



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. E536 OF 2020**

ISAAC'S INVESTMENTS COMPANY LIMITED.....PLAINTIFF

VERSUS

FIRST COMMUNITY BANK LIMITED.....DEFENDANT

**RULING**

**The Application**

1. The application for determination is Plaintiff/Applicant's Notice of Motion, dated 10<sup>th</sup> December, 2020 brought under Section 7 of the Arbitration Act, 1995, Order 40 Rules 1-4 of the Civil Procedure Rules and Section 63(e) of the Civil Procedure Act. The Application seeks the following orders:

1) *Spent*

2) **THAT** pending the hearing and determination of this application inter partes, interim orders be granted in terms of Prayers 5 and 6 of the application herein.

3) **THAT** this honourable court be pleased to issue an Order directing that the dispute between the Plaintiff and the Defendant arising from the Musharaka Ending-With Ownership Finance Agreement and/or Letters of Offer dated 7<sup>th</sup> November, 2011, 23<sup>rd</sup> December, 2012 and 10<sup>th</sup> March, 2015 respectively be referred to Arbitration by a Single Arbitrator in accordance with the provisions of the said Finance Agreement.

4) **THAT** this honourable court be pleased to order and direct that the Arbitrator to be appointed by both parties should be knowledgeable and competent with Shariah Law in view of the unique nature of the Finance Agreement signed between both parties.

5) **THAT** pending the commencement, hearing and determination of the Arbitration proceedings, an Order of temporary Injunction be issued restraining the Defendant, its officers, servants or agents or any other person acting under the instructions of the Defendant from advertising, selling or offering for sale either by public auction or private treaty, leasing, alienating, renting, charging or in any other manner whatsoever interfering with all and/or any portion of the security property known as L.R No. Dagoretti/Riruta/3129, Nairobi until further orders of the Arbitration Tribunal and/or this honourable court.

6) *Spent.*

7) **THAT** this honourable court be pleased to issue any further orders and/or directions as it may deem fit in the interests of dispensing justice in this suit.

8) **THAT** the costs of this application be paid by the Defendant.

2. The application is based on the grounds on the face of it and supported by the Affidavit of the Applicant's Director one **ALI M. ISAAC** sworn on even date. He averred mainly that the Applicant was the registered owner of land parcel **L.R No. Dagoretti/Riruta/3129, Nairobi (the security property)** which is developed with a total of Ninety (90) Apartments.

3. He averred that under the express provisions of the Memorandum and Articles of Association of the Defendant, the main objective for which the Defendant is established is to carry out in strict compliance with the principles of Islamic Shariah Law the business of banking in all its aspects but without charging or paying interest on the principal amount lent, deposited or borrowed by its customers.
4. On the basis of the Defendant's representations, the Plaintiff/Applicant as a property developer through its directors who are Muslims by faith approached the Defendant and applied for a Musharaka-Ending-With-Ownership Financing product for the purpose of developing the security property.
5. Pursuant thereto, the Plaintiff and the Defendant signed the First Letter of Offer dated 7<sup>th</sup> November, 2011 and the Plaintiff was advanced the principal amount of Kshs. 36,000,000.00 as finance to construct Phase 1 of the project.
6. He further averred that **Clause 25** of the said Letter of Offer expressly stated that any dispute arising between the parties out of or in connection with the said Lending Agreement shall be referred to Arbitration by a Single Arbitrator to be appointed mutually by both parties.
7. Both parties thereafter executed a Charge document dated 15<sup>th</sup> December, 2011 for Kshs. 36,000,000.00 which under Clause 15.3.12 thereof incorporated the terms and conditions of the said Letter of Offer as an integral part of the Charge document and the Lending Contract.
8. He also averred that by a Second Letter of Offer dated 23<sup>rd</sup> December, 2012, the banking facilities granted to the Plaintiff were increased to Kshs. 210,000,000.00 and a Further Charge document dated 28<sup>th</sup> January, 2013 was executed between both parties.
9. The Director stated that even though the provisions of the Further Charge purported to adopt the terms and conditions of the Letter of Offer dated the 23<sup>rd</sup> day of December, 2012, the same provided for the contrary in certain clauses that purported to confer upon the Respondent statutory power of sale contrary to provisions of the letter of offer which expressly provided for equal share of profits and/or losses arising from the project.
10. He additionally averred that the banking facilities granted to the Plaintiff were restructured vide a Third Letter of Offer dated 10<sup>th</sup> March, 2015 which increased the Respondent's shareholding in the security from 80% to 86% while the Applicant's share was reduced from 20% to 14%.
11. The Respondent, in a bid to exercise its statutory power of sale on allegations of default on the part of the Applicant advertised the suit property for sale via public auction. Consequently, the Applicant moved to court for orders of injunction in High Court Civil Suit No. 316 of 2018 to stop the Respondent from selling the remaining 19 apartments within the security property and the suit was duly withdrawn vide a notice of withdrawal dated the 30<sup>th</sup> day of November, 2020.
12. The Applicant became knowledgeable that the Respondent was actively marketing the remaining 19 apartments prompting him to file the instant suit.
13. Additionally, the Applicant avers that it stands to suffer substantial loss not only because the Respondent has contravened various provisions of the agreements but has also recovered from the Applicant approximately Kshs. 380,000,000.00 out of an advancement of Kshs. 245,000,000.00 and the Applicant believes that it has fully paid the advanced loan together with the share profits that the Respondent was entitled to under the Musharaka Finance Agreement.

