REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL SUIT NO. E006 OF 2025

LOHIM LIMITED……PLAINTIFF

=VERSUS=

TAVEVO WATER & SEWERAGE COMPANY LIMITED……DEFENDANT

RULING

1. The application coming for consideration in this Ruling is the one dated 4th November 2025 brought under Section 7 of the Arbitration Act, Sections 1A, 3A and 63 of the Civil Procedure Act, Order 40 Rule 2, 4(1) Order 51 Rules 1 of Civil Procedure Rules, 2010 seeking the following orders:-

    (i) THAT the application herein be certified as urgent and service of the same be dispensed with in the first instance.

    (ii) THAT pending the hearing and determination of this application, a temporary injunction do issue restraining Family Bank Limited, whether by itself, its officers, agents, servants or otherwise howsoever, from honouring, releasing, or making payment under

the performance guarantee issue in favour of the Respondent in respect of Contract No. TVO/TVT/T/CW/006/2023/2024.

(iii) THAT pending the hearing and determination of the intended arbitration, a temporary injunction do issue restraining Family Bank Limited, whether by itself, its officers, agents servants, or otherwise howsoever, from honouring, releasing, or making payment under the performance guarantee issued in favour of the Respondent in respect of Contract No. TVO/TVT/T/CW/006/2023/2024.

(iv) THAT the subject matter of the intended arbitration be preserved pending the hearing and determination of the arbitral proceedings.

(v) THAT costs of this application be provided for.

2. The application is based on the following grounds:-

(i) THAT the Applicant and Respondent are bound by a written contract dated 4th May 2024 for the construction of the Kaloleni Water Supply Project, which contains an arbitration clause at GCC Clause 25/26 providing that all disputes arising out of or in connection with the contract shall be referred to arbitration.

(ii) THAT the Respondent wrongfully and unlawfully terminated the contract by letter dated 18th October 2025 after the Applicant had achieved approximately 99% completion of the works, purely to evade its payment obligations.

(iii) THAT the Respondent acted in bad faith by deliberately waiting until the Applicants had substantially completed the project before termination, in breach of Clause 58 of the General Conditions of Contract, which expressly obliges the Respondent to pay all certified sums as at the date of termination regardless of any alleged breach.

(iv) THAT the Respondent has instructed Family Bank Limited to encash the performance guarantee issued in the sum of Kshs. 5,676,686 and the said bank is on the verge of releasing the said sum in favour of the Respondent.

(v) THAT the Applicant has established a prima facie case with a probability of success, having lawfully and substantially performed its contractual obligations and being entitled to payment under the contract.

(vi) THAT this Honourable Court has jurisdiction under Section 7 of the Arbitration Act, 1995 to grant interim protective measures before or during arbitral proceedings in order to preserve the subject matter of the dispute and ensure that the arbitration process is not prejudiced or rendered nugatory.

(vii) THAT it is just, equitable, that the interim protective orders sought be granted to preserve the rights of the parties and the integrity of the arbitral process.

3. The application is supported by the affidavit of **ESTHER PANGA THONGORI** in which she deposed as follows:-

(i) THAT I am the Managing Director of the Applicant, duly conversant with the facts herein deposed to and duly authorized hence competent to swear this affidavit.

(ii) THAT on or about 4th May 2024 the Applicant and the Respondent entered into a written contract for the Proposed Construction of Kaloleni Water Supply Project in Taita Taveta County under Contract No. TVO/TVT/T/CW/006/2023/2024.

(iii) THAT the said contract contains an arbitration clause at GCC Clause 25/26, which provides that any dispute arising out o for in connection with the contract shall

be referred to arbitration in accordance with the Arbitration Act.

(iv) THAT the Applicant diligently and substantially performed its contractual obligations and achieved approximately 99% completion of all works for which site access and approved designs were issued by the Respondent.

(v) THAT all works executed by the Applicant were duly inspected, certified and approved by the Respondent's Engineer in accordance with the terms of the contract.

(vi) THAT on or about 18th October 2025, the Respondent issued a termination letter of which the Applicant responded by a detailed letter dated 30th October 2025 demonstrating full and lawful performance and completion.

(vii) THAT the Respondent deliberately waited until the Applicant had substantially completed the project before termination, clearly acting in bad faith and with the calculated intent of evading its payment obligation.

(viii) THAT under Clause 58 of the General Conditions of Contract, the Respondent is expressly and

unequivocally obliged to pay the Contractor all amounts certified and due as at the date of termination, regardless of any alleged breach.

