



**Elen Properties Limited v Ndung’u (Commercial Miscellaneous Application E976 of 2024)
[2025] KEHC 15201 (KLR) (Commercial and Tax) (24 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E976 OF 2024**

MN MWANGI, J

OCTOBER 24, 2025

BETWEEN

ELEN PROPERTIES LIMITED APPLICANT

AND

MARGARET MUTHONI NDUNG’U RESPONDENT

RULING

1. Before me is a Chamber Summons application dated 20th November 2024, filed pursuant to the provisions of Article 159(2)(c) of *the Constitution*, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Section 7 of the *Arbitration Act*, 1996, Rule 2 of the Arbitration Rules, 1997 and all other enabling provisions of the law. The applicant prays for an order of temporary injunction restraining the respondent and her agents from withdrawing funds from ABSA Bank Account No. 2036363536 held in the name of Elen Properties Limited and/or disposing of any of the applicant’s assets pending the hearing and determination of the applicant’s claim in arbitration.
2. The application is premised on the grounds on the face of the Summons, and it is supported by an affidavit sworn on the same day by Mr. Peter Waithaka Ndung’u, the Chairperson of the Board of Directors of the applicant company. Mr. Waithaka averred that the applicant is a duly incorporated limited liability company whose shareholders include members of the late Livingstone Ndung’u Waithaka’s family. That the company operates two bank accounts, an ABSA Bank Account No. 2036363536 and a KCB Bank Account No. 1138498343. He averred that following the death of the applicant’s founding Director, the respondent became the sole signatory of the ABSA bank account but she has refused to include the other Directors as signatories, despite repeated demands.
3. Mr. Waithaka stated that on 5th September 2024, the applicant received Kshs. 5,953,100.55 from Kinangop Dairy Limited as interim dividends, but the respondent failed to disclose or account for the funds to the Board. He deposed that the respondent has exclusive control over the applicant company’s



- bank account and assets, including the company seal, cheque books, Title deeds, laptops, tenants' and financial records, which she keeps in her private residence. He further stated that the respondent has also been suspended as the applicant company's Managing Director but continues to withhold company property and information.
4. Mr. Waithaka averred that during the respondent's tenure, she failed to convene Board meetings in 2023, neglected to provide financial updates for over 12 months and failed to disclose the company's financial position. He stated that the applicant invoked the arbitration clause under Clause 81 of its Articles of Association and issued a notice dated 14th November 2024, to have the dispute referred to arbitration. He averred that due to the respondent's continued mismanagement and risk of dissipation of assets, the applicant seeks urgent interim injunctive reliefs pending the hearing and determination of the applicant's claim in arbitration.
 5. In opposition to the Chamber Summons, the respondent filed a replying affidavit sworn on 29th January 2025 by Mr. Shemir Omar Yakub but deposed by Ms Margaret Muthoni Ndung'u, the respondent herein. She averred that since the death of the applicant company's founding Director, she has been solely running the affairs of the company. She stated that following a succession process, each shareholder received their respective share of properties and duties were allocated accordingly. She contended that the other Directors of the applicant company have not participated in the management of the company and only show interest when money is involved, without contributing any work or putting in any effort.
 6. Mrs Ndungu averred that the ABSA Bank Account No. 2036363536 was opened jointly with the late founding Director of the applicant as her subsistence account in the event of his death, to enable her sustain herself as his wife. She further averred that she was also appointed as the main signatory to the KCB bank Account No. 1138498343, together with any other two other Directors from the remaining Directors of the company. She asserted that the applicant company has always operated transparently, with the other Directors being aware of all transactions, including property sales, but the other Directors unlawfully removed her as a signatory from the KCB account without notice, documentation, or a Court order authorizing such removal.
 7. Mrs Ndungu maintained that she has been operating the ABSA account without any issues and urged this Court to examine the procedure used in her removal as a signatory from the KCB account. She attributed the current dispute to strained family relations and disrespectful conduct by the other Directors of the applicant company, who are her children, during meetings held in 2024. She denied the allegations contained in paragraphs 8, 9, 10 and 11 of the applicant's affidavit in support of the instant application.
 8. The application herein was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Musungu, Miriti & Naliaka Advocates LLP on 27th February 2025. It is however evident from the Court record and the Case Tracking System that the respondent neither filed any written submissions nor made oral submissions in Court, in opposition to the instant application.
 9. Mr. Musungu, learned Counsel for the applicant submitted that though the respondent's replying affidavit purports to have been sworn by Margaret Muthoni Ndung'u, the person who actually appeared before the Commissioner for Oaths and signed it as the deponent was one Shemir Omar Yakub. This discrepancy he argued, demonstrates that Margaret Muthoni Ndung'u did not appear before the Commissioner for Oaths to take the oath as required under Rule 7 of the Commissioner for Oaths (Fees for Affidavits) Rules, 2023. He contended that the said replying affidavit cannot be deemed to have been validly sworn.



