



REPUBLIC OF KENYA



**Cactus Cantina Investments Limited v Onit Microfinance Bank Limited & another (Commercial Case E648 of 2025) [2026] KEHC 2614 (KLR) (Commercial and Tax) (19 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 2614 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E648 OF 2025  
JWW MONG'ARE, J  
FEBRUARY 19, 2026**

**BETWEEN**

**CACTUS CANTINA INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**ONIT MICROFINANCE BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KAMU LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction and Background**

1. The Plaintiff (Cactus) filed this suit together with a Chamber Summons application dated 29<sup>th</sup> September 2025 seeking conservatory orders pending the hearing of arbitration proceedings. It seeks to suspend/stay the implementation of the resolutions of the 1<sup>st</sup> Defendant (“Onit Microfinance”) passed at the AGM/EGM of 27<sup>th</sup> August 2025 and the EGM of 18<sup>th</sup> September 2025 and further restrain the Defendants from removing Mr. Grant Brooke as a director, proceeding with the capital raise or share allotment based on the disputed shareholding structure and making any alterations to the shareholding, the member register, or board composition prejudicial to Cactus.
2. The application is supported by the grounds on its face and the supporting affidavit of Grant Brooke sworn on 26<sup>th</sup> September and it is opposed by Onit Microfinance through the replying affidavit of its Chief Executive Officer, Ken Okwero sworn on 6<sup>th</sup> November 2025 and by the 2<sup>nd</sup> Defendant (“Kamu”) through the replying affidavit of its director, Biki Kangwana sworn on 5<sup>th</sup> November 2025. On 30<sup>th</sup> September 2025, the court granted interim conservatory orders which prompted the Defendants to file the applications dated 14<sup>th</sup> October 2025 and 16<sup>th</sup> October 2025 seeking to set aside and discharge those orders.



3. The applications have been canvassed by way of written submissions which together with the pleadings I have considered and I will be making relevant references to the same in my analysis and determination below.

### **Analysis and Determination**

4. I propose to first deal with Cactus' application as it will determine whether or not the interim orders should be discharged and consequently dispose of the Defendants' application. Cactus states that it purchased a 56% stake in Onit Microfinance from the Kamu under through a Share Purchase Agreement (SPA) dated 29<sup>th</sup> July 2022 and amended on 31<sup>st</sup> July 2023. That a dispute exists over the SPA's performance and Cactus commenced arbitration against Kamu before the London Court of International Arbitration (LCIA) on 11<sup>th</sup> April 2025, alleging breaches of the agreement. It claims that despite the pending arbitration, the Defendants convened meetings and passed resolutions to remove Mr. Brooke, who was Cactus' nominee director from the board through an EGM held on 18<sup>th</sup> September 2025 and; to implement a Kshs. 300 million capital raise, to increase share capital, and to allot new shares on a pro-rata basis through an AGM/EGM held on 27<sup>th</sup> August 2025.
5. Cactus contends that implementing the resolutions would irreversibly dilute the its shareholding and alter Onit Microfinance's governance before the arbitration tribunal can rule on the underlying shareholding dispute and that this would render the arbitration nugatory. That Cactus would suffer irreparable harm, including unlawful forfeiture of its 56% stake and loss of control rights, which cannot be adequately compensated by damages and that the actions are taken in bad faith during pending arbitration. Cactus also alleges the share reallocation violated section 19 of the [Microfinance Act](#) requiring the Central Bank of Kenya (CBK) approval for transfers over 10% and a reduction plan for holdings over 25%.
6. In response, the Defendants depone that the AGM on 27<sup>th</sup> August 2025 and EGM on 18<sup>th</sup> September 2025 were properly convened under the [Companies Act](#) and the Onit Microfinance's Articles of Association. They agree that the resolutions included a capital raise of Kshs. 300 million through issuance and allotment of shares, appointment of new directors subject to CBK's approval and removal of Mr. Brooke as a director. That all shareholders except Cactus paid for their allotted shares within the 21-day deadline and the removal of Mr. Brooke was registered with the Registrar of Companies and reflected in the CR12.
7. The Defendants state that Cactus' application is moot and an abuse of process as the orders sought have been overtaken by events as the resolutions are already being implemented and that Cactus' application is frivolous, misconceived, and intended to disrupt Onit Microfinance's operations. They also state that no arbitration exists between Cactus and Onit Microfinance and that Cactus' arbitration request is only against Kamu and not Onit Microfinance. That the arbitration relates to warranty and indemnity claims under the SPA, not to corporate governance, capital raising, or share allotment and that Onit Microfinance' internal resolutions fall outside the scope of the SPA's arbitration clause. They accuse Cactus of engaging in forum shopping and non-disclosure as it previously filed HC Comm Petition E011 of 2024 on the same issues, which was dismissed by the court on 31<sup>st</sup> July 2025 and that Cactus is now seeking similar reliefs in this suit while an appeal is pending, a tactic amounting to forum shopping and abuse of the court process. They aver that Cactus failed to disclose material facts about the dismissed petition and existing litigation.
8. The Defendants advance that Onit Microfinance is significantly undercapitalized and faces imminent regulatory action from CBK, including risk of license withdrawal, that the AGM resolutions are critical to recapitalize Onit Microfinance and ensure compliance with the [Microfinance Act](#) and that any court



order restraining implementation would jeopardise its survival, harm depositors, and destabilize the financial system.