(ix) THAT the Respondent has instructed Family Bank Limited to honour and encash the performance guarantee issued by the said bank in the sum of Kshs. 5,676,686 in favour of the Respondent.

(x) THAT I am reliably informed by the Applicant's bankers and verily believe the same to be true, that the said bank is on the verge of releasing the said sum to the Respondent under the performance guarantee and such payment is imminent.

(xi) THAT the encashment of the performance guarantee in the circumstances would amount to unjust enrichment of the Respondent at the expense of the Applicant, a grave abuse of the guarantee mechanism which is intended as security and not as a tool for expropriation and would cause immediate and irreparable harm to the Applicant, rendering the intended arbitration nugatory.

(xii) THAT once the performance guarantee is encashed, the Applicant will suffer immediate and irreparable loss which cannot be adequately compensated in

damages, including the collapse of the Applicant's business operations and credit facilities, irreversible damage to the Applicant's financial standing and reputation and the practical impossibility of recovering the proceeds form the Respondent, particularly in light of the Respondent's conduct to date.

(xiii) THAT the Respondent on the other hand, will suffer no prejudice whatsoever if the guarantee remains intact pending the determination of the dispute by arbitration as it retains its full rights and remedies under the contract and at law.

(xiv) THAT the balance of convenience lies overwhelmingly in favour of preserving the status quo pending arbitration, as no prejudice will be suffered by the Respondent if the guarantee remains intact.

(xv) THAT unless this Honourable Court intervenes urgently, the Respondent will unjustly enrich itself through its own wrongdoing and the entire arbitration process will be rendered futile and academic.

(xvi) THAT it is therefore just and equitable that the interim protective orders sought be granted to

preserve the subject matter of the dispute and ensure that the arbitration process is not prejudiced or rendered nugatory.

4. The Respondent opposed the application vide Replying Affidavit dated 13th November 2025 as follows:-

(i) **THAT** I am the Managing Director of the Respondent, duly authorized to depose to this affidavit on behalf of the Respondent, and I am competent to swear this affidavit.

(ii) **THAT** the Respondent denies that the Applicant has established the factual basis for the grant of interim injunctive relief and avers that the performance guarantee was validly invoked as a direct consequence of the Applicant's persistent and fundamental breaches of the underlying contract. The facts leading to the invocation are fully set out and evidenced in the Project Manager's Certificate of Breach dated 27th October, 2025, which contains a detailed chronology and tabulation of correspondence between the Contractor and the Project Manager; including the dates, subjects, and reference numbers of all relevant communications.

(iii) **THAT** the Applicant's Notice of Motion and supporting affidavit are premised on allegations that the Applicant

had achieved "*approximately 99°/0 completion*" and that the Respondent acted in bad faith in terminating the contract. These assertions arc factually incorrect or premature for the following reasons;

(iv) THAT the Applicant's assertion that the Works were 99°/0 complete" is inaccurate and misleading. While the Respondent duly honoured all certified Interim Payment Certificates amounting to KES 45,149,926 against the total contract sum of KES 56,766,860, such financial progress does not equate to physical completion. As at the date of notification of termination, no Certificate of Completion had been issued, the project had not entered the Defects Liability Period (DLP), and most critically, the water supply system remained non-functional. The non-functionality arose from the Contractor's failure to rectify and return the defective pump installations (core component of the water system) despite express instructions from the Project Manager. Without the pumps and associated control systems, the scheme could not undergo Tests on Completion, commissioning, or acceptance as required under the Contract, thereby rendering the project incomplete.

(v) **THAT** the Applicant's own application for Practical Completion, dated 4th June 2025, was rejected by the Project Manager on the same date and the Project Manager issued guidance on the specific requirements for application/completion and acceptance testing (tests, O&M manuals, as-built drawings, statutory certificates, site clearance, training and insurances none of which had been satisfied)

(vi) **THAT** the Contract in clause 53 of the GCC expressly requires the Contractor to apply to the Project Manager for a Certificate of Completion and for the Project Manager to decide whether the whole of the Works is complete. The Applicant had not met those objective contractual preconditions at the material time.

(vii) **THAT** the Applicant repeatedly abandoned site works for periods in excess of 30 days without authorization from the Project Manager. There are multiple contemporaneous notices of slow progress and site abandonment as enumerated in the Certificate of default by the Project Manager.

