Leapfrog Limited v Egap Solutions & 11 others (Civil Suit E002 of 2024) [2025] KEHC 17201 (KLR) (20 November 2025) (Ruling)

Neutral citation: [2025] KEHC 17201 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL SUIT E002 OF 2024

JL TAMAR, J

NOVEMBER 20, 2025

BETWEEN

LEAPFROG LIMITED .... PLAINTIFF

AND

EGAP SOLUTIONS .... 1ST DEFENDANT

MILAN SHAH .... 2ND DEFENDANT

ANANTI SHAH .... 3RD DEFENDANT

FIDA CHISHTI .... 4TH DEFENDANT

ANDREA CHISTI .... 5TH DEFENDANT

SHROOTINSHAH .... 6TH DEFENDANT

MINAL SHAH .... 7TH DEFENDANT

SHANTILAL SHAH .... 8TH DEFENDANT

SRS RISK CONSULTING LIMITED .... 9TH DEFENDANT

GIBBON AKIFUNA .... 10TH DEFENDANT

ERICK OKUKU .... 11TH DEFENDANT

EMMANUEL MWAGAMBO .... 12TH DEFENDANT

RULING

Introduction

1. There are two applications before me for determination. The first being the 10th to 12th Defendant's application dated 9th May 2024, where they seek to have the dispute between themselves and the

plaintiff referred to arbitration. The second one is an application dated 23rd May 2024 by the 2nd to 9th Defendants seeking inter alia the appointment of a receiver over the Maya Gardens Kibiko Project for its management and sale.

A. The 1st Application

2. The 10th to 12th Defendant's application dated 9th May 2024 is premised on the grounds set on the face of it and supported by the affidavit of Emmanuel Mwagambo Mwagonah of even date and a supplementary affidavit dated 19th February 2025. The brief background to this application being that the10th to 12th defendants serve on the plaintiff's board in their capacity as non-shareholding directors of the plaintiff. The plaintiff's and 10th-12th defendant's relationship being governed by director service agreements executed at various dates in 2018-2019, which designates arbitration as the exclusive dispute resolution mechanism.

3. The application was opposed through the replying affidavit of Premal Shah, a director/shareholder of the Plaintiff/Respondent company dated 10th October 2024 and through a further replying affidavit dated 9th April 2025. It's deponed therein that although indeed the arbitration agreement exists, the 10th-12th defendant/applicant's actions cannot be separated from the rest of the defendants in the main suit. Specifically, it is alleged that the applicants and the other defendants through the 12th Defendant/Applicant jointly colluded and fraudulently applied for and obtained provisionally titles over Maya Gardens projects. It is averred that on the face of the evidence of the intertwined nature of the defendants' collusion, joint and fraudulent actions, it would be improper to separate the claims. It was further sworn that allowing the application would lead to fragmented litigation defeating the plaintiff's access to justice due to the joint action of the defendants.

4. The application was conversed through written submissions.

Parties Submission

5. The applicant through its submissions date 19th February submitted that the present-day application was premised on section 6 of the *Arbitration Act*. The provision they stated, provides that a court would stay and refer a matter subject to an arbitration agreement unless the agreement is null and void, inoperative, incapable of being performed or that the dispute is not concerning matters agreed to be referred for arbitrations. It was further submitted that section 10 of the Act, provides that a court cannot interfere with arbitration disputes, except as provided under the Act. As such, it was the applicant's submission that the respondent had not offered any lawful or reasonable ground as laid out in section 6 of the *Arbitration Act* to warrant this court's interference. They placed reliance in the Court of Appeal's decision in Nyutu Agrovet Limited v Airtel Networks Limited reproduced in re Application for appointment of an arbitrator (miscellaneous Application e28 of 222) [2022], which held that courts should treat with deference the concept of party autonomy, where they freely choose to subject themselves to arbitration. Reliance was also placed in the case of James & Catherine Holdings Ltd v Thika Greens Ltd & Another where the court held that where a court finds that a valid arbitration agreement exists between the parties, it should preclude itself from interference save as to grant interim measures as provided for under section 7 of the Act.

