



Northstream Limited v Registered Trustees of the Comboni Sisters (Land Case (Originating Summons) E063 of 2024) [2025] KEELC 8379 (KLR) (1 December 2025) (Ruling)

Neutral citation: [2025] KEELC 8379 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE (ORIGINATING SUMMONS) E063 OF 2024
CA OCHIENG, J
DECEMBER 1, 2025**

BETWEEN

NORTHSTREAM LIMITED APPLICANT

AND

REGISTERED TRUSTEES OF THE COMBONI SISTERS RESPONDENT

RULING

1. What is before the Court for determination are two applications. The first one is the Applicant's Originating Summons dated 7th October 2024 where it seeks the following Orders:
 - a. That this Honourable Court be pleased to uphold the challenge lodged by the Applicant NorthStream Limited before Nyambura Musyimi, Sole Arbitrator, ("the Arbitrator") on 26th April 2024 and remove the arbitrator from the Arbitration between registered trustees of Comboni Sisters and the Applicant.
 - b. That this Honourable Court be pleased to annul the entire arbitral proceedings presided over by the Arbitrator and quash her Ruling dated 24th June 2024 delivered on 10th September 2024.
 - c. Spent.
 - d. That this Honourable Court be pleased to stay any further proceedings with respect to this matter before Nyambura Musyimi, sole arbitrator pending the hearing and determination of this Originating Summons.
 - e. That the costs of this application be provided for.
 - f. The Court be pleased to make any further orders as it deems fit and just in the circumstances.
2. The Originating Summons is premised on grounds on its face and on the supporting affidavit of Fuad Salim, the Applicant's director. He avers that by a Lease Agreement dated 29th January 2021 between



the parties herein, the Applicant leased Land Reference Number 4857/22 for purposes of developing, constructing and operating a commercial complex comprising of a fuel station and a retailing building. Further, that his first attempt to bid for the said Lease was denied ostensibly on the basis of his Muslim faith but once he brought in a proxy director, one Mr. David Mahinda of Christian faith, the bid was accepted.

3. He claims that he appeared for a meeting scheduled by the Respondent to discuss payment of rent and shortly thereafter, the Respondent wrote to the Applicant on its intention to terminate the Lease, ostensibly because it realized the lessees are of a different religion. He avers that about March 2023, the Respondent invoked the arbitration clause under clause 33.2 of the Lease Agreement and at its request, the Chairman of the Chartered Institute of Arbitrators nominated Nyambura Musyimi to be the sole Arbitrator in the proceedings.
4. He contends that while the Applicant is not opposed to the arbitration, it wrote to the nominated Arbitrator challenging her appointment as the sole Arbitrator based on legitimate doubts regarding her ability to exercise impartiality and objectivity in conducting the arbitral proceedings on grounds that she was the Chair of Human Resources and Spiritual Nurture Committee at Daystar university, which entails matters of Christian spiritual inclination. Further, that its fears are based on the fact that the Applicant's beneficial owners are of Muslim faith.
5. He contends that religious inclinations of the appointed Arbitrator are of significant concern in the matter and that the Applicant filed an application challenging the Arbitrator's impartiality but she dismissed it in a Ruling delivered on 10th September 2024. He insists that the Arbitrator's appointment is not consistent with the principles of fairness and impartiality required in arbitral proceedings.
6. In opposition, the Respondent filed a replying affidavit sworn by one of its trustees, Susan Murugi Ng'ang'a. She avers that the Respondent transacts and deals with individuals regardless of their beliefs thus its engagement with the Applicant was based on its status as a Limited Company which is distinct from its shareholders/ directors. Further, that the Respondent was approached by David Mahinda who did not disclose he was acting as a proxy and as per the Applicant's CR12, he was its director.
7. She avers that religious reference did not influence the Lease termination. Further, that the Applicant took possession of the suit property immediately upon execution of Lease but failed to perform its obligation as it did not pay the agreed rent thus it should not be protected under equity. She reiterates that the period for challenging the Tribunal's decision lapsed on 7th August 2024.
8. The application was canvassed by way of written submissions.

Submissions

9. The Applicant submits that the instant Originating Summons is brought within the statutory timeline prescribed by Section 14 (3) of the *Arbitration Act*. Further, that the impartiality and independence of an Arbitrator are paramount as underscored and that the test is objective and not subjective. It insists that its Lease termination was precipitated by the Respondent's discovery of Mr. Fuad Salim's Muslim faith, despite the initial use of a Christian proxy director, Mr. David Mahinda and it intends to lead such evidence at arbitration.
10. It submits that since the appointed Arbitrator holds a prominent role at Daystar University, a self-described Christ centered institution that integrates Christian faith and learning, a reasonable observer would question whether she could impartially determine a dispute involving alleged anti-Muslim discrimination by a Catholic institution.



