



Ngugi (Suing as a Director/Shareholder and Chairman of the Nairobi Urological Services Ltd) v Kahi (Being the Official Receiver of the Plaintiff and the Agent of the 2nd Defendant) & another (Commercial Case E780 of 2024) [2025] KEHC 16213 (KLR) (Commercial and Tax) (6 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E780 OF 2024**

**PM MULWA, J
NOVEMBER 6, 2025**

BETWEEN

PROF. PETER MUNGAI NGUGI (SUIING AS A DIRECTOR/SHAREHOLDER AND CHAIRMAN OF THE NAIROBI UROLOGICAL SERVICES LTD) PLAINTIFF

AND

**PETER KAH (BEING THE OFFICIAL RECEIVER OF THE PLAINTIFF AND THE AGENT OF THE 2ND DEFENDANT) 1ST DEFENDANT
EASTERN & SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK 2ND DEFENDANT**

RULING

1. This ruling is in respect of two applications. The first application is dated 20th December 2024 by the Plaintiff, while the second application is dated 3rd February 2025 by the 2nd Defendant, which was filed in response to the Plaintiff's application.
2. The Plaintiff's application dated 20th December 2024 seeks a stay of the conservatory orders restraining the Defendants from advertising, auctioning, offering for sale, leasing, mortgaging, charging, transferring, assigning, entering upon, trespassing on, taking possession of and/or otherwise dealing with the properties known as Ngong/Ngong/29755 and Ngong/Ngong/29756, situated at Ongata Rongai, Kajiado County.
3. The application is supported by the affidavit of Prof. Peter Mungai Ngugi, who avers that the Plaintiff, Nairobi Urological Services Limited, charged the suit properties to the 2nd Defendant as security for



a loan facility of USD 2,200,000 at a fixed interest rate of 6% per annum. A dispute subsequently arose between the parties, and by a deed of appointment dated 31st August 2023, the 2nd Defendant appointed the 1st Defendant as the Official Receiver to recover the loan facility.

4. It is the Plaintiff's contention that the 1st Defendant, as receiver, has failed to account for monthly rental income of approximately Kshs. 3,000,000/=, leading to a cumulative loss of Kshs. 45,000,000/= over fifteen months. Further, that the 1st Defendant has advertised the suit properties for sale contrary to Section 89 and Section 90(1) & (2) of the Land Act, without proper statutory compliance or disclosure of accounts, and in violation of the in duplum rule, since the statutory notice demanded USD 6,960,806.29, exceeding twice the principal facility.
5. The 2nd Defendant's application dated 3rd February 2025 seeks to stay further proceedings and refer the matter to arbitration pursuant to clauses 16.12, 37, and 43 of the Loan Agreement, Debenture, and Charge, and further seeks that the status quo orders issued on 20th December 2024 be set aside. In the alternative, the 2nd Defendant prays that the entire suit be struck out for being in breach of the parties' arbitration agreement. The application is supported by the annexed affidavit of Edward Sampa.
6. The 2nd Defendant argues that the dispute arises directly from the loan facility and its enforcement, which are governed by contractual instruments expressly providing for arbitration as the chosen dispute resolution mechanism.
7. Reliance is placed on Section 6(1) of the Arbitration Act, 1995, which provides that a court before which proceedings are brought in a matter subject to an arbitration agreement shall, if a party so applies not later than when submitting its first statement on the substance of the dispute, stay the proceedings and refer the parties to arbitration.
8. The Plaintiff, through a replying affidavit sworn on 18th February 2025, opposes the 2nd Defendant's application, arguing that the issues before this Court are not contractual but relate to the conduct of the Official Receiver (the 1st Defendant) in his statutory capacity. The Plaintiff asserts that the suit is anchored on mismanagement, failure to account, and illegal dealings with company assets, matters which transcend the loan agreement and fall within the Court's supervisory jurisdiction over receivers and managers. The Plaintiff argues that the issues raised are therefore not arbitrable, as they concern statutory and fiduciary duties under the Insolvency Act and not merely contractual disputes under the charge instruments.
9. The 2nd Defendant submits that the Plaintiff in person lacks the locus standi to bring the instant application as he is a separate entity from the company. The Plaintiff has not obtained leave to file a derivative suit. It contends that upon the appointment of an Official Receiver, the borrower lacks the capacity to sue, as all the affairs of the borrower sit squarely in the hands of the receiver. It contends that the suit is fatally defective and ought to be struck out, and that the court lacks the requisite jurisdiction to entertain the suit owing to the lack of capacity by the Plaintiff. It urged the court to stay the proceedings herein and refer the dispute to arbitration in reference to Section 6 of the Arbitration Act. There is a deliberate attempt by the Plaintiff to circumvent the binding arbitration clause, which was entered into freely by the parties.