6. The Plaintiff/Respondent on the other hand through its submissions of 5th May 2025 submitted that the arbitration clauses were inoperable and that the nature of its claims against the applicants, including the allegations of fraud fall outside the scope of the arbitration clause. On the first limb of their submission, they submit that 2nd- 9th defendants, through the 10th, 11th and 12th defendant accepted hand over of the project contrary to the completion agreement with the 1st defendant/

contractor and proceeded to declare it persona non-grata and denying it access to the project. Further they submitted that through their replying affidavit they have adduced evidence to show that the applicants herein fraudulently applied for and obtained provisional titles over Maya Gardens Project falsely claiming that the original titles were lost whereas the same were in the plaintiff's possession. They further submitted that their search at the land registry confirmed that the 2nd-9th defendants through their representative Ramesh Hirani appointed the 12th defendant via a Power of Attorney no. POA/208/5/21 to apply for the provisional titles which they fraudulently did. They relied on the case of Leiser Communications Limited & 5 Others v Safaricom limited [2016] KECA 145 (KLR) to submit that where an arbitration would severely prejudice the plaintiff's access to justice and possesses a risk of conflicting determinisations, the same ought not to be enforced.

7. On the second limb they submit that while it is true that disputes concerning conflicts of interests or breaches of fiduciary duties fall within the scope of the director service agreements and may properly be referred to arbitration, the present one however is grounded not only in contractual breaches but also in fraud and collusion, not envisioned under the arbitration agreement, they relied on the case of UAP Provincial Insurance Company Ltd V Michael John Beckett [2013] eKLR to submit that the dispute was beyond the scope of the arbitration agreement and thus properly before the court.

8. They also placed reliance on the case of Kenneth Maweu Kasinga v Cytoonn High Yield solutions LLp & Capital markets Authority [2020] eKLR where they submit that where the reliefs sought flow from allegations of fraud and where such allegations are sufficiently pleaded the matter may be properly within the jurisdiction of the court and not an arbitral tribunal.

9. The 2nd to 9th defendant on their part maintained that they are not subject to the arbitration agreement and did not make any substantive submissions in this regard.

10. I have gone through the application, the response thereto and the parties' respective submissions and frame the following issues for determination:

Issues

i. Whether the dispute between the Plaintiff and the 10th- 12th defendants should be referred to arbitration

Analysis and Determination.

11. The instant application is premised on section 6 of the *Arbitration Act*, which reads:

> " 6. Stay of legal proceedings
>
> (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."

Section 10 of the same act is pertinent and provides that:

" 10. Extent of court intervention

Except as provided in this Act, no court shall intervene in matters governed by this Act."

12. As was held by the court of appeal in UAP Provincial Insurance Company Ltd v Michael John Beckett [2013] KECA 205 (KLR) the enquiry that this court is required to undertake under section 6(1)(b) of the *Arbitration Act* is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. Should the result of that enquiry lead the court to come to a conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.

13. While it is not in dispute that a valid arbitration exists between the 10th-12th defendant/applicants and the plaintiff/respondent, it is disputed that the same is operable and capable of performance and that the nature of the parties' dispute fall within the scope of the arbitration clause.

14. Starting with latter, I have reviewed the arbitration clause in the Director Service Agreement and find that the same governs all the matters raised in the plaint against the 10th to 12th defendants. The said clause provides arbitration as the sole dispute resolution mechanism for disputes arising out of the director service agreement or related to agreement. I find that the same broadly covers the plaintiff's claim as against the 10th to 12th defendants. The said provision reads:

" 8. Remedies, Arbitration and Venue

8.1. The parties each agree that the resolution of disputes between the parties herein shall at first instance be through mediation and if this fails then the parties agree that they shall request the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Chapter to appoint an Arbitrator to resolve the dispute. The arbitrator's decision shall be final, conclusive and binding upon the parties. The parties agree that the dispute resolution procedures prescribed in this Clause 8.1 will be the sole and exclusive procedures for the resolution of any dispute which arise out of or are related to the Agreement."