(viii) **THAT** the Applicant failed to submit and maintain the required program of works. The program of works (and subsequent updates) expired on 21" March 2025 and no compliant updated program was submitted despite repeated reminders; the Applicant therefore incurred contractual surcharges for delayed program submission in accordance with the clause 26.3 of the GCC and Special Conditions of Contract. The Project Manager's

(ix) **THAT** the Applicant failed to seek extensions of time as contractually required and repeatedly declined to comply with instructions for remedial works under Clause 34.2 of the GCC (notably defects in pump installation and trenching depths on Line 1). The Project Manager repeatedly instructed corrective action which the Applicant did not carry out.

(x) **THAT** as a result of the above, the Project Manager certified that the Applicant had committed fundamental

breaches under sub-clauses 57:2(a), 57:2(e) and 57.2(g) of the General Conditions of Contract and recommended termination to protect the Project from stalling and further loss.

(xi) **THAT** the Respondent therefore issued a notice of termination in accordance with the Contract, which takes effect after the contractually prescribed notice period and triggers the contract closure and valuation processes under Clause 58 of the GCC.

(xii) **THAT** the Respondent firmly denies the Applicant's allegation that the termination of the Contract was intended to evade payment obligations. The termination was lawfully effected pursuant to GCC Clause 57 on account of the Contractor's fundamental breaches, including abandonment of works, failure to correct defects, and non-compliance with the Project Manager's lawful instructions. In accordance with GCC Clause 58.1, where termination arises due to a fundamental breach by the Contractor, the Project Manager is required to issue a certificate for the value of the work done and materials ordered, less advance payments and the percentage applicable to uncompleted works. This stage will take effect once the notice of termination expires,

after which the Contractor will be invited to participate in a joint valuation and measurement exercise in accordance with the Contract. This process ensures that only the value of properly executed and certified works is payable.

(xiii) **THAT** the Respondent has duly honoured all certified interim payments to date amounting to over KF.S 45 million and any further payments can only be made in accordance with the Project Manager's certification under Clause 58.1. Termination therefore cannot be construed as a mechanism to evade payment but as an exercise of contractual rights designed to safeguard public funds and ensure accountability for incomplete and defective works.

(xiv) **THAT** following termination, and strictly in accordance with the Contract and the express terms of Performance Guarantee No. 068GUPS241300001 dated 31" July 2025, the Respondent lawfully issued a formal written demand to Family Bank Limited for encashment of the guaranteed sum of KShs 5,676,686. The demand fully complied with the conditions stipulated in the Guarantee, which

(xv) **THAT** the encashment of the guarantee is not an act of unjust enrichment: it is the contractual security

mechanism available to the Respondent where the Contractor has been certified in breach by the Project Manager and has failed to carry out remedial works

(xvi) **THAT** the Applicant's allegation that encashment of the performance guarantee would cause irreparable harm, including business collapse and loss of credit, is unsubstantiated and speculative. No evidence has been provided to demonstrate that the Applicant's operations would be irreversibly impaired or that any alleged loss could not be remedied by an award of damages.

(xvii) **THAT** the Respondent avers that the performance guarantee is a risk instrument expressly contemplated under the clause 50 of General Conditions of Contract; a risk and obligation the Applicant accepted on award of tender that performance security may be called *in* on breach. As such, the same cannot now be characterized as irreparable harm and its encashment does not extinguish the Applicant's right to pursue arbitration. Should the Applicant's claim ultimately succeed and an arbitral award be made in its favour, the Applicant will be awarded damages. Likewise, if the Applicant can prove fraud or bad faith, recovery of such funds remains

available through due process. The Applicant has therefore failed to establish the existence of irreparable harm warranting injunctive relief.

(xviii) **THAT** the Applicant's application seeks orders preserving the "*subject matter of the intended arbitration*". There are no commenced arbitral proceedings and no arbitration reference before the arbitral tribunal. The prayer is therefore speculative and premature. The likely subject matter of any arbitration will be issues arising from alleged wrongful termination or other contractual claims not a basis to restrain an independent bank guarantee already validly demanded on certification of breach.

(xix) **THAT** the Applicant has not pleaded or proved any facts demonstrating fraud, collusion, or bad faith by the Respondent or by the Bank in relation to the demand. The Respondent acted on the Project Manager's certification and contemporaneous project records.

(xx) **THAT** the performance guarantee constitutes an independent and autonomous financial instrument separate from the `underlying contract. Its purpose is to secure performance and protect the Employer against non-performance or default. The Respondent's

invocation of the guarantee was therefore a lawful and contractual exercise of its rights following the Applicant's fundamental breaches, and it cannot be restrained merely because a dispute has arisen 'under the main contract.