#### **Respondent's case**

14. The Application is opposed vide a Replying Affidavit sworn by **CLARIS OGOMBO**, the legal officer of the Defendant Bank on the 30<sup>th</sup> day of March, 2021 in which she averred that the instant application and the suit are tainted with material non-disclosure of facts well known to the Plaintiff, are an abuse of the court process and a grave miscarriage of justice.
15. She averred that Annexed to the Offer Letter dated 23<sup>rd</sup> December, 2012 was a Musharaka ending with Ownership Financing Agreement, and whose terms were duly incorporated by reference and formed a key part of the contract between the parties.
16. She avers that the Applicant defaulted on its obligations prompting the Respondent to inform the Applicant, through its letter dated 12<sup>th</sup> September, 2017 of its decision to institute recovery proceedings which said letter was responded to by the Applicant on the even date offering to settle the outstanding amount by a lump sum payment of Ksh.120,000,000.00 which amount was to be derived from yet another facility of Kshs. 500,000,000.00 proposed for the construction of 560 units on a separate parcel of land which the Plaintiff intended to purchase. The said proposal was rejected by the Respondent.
17. The Respondent issued the statutory notices which prompted the Applicant to institute proceedings in **Nairobi High Court Civil Suit Number 316 of 2018** against the Respondent in which at the instance of the Applicant the interim orders were vacated and the Respondent proceeded to advertise the security property for sale via public auction again prompting the Applicant to file an application to stop the said sale which said application was compromised by the consent of the parties of the 16<sup>th</sup> May, 2019 and one of the terms was that the Applicant avails 15 apartments on the security property for mutual valuation.
18. The Respondent proceeded to have the 15 units sold after attempts to stop the said sale by the Applicant were unsuccessful.
19. The Respondent strongly avers that the instant cause is barred by the doctrine of *res judicata* as the same was brought to a finality vide a

Withdrawal Notice of the suit in **Commercial Civil Suit No. 316 of 2018 – Isaac’s Investments Company Limited v First Community Bank Limited & Regent Auctioneers.**

20. It is the Respondent’s further averment that it is yet to recover the full outstanding sum thus the Application seeks to delay and/or aid the Applicant in abnegating his contractual obligations and subject the respondent to irreparable loss thus the instant application should be dismissed.