15. The court of appeal in Nyutu Agrovet Limited v Airtel Networks Kenya Ltd [2024] KECA 523 (KLR) at paragraphs 37-40 considered at great lengths on the issue of what constitutes a matter envisioned in the scope of an arbitration agreement. The court while citing with approval the UK Supreme Court case of Mozambique v Privinvest [2023] UKSC and the House of Lords decision in Fili Shipping Co LTD vs Premium Nafta Products and Others [2007] UKHL held that the scope must be determined with reference "to what rational businesspeople would contemplate," observing that "rational businesspeople are likely to intend that any dispute arising out of their contractual

relationship be decided by the same tribunal." In this case, having analysed the Plaintiff's statement of claim, in particular paragraphs 8, 10, 13, 20-23, 28, 30 and the prayers therein, I find that the plaintiff's claim against the 10th-12th defendant as sufficiently covered under the scope of the arbitration agreement.

16. With respect to the respondent's submissions that the nature of the claim being fraud, arbitration in not suitable, I am guided by its own cited authority of Kenneth Maweu Kasinga v Cytonn High Yield Solution LLP & another [2020] eKLR where the court held that:

> " 21. In making a determination whether the allegations of fraud are merely sprinkled on the pleadings as a jurisdictional hook or whether they disclose sufficiently plausible claims of fraud to warrant the ousting of arbitration on public policy grounds, the Court primarily looks at two aspects of the pleadings. First, the Court looks at the fit between the allegations made and the prayers in the Plaint. Where the prayers sought are in the nature of remedies for a breach of contract as opposed to its rescission due to the alleged fraud, a Court is more likely to conclude that the allegations of fraud are pre-textual and strategic and insufficient to oust arbitration jurisdiction. On the other hand, where structurally the pleading shows a close fit between the allegations of fraud made and the prayers which are not in the nature of enforcing the contract but avoiding it, the Court is more likely to oust arbitration jurisdiction and hold that the dispute must be litigated in Court.
>
> 22. The second aspect of the pleadings that the Court looks at is the prima facie plausibility of allegations and whether they reveal a true dispute based on deliberate misstatements of material fact knowingly made in order to deceive the party alleging the fraud. The nature of the allegations including the details disclosed helps the Court make a determination whether the allegations are merely pre-textual and also whether the alleged fraud is complex or serious enough to oust arbitration jurisdiction.
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> 23. In the present case, the Plaintiff's claim that the central aspect of the case is fraud fails on both indicators. First, the overwhelming majority of the Plaint carefully pleads a case sounding in breach of contract. Second, a look at all the prayers other than prayer (a) reveals that the Plaintiff is interested in enforcing the contract – not avoiding it. The Plaintiff wants to obtain the benefits of the contract as concluded between himself and the 1st Defendant and wants the 1st Defendant compelled to specifically perform certain clauses of the contract. Having made this choice, the Plaintiff cannot turn around and make the claim that he is, in fact, suing for fraud and deception. The structure of the Plaint and the prayers sought betray a radically different claim."

