Aristocrats Concrete Limited v Concrete Construction Company Limited (Environment and Land Case E037 of 2025) [2026] KEELC 613 (KLR) (10 February 2026) (Ruling)

Neutral citation: [2026] KEELC 613 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND CASE E037 OF 2025

AY KOROSS, J

FEBRUARY 10, 2026

BETWEEN

ARISTOCRATS CONCRETE LIMITED ..... PLAINTIFF

AND

CONCRETE CONSTRUCTION COMPANY LIMITED ..... DEFENDANT

RULING

1. The subject of this ruling concerns the plaintiff's notice of motion dated 20/03/2025, in which it has petitioned this court pursuant to the provisions of Articles 40 and 159 of *the Constitution* of Kenya 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Sections 6 and 7 of the *Arbitration Act* No. 4 of 1995 and Order 40 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules. It prays for the following orders.

    a. Spent.

    b. Spent.

    c. That this suit be referred for arbitration as provided for under Clause 13.0. of the agreement for sale between the parties

    d. That pending the hearing and determination of the arbitration proceedings, the honourable court be pleased to issue an order of injunction restraining the defendant by itself, its agents, servants or legal representatives from transacting, selling, charging, alienating and or in any way whatsoever interfering with or otherwise dealing with the property known as land parcel number L.R. NO. 22133.

    e. That the costs of this motion be in the cause.

2. The motion is supported by the grounds outlined in the body thereof and the supporting affidavit of Thomas Masaki, sworn on the instant date. Substantially, he states that the plaintiff purchased L.R.

NO. 22133 (“suit property”) from the defendant via a sale agreement dated 14/12/2021, and paid a deposit of Kshs. 18,000,000. Subsequently, the plaintiff executed an addendum agreement dated 18/02/2022, whereby the deposit was regarded as full payment for a 3-acre portion of the suit property (“3 acres”).

3 According to the addendum, the plaintiff was to be granted possession, and a survey was conducted for the proposed subdivision to ensure the plaintiff retained its 3 acres. However, it has come to the plaintiff’s attention that the defendant now intends to sell and transfer the land to another party without the plaintiff’s consent.

4. Upon service, the defendant filed grounds of opposition dated 15/04/2025, whereby the following bases are raised: -

a. That at Clause 13.0 of the alleged sale agreement, there is a mandatory requirement that parties thereto endeavour to resolve any dispute relating to and/or arising from the said agreement amicably, failure to which the matter shall be referred to an arbitrator appointed by both parties.

b. That the present suit and application are therefore misconceived, ill-advised and an attempt to rewrite the alleged/purported contract between the parties herein, which is untenable and ought to be rejected.

c. The defendant does not intend to sell the subject property as alleged, and the subject property has never been on sale, and the plaintiff has not tendered even a scintilla of evidence that the defendant intends to dispose of the subject property by transferring it to a third, unknown party.

d. This honourable court is thus devoid of jurisdiction to entertain the plaintiff’s suit and notice of motion pursuant to clause 13.0 of the alleged agreement between the plaintiff and the defendant. The same ought to be dismissed in limine.

e. The defendant is not properly constituted as required by its articles of association and is presently constituted of one director, thus deficient; therefore, it could not have and cannot pass a resolution to dispose of immovable property as alleged by the plaintiff.

f. That the alleged sale agreement is invalid, unenforceable and a nullity, so no cause of action can arise therefrom.

g. That the main suit and the present application are founded on conjecture, surmise and speculation, hence a gross abuse of the court process.

h. That the application is thus untenable both in law and in fact, is frivolous, vexatious, and amounts to a gross abuse of the court process.

i. That the instant application is deficient in form and substance, and lacks a legal basis, and, as such, the same ought to be dismissed in limine.

5. The motion is canvassed by written submissions filed by the law firm of M/s. Ben Musundi & Co. Advocates on behalf of the plaintiff, dated 11/11/2025. Regrettably, the court did not benefit from the defendant’s submissions, as none had been filed by his law firm on record at the time of writing this ruling. Should such submissions be filed subsequently, the court shall regard them as having been filed out of time.

