



**Gogo v Atancha (Environment and Land Case E460 of 2024)
[2025] KEELC 8398 (KLR) (2 December 2025) (Ruling)**

Neutral citation: [2025] KEELC 8398 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E460 OF 2024
CA OCHIENG, J
DECEMBER 2, 2025**

BETWEEN

DOROTHY ANYANGO GOGO PLAINTIFF

AND

BERNARD TONNY ATANCHA DEFENDANT

RULING

1. The Plaintiff commenced this suit vide a Plaint dated 5th November 2024 seeking a declaration that the Defendant breached the agreement for sale of Plot No. K5 of Nairobi Block 136/Drumville by terminating it without settling any dispute that arose therein; an order compelling the Defendant to authorize the Chairperson of the Chartered Institute of Arbitrators to select an Arbitrator to settle the dispute, amongst other orders. Simultaneously with the plaint, the Plaintiff also filed a Notice of Motion application dated 5th November 2024 seeking interim orders and on 2nd December 2024, this Court granted an order of maintenance of status quo.
2. The Defendant filed a Notice of Preliminary Objection dated 24th March 2024 which is for determination. He contends that the Court lacks jurisdiction to hear the matter as the arbitration clause embedded in the contract dated the 16th November 2023 between the Plaintiff and himself supersedes its action. Further, that the Plaintiff has pre-empted the mandatory arbitration mechanism provided in the aforementioned contract and that she fails to meet the threshold of the doctrine of “He who comes to equity must do equity” as she continues to be in breach.
3. The Notice of Preliminary Objection was canvassed by way of written submissions.

Submissions

4. The Defendant submits that Clause 13 of the Sale Agreement dated 16th November 2023 between the Plaintiff and himself, stipulates that any dispute arising from the agreement shall be referred to



arbitration. Further, that where parties have voluntarily entered into a contract with an arbitration clause, the Court must give it effect unless it is inoperative/incapable of being performed. He insists that this suit is premature for failure to exhaust the agreed dispute resolution mechanism. To buttress his averments, he relied on the following decisions: Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd & another [2015] eKLR; University of Nairobi v Multiscope Consultancy Engineers Ltd [2020] eKLR; Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR; Kenya Railways Corporation v Edermann Property Limited & 2 others [2020] eKLR; Nairobi Bottlers Ltd v Kenya Industrial Estate Ltd [2018] eKLR and Speaker of the National Assembly v Njenga Karume [2008] 1 KLR 425.

5. On her part, the Plaintiff submits that she has not prematurely initiated legal proceedings nor circumvented the mandatory arbitration mechanism stipulated in the sale agreement as she has complied with the arbitration clause by notifying the Defendant of the dispute and initiating steps to appoint an arbitrator. Further, that her Notice of Motion application seeks interim measures and is brought pursuant to Section 7(1) of the *Arbitration Act*, thus the Court possesses requisite jurisdiction to entertain it, by granting protective measures aligned with the constitutional directive to support and facilitate arbitration in line with Article 159(2)(c) of *the Constitution* of Kenya.
6. She also submits that the third ground raised in the Defendant's preliminary objection does not qualify as a proper point of law as defined in the case of Oraro v Mbaja [2005] eKLR.

Analysis and Determination

7. Upon consideration of the instant Notice of Preliminary Objection including the rivalling submissions, the only issue for determination is whether the said Preliminary Objection is merited.
8. The Defendant contends that the Plaintiff has not exhausted the arbitration mechanism provided in the contract between them thus the suit is premature. The Plaintiff insists that she has not prematurely initiated legal proceedings and that she has complied with the arbitration clause contained in the agreement entered between the Defendant and herself by notifying the Defendant of the dispute and initiating steps to appoint an arbitrator. She also contends that the Court has jurisdiction to grant interim orders under Section 7(1) of the *Arbitration Act*.
9. On raising a Preliminary Objection, in the case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696, it was held that:

“So far as I am aware, a Preliminary Objection consists of a point of law which has 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. The Court of Appeal stated as follows in Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR;

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked”
11. In Yes Housing Co-operative Society Limited v Kenneth Onsare Maina [2020] eKLR, the Court held that:

“Article 159 (2) (c) of *the Constitution* provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of



dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. ..It follows that this Court is not just under a duty to enforce a contractual clause binding the parties to refer their disputes to arbitration but is under a Constitutional obligation to promote that mode of dispute resolution.”

12. On perusal of the Agreement for Sale dated the 16th November, 2023 between the Plaintiff and the Defendant, I note at Clause 13, it provides for Arbitration wherein parties are directed to refer the matter to arbitration in the first instance, in case any dispute arose herein in respect to the subject matter. The Plaintiff contends that she has referred the matter to arbitration but is also seeking interim measures from Court to protect the substratum of the suit.

13. On granting of interim measures, Section 7 of the *Arbitration Act* provides that:

“interim measures by court (1) 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. (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.”

14. The Plaintiff argues that while she initiated steps to commence arbitration proceedings, this Court has jurisdiction to issue interim measures sought. I note the Defendant has not indicated whether an Arbitrator has granted any interim order.

15. In the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR, it was held as follows:

“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.....It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names. Whatever their description however, they are intended in principle to operate as ‘holding’ orders, pending the outcome of the arbitral proceedings.”

38. Erick Ogola J stated as follows in *Itabuild Imports Limited v A.I.C Kijabe Hospital* [2015] eKLR:

“Section 7 of the *Arbitration Act* allows the court to issue interim measures of protection to the suit property pending arbitration. The existence of an Arbitration Clause in a contract, and the fact that in this case the arbitration process is almost underway, are in themselves prima facie evidence that the Applicant could have a case to be protected in much the same way as the principles established under *Giella – Vs – Cassman Brown & Company Limited* Case. However, that alone is not enough. The court must look into the nature of the subject matter to be protected in relation to the totality of the agreement or contract allowing the arbitration process. The court in exercising jurisdiction under Section 7 must satisfy



itself that the subject matter to be protected is one which will dissipate if not protected, and also one which once lost, would not be recovered. That is to say, the Applicant must show a possibility of irreparable loss which cannot be compensated for by way of damages. The court must also consider the inconvenience to be suffered by either of the parties in considering whether or not to grant the interim measures of protection.”

38. Based on the facts before Court including relying on the legal provisions cited and associating myself with the decisions quoted, I find that it would be pertinent to grant interim measures pending the determination of the arbitral proceedings so as not to interfere with the fulcrum of the dispute herein, which was purchase of land through the Sale Agreement. Further, I note it is not disputed that the Plaintiff already paid the Defendant who is the vendor the purchase price of Kshs. 500,000/= in respect to Plot No. K5 of Nairobi Block 136/Drumville. Further, the Defendant does not deny he is not the registered proprietor of the said land. I further note that the Defendant failed to deliver the completion documents within six (6) months as had been agreed upon in the Sale Agreement. It emerged that on the 5th June, 2024, the Defendant even issued another notice to the Plaintiff to complete the sale and informed her that the purchase price had increased to Kshs. 2,800,000/=. In my view, I find that the Plaintiff has indeed established a prima facie case to warrant the grant of interim measures as envisaged under section 7 of the Arbitration Act as there is clearly a need to protect the substratum of the arbitral proceedings.
38. In the circumstances, I find the Notice of Preliminary Objection dated 24th March 2024 unmerited and will dismiss it with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ms Nyagah holding brief for Okatch for Plaintiff/Applicant

Wamuti for Defendant/Respondent

Court assistant: Joan