21. The Applicant in response filed a Supplementary Affidavit sworn on the 28<sup>th</sup> day of April, 2021 in response to the Replying Affidavit in which it further addressed the issues, *inter alia*, that the offer letters agreeing to have parties resort to arbitration in the event of a dispute, **Clause 25** of the Letter of Offer dated 7<sup>th</sup> November, 2011 provided that:

**“Applicable Law and Arbitration.**

**25. This Agreement and its performance shall be governed by and construed in accordance with the laws of Kenya.**

**a.) Any dispute arising out of or in connection with this Agreement shall first be referred to arbitration by a Single Arbitrator (such as a business consultant) to be appointed mutually in agreement by both the parties.**

**b.) Such arbitration shall be conducted in Nairobi and each party shall be responsible for its share of the Arbitrator’s fees as may be mutually agreed by the parties.**

**c.) To the extent permissible by law, the determination of the Arbitrator shall be binding upon the parties.**

**d.) Any aggrieved party to an award made under this Clause shall have the right of appeal to the courts and the parties herein submit to the non-exclusive jurisdiction of the Kenyan courts.**

**e.) In the event a party fails to proceed with arbitration or unsuccessfully challenges the Arbitrator’s award or fails to comply with the Arbitrator’s award, the other party is entitled to costs of suit including reasonable legal fees for having to compel arbitration or defence or enforce the award.”**

22. Additionally, it stated that the doctrine of *res judicata* did not arise as the matter was withdrawn and none of the Applications filed were heard on merit to logical conclusion but were compromised by agreement of the parties.

23. In a nutshell the Applicant avers that the instant suit raises numerous issues for determination which were not dealt with substantively, *inter alia*, the position of accounts, the process of valuation, the sums due and/or overpaid and further posits that the Honourable Court has the jurisdiction to grant its prayers notably an order of preservation of the suit property pending Arbitration.

24. The Respondent filed a Further Affidavit sworn on 13th May, 2021 in response to the Supplementary Affidavit and in reiteration of the averments in the Replying Affidavit. It averred that the Honourable Court had the jurisdiction to entertain the matter contrary to the assertion by the Applicant that the transaction having expressly provided for arbitration, the Court lacked jurisdiction unless it is an appeal arising from the arbitration proceedings and/or award.

25. The Respondent further averred that the Applicant was bound by their mutual agreement unless otherwise it could prove coercion, fraud or undue influence. Further, the contract was expressly on the issue of interest and stipulated that the same was not chargeable as claimed by the Applicant and denies that the Respondent ever breached the terms of the contract.

26. Additionally, the Respondent refuted the claims of overpayment of the facility on the part of the Applicant and reiterated that it was yet to fully recover the outstanding amount and it duly served notices. Consequently, selling the same by agreement of parties and via public auction was the only option available.

**Submissions**

**Applicant’s submissions**

27. The Application was canvassed by way of written submissions. Those of the Applicant are dated the 5<sup>th</sup> day of May, 2021.

28. The Applicant submits that where the contract provides for an arbitration clause, the jurisdiction of the court is limited and the intentions of such parties should not be interfered with. It cited the cases of **Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR** and **Simba Corporation Limited v Caetano Formula East Africa, SA [2019] eKLR**

29. It is also the submission of the Applicant that the instant matter was not barred by the doctrine of *res judicata* as the previous suit was withdrawn thus issues pertinent in the same were not substantially and directly determined between the parties. The Applicant made reliance on Section 7 of the Civil Procedure Act, 2010 and cited **The Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others (2017) eKLR**, **Kenya Commercial Bank Limited vs. Muiri Coffee Estate Limited & Another (2016) eKLR** and **Accredo AG & 3 Others vs. Stefano Uccelli & Anor (2019) eKLR** to further buttress this position.

30. The Applicant further submits that court has jurisdiction to compel parties to proceed to arbitration pursuant to Section 6 of the

Arbitration Act. The position was emphasized by making reference to Clause 25(e) of the Letter of Offer dated the 7<sup>th</sup> day of November, 2011 providing that:

**“25(e) In the event a party fails to proceed with arbitration or unsuccessfully challenges the Arbitrator’s award or fails to comply with the Arbitrator’s award, the other party is entitled to costs of suit including reasonable legal fees for having to compel arbitration or defence or enforce the award.”**

31. In addition to the foregoing on the issue of jurisdiction, the Applicant submitted that the Honourable Court having the powers to compel parties to arbitration is also bestowed with powers to order preservation of the suit property pending Arbitration.