11. It also contends that the Arbitrator misdirected herself by focusing solely on the absence of explicit religious references in the Lease agreement rather than considering the contextual and factual circumstances giving rise to a reasonable apprehension of bias and that this Court's supervisory jurisdiction under Section 14 empowers it to intervene where the tribunal's decision on a challenge is flawed.
12. To buttress its averments, the Applicant relied on the following decisions: Justice Philip K. Tunoi and another v Judicial Service Commission and Another NRB CA Civil Appeal No 6 of 2016 [2016] eKLR, Zadock Furnitures Systems Limited & another v Central Bank of Kenya [2014] KEHC 2163 (KLR), Nelson Andayi Havi v Law Society of Kenya & 3 Others [2018] eKLR, Republic v Juma & 2 Others (Criminal Revision E160 of 2021) [2022] KEHC 365 (KLR) and Fugicha v Methodist Church in Kenya (Suing Through its Registered Trustees) & 3 Others (Civil Appeal 22 of 2015) [2016] KECA 273 (KLR).
13. On its part, the Respondent submits that the application is filed out of the timelines prescribed for challenging the Arbitrator's decision under Section 14 (3) of the *Arbitration Act*, contending that the computation of time arising from a decision of the Arbitrator is contemplated to commence from the time the Tribunal notifies the parties that the Award is ready for collection. It is pointed out that the Arbitral Tribunal notified the parties that the decision was ready for collection through email on 8th July 2024 thus the Applicant should have brought the Originating Summons on or before 7th August 2024, which would have been within thirty days of the Arbitrator's notice of her decision on the challenge but instead, it filed the same on 8th October 2024, three months after the Arbitrator notified the parties that the decision was ready for collection. It insists that a recusal decision was not warranted as the Applicant did not prove the allegations regarding the religion of its director at the time of termination of the Lease. It argued that it is a longstanding principle that a company is a separate and distinct legal entity from its shareholders and there is no evidence that the Applicant, as a company, declared its religion or religious affiliation; hence, the connotation of the dispute as being on religion does not arise. Further, that there is no proof that the Arbitrator, by holding the position she holds, has openly expressed opinions against any religion.
14. To buttress its averments, it relied on the following decisions: Sensei Limited v Agriculture Development Corporation (Commercial Arbitration Cause E071 of 2022) [2023] KEHC 18654 (KLR) (26 May 2023) (Ruling); Mercantile Life and General Assurance Company Limited & another v Dilip M. Shah & 3 others [2021] KEHC 9725 (KLR); University of Nairobi v Multiscope Consultancy Engineers Limited [2020] KEHC 9696 (KLR); Zadock Furnitures Systems Limited & another v Central Bank of Kenya [2014] eKLR and Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 Others [2013] eKLR.
15. The second application for determination is the Respondent's Chamber Summons dated the 16th April 2025 where it seeks the following Orders:
 1. Spent.
 2. Spent.
 3. Pending hearing and determination of the Arbitration Dispute between the parties, this Honourable Court be pleased to issue an order:
 - a. Of injunction directed at North stream Limited, its agents, servants or employees or any person acting under its instructions restraining them from vandalizing or in any



manner whatsoever ruining the buildings, structures and developments on land parcel Nairobi/Block 22/313 (formerly known as L.R. No. 4857/22 Nairobi).