Analysis and determination

10. Having considered both applications, the affidavits, and submissions, the issues that arise for determination are:
 - i. Whether this Court should stay proceedings and refer the dispute to arbitration;



- ii. Whether the interim conservatory orders should be maintained or set aside.
11. The starting point is Section 6(1) of the *Arbitration Act*, 1995, which provides:

“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.”
 12. The principles governing the referral of disputes to arbitration were articulated in *UAP Provincial Insurance Co. Ltd v Michael John Beckett* [2013] eKLR, where the Court of Appeal held that the court’s role at this stage is limited to satisfying itself that there exists a valid arbitration agreement and that the subject matter falls within its scope and that the party has not taken steps inconsistent with an intention to arbitrate.
 13. However, the existence of an arbitration clause does not automatically oust the jurisdiction of the Court. In *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR, the Court held that where the dispute involves statutory duties, public interest, or fiduciary obligations, such issues are not arbitrable as they invoke the Court’s supervisory jurisdiction.
 14. In the present case, the gravamen of the Plaintiff’s claim is the 1st Defendant’s alleged failure to account for rental income, non-disclosure of financial statements, and the unlawful advertisement of charged properties. These matters arise from statutory obligations under the *Insolvency Act* and *Land Act*, not contractual rights under the loan instruments.
 15. Consequently, this Court finds that the dispute, as framed, extends beyond the scope of the arbitration clause and concerns the conduct of a statutory officer performing public duties. Such matters fall within the purview of this Court’s supervisory jurisdiction under Article 165(6) of *the Constitution*.
 16. On the issue of locus standi, while a company is a separate legal entity, a director or shareholder may, in limited circumstances, move the Court to protect company assets from waste or mismanagement where those in control act contrary to their fiduciary obligations. This position is supported in *Foss v Harbottle* (1843) 67 ER 189 and *Ghelani Metals Limited & 3 Others v Elesh Ghelani Natwarlal & Another* [2017] eKLR. The Plaintiff, therefore, has limited standing to institute this suit for protection and accountability pending proper resolution.
 17. Accordingly, the Court finds that the application dated 3rd February 2025 lacks merit and the prayer for referral to arbitration is hereby dismissed.
 18. On whether the interim orders should be maintained, the principles governing interlocutory injunctions are set out in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR. The applicant must establish a prima facie case, demonstrate irreparable harm, and if in doubt, the Court considers the balance of convenience.
 19. The Plaintiff has established that it holds a proprietary interest in the suit properties and that there is a pending dispute regarding the propriety of the Receiver’s conduct and the validity of the statutory notice. If the properties are sold before the determination of the suit, the Plaintiff stands to suffer irreparable loss not compensable in damages.



20. The 1st Defendant, being a statutory officer, is expected to act prudently, transparently, and in good faith. His failure to account for rental income and to provide statements of account raises serious issues that warrant the Court's intervention to preserve the substratum of the dispute.
21. Consequently, the Court is persuaded that the balance of convenience tilts in favour of maintaining the status quo to preserve the suit properties pending determination of the main suit.
22. In the result, I make the following orders:
 - i. The 2nd Defendant's application dated 3rd February 2025 is dismissed.
 - ii. The Plaintiff's application dated 20th December 2024 is allowed to the extent that the status quo orders restraining any dealings with the suit properties known as Ngong/Ngong/29755 and Ngong/Ngong/29756 shall remain in force pending trial.
 - iii. The matter shall be set down for case management and hearing on a priority basis.
 - iv. Costs of both applications shall be in the cause.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF NOVEMBER 2025.

P.M. MULWA

JUDGE

In the presence of:

Ms. Mutua h/b for Mr. Muga for Plaintiff

Ms. Claire Mwangi & Ms. Lubano for Defendants

Court Assistant: Carlos