6. Accordingly, the court has considered the plaintiff's submissions and the arguments contained therein, together with the provisions of the law relied upon and the judicial precedents cited, which shall be regarded in this court's analysis and determination. Consequently, having carefully considered the motion, its grounds, the affidavit, the grounds of opposition, and the plaintiff's submissions, the issues for determination are (a) whether this matter should be referred to arbitration and whether an injunction should issue pending the determination of the arbitration proceedings. In dealing with these issues, which will be dealt with separately, it is pertinent to highlight the relevant law and jurisprudence.

Whether this matter should be referred to arbitration

7. Respecting applicable law, Article 159(2)(c) of our Constitution entrenches arbitration in Kenya as an alternative dispute resolution (ADR) method. It states that when exercising judicial authority, courts and tribunals shall, subject to clause (3) thereof, be guided by principles of alternative dispute resolution, such as reconciliation, mediation, arbitration, and traditional mechanisms, which should be promoted as outlined in that clause. In furtherance of this Article, our *Arbitration Act*, CAP 49, which was last amended by Revised by 24th Annual Supplement (Legal Notice 221 of 2023) on 31 December 2022, breathes life into this Article. The Supreme Court in Synergy Industrial Credit Limited v Cape Holdings Limited [2019] KESC 12 (KLR) held as follows on the legal framework of arbitration: -

> "In interpreting the arbitration law, one should never lose sight of the purpose of the enactment of the Act and in addition, the fact that *the Constitution* under article 159(2)(c) on judicial authority enjoined courts to be guided by the principles of alternative forms of dispute resolution such as arbitration. Arbitration was an attractive way of settling commercial disputes by virtue of the perceived advantages it brought beyond what was generally offered by the normal court processes, which were often characterised by formalities and delays. In addition, arbitration regime was meant to ensure that there was a process, distinct from the courts, of effectively and efficiently solving commercial disputes, the law also recognised that such a process was not absolutely immune from courts' intervention. Courts of law remained the ultimate guardians and protectors of justice and hence, they could not be completely shut off from any process of seeking justice."

8. The defendant has contested the court's jurisdiction to hear the case. However, the presence of an arbitration clause in an agreement does not exclude the court's authority; instead, the proceedings should be stayed in accordance with Section 6 of the *Arbitration Act*, but subject to certain conditions. This provision explicitly states that:

> "(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—
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> (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.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

10. In this case, the plaintiff has promptly approached the court; thus, this court finds that the prayer for referral to arbitration is duly presented before it. The manner in which the plaintiff has approached the court is not new and has been the subject of several court pronouncements. By these decisions, it is now established law that when parties agree to resolve any disputes arising from a commercial agreement by arbitration, courts are required to respect that agreement and refer the matter to arbitration. In Synergy (Supra), the court held in paragraph 8 that: -

> " Once parties agreed to settle their disputes through arbitration, the arbitral tribunal should be the core determinant of their dispute."

11. In addressing motions of this nature, the court must first ascertain and be convinced that a valid and enforceable arbitration clause exists within the agreement. In this case, the plaintiff has submitted two sets of agreements for the court's consideration; however, of particular interest is clause 13.0 of the agreement dated 14/12/2021, which states-

> " 1 3 .0 Dispute Resolution
>
> 13. 1 The parties shall endeavor to resolve any dispute or difference arising between them relating to the validity, construction or performance of this agreement, including any amounts payable hereunder amicably and in good faith.
>
> 13. 2 If they fail to so resolve the dispute/difference amicably, either party may then refer it to an arbitrator appointed by both parties. In the event that the parties fail to agree on the appointment of an arbitrator, then within fourteen (14) days of such notice, the dispute shall be referred to the Chairman of the Kenya Chapter of the Chartered Institute of Arbitrators to appoint an arbitrator.
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> 13. 3 The seat of the arbitration shall be Nairobi, Kenya. The language of the arbitration proceedings shall be English. The arbitrator so appointed shall within three (3) months of appointment give his/her decision on the matter, which will be final and binding on the parties. The parties shall co-operate with the said arbitrator providing him/her such information and other assistance as he/she shall require and each party shall pay his/her costs, as he/she shall determine. The parties hereby agree that they shall abide by any decision so made by such Arbitration. Each party shall bear its costs of arbitration."