17. Similarly, here the plaintiff/respondent's claim fails on both indicators, the overwhelming majority of the claims and the prayers show that indeed the plaintiff's cause of action is one of damages for breach of contract and not one grounded in fraud. I find that the mere allegation of fraud herein, no matter how mischievous, does not oust an arbitral tribunal's jurisdiction see Telkom Kenya Ltd vs Kam Consult Ltd [2001] 2 EA 574

18. On the first issue, Justice Mativo in Technoservice Limited v Nokia Corporation & 3 others [2021] KEHC 13349 (KLR) in deciding on a similar application under similar circumstances held;

> " 80. In Dyna-Jet Pte Ltd v Wilson Pte Ltd,[66] it was recognized that an arbitration agreement is inoperative, at the very least, when it ceases to have effect as a binding contract. That can occur as a consequence of various contractual doctrines, such as discharge by breach, by reason of waiver, estoppel, election or abandonment. More specifically, an arbitration agreement will be inoperative where a party has committed a repudiatory breach of that agreement, and the repudiation has been accepted by the innocent counter party. Borrowing from the jurisprudence discussed above, it is my finding that the invitation to this court to find that the arbitration clauses are inoperative is legally infirm. The clauses clearly demonstrate the party's intention. There is nothing before me to show that the arbitration clause is inoperative, null or void.
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> 81. The phrase 'incapable of being performed' was considered in Bulkbuild Pty Ltd v Fortuna Well Pty Ltd & Ors.[67] Fortuna brought a motion to stay court proceedings pending arbitration pursuant to the arbitration agreement contained in the contract. Bulkbuild resisted the motion, claiming that the arbitration agreement was incapable of being performed on the grounds that there would be a risk of different factual findings being reached if its claims against Fortuna were determined by arbitration but its claims against another party to the proceedings (the Superintendents) were determined by a court. It was argued that the claim against Fortuna arose out of similar factual matters as its claims against the Superintendents. The court, rejecting Bulkbuild's argument, held that mere inconvenience, "such as might arise if the claims against the second and third defendants were permitted to be actively pursued in the court, at the same time as the arbitration of the claim against the first defendant," does not render the arbitration agreement incapable of being performed. The court considered the meaning of the phrase 'incapable of being performed' from which the following points can be taken: -
>
> a. the term would relate to the capability or incapability of parties to perform an arbitration agreement; the expression would suggest "something more than mere difficulty or inconvenience or delay in performing the arbitration";
>
> b. there has to be "some obstacle which cannot be overcome even if the parties are ready, able and willing to perform the agreement"; and
>
> c. the focus in the practical examples canvassed by the court was on the administration of the arbitration itself rather than on the merits of what was to be referred to arbitration.
>
> 82. The phrase "incapable of being performed" has judicially been interpreted to mean a situation where a contingency prevents the arbitration from being set in motion, whether or not that contingency is foreseen and bargained for. The argument propounded by the Plaintiff cannot meet this test."

19. Drawing strength from the decision above, I find similarly that the respondent has not proved that the arbitration agreement is inoperative or incapable of performance. I further find that mere difficulties that may arise from fragmented proceedings as not rendering the arbitration agreement herein as inapplicable of performance. I am not also persuaded, having analysed the substantive claim and the affidavit evidence at a glance by the plaintiff/respondent's argument that the nature of the claim is so convoluted that it cannot possibly pursue its claims against the 2nd- 9th defendants and the 10th-12th defendants in separate forums.

20. On the argument that the same would hinder the respondent's right to access justice, relying on the decision in Technoservice Limited (supra) I cannot find anything in the material presented before me to this effect, other than an inconvenience of the Applicant's part of undergoing double litigation. Arbitration just like courts are vehicles for the parties' access to justice, I am not persuaded by the respondent's argument that reference to arbitration would automatically harm *the constitution* guarantee of access to justice. With respect to their cited authority of Laiser Communications Limited & 5 others v Safaricom Limited [2016] KECA 145 (KLR), in support of their position, I find that the same is different from the circumstances herein in that there was no agreed and binding arbitration agreement in that dispute.

21. Furthermore, the respondent's rights must also be weighed against those of the applicant which this court believes would best be served by honouring the parties Arbitration agreement, where I firmly believe he will be accorded a fair opportunity to plead his case. The court of appeal in National Bank of Kenya LTD & another [2001] eKLR held "A Court of Law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved." None of these grounds were pleaded or proved.