#### **Respondent’s submissions**

32. The Respondent filed its submissions dated the 13<sup>th</sup> day of May, 2021. It submits that the instant claim is *res judicata* as the substratum of the previous suit was the sale of the 15 apartments on the security property which were logically dealt with before the suit was withdrawn. It is posited that the existence of a consent order would mean that the suit was dispensed and can only be challenged by the Applicant setting aside the same. The Respondent cited **Shakhalaga Khwa Jirongo & another v Board Of Trustees Of The National Social Security Fund [2015] eKLR.**

33. The Respondent submits that the Applicant having admitted being in debt, it was right for it (Respondent) upon issuance of the relevant notices to exercise its statutory power of sale to recover the outstanding sums as the property charged becomes a commodity for sale for which value is attached as was held in **John Nduati Kariuki T/A Johester Merchants vs. National Bank of Kenya Ltd Civil Application No. Nai. 306 of 2005 [2006] 1 EA 96** as follows:

***“A bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant having obtained a large amount of those funds and had full benefit of it and having offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents, cannot be heard to say that the securities are unique and special to him as the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capacity has not been challenged”.***

34. It was further submitted by the Respondent that the issue of the 15 apartments having been settled and the same having been sold to a third party, it could not be subjected to re-litigation as Section 6 of the Arbitration Act, 1995 empowers this Honourable Court to issue an order of stay of proceedings upon an application by a party, (Defendant) not later than the time when that party enters appearance or acknowledges the claim.

#### **Analysis and determination**

35. I have considered the application, the affidavits both in support of, and in opposition to, the application, the Supplementary and Further affidavits, the submissions of both parties as well as the authorities relied upon. I find the issues arising for determination are:

- a) *Whether the application is res judicata.*
- b) *Whether the proceedings herein should be stayed pending referral of the dispute to arbitration.*
- c) *Whether the court should issue an order preserving the suit property pending arbitration*

#### **Whether the application is res judicata**

36. Under this head, Section 7 of the Civil Procedure Act provides that:

***“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

***Explanation (1) – The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.***

***Explanation (2) - For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.***

***Explanation (3) – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.***

***Explanation (4) – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”(emphasis added).***

37. The doctrine of *res judicata* has been extensively explained in various cases. In the recent case of the **Independent Electoral and**

**Boundaries Commission –v- Maina Kiai & 5 Others (2017) eKLR**, the Court of Appeal held as follows:

*“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:*

- a) The suit or issue was directly and subsequently in issue in the former suit.*
- b) The former suit was between the same parties or parties under whom they or any of them claim.*
- c) Those parties were litigating under the same title.*
- d) The issue was heard and finally determined in the former suit.*
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”*

38. In the same decision, the Court went on to say:

*“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundation of res judicata thus rest in the public interest for swift, sure and certain justice.”*

38. In further establishing what key elements are considered when it comes to the doctrine of *res judicata*, I make reference to the case of **Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR** to include;

- “(a) the former judgment or order must be final;*
- (b) the judgment or order must be on merits;*
- (c) it must have been rendered by a court having jurisdiction over the subject matter and the parties; and*
- (d) there must be between the first and the second action identity of parties, of subject matter and cause of action.”*

40. My attention is further drawn to the case of **George W. M. Omondi & Another v National Bank of Kenya Ltd & 2 Others [2001] eKLR**, in which Ringera, J (as he then was) in finding that the suit is not *res judicata*, held as follows:

*“I have concluded that the present suit is not res judicata for the following reasons. First, as regards HCCC No 350 of 1998, I accept Mr. K’Opere’s submission that the same having been withdrawn rather than determined on its merits, there would be no basis of pegging the plea in bar thereon for it is a fundamental condition precedent to this plea in bar that the previous suit should have been heard and finally determined by a Court of competent jurisdiction...”*

41. In my considered view, I find that the doctrine of *res judicata* does not apply in the instant suit as **Commercial Civil Suit No. 316 of 2018 – Isaac’s Investments Company Limited v First Community Bank Limited & Regent Auctioneers** was withdrawn. This was done vide a Notice of Withdrawal & Discontinuance of Suit dated 17<sup>th</sup> November, 2020 by counsel for the Plaintiff. What this implies is that, that previous suit was not determined on merits. That is to say that the issues pending for determination herein were never canvassed to conclusion; simply stated, no conclusive order or judgment was made.