12. As held in Blue Limited V Jaribu Credit Traders Limited [2008] KEHC 1347 (KLR), which this court associates itself with, when an agreement includes an arbitration clause, that clause is considered a distinct and separable agreement between the parties, who agree to resolve any disputes related to the agreement via arbitration. A party cannot question the validity of the overall agreement to challenge the arbitration clause. When faced with the issue of the validity of contracts, the decision of Euromec

International Limited v Shandong Taikai Power Engineering Company Limited [2021] KEHC 93 (KLR), with which this court concurs with stated: -

> " The other reason to bear in mind is that the Arbitrator, and not the court has authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of the agreement including, but not limited to any claim that all or any part of the agreement is void or voidable."

13. After examining clause 13.0 of the said agreements, it is clear that the arbitration agreement is valid and enforceable. The agreement shows that the parties consented to the arbitration seat, location, and applicable law. Without evidence of fraud or misrepresentation, they are bound by their choices, and this court has no authority to override their preferences. Consequently, and in accordance with the law and judicial precedents, this court must find this relief merited.

Whether an injunction should issue pending the determination of the arbitration proceedings.

14. As indicated in the face of the motion and reiterated in the plaintiff's submissions, the relevant legal framework that empowers this court to grant interim protective measures, including temporary injunctive relief, is found in Section 7 of our *Arbitration Act*. This proviso delineates the rights of intervention and the boundaries thereof. It states:

> " (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.
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> (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."

15 The grant of injunction orders is issued by the court in the exercise of its sound judicial discretion. The Court of Appeal decision in Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] KECA 346 (KLR), which is binding on this court, cautioned against reliance on the criteria outlined in Order 40 of the Civil Procedure Rules and the established principles in Giella v. Cassman Brown & Co. Ltd [1973] EA 358, noting that these strictures do not apply to arbitration proceedings. The court further articulated the non-exhaustive guiding principles to be considered when assessing an application for interim reliefs pending arbitration, as follows: -

> " Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. 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:-
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> 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? ."

16. A court of law, when requested to issue interim measures of protection, must exercise caution to prevent rendering a determination that could adversely affect the final outcome of the arbitration. In this particular case, the plaintiff has submitted agreements that purportedly substantiate its claims. An alleged subdivision scheme has also been presented. Additionally, a bank payment of Kshs. 18,000,000/- and correspondence from the plaintiff's counsel dated 12/02/2024, demanding possession, have been provided to the court. Furthermore, the plaintiff expresses concern that the defendant intends to sell the 3-acre portion to a third party.

17. Faced with these serious allegations, it was anticipated that the defendant would file a replying affidavit to counter these facts. Instead, the defendant filed grounds of opposition, which were reproduced earlier in the ruling. These grounds address only issues of law, comprising general averments that do not respond to the assertions made in Mr. Masaki's affidavit. The absence of a replying affidavit rebutting the assertions in the supporting affidavit is construed to mean that the defendant has no claim against the plaintiff.

18. In these circumstances, the assertions contained within the supporting affidavit remain true and un contested. The court therefore finds that the allegations made against the defendant are unrebutted and establish a prima facie case. It also finds that the suit property should be preserved. Accordingly, the court determines that the plaintiff is entitled to the interim reliefs sought.

19. Ultimately, guided by the law and judicial precedents, this court finds the notice of motion dated 20/03/2025 meritorious. It is allowed. Each party will bear their own costs. In the end, the court hereby issues the following final disposal orders: -

    a. This matter be and is hereby referred to an arbitrator pursuant to clause 13 of the agreements for sale, dated 14/12/2021.

    b. That pending the hearing and determination of the arbitration proceedings, an order of temporary injunction is hereby issued restraining the defendant by itself, its agents, servants or legal representatives from transacting, selling, charging, alienating and or in any way whatsoever interfering with or otherwise dealing with the property known as land parcel number L.R. NO. 22133.

    c. Each party shall bear their respective costs of the notice of motion dated 20/03/2025.

    d. A mention date shall be given for purposes of updating the court on the arbitral process.

    It is so ordered.

DELIVERED AND DATED AT MACHAKOS THIS 10TH FEBRUARY, 2026.

HON. A. Y. KOROSS

JUDGE

10. 02.2026

RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

In the presence of;

Ms Kanja Court Assistant

Mr. Musundi for Plaintiff/ Applicant

Mr. Ashford Mugwuku for Defendant/ Respondent