22. The upshot of the above is that the application dated 9th May 2024 is allowed as prayed.

B. The Second Application

23. The 2nd Application is premised on grounds set out on its face and the supporting affidavit of Fida Chisti. The Notice of Motion application is brought under order 41 rule 1, order 51 rule 1 of the civil procedure rules and sections 1A, 1B, 3A, 63, (d) and (e) of the civil procedure rules seeking the following orders:

    a. That pending the final hearing and determination of the suit herein, the court be pleased to appoint a receiver over the suit properties Title Numbers Ngong/Ngong/93820, 93821,93822, 93823, 93824, 93825, 93826, 93827, 93828, 93829, 93830, 93831, 93832, 93833, 93834, 93835, 93836, 93837, 93838, 93839, 93840, 93841 also known as Maya Gardens, Kibiko Project, with all the necessary powers for the management, protection, preservation, and improvement, the collection of rents and profits hereof and any money for the project held by any party, realisation of the properties through sale application and disposal of such rents and profits, and the execution of such documents as the registered proprietor has, or such of those powers has, or such of those powers as the court thinks fit.

    b. That the receiver appointed as per order 1 to periodically furnish the Court with a report of the status of the project including the statement of the expenditure and income of the Maya Gardens, Kibiko Project.

    c. That the OCS Ngong Police Station to ensure compliance with order 1 above and for the maintenance of peace and order during the enforcement of the said Court orders.

    d. That the Court to make further orders as it may deem fit in the circumstances.

e. That the costs of this Application be awarded to the Applicants.

24. The brief background facts are that the 2nd to 9th defendant/applicants and the plaintiff/respondent entered into various investment agreements in respect of the plaintiff's Maya Kibiko Project to the tune of Kshs. 131,957,967.00. The applicants aver that before the realisation of the investment objective; it became clear that there was a conflict in the plaintiff's board of directors which has now resulted in the project being stalled for about 4 years. They therefore seek the intervention of this court to stop the ongoing wastage of the project by appointing a receiver to manage the project and oversee additional works required, if any and the ultimate sale of the project in alignment with the parties ultimate understanding.

25. It is opposed through the replying affidavit of Pratul Shah a director/shareholder of the Plaintiff/1st Respondent, Leapfrog Limited dated 10th October 2024 and with the leave of the court a further replying affidavit dated 9th April 2025. Therein it is sworn that the Investment agreement did not confer any powers/authority to the Investors to deal with the Maya Gardens Project as purported. He further deponed that he conducted a search at the land registry and confirmed that the 2nd to 9th defendants through their representative Ramesh Hirani appointed the 12th Defendant via a power of attorney POA/2085/21 to fraudulently apply for provisional titles to the property. It was further deponed that the 2nd to 9th defendants colluded with the 12th defendant to lodge cautions over the Maya Gardens Project. He swore that the same was evidence of the applicant/investors unlawful interference with the project making it difficult for the plaintiff company to achieve the project ultimate's objective.

26. The Application was canvassed by way of written submissions which are on record.

Parties Submissions

27. The applicant's submission on record is dated 18th February 2025. They further with the leave of the court addressed issues raised in the Plaintiff/respondent's further Replying affidavit through supplementary submissions dated 21st July 2025. On the facts in support of their application, they submitted that the project was to sell the housed and have the applicants/investors share the profits, which was not realised as a result of the conflict in the plaintiff's board. They further submit that the conflict was so intense that the plaintiff company and its shareholders (2nd and 3rd respondents in their counterclaim) could not agree that the project was completed and handed over to a representative of the company and house No 12 sold as alleged in paragraphs 6.3 to 6.7 of the 1st Defendant/Contractor's statement of defence.