(xxi) **THAT** the Respondent avers that allowing realization of the performance guarantee will enable urgent remedial works to be undertaken, thereby restoring the functionality of the project and protecting public and donor funds entrusted to the Respondent. The Applicant has already been paid over KES 45 million against a total contract value of KES 57 million, yet the project remains non-operational. The affected community in Taita Taveta County continues to suffer acute water shortages, despite substantial public resources having been expended in good faith.

(xxii) The balance of convenience tilts heavily in favour of the Respondent. The pumps which form the heart of the water supply system were fully paid for under certified Interim Payment Certificates, yet the Applicant has failed to rectify the defects and return them to site despite express written instructions by the Project Manager. As a result, the Respondent is left without

possession of critical infrastructure that was financed through public and donor funds. Granting the injunction would not only deny the Respondent the benefit of the performance security meant to safeguard against such default but would also perpetuate prejudice against the public, who continue to suffer from lack of water due to the Contractor's inaction. In these circumstances, it is the Respondent, not the Applicant, who stands to suffer greater harm if the injunction is granted.

(xxiii) **THAT** the Respondent refers to the Contract executed on 3rd May 2024, which commenced on 15th May 2024 with an agreed implementation period of three (3) months to Practical Completion, followed by a two-month Defects Notification Period (DNP). Accordingly, Practical Completion was due on 16' August 2024. The Contractor was subsequently granted three extensions of time; Extension Nos. 1, 2, and 3 cumulatively extending the completion date to 16" November 2024. Despite these extensions and continuous support from the Employer, no Practical Completion has been achieved to date, and the project remains **INCOMPLETE** and **NONFUNCTIONAL.** The continued delay has prejudiced the Employer, who has fulfilled its financial

obligations, and more importantly, has deprived the residents of Taita Taveta County of access to clean and reliable water. The failure to complete the project within the extended contractual timelines underscores the Applicant's persistent non-performance and justifies the Respondent's invocation of the performance guarantee.

(xxiv) Conversely, the applicant has not shown that it will suffer irreparable harm if payment is allowed and is unable to explain why money recoverable in arbitration would be an inadequate remedy. The balance of convenience therefore favours refusal of an interim injunction.

(xxv) For the foregoing factual and evidentiary reasons, the Respondent prays that the application for interim injunctive relief including the proposed restraint on Family Bank Limited, both pending the hearing of this application and the speculative arbitral proceedings yet to be commenced be dismissed in its entirety. The injunctive relief sought is premature, overreaching, and intended to frustrate the Respondent's lawful right to realize the performance security under the Contract. The Bank should therefore be permitted to

honour the Respondent's valid and properly invoked demand under the Performance Guarantee.

5. The parties filed written submissions as follows; The Applicant submitted that it seeks an interlocutory injunction to restrain Family Bank from issuing a performance guarantee to the Respondent, Tavevo Water & Sewerage Company Ltd.
6. First, they assert a prima facie case, contending that the Respondent’s termination of the contract and demand for the guarantee were unlawful.
7. They argued the termination was based on delays allegedly caused by the Respondent itself, that the works were 99% complete, that an unresolved claim from the Applicant remains outstanding, and that mandatory amicable settlement procedures under the contract were bypassed.
8. They further alleged the Respondent acted in bad faith by demanding the guarantee before a contractual notice period had expired.
9. Secondly, the Applicant submitted that they will suffer irreparable loss not compensable by damages if the injunction is denied.
10. They contended that losing the performance guarantee to the Respondent would render their own claims for unpaid work and intended arbitration proceedings nugatory, especially given the

Respondent's demonstrated bad faith, which casts doubt on any future compensation.

11. Finally, on the balance of convenience, the Applicant argued it tilts in their favour. The inconvenience of the guarantee remaining with the Bank pending arbitration is minimal for the Respondent, whereas denying the injunction would cause the Applicant severe and irreversible harm.

12. They concluded by praying for the injunction to be granted and for costs of the application to be awarded to them, as the unsuccessful party should bear the costs.

13. **The issues for determination in this Application are as follows;**

(i) Whether the Plaintiff/Applicant has established a prima facie case with a probability of success to warrant the grant of an interlocutory injunction restraining the encashment of the performance guarantee.

(ii) Whether the Plaintiff/Applicant stands to suffer irreparable harm, not compensable by an award of damages, if the injunction is not granted and the performance guarantee is encashed.

(iii) Where the balance of convenience lies as between the Plaintiff/Applicant and the Defendant/Respondent

pending the hearing and determination of the intended arbitral proceedings.

