



Waweru & 2 others v KCB Bank Kenya Limited & 3 others; Waiyaki Ridges Management Company Ltd & another (Interested Parties) (Commercial Case E193 of 2024) [2025] KEHC 14752 (KLR) (Commercial and Tax) (16 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14752 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E193 OF 2024
PM MULWA, J
OCTOBER 16, 2025**

BETWEEN

**CHRISTOPHER THIONGO WAWERU 1ST PLAINTIFF
JAMES MWANGI KABUGI 2ND PLAINTIFF
NICHOLAS KAMANU WAWERU 3RD PLAINTIFF**

AND

**KCB BANK KENYA LIMITED 1ST DEFENDANT
WAIYAKI WAY DEVELOPER LIMITED 2ND DEFENDANT
VIRJI MEGHJI PATEL 3RD DEFENDANT
SHILPA NARENDRA HIRANI 4TH DEFENDANT**

AND

**WAIYAKI RIDGES MANAGEMENT COMPANY LTD INTERESTED PARTY
WAIYAKI REAL GARDENS LIMITED INTERESTED PARTY**

RULING

1. Before the court is the Notice of Motion dated 15th April 2024 brought under Section 7 of the *Arbitration Act*, Articles 40 and 159(2)(c) of *the Constitution* of Kenya, Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act*.
2. The Applicants seek, inter alia, interim measures of protection pending the enforcement of an arbitral award, including:



- a. An injunction restraining the Respondents from advertising for sale, selling, transferring, or alienating property known as Dagoretti/Kangemi/2037;
- b. An order compelling the 1st Respondent to furnish the Applicants with statements of the loan facilities advanced to the 2nd - 4th Respondents and details of the discharged apartments;
- c. Preservation of rental and sales income accruing from apartments allocated to the 3rd and 4th Respondents;
- d. Expungement of the auctioneer's notice dated 5th March 2024; and
- e. Costs of the application.

Applicants' Case

3. The application is supported by the affidavit of James Mwangi Kabugi, who deposes that the Applicants were the original registered owners of Dagoretti/Kangemi/1861, 1860, and 1326, which were consolidated to form Dagoretti/Kangemi/2037. The properties were transferred to Waiyaki Way Developers Limited, a special purpose vehicle incorporated for developing 264 residential apartments.
4. The Applicants and the developers, namely Muigai Phares Thumbi and Peter Karieny Maina Kanambo, executed a Shareholding Agreement dated 30th December 2015, outlining each party's entitlement in the developed units: 48, 42, and 34 units respectively.
5. Subsequently, by an agreement dated 6th February 2017, the said Peter Maina Kanambo sold his shares to Virji Meghji Patel (3rd Defendant), who, alongside the 4th Defendant, assumed obligations for financing the project. The 3rd and 4th Defendants are said to have procured loan facilities from the 1st Respondent (KCB Bank Kenya Ltd) amounting to Kshs. 850 million in 2017 and an additional Kshs. 230 million in 2020 without the Applicants' consent.
6. The Applicants contend that despite completion of the 264 units, disputes arose regarding allocation, prompting referral to arbitration. A final award dated 22nd July 2024 allegedly confirmed the Applicants' entitlement to 124 apartments under the Shareholders Agreement. It is asserted that the 1st Respondent's attempt to sell the entire property including units allocated to the Applicants amounts to deprivation of property.

Responses

7. The 1st Respondent (KCB Bank) opposes the application, arguing through the affidavit of Lilian Sogo that it is not privy to the shareholders' agreement or the arbitration. It contends that the 2nd Defendant, as the registered proprietor and chargor, validly charged the property. The Applicants, being neither registered owners nor chargors, lack any enforceable legal interest capable of being protected.
8. The 2nd to 4th Respondents, through Patrick Sagwa Kisia, similarly contend that the Applicants have no registered interest in the property, that the loan was lawfully obtained by the company, and that the project's proceeds were to settle the facilities advanced by the 1st Respondent.
9. The application was heard through written submissions. The Plaintiff submissions are dated 23rd October 2024. The 1st Respondent's submissions are dated 17th September 2024, while 2nd – 4th submissions filed out of time without the leave of the court were expunged from the record.