28. It was submitted that only after sale of the houses could the applicants as investors realise the fruits of their investment, which has been frustrated by the Respondents. Regarding the plaintiff's response, they submitted that the same did not deny the suit properties were built using the applicant's funds with the aim of selling them and sharing of the profits. It was further noted that the plaintiff's response did not deny that the director's dispute disadvantaged the investors and that further the suit properties were deteriorating. In response to the cautions on the titles on the titles they submit that the same were authorised to be lifted through the POA dated 5th May 2021 and did not prevent any sale of the properties. They further rebutted the allegations of being in possession of the suit properties.

29. On the law in support of their application they submitted that this Honourable Court had discretion under Order 41 Rule 1 of the civil procedure rules to appoint a receiver and relied on the case of re Estate of Lawrence R. Wambaa (Deceased) [2013] eKLR and Triple Eight Investments (K) Ltd V City Finance Bank Limited & Another [2008] eKLR. They submitted that they had demonstrated that the

Applicants have a right to the property and that the said property continues to waste due to the conflict in the Plaintiff/Respondent's board.

30. The Plaintiff respondent in its submissions dated 5th April 2025 submitted on three broad limbs. In the first limb of their submission, they submitted that the Applicants had not demonstrated a legal or proprietary interest in Maya Gardens Kibiko Project capable of warranting the appointment of a receiver. They submitted that the law under Order 41 Rule 1 of the Civil Procedure Rules allows the court to appoint a receiver when it appears just and convenient to do so, particularly for the preservation, custody and management of property. However, the discretion therein, they submit, can only be exercised in protection of a legal or equitable right not as tool for a party to gain control in the absence of such control. In this, they highlight that the parties' relationship is only governed by the provisions of the investment agreements which do not establish the said investors as co-owners, chargees or creditors secured by the Maya Gardens Kibiko Project. They submit that the applicants therefore clearly do not have any registered charge, possessory or ownership rights and distinguish the authority relied upon by the applicants, Re Estate of Lawrence R Wambaa (supra) from the circumstances of this case in that the later dealt with preservation of estate property in the face of competing interests. Such interest they submit does not exist under the investment agreement and if they did exist it would be subject to the investment agreement itself, which they note do not grant the applicants any management rights at this stage.

31. They further submit that the allegations that the property is subject to danger under the plaintiff/respondent is unsubstantiated and contradicted by their demonstrated commitment to its success as evidenced in the filling of the present suit. To the contrary they submit that it was the applicants own conduct that obstructed the Plaintiff's ability and efforts to complete the project, titling and the balance of convenience is in the plaintiff/respondent's favour.

32. On the second limb of their submissions, they submit that given the conduct of the applicants as alleged in their pleadings and affidavit evidence it would not be just and convenient to grant the order for receivership. They submit that as by their evidence the applicants already being in possession, granting of the order for receivership over the suit property would be formally entrenching the applicants' control.

33. They also relied on the authority of Triple Eight Investment Limited vs City Finance Bank Limited and Another [2008] to submit that the appointment of a receiver is an extra-ordinary remedy that should only be granted in situations where there is clear evidence of mismanagement, imminent risk or harm, or inability to preserve assets and where the court deems it just to appoint one.

34. On their final limb they submitted that 2nd to 9th Defendant/applicant's conduct disentitles them from an equitable remedy of appointing a receiver. They relied on the authority of Mrao Ltd V First American Bank of Kenya and Partrick Waweru Mwangi &Another Housing Finance Co. Of Kenya Ltd (2013) eKLR to submit that an injuction is an equitable remedy and that He who comes to Equity must come with clean hands.

Issues

35. I have had the privilege of going through all the documents before the court and the parties' respective submission and read through the authorities relied upon and frame the following issues for determination:

    i. Whether the 2nd-9th Defendants/Applicants have demonstrated a legal or proprietary interest in the Maya Gardens Kibiko Project capable of warranting the appointment of a receiver?

ii. Whether it is just and convenient in the circumstances of this case, to appoint a receiver under Order 41 Rule 1 of the Civil Procedure Rules?