42. There is also no contestation that in the suit, the Applicant filed a Notice of Motion which was compromised by a consent of the parties of the 16<sup>th</sup> May, 2019 and one of the terms was that the Applicant avails 15 apartments on the security property for mutual valuation. This means that parties did not consent on sale of the 15 apartments as alluded by the Respondent. That being the case, it is trite that the Applicant did not sanction the sale of the apartments. Furthermore, a consent is an agreement between parties which court cannot interfere with. It is therefore improper for the Respondent to impute terms that were never agreed upon in the consent. Consequently, this limb of dispute remains unresolved as it was not addressed in the consent.

43. As such upon withdrawal of the previous suit, the Applicant herein was at liberty to file a fresh suit relating to the same parties and on the same subject matter without offending the *res judicata* principle. That is the scenario obtaining herein, hence the *res judicata* principle has not been offended.

#### ***Whether the subject matter should be referred to arbitration***

44. This question is determined by the provisions of **Clause 25** of the Letter of Offer dated 7<sup>th</sup> November, 2011. In the view of the Applicant, the Clause provided for a referral of the dispute to arbitration.

45. The substantive provision under which the Applicant sought the court's intervention is **Section 6 (1)** of the Arbitration Act, 1995. It provides as follows:

***“(1) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds:-***

***(a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or***

***(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.***

***(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.***

***(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings”(emphasis added)/***

46. The Court of Appeal in the case of *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] eKLR* pronounced itself with respect to Section 6 of the Arbitration Act, *inter alia*, that:

***“All that an applicant for a stay of proceedings under section 6 (1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:***

***(a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;***

***(b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and***

***(c) Whether the suit intended concerned a matter agreed to be referred to arbitration”***

47. In addressing the Provisions of Section 6(1) of the Act, the court in *Adrec Limited versus Nation Media Group Limited [2017] eKLR*, cited by the Applicant held that:

***“Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration”***

48. From the afore going analysis, there is no doubt that parties consented to referral of the matter to arbitration pursuant to **Clause 25** of the Letter of Offer dated 7<sup>th</sup> November 2011. The same reads thus:

**“ Applicable Law and Arbitration**

***This Agreement and its performance shall be governed by and construed in accordance with the laws of Kenya.***

***a) Any dispute arising out of or in connection with this agreement shall first be referred to arbitration by a single arbitrator (such as a business consultant) to be appointed mutually by both parties.***

***b) Such arbitration shall be conducted in Nairobi and each party shall be responsible for its share of the arbitrator's fees as may be mutually agreed by the parties.***

***c) To the extent permissible by law, the determination of the arbitrator shall be binding upon the parties.***

***a) Any aggrieved party to the award made under this clause shall have the right of appeal to the courts and the parties herein submit to non-exclusive jurisdiction of the Kenyan Courts.***

***b) In the event that a party fails to proceed with the arbitration or unsuccessfully challenges the arbitrator's award or fails to comply with the arbitrator's award, the other party is entitled to costs of the suit including reasonable legal fees for having to compel arbitration or defend or enforce an award.***

49. The Applicant passes this test and the court cannot be a barrier to facilitating the fulfilment of how parties intend to settle their dispute.

50. That aside, there is no doubt that the Applicant has made the application to have the matter referred to Arbitration pursuant to the arbitration clause. I thus disagree with the Respondent's submission that the Party who was entitled to apply was itself and not the Applicant. Section 6 does not specifically describe the Party entitled to apply and as such, it was within the right of the Applicant to seek redress in the form of the application herein. It follows then that the Applicant passes this test. I then hold that this a matter ripe for referral to arbitration.