10. Counsel relied on the case of Emanuele Emilio Villa vs Valerio Bucciareli [2004] KEHC 2154 (KLR), and urged this Court to find that the replying affidavit herein is fatally defective for want of proper commissioning hence it ought to be struck out and the instant application treated as unopposed. The foregoing notwithstanding, Mr. Musungu submitted that it is not disputed that Article 81 of the applicant's Articles of Association contains an arbitration clause requiring any dispute between the company and its members to be referred to arbitration, and that the current dispute has already been referred to arbitration before Mr. Evans Ochieng' Okeyo, MCI Arb, who has convened preliminary meetings and issued directions. He stated that ABSA Bank Account No. 2036363536 is registered in the name of Elen Properties Limited.
11. He argued that the respondent's claim of having been allocated the said bank account through succession proceedings is unsupported by any documentary evidence. Additionally, there is no Board resolution authorizing the respondent to exercise exclusive control over the ABSA bank account. He stated that the respondent's own admission that the account serves as her personal subsistence account confirms the applicant's allegation that she has appropriated company funds for her personal use. Mr. Musungu submitted that the applicant has met the threshold for the being granted interim measures of protection under Section 7(1) of the *Arbitration Act*, 1995, as set out by the Court of Appeal in the case of Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] KECA 346 (KLR).

Analysis And Determination.

12. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit filed by the respondent and the written submissions by Counsel for the applicant. The issues that arise for determination are –
 - i. Whether the respondent's replying affidavit is fatally defective; and
 - ii. If interim measures of protection should be granted pending arbitration.

Whether the respondent's replying affidavit is fatally defective.

13. The applicant averred that the respondent's replying affidavit is fatally defective for having been deposed to by one Margaret Muthoni Ndung'u and sworn by one Shemir Omar Yakub.
14. While this Court is mindful of the requirement under Rule 7 of the Commissioner for Oaths (Fees for Affidavits) Rules, 2023 that a Commissioner must satisfy himself that the person named as the deponent is the same person appearing before him, the applicant has not placed before this Court any evidence to demonstrate that the said Margaret Muthoni Ndung'u did not personally appear before Thairu Ng'ang'a & Associates, Advocates, Commissioner for Oaths & Notaries Public for purposes of swearing the affidavit in issue.
15. Further, Order 19 Rule 7 of the Civil Procedure Rules, 2010. empowers Courts to admit an affidavit notwithstanding defects or irregularities of form. The said provisions state that-

The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.
16. In addition to the above provisions, Article 159(2)(d) of *the Constitution* of Kenya enjoins Courts to administer justice without undue regard to technicalities. In the absence of proof that the respondent's replying affidavit was sworn by a different person from the named deponent, I find that the discrepancy in names constitutes a curable irregularity that does not go to the substance of the affidavit.



17. I am therefore not persuaded that the respondent's Replying Affidavit is fatally defective to warrant its being struck out.