Analysis and determination

10. Having considered the pleadings, affidavits, and submissions, the Court discerns the following issues for determination:
 - i. Whether the Applicants have established a case for grant of an interim measure of protection under Section 7 of the [Arbitration Act](#);
 - ii. Whether the Applicants have demonstrated a proprietary or equitable interest in the suit property capable of protection;
 - iii. Whether the balance of convenience tilts in favour of preserving the property pending enforcement of the arbitral award.

Whether this Court has jurisdiction to grant interim measures of protection

11. Section 7(1) of the [Arbitration Act](#) (Cap 49) provides:

“It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from the High Court an interim measure of protection and for the High Court to grant such measure.”
12. The purpose of this provision is to preserve the subject matter of arbitration and prevent one party from rendering the arbitral process nugatory. The power to grant interim measures of protection is discretionary, but it must be exercised judiciously, guided by the need to preserve the substratum of the arbitration pending the outcome of the proceedings - (see Court of appeal *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR).
13. Accordingly, this Court retains jurisdiction to issue interim protection where the circumstances so demand, provided that the same does not trespass upon the merits of the arbitral award or proceedings.

Whether the Applicants have established a prima facie case warranting such interim protection

14. The guiding principles for grant of interim measures of protection under Section 7 of the [Arbitration Act](#), mirror those in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 - a prima facie case with a probability of success, likelihood of irreparable harm, and balance of convenience.
15. It is not in dispute that there exists a final arbitral award recognizing the Applicants’ entitlement to 124 units within *Dagoretti/Kangemi/2037*. This Court is therefore not being invited to reopen or review the merits of that award, but to preserve the subject matter pending enforcement.
16. The 1st Respondent contends that the Applicants are not registered proprietors of the property. However, the Applicants’ interest arises from the Shareholders’ Agreement and the arbitral award confirming ownership of specific units. This Court takes the view that equitable and beneficial ownership, particularly in joint venture and special purpose vehicle arrangements, is capable of judicial protection.
17. As held in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, a prima facie case includes the demonstration of a right that has been infringed or is threatened with infringement. In my view, the Applicants have exhibited such a right through a valid arbitral award, and the intended sale of the property threatens to defeat that right.



18. The *Land Act* of 2012 recognizes the first respondent's statutory power of sale. However, this right must be employed in accordance with justice and public policy that favours arbitration, as entrenched in Article 159(2)(c) of *the Constitution*, which supports alternative dispute settlement processes.
19. Section 7 of the *Arbitration Act* allows the Court to intervene to protect a party's genuine interest in property during arbitration proceedings. Allowing the sale of the units awarded to the Applicants would undermine the substratum of the arbitration and render the award nugatory, contrary to the norm of finality in arbitral procedures.

Whether the Applicants stand to suffer irreparable harm and where the balance of convenience lies

20. On irreparable harm, the Applicants submit they stand to lose their ancestral and lifetime investment which has been recognized through the arbitral process. The loss of specific residential units cannot be adequately compensated by damages, given the unique nature and location of the development. I am of the considered view that monetary compensation would not adequately remedy the deprivation of specific units forming part of their property entitlement.
21. On balance of convenience, maintaining the status quo by preserving the property pending resolution best serves justice and prevents multiplicity of suits, given that the 1st Respondent retains security over the unallocated units and other apartments already discharged.
22. The Court is persuaded that a limited measure of protection is warranted not to interfere with the lender's general security rights but to preserve the units identified as belonging to the Applicants in the arbitral award pending enforcement proceedings.
23. In view of the foregoing analysis, the Court finds merit in the Applicants' Motion dated 15th April 2024 and makes the following orders:
 - i. An interim measure of protection is hereby issued restraining the Respondents, their agents, servants, or auctioneers from advertising, selling, transferring, or otherwise dealing with Dagoretti/Kangemi/2037 or any units allocated to the Applicants, pending the hearing and determination of the arbitral enforcement proceedings.
 - ii. The 1st Respondent shall, within thirty (30) days, furnish the Applicants with a loan statement and a schedule of discharged apartments on Dagoretti/Kangemi/2037.
 - iii. The rental income and any proceeds of sale relating to units allocated to the Applicants shall be deposited in a joint escrow account held by counsel for the parties pending further orders of the Court.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF OCTOBER 2025.

P.M. MULWA

JUDGE

In the presence of:

Mr. Saende for Plaintiffs/Applicants

Mr. Ogunde for 1st Defendants/Respondent

Mr. Wambugu h/b for Mr. Tito for 2nd – 4th Defendants and 1st & 2nd Interested Parties

Court Assistant: Carlos