## **Whether an injunction and/or preservation order should issue**

51. The next issue for consideration by this Court is the granting of temporary injunction and/or preservation orders with respect to the security property. Section 7 of the Arbitration Act, 1995 provides that:

### ***“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.”***

52. The foregoing provision has been expounded on by the courts on various instances. In the case of **Seven Twenty Investments Limited - Vs- Sandhoe Investment Kenya Limited, (2013) eKLR**, the court held as follows:

***“Perusal of section 7 of the Arbitration Act clearly shows that the issue of whether or not there is a dispute or whether or not there would be losses by either side would not be a factor for a court to take into consideration when deciding whether or not it should grant an order of interim measure of protection or injunction to safeguard the subject matter of the arbitral proceedings. All that a court would be interested in is whether or not there was a valid arbitration agreement and if indeed the subject matter of the arbitral proceedings was in danger of being wasted or dissipated so as to preserve the same pending the hearing and determination of the arbitral reference.”***

53. The Court of Appeal in the case of **Safaricom Limited v Ocean View Beach Hotel Ltd & 2 others (supra)** outlined the factors to be considered before granting interim measure of protection. The Court had this to say:-

***“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:-***

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

***ii. Whether the subject matter of 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 power as intended by the parties?”***

54. I have considered the respective submissions of the parties and the pleadings in a bid to establish whether the subject matter is under threat. The Applicant avers that the Defendant has already recovered in excess of what it was entitled under the contract. The Respondent on its part avers that it is yet to have the outstanding sums from the facility advanced to the Applicant and reserves the right of statutory power of sale.

55. As regards whether the Security Property is under threat of sale, there is no doubt about it. The Applicant’s case is that he is aware that the Respondent Bank wants to dispose of the subject remaining units. The Respondent on its part does not denounce this assertion save to state that it has a statutory duty to recover debt owed to it by the Applicant. On account that the Respondent has already sold the greater chunk of the Applicant’s property speaks volumes that the Bank may have substantively recovered its debt. The noble thing to do, as the anchor of justice, is for the court to preserve the remaining property pending resolution of the dispute by a Tribunal. Furthermore, the dispute revolves around the amounts owed to the Respondent and/or whether the Applicant has overpaid. If the court does not preserve the suit property, it implies that the Defendant will sell the remaining units at the risk of recovering more than is entitled to it.

56. It is also notable that the Respondent failed from the outset to demonstrate what amount of debt is owed to it by the Applicant by way of exhibiting Bank statement(s). Having regard to the fact that the loan was taken from “a no-interest” account and bearing in mind that the Applicant has already lost most of his property units towards repayment of the loan is a pointer that more than was advanced or close to the advanced loan has already been recovered. It is only then fair and just to allow that parties settle the dispute in the manner agreed upon whilst in the meantime the remaining units are preserved.

57. In view of the foregoing, it is my considered opinion that there is a likelihood/threat of wastage of the suit property which is the subject matter of the intended arbitration if an order of preservation is not issued. I find that this is a proper case for me to exercise discretion and issue interim protective orders.

## **Deposition**

58. In conclusion and for the reasons above stated, I make a finding that this application is properly before this Court and that the same is merited. Accordingly, I allow the same and make the following orders:

**i. In terms of Clause 25 of the Letter of Offer dated 7<sup>th</sup> November, 2011, the dispute herein between the Plaintiff and the Defendant is referred to arbitration.**

**ii. An order be and is hereby issued that the parties shall agree on an Arbitrator knowledgeable and competent with Shariah Law in view of the unique nature of the Finance Agreement signed between both parties within 60 days.**

**iii. THAT pending the reference of this dispute to arbitration, hearing and determination thereof, the Defendant/Respondent by itself, its officers, employees, servants and/or agents or otherwise however are hereby restrained from transferring the Suit Property known as L.R No. Dagoretti/Riruta/3129, Nairobi or any unit of apartment comprised therein that remains alienated as at today.**

**iv. Costs of the application shall abide the outcome of the arbitration.**

59. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>nd</sup> DAY OF JULY, 2021**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

**1. Mr. Odek h/b Mr. Zakayo for the Plaintiff/Respondent.**

**2. Miss Githii h/b Mrs. Kiiru for the Defendant/Respondent.**