14. I have carefully considered the Notice of Motion dated 4th November 2025, the supporting and replying affidavits, and the written submissions filed by counsel, the court proceeds to determine the application on its merits.

15. The principles governing the grant of an interlocutory injunction are well settled in Kenyan jurisprudence, as established in the landmark case of **Giella v Cassman Brown & Co. Ltd [1973] EA 358.**

16. The applicant must demonstrate a prima facie case with a probability of success; that he stands to suffer irreparable injury which would not adequately be compensated by an award of damages; and if the court is in doubt, it will decide the application on a balance of convenience.

17. These principles apply with equal force in applications for interim measures of protection pending arbitration under Section 7 of the Arbitration Act, No. 4 of 1995.

18. On the first issue of whether a prima facie case has been established, the court's role at this interlocutory stage is not to make final determinations on contested facts but to assess whether the material before the court discloses bona fide serious questions to be tried.

19. The applicant contends that the contract termination was wrongful, motivated by bad faith to evade payment for nearly completed works, and that the consequent call on the performance guarantee is unlawful.

20. The respondent, however, presents a detailed counter-narrative supported by a Project Manager's Certificate of Breach, asserting that termination was justified due to the applicant's fundamental breaches, including abandonment of site, failure to rectify defects, and failure to submit an updated program of works, rendering the project non-functional despite interim payments.

21. These are weighty factual disputes that go to the heart of the parties' contractual obligations.

22. The Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** defined a prima facie case as one which, on the material presented to the court, raises more than a mere triable issue—it must show a right that has been infringed and deserves protection.

23. While the applicant's claim of near-completion raises a triable issue, it is heavily contested by the respondent's evidence of non-performance and breach.

24. Importantly, the law regards a performance guarantee as an independent contract, autonomous from the underlying construction contract.

25. The bank's obligation to pay arises upon a demand that conforms to the terms of the guarantee itself.
26. An injunction to restrain a call on such a guarantee will only be granted in exceptional circumstances, primarily where there is clear evidence of fraud.
27. The applicant in this case has not pleaded, let alone substantiated, any allegation of fraud in the respondent's demand to the bank.
28. In the absence of such an exceptional circumstance, the court is reluctant to interfere with the commercial mechanism of an unconditional guarantee.
29. Consequently, the applicant's challenge to the termination, while a matter for arbitration, does not, in itself, constitute a prima facie case sufficient to restrain the operation of the separate performance guarantee instrument.
30. Turning to the second issue of irreparable harm, the applicant avers that encashment would cause business collapse, damage to financial standing, and render arbitration nugatory.
31. However, the court finds these assertions to be speculative and not substantiated by concrete evidence.
32. The respondent correctly points out that the performance guarantee is a risk instrument expressly provided for under Clause 50 of the General Conditions of Contract, a risk the applicant accepted upon entering the contract.

33. The harm alleged is primarily financial. The Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR reiterated that irreparable harm means that the injury must be one that cannot be adequately compensated for in damages.

34. A claim for monetary loss is essentially the kind of injury that is compensable by damages.

35. Should the applicant succeed in the intended arbitration and establish that the call on the guarantee was wrongful, an arbitral award of damages or restitution would provide an adequate remedy.

36. The applicant's fears about the respondent's ability to pay any future award are not a sufficient basis for injunctive relief at this stage.

37. Finally, on the balance of convenience, the court must weigh the potential prejudice to each party.

38. Restraining the guarantee preserves the status quo for the applicant but deprives the respondent of contractual security for alleged breaches, security intended precisely for a situation where the contractor is said to be in default.

39. The respondent has highlighted a compelling public interest element, that the project, funded by public and donor funds, remains non-functional, denying the community of Taita Taveta access to water.

40. The guarantee funds are needed to undertake remedial works. On the other hand, the applicant's inconvenience is the potential depletion of its security, a commercial risk inherent in such contracts.

41. In the circumstances, and particularly in the absence of a strong prima facie case founded on fraud, the balance of convenience tilts in favour of the respondent.

42. The respondent and the public interest in seeing the project completed outweigh the applicant's commercial interests, which are protectable by a monetary award.

43. Consequently, the Plaintiff's/Applicant's application dated 4th November 2025 has failed to meet the threshold for the grant of the orders sought.

44. The same is hereby dismissed. Each party to bear its own cost of the Application.

Dated, signed and delivered this 18th day of December 2025 in open court at Voi High Court.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent/Mabishi

Mr. Chaka for the Plaintiff

Miss Kilubi for the Defendant