If an interim measures of protection should be granted pending Arbitration

18. The respondent does not dispute that the applicant's Articles of Association contains an arbitration agreement under Clause 81 thereof which states that –

“Whenever any difference arises between the Company on the one hand and any of the members on the other, their executors, administrators or assigns on the other hand touching on the true intent or construction or the incidents or consequences of these Articles, or of the statutes or touching anything then or thereafter done, executed, omitted or suffered in pursuance of these articles, or of the statutes or touching on any breach or alleged breach of these Articles or any claim on account of any such breach or alleged breach or otherwise relating to the premises or to these Articles or to any statutes affecting the Company or to any of the affairs of the Company, every such differences shall be referred to the decision of an arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of two arbitrators of whom one shall be appointed by each of the parties in difference.”

19. The applicant averred that the dispute between the parties herein has already been referred to arbitration before Mr. Evans Ochieng' Okeyo, MCI Arb, who has convened preliminary meetings and issued directions. This Court notes that whereas the applicant has not tendered evidence to confirm if the arbitral proceedings have formally commenced, it is evident that through a letter dated 14th November 2024, the respondent was notified of the applicant's intention to refer the dispute to Arbitration before a sole arbitrator, Mr. Evans Ochieng' Okeyo, MCI Arb.

20. The High Court's jurisdiction to issue interim orders to preserve the subject matter of arbitration and/or maintain status quo so as to ensure that there is a dispute for hearing and determination before the Arbitrator is derived from Section 7 of the Arbitration Act, 1995, which states that –

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.”

21. The guiding principles when dealing with an application of this nature were laid down by the Court of Appeal in the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* (supra) where Nyamu. JA, held that –

“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 -

1. The existence of an arbitration agreement.
2. Whether the subject matter of arbitration is under threat.
3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.



4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision-making power as intended by the parties.”
22. The dispute between the parties herein revolves around the management and control of the applicant company, specifically concerning control and operation of its ABSA Bank Account No. 2036363536, which the applicant avers that the respondent operates solely and refuses to share control of, with the other Directors of the applicant. The applicant further claims that the respondent has failed to properly manage or account for Kshs.5,953,100.55 received from Kinangop Dairy Limited as dividends belonging to the company.
23. As to whether the subject matter of arbitration is under threat, it is not disputed that the subject bank account belongs to the applicant company, having been opened in its name and that it is solely managed and operated by the respondent to the exclusion of the other Directors. That being the case, I am persuaded that the subject matter of the arbitration proceedings, namely, the subject bank account and the funds therein are at the risk of being dissipated in the event that the orders sought herein are not granted.
24. For that reason, this Court is satisfied that there exists a real risk of dissipation or wastage of the subject matter of the suit herein. In safeguarding the subject matter of proceedings before an Arbitrator, the Court must ensure that the Arbitrator's jurisdiction is not rendered nugatory by any further unlawful acts of the parties. From the respondent's replying affidavit, it is clear that she considers herself as being solely entitled to operate the subject bank account and to utilize the funds therein for her personal use and at her discretion, notwithstanding that the account stands in the name of the applicant company.
25. Accordingly, there is no way of ascertaining if by the time the arbitral proceedings are concluded, there will be any funds left in the subject bank account and/or even if the account will still be open, and active. Having found that there exists a dispute between the parties herein and that the subject matter of the arbitration is under threat, it is only fair and just to grant an interim order and/or measure of protection to safeguard the subject matter of arbitration, pending conclusion of the arbitral proceedings.
26. In the end, I am persuaded that the instant application is merited. It is hereby allowed in the following terms –
- i. An order of temporary injunction is hereby granted restraining the respondent and her agents from withdrawing funds from ABSA Bank Account No. 2036363536 held in the name of Elen Properties Limited and/or disposing of any of the applicant's assets pending the hearing and determination of the applicant's claim in arbitration; and
 - ii. Costs of the instant application shall be borne by the respondent.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 24TH DAY OF OCTOBER, 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Naliaka h/b for Mr. Musungu for the applicant



No appearance for the respondent

Ms. B. Wokabi – Court Assistant.

NJOKI MWANGI, J.

