done on it. Once a Court delivers a judgment in a matter, it is deemed to have determined the issues between the parties. The court is then said to be *functus officio* as far as that matter is concerned, save as in the exercise of its review jurisdiction.

43. As regards *res – judicata,* ***section 7 of the Civil Procedure Act*** is clear on it. In order for the doctrine to apply, the issues raised in a subsequent suit or application must have been raised (or could have been raised) in the previous suit, the parties must be the same or under whom they or any of them claim, the parties should have been litigating under the same title, the issue in question should have been determined with finality and the court that determined the matter should have had the jurisdiction to determine the same.

44. In the present case, the parties in **Bilha W. Mwangi & Another v. Njeri Benson Ngugi & 2 0thers** were not the same as in this case. The applicant herein, the 1st to 6th respondent and the 7th respondent were not parties in the said suit. The issue in the said suit was enforcement of a professional undertaking while the issue here is an interim measure of protection. The issue herein was never raised in the said suit and could not be determined and neither was it determined.

45. Accordingly, I reject the contention that the Court is *functus officio* or that the issue herein is *res – judicata.*

46. The next contention was that the orders sought are not within the scope of ***section 7 of the Arbitration Act.*** The case of **Seven Twenty Investments Ltd v. Sandhoe Investment Kenya Ltd [2013] Eklr** was relied on. It was submitted that the issue before the arbitrator is damages and that the amount in the judgment in the said suit is not such damages.

47. In their submissions, the respondents stated: -

> ***"The Court is being invited to curtail the right of the 1-6th Respondents to be paid balance of the purchase price and the 8th Respondent to be paid fees for services rendered".***

48. The holding in the **Seven Twenty Investments Ltd v. Sandhoe Investment Kenya Ltd case** is not applicable. As already stated, the issue in the suit before Court is whether there should be some interim measure of protection to safeguard the sum of Kshs.102,3778,022/93 pending the conclusion of arbitration. The Court is not being asked to interfere in the pending arbitration. Rather, the Court is being asked to assist the arbitration so that the same is not rendered nugatory as at the time it is determined.

49. In their submissions, the respondents attempted to argue the merits of the application but this Court refuses to be drawn to making any findings thereon. The application is yet to be argued. I reject that contention.

50. As regards the contention that the application seeks to injunct the 7th respondent from paying a judgment amount, I have already held above the efficacy of injunctive orders vis a vis an order or orders of interim measure of protection.

51. For the foregoing reasons, I find that there are no grounds upon which the application and suit should be struck out in terms of **Safaricom Limited v. Ocean View Beach Hotel Limited case** as submitted by the respondents.

52. Accordingly, I find that the preliminary objection dated 18/2/2021 to be without merit and dismiss the same with costs to the applicant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL, 2021.

A. MABEYA, FCI Arb

JUDGE