Analysis and Determination

i. Whether the 2nd-9th Defendants/Applicants have demonstrated a legal or proprietary interest in the Maya Gardens Kibiko Project capable of warranting the appointment of a receiver?

36. The application has been brought under Order 41 Rule 1 of the Civil Procedure rules which provides:

Order 41 - Appointment of Receivers

1. Appointment of receivers [Order 41, rule 1]

   (1) Where it appears to the court to be just and convenient, the court may by order—

   (a) appoint a receiver of any property, whether before or after decree;

   (b) remove any person from the possession or custody of the property;

   (c) commit the same to the possession, custody or management of the receiver; and

   (d) confer upon the receiver all such powers as to bringing and defending suits and for the realisation, management, protection, preservation, and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of such documents as the owner himself has, or such of those powers as the court thinks fit.

   (2) Nothing in this rule shall authorise the court to remove from the possession or custody of any person property whom any party to the suit has not a present right so to remove.

37. In my understanding of the above provision the court can only grant this order to an applicant who has a present right to remove property from the respondent. I am aided in this by the interpretation of the above provision in the case of re Estate of Lawrence R. Wambua (Deceased) [2013] eKLR. In the said case, the learned judge in analysing the provisions noted;

> " A present right to the property in my understanding means an established right to the property, and not a right to be determined in the future. If there is no established right over the property, then the court may appoint a receiver to preserve property from some danger that threatens it and where required to ensure its proper management pending litigation to decide the rights of the parties. I am guided in this respect by the statement given in paragraph 1-9 at page 8 of Kerr and Hunter on Receivers and Administrators, 18th Edition by Muir Hunter Q.C. as follows:
>
> > "…. If the court is satisfied, upon the materials it has before it, that the applicants has established a good prima facie title and;
> >
> > 1. That the property the subject-matter of the proceedings will be in danger, if left until the trial in the possession or under the control of the party against whom the appointment of the receiver is asked for, or

2. That there is at least some reason to apprehend that the party who makes the application will be in a worse situation if the appointment of a receiver be delayed, the appointment of a receiver is almost a matter of course. If there is no danger to the property, and no fact is in evidence to show the necessity and expediency of appointing a receiver, a receiver will not be appointed."

38. The need for courts to exercise caution in the appointment of receivers with regard to cases of disputed title is echoed in Halsbury's Laws of England, 4th Edition, Volume 39 at paragraph 828 as follows:

> " ..Now however, an interlocutory application for a receiver by a person asserting a purely legal title will be entertained, and a receiver may be appointed if the court thinks that the plaintiff will probably succeed at the hearing and that, in all the circumstances of the case, the appointment is just and convenient. In an action for recovery of land, the jurisdiction is exercised with great caution, and if the defendant is in occupation a receiver will only be appointed in special circumstances, as otherwise the substantive issue may in effect be determined by evidence only admissible on interlocutory application, and a defendant in such an action may be deprived of the privilege of replying on his occupation without disclosing the title."

39. From the above, we can deduce that there are two classes of applicants who may successfully move the court under the provisions of Order 41 rule 1, those with an established right, or those seeking the determination of a right which would entitle the applicant to remove the respondent in possession. The duty of the court upon a motion for receivership is merely to protect the property for the benefit of the person or persons to whom the court, when it has all the material for determination shall think it properly belongs. It is imperative that on a motion for appointment of a receiver that the court does not prejudice the cause of action. The court would therefore not in the second class of cases appoint a receiver at the instance of a party whose right is disputed, where the effect of the order would be to establish the right, even if the court be satisfied that the person against whom the demand is made is fencing off the claim. Nor will the appointment be made where it may affect legal rights. I am guided in this respect at pages 7-8 of the Kerr on the Law and Practice as to Receivers and Administrators (17th Edition) by Sir Raymond Walton and Muir Hunter.