- b. Maintaining the status quo concerning the status of the existing buildings, structures, facilities and developments on Land Parcel No. Nairobi/Block 22/313 (formerly known as L.R. No. 4857/22, Nairobi), particularly restraining North stream Limited, its agents, servants, employees, or any other person acting under its instructions from making any alterations, demolitions, additions, partitions, undertaking construction or any developments thereto.
4. This Honourable Court be pleased to issue such other or further measures of protection as it may deem just and expedient in the circumstances of this case to safeguard the subject matter.
 5. The costs of this Application be provided for.
16. The application is premised on grounds on its face and on the supporting affidavit of Susan Murugi Ng'ang'a, one of the Respondent's trustees. She avers that the Respondent leased the suit property to the Applicant through the Lease Agreement dated 29th January 2021, at an agreed monthly rent of Kshs. 1,000,000, exclusive of VAT. Further, that as a term of the agreement, the Applicant was concurrent with the execution of the Lease obligated to provide an irrevocable bank guarantee of Kshs. 50 million to secure the performance of its obligations to construct on the suit property.
 17. She contends that the Respondent terminated the Lease on account of failure to pay rent and provide the guarantee, leading to an arbitration dispute when the Respondent refused to vacate the suit property. Further, that in a Ruling dated 2nd April 2025, this Court restrained the Respondent from, among other things, evicting the Applicant from the suit property while the Applicant was ordered to pay the monthly rent as and when due.
 18. She claims that on the strength of the aforementioned orders and its continued occupation, there is a clear indication that the Applicant is preparing to demolish buildings and structures on the suit property to commence construction of new ones absent of a suitable guarantee and without payment of rent thereby substantively altering the suit property, which will cause the Respondent irreparable loss and damage. Further, that there are peculiar facts necessitating this Court to issue interim measures under the *Arbitration Act* so as to protect the suit property pending arbitration proceedings.
 19. The application is opposed by the Applicant vide the replying affidavit of its director, one Fuad Salim. He avers that the application is an attempt to relitigate matters decided in the Ruling of 2nd April 2025. He denies allegations that the Applicant intends to demolish existing structures on the suit property and avers that it intends to utilize unused portions of the property to generate income.
 20. He avers that the purposes of the Lease between the parties herein was for the development, construction and operation of a commercial complex comprising a fuel station and a retailing building not exceeding the ground floor plus two (2) floors, which was to raise revenue for the Applicant to meet its rental obligation. Further, that the Applicant has been unable to commence the project due to acts and omission of the Respondent, which includes refusal to release the original converted title to the Applicant for purposes of registration of the Lease and securing a suitable guarantee since all financiers require a registered Lease.
 21. In rejoinder, the Respondent filed a supplementary affidavit sworn by Susan Murugi Ng'ang'a. She contends that the Applicant's obligation to pay rent under the Lease was unqualified as the Lease agreement did not contemplate payment of rent from direct revenue raised from the suit property. She



also refutes the allegation that the Respondent refused to release original title documents and reiterates that any construction on the suit property would irreparably alter its form.

22. The application was canvassed by way of written submissions.

Submissions

23. The Respondent submits that this Court has jurisdiction to grant interim measures of protection pending arbitration under Section 7 of the *Arbitration Act* and that it has met the threshold for issuance of the orders sought as set in the decisions of *Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 Others* [2010] eKLR and *Itabuild Imports Limited v A.I.C Kijabe Hospital* [2015] eKLR, where it was held that the existence of an arbitration agreement and arbitral proceedings is sufficient prima facie evidence that there exists a case for protection orders.
24. Further, that the claim of inability to pay rent due to these proceedings is unfounded, as the Lease agreement did not specify sources of income from which the rent would be derived and that even if the Court were to consider the application on the principles in *Giella v Cassman Brown & Company Limited* [1973] EA 358, the orders sought will still be merited. Further, that allowing the Applicant to alter the current state of the suit property will create more difficulty than preventing it from taking place, considering the Applicant has not deposited all rental arrears.
25. On its part, the Applicant submits that the Respondent has failed to satisfy the legal threshold for the grant of injunctive relief and that the application is a deliberate attempt to stall the arbitral process and unfairly benefit from the continued rental income while denying the Respondent the full use of the suit property. Further, that the application amounts to a collateral attack on this Court's Ruling of 2nd April 2025, in which it determined the question of possession and quiet enjoyment by the Applicant pending arbitration.
26. Further, that the purpose of Section 7 of the *Arbitration Act* is to preserve the subject matter of arbitration and prevent injustice pending arbitration, not to alter the balance of contractual rights or confer undue advantage to one party.
27. To buttress its averments, the Applicant relied on the following decisions: *American Cyanamid Versus Ethicon Limited* (1975) AC 396, *Kenya Commercial Finance Co. Ltd v Afraha Education Society* (2001) 1 EA 86 among other cases which the court has considered.

Site visit Report

28. On 20th May 2025, the Deputy Registrar of this Court conducted a site visit of the suit property to establish its current state and filed a report.

Analysis and Determination

29. Upon consideration of the two instant applications including the respective affidavits and rivalling submissions, the following are the issues for determination:
- a. Whether the Court should uphold the challenge lodged and remove Nyambura Musyimi as the sole arbitrator in the dispute between the parties herein.
 - b. Whether the Applicant has made a case for annulment of arbitral proceedings presided over by Nyambura Musyimi and quash her Ruling dated 24th June 2024.
 - c. Whether the Respondent met the threshold for issuance of status quo orders pending arbitration proceedings?



I will deal with the first two issues jointly.

