



**Gowi v Waweru & another (Environment & Land Miscellaneous Case
E303 of 2024) [2025] KEELC 4939 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4939 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E303 OF 2024**

TW MURIGI, J

JUNE 20, 2025

BETWEEN

SHEM PETER GOWI APPLICANT

AND

JAMES KIMANI WAWERU 1ST RESPONDENT

WAMBUI GITARI KARIUKI 2ND RESPONDENT

RULING

1. Before me for determination is the Chamber Summons dated 20th December 2024 in which the Applicant seeks the following orders: -
 - a. Spent.
 - b. That pending the hearing and determination of the arbitral proceedings between the parties herein, this Court be pleased to issue an interim order of injunction restraining the Respondents from transferring, letting, disposing of or in any way dealing with Apartment Number BD4 erected on L.R No. 330/667 .
 - c. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Shem Peter Gowi sworn on even date.

The Applicant's Case

3. The Applicant averred that he entered into a sale agreement with the Respondent for the purchase of the suit property valued at Kshs. 22,500,000. He further averred that he paid a deposit of Kshs. 4,000,000/=, secured substantial financing and was left with a minimal balance to settle. That when



the Respondents were requested to execute the assignment of lease they terminated the sale agreement despite having received the deposit and an undertaking from his financier.

4. He went on to state that his advocate declared a dispute as per Clause 14 of the sale agreement and requested the Respondents to concur with the appointment of an Arbitrator. That when the Respondents declined to concur with the appointment of the proposed Arbitrator, the Chartered Institute of Arbitrators appointed one for the parties. The Applicant is apprehensive that the Respondents will sell or let out the suit property before the dispute is settled by arbitration. He urged the court to grant an interim measure protection pending the hearing and determination of the arbitral proceedings.

The Respondents Case

5. In opposition, the Respondents filed a Notice of Preliminary Objection dated 16th February 2025 on grounds that the application is fatally defective as it offends the mandatory provisions of Rule 2 of the Arbitration Rules 1997.
6. The preliminary objection was canvassed by way of written submissions.

The Respondents' submissions

7. The Respondents filed their submissions dated 16th February 2025. On behalf of the Respondents, Counsel submitted that the application is fatally defective as it is not anchored on any suit. To buttress this argument, Counsel relied on Section 7 of the *Arbitration Act*, Rule 2 of the Arbitration Rules 1997 and on the case of *Scope Telematics International Sales Limited v Stoic Company Limited & another* [2017] KECA 545 (KLR)

The Applicant's Submissions

8. The Applicant filed his submissions dated 12th March 2025. On behalf of the Applicant, Counsel submitted that the application is properly before the Court as the Court is not being called upon to determine substantive rights as in an ordinary suit. Counsel further submitted that the substantive issues are the subject matter in the arbitral proceedings. To buttress his submissions, Counsel relied on Section 7 of the *Arbitration Act*, Rule 2 of the Arbitration Rules and on the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] KECA 346 (KLR)

Analysis And Determination

9. The law on preliminary objections is well settled. A preliminary objection must be on a pure point of law.

In *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd* (1969) EA 696, Law JA stated; "So far as I'm aware, a preliminary objection consists of point of law which have been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

10. In *Oraro Vs Mbaja* 2005 eKLR Ojwang J (as he then was) described it as follows:

"I think the principle is abundantly clear. A Preliminary Objection correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of



evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

11. Having considered the preliminary objection and the rival submissions, the issue that arises for determination is whether the application herein is properly before the Court.
12. The Respondent contends that the application herein is fatally defective as it not premised on a suit as required under Section 7 of the *Arbitration Act* 1995 and Rule 2 of the Arbitration Rules 1997. The application herein is brought under Section 7 (1) of the *Arbitration Act* which provides as follows: -

“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.”
13. Rule 2 of the Arbitration Rules 1997 provides that: -

Applications under Sections 6 and 7 of the Act shall be made by summons in the suit.
14. The Court of Appeal in *Scope Telematics International Sales Limited v Stoic Company Limited & another* [2017] KECA 545 (KLR) held as follows:

It must be borne in mind that the substantive provision that the 1st respondent invoked was section 7 of the Act. The 1st respondent was seeking an interim measure of protection pending arbitration. The procedure applicable in such circumstances is clearly spelt out by rule 2 of the Arbitration Rules, 1997. Suffice it to say, that the rule is couched in mandatory terms. Our jurisprudence reflects the position that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or Statute, that procedure should be strictly followed (See Speaker of National Assembly V Njenga Karume [2008] 1 KLR 425).

The 1st respondent did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on Article 159 of *the Constitution* for the proposition that justice is to be administered without undue regard to technicalities. That Article also provides that alternative forms of dispute resolution mechanisms like arbitration should be promoted by the courts. There are however many decided cases to the effect that Article 159 of *the Constitution* should not be seen as a panacea to cure all manner of indiscretions relating to procedure.”
15. From the foregoing, it is crystal clear that the procedure for the grant of an interim order requires that the application must be made within a suit. Rule 2 of the Arbitration Rules is couched in mandatory terms. I find that failure to comply with the same cannot be cured by Article 159 of *the Constitution*.
16. In view of the foregoing I find that the application is fatally defective for want of compliance with law.
17. In the end, I find that the preliminary objection is merited and the same is hereby upheld.
18. Consequently, the application dated 20th December 2024 is hereby struck out with costs to the Respondents.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF JUNE 2025.

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HON. T. MURIGI

JUDGE

In The Presence Of: -

Court assistant – Ahmed

Nduu for the Applicant

Mogira for the Respondent