40. I am not persuaded, on the strength of the material before this court that the Applicants have proved existence of any prima facie right to the property, either as an equitable encumbrance on the property or title to the property. Indeed, while it is not disputed that the applicants' funds as investors was subsequently used in development of the property, that the question as to whether the same conferred any right to the property is disputed. This position, I draw from the Plaintiff's own pleadings where he is suing the defendant/applicants herein for unnecessary interfering with the project ultra vires (see para 17 of the Plaint). Furthermore, examining the plaint and the counterclaim, I do not find that before this court is an action for the determination of any rights in land or recover of land, but multiple claims arising from breach of various contracts. I also wish to add that; it was neither pleaded nor proved that the Plaintiff/Respondent was holding the land in trust for the 2nd to 9th defendant/applicants.

41. The provisions of article 40 of *the constitution* are very clear in that its protection and prevention of deprivation of a person's proprietary right. Section 25 of the *Land registration Act* elaborates further on this constitutional right but stating that save for the conditions and restrictions noted in the register or the overriding interests under section 28, the rights of a proprietor shall not be defeated, and shall

be held by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever.

42. Based on the above, the applicant would either have to prove that the investment agreement provided for a right in the property, or that it constituted an encumbrance or restriction subsequently noted in the register or an overriding interest, which would entitle them to disposes the plaintiff/respondent.

43. On examining the various Investment agreements annexed as FC1 to the affidavit of Fida Chisti, I am not of the view that the Applicants at this interlocutory stage have prima facie proved that the same conferred or would confer a prima facie right either in the form of equity in the plaintiff company; the undisputed legal owner of the property, or that such investment was in the form of a debt over the property, or that a trustee relationship was formed. Any of these prima facie rights if sufficiently pleaded and brought under the appropriate law governing such affairs would entitle the applicants to move the court in granting of this order. Indeed, the investment agreements use the term "fund" and in material, resembles an investment into a Property Investment fund now regulated by the Capital Markets (Alternative Investment Funds) Regulations Legal Notice 170 of 2023. Regulation 2 as read together with 3 (3) (d) provide:

> " Alternative investment fund" means a collective investment scheme that privately pools funds from at least two but not more than one hundred investors in Kenya or outside Kenya to invest on the investor's behalf in accordance with a defined investment policy statement:"
>
> "3. Requirements for approval"
>
> 3) A fund manager shall seek approval to operate an alternative investment fund which can be any of the following—
>
> (d) a property fund;"

44. I am further emboldened by the language of the same agreement in my thinking that the applicants herein were not investing in the plaintiff company which would ordinary be in the form of equity subscription, as a joint venture or either secured debt or in the form of an unsecured debt, but in an investment fund, managed by the Plaintiff. See below excerpt from the annexed agreement dated 30th September 2018 of Frida Chisti.

> " ...Chosen Fund
>
> Kibiko Fund
>
> Investment into this Fund should be regarded as a medium to long-term investment. There can be no guarantee that the investment objectives of this fund will be achieved.
>
> ....
>
> Outlook
>
> ....Your IRR will depend on actual fund performance."

45. The court of appeal in Nathan Chesang Moson & 3 others v Community Uplift Ministries [2016] KECA 508 (KLR) faulted the trial court in granting the order for receivership where the applicant had failed to prove legal or other title to the property. In the said case, similar to the present dispute, the main dispute was regarding the management of property which was purchased through the donor's/respondent funds in line with their agreement and project objectives. Similar as herein, the suit property was under the possession of and registered in the appellant's name.

46. Having determined the first issue in the negative, I will not proceed in determining the second issue. While this court is sympathetic to the Applicants current position and the colossal nature of their investment, their application and the prayers therein is without merit, the same is as such denied.

Final Orders of the court

2. The application dated 9th May 2024 is found to be merited and the orders are granted as prayed.

3. The application dated 23rd May 2024 is dismissed with costs to the respondents.

DATED, SIGNED, AND DELIVERED THIS 20TH DAY OF NOVEMBER 2025

JOHN.T. LOLWATAN

JUDGE