30. The Applicant challenged the appointment of Nyambura Musyimi as the sole Arbitrator in the dispute between the Respondent and itself on the basis that the Arbitrator is biased as she is the Chair of Human Resources and Spiritual Nurture Committee at Daystar university and termination of its Lease with the Respondent was motivated by religious discrimination on its director Fuad Salim, who is a Muslim. It emerged that on the 24th June, 2024, the Arbitrator Nyambura Musyimi dismissed the Applicant's application that had sought for her recusal.
31. The Respondent asserts that there is no religious bearing in the dispute as it does not operate on discriminatory grounds. Further, that Fuad Salim, who is said to be a Muslim, was not the Applicant's director at the time the Lease between the parties herein was terminated for breach of the parties' obligations. The Respondent also contends that the application is filed out of the statutorily prescribed timeline of 30 days as it is time-barred.
32. On challenging an Arbitrator's decision, Section 14 (3) of the Arbitration Act provides that:

“If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within thirty days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.”
33. Courts have interpreted that the term ‘notice of decision’ to mean that once the Arbitral tribunal notifies the parties that the Award is ready for collection; To this end, it was stated as follows in *Sensei Limited v Agriculture Development Corporation* [2023] KEHC 18654 (KLR);

“Essentially, an applicant seeking to set aside an award has three months to file its application from the date of receiving the said award. The meaning of “received” in section 35(3) aforesaid has been expounded on by the Court in a catena of decisions holding that an arbitral award is deemed to have been received by the parties once the arbitral tribunal notifies the parties that the award is ready for collection.”
34. On setting aside the sole Arbitrator's decision on the basis of bias, in *Philip K. Tunoi v Judicial Service Commission & another* [2016] eKLR, it held that:

“in determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.”
35. In this instance, I note the Applicant except for claiming that the sole Arbitrator is the Chair of Human Resources and Spiritual Nurture Committee at Daystar University, has not placed before Court any facts on how she was biased during the arbitration proceedings. The Applicant has even admitted that at the point of entry into the Lease Agreement, it was represented by a non-Muslim Mr. David Mahinda. In my view, since the Applicant and Respondent's relationship including obligations are governed by terms of the Lease Agreement which was the contract, I do not see how the issue of religion can be invoked. Further, the Applicant has failed to demonstrate any actions of the Arbitrator that could have been marred with suspicion. I note the Applicant even filed the instant application after the requisite period of thirty (30) days.
36. In the foregoing while relying on the legal provisions cited as well as associating myself with the decisions quoted, I find that Applicant's application seeking to challenge the Arbitrator's decision of



24th June 2024 is time barred by dint of Section 14 (3) of the *Arbitration Act*. In my view since there is no element of bias from the Arbitrator, I am unable to uphold the challenge lodged and remove Nyambura Musyimi as the sole Arbitrator in the dispute between the parties herein. I hold that the Applicant has not made out a case for the annulment of the arbitral proceedings presided over by Nyambura Musyimi and quash her Ruling dated 24th June 2024 and will decline to do so.

37. On whether the Respondent has met the threshold for issuance of status quo orders pending arbitration proceedings, the Respondent contends that there exists special circumstances to justify the issuance of status quo orders to protect the subject matter of the arbitration because the Lease agreement was terminated due to rent arrears and failure to provide a Bank Guarantee, which is the security in the Lease. Further, despite the Court ordering the Applicant to deposit all rent arrears in a joint interest-earning account and continue to deposit such sums as and when due, only Kshs. 5 million has been deposited, leaving a huge balance.

38. 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.”

39. In the *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR, the Court stated 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.”

40. In the current scenario, I note vide a Ruling delivered on the 2nd April, 2025, the Court granted conditional interim orders of injunction for only one year where the Applicant was directed to pay rent to the Landlord or in an interest earning account. The Applicant has not denied that it has not paid the full rent as directed. Further, that the dispute herein is before an Arbitrator. From the site visit report, it seems there is no activity on the suit property. In that regard, I opine that the fulcrum of the dispute should be preserved as it is, to enable the parties finalize with the arbitral proceedings.

41. In the foregoing, I find the Applicant’s application unmerited and will disallow it. I however find the Respondent’s application partially merited and will allow it in the following terms:

- i. Pending hearing and determination of the Arbitration Dispute between the parties, the obtaining status quo be maintained concerning the status of the existing buildings, structures, facilities and developments on Land Parcel No. Nairobi/Block 22/313 (formerly known as L.R. No. 4857/22, Nairobi).



- ii. The parties are directed to adhere to the Orders of this Court issued on the 2nd April, 2025.
- iii. Costs in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF DECEMBER, 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Gicheru for Ndirangu for Respondent

Limo for Applicant

Court Assistant: Joan