9. They contend that Cactus' arbitration claim is solely for monetary damages against Kamu and no substantial harm will be suffered if Microfinance's resolutions proceed. For these reasons, they seek the dismissal of the Chamber Summons with costs.

1. Section 7 of the *Arbitration Act* grants the court the power and jurisdiction to provide interim measures of protection in arbitration proceedings as follows:

7. 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.

11. One of the leading cases that outlined the principles governing the grant of interim measures of protection is *Safaricom Limited v Ocean View Beach Hotel Limited, Salim Sultan Moloo & Alsai (K) Limited* [2010] KECA 346 (KLR) by the Court of Appeal where Nyamu JA., observed as follows;

By determining the matters on the basis of the [GIELLA] principles the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. 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. In the case of Kenya, the *Arbitration Act* is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as "interim measures of protection" under section 7 of the *Arbitration Act*. On the other hand, in the English version of the ICC Rules for example, they are known as "interim conservatory measures". Whatever their description however, they are intended in principle to operate as "holding" orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation.

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An interim measure of protection such as that sought in the matter before us is supposed to be issued by the court under section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for the grant of injunctions as the High Court purported to do in this matter.

To illustrate the point Article 26-3 of the UNICTRAL Arbitration rules states:-

"A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement."

Section 7 of the *Arbitration Act* is modeled on this. However, in the matter before us and with due respect, the Commercial Court (Kooze, J.) contravened the above principles



by firstly either declining to issue any measure of protection or granting such a measure. The Court also failed to correctly address the principles for the issue of any such measures and worse still, the supreme court took over the subject matter altogether and ruled on the merits of the subject matter of the arbitration thereby prejudicing the outcome of the arbitration. This explains why in the special circumstances of this matter, this Court must take extraordinary measures to rectify an extraordinary illegality. 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:-

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. [Emphasis mine]

12. Going through the SPA, whereas I agree that the same contains an arbitration agreement, I am in agreement with the Defendants' position that as per Cactus' Notice of Dispute and the arbitration it has invoked, the same is only against Kamu and relates to warranty/indemnity claims. The present dispute does not fall under that arbitration agreement as the AGM/EGM resolutions of the capital raise, director appointments, and removal of Mr. Brooke are corporate governance matters governed by the Companies Act and Onit Microfinance's Articles of Association, not the SPA. The AGM/EGM resolutions do not affect the subject matter of that arbitration as the arbitration is not about shareholding structure, capital raising, or director appointments and the shares in question in the arbitration, that is, forfeited shares and allocation notice shares are different from the unallotted shares being issued under the AGM resolution.
13. I find that Cactus' rights in the arbitration to claim damages are not threatened by Onit Microfinance's recapitalization or governance changes fortifying the position that the subject matter of arbitration is not under threat. It is also my finding that the balance of convenience tilts in favour of not granting an interim measure of relief as the resolutions are critical for regulatory compliance and restraining them would threaten the Onit Microfinance's license and stability.
14. It is also clear to me that Cactus did not mention or disclose that there have been previous and continuing litigation between the parties over the same issues. It should always be remembered that in all cases of ex parte proceedings, there must be full and frank disclosure to the court of all material facts known to the applicant and that injunctions are equitable remedies where an applicant must come to court with clean hands hence a party must disclose every relevant fact in the case in order to benefit from the remedy (See the Court of Appeal in *Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 Others* [1998] KECA 255 (KLR)).
15. Cactus previously filed HC Comm Petition No. E011 of 2024 challenging inter alia the forfeiture of 50% of its shares and the cancellation of the allocation Notice for Kamu's remaining shares.



The Court(Musyoki J., ) dismissed the petition on 31<sup>st</sup> July 2025, holding that the resolutions were not oppressive or unfairly prejudicial, the forfeited shares were not paid for and Cactus' conduct contributed to delays and disputes. The Court also acknowledged that Onit Microfinance's recapitalization was needed for regulatory compliance. Cactus has also filed a Notice of Appeal but is now seeking similar injunctive relief in this suit while the appeal is pending. Cactus is now using a new procedural route to re-argue issues already adjudicated. It is clear that it did not disclose the existence and outcome of HC Comm Petition E011 of 2024, the pending appeal and that the same factual matrix of share forfeiture, capital raise and director changes was already ruled upon by a competent court and that the arbitration it now relies upon was never initiated against Onit Finance, only against Kamu. These non-disclosures alone automatically disentitle Cactus from any equitable relief from the court.

16. It is also not lost to me that a court will not grant an injunction, or any order, to restrain an action that has already been fully completed. The purpose of an injunction is to prevent a future or ongoing harm, not to undo a past action. The court's orders of 30<sup>th</sup> September 2025 have been overtaken by events as the events or actions sought to be stopped by Cactus, that is the capital raise, allotment of shares and removal of Mr. Brook have already occurred. An injunction to prevent these actions would be meaningless and serve no practical purpose (see *Malewa Raching Company Limited v Nganga & 146 others* [2024] KEHC 2780 (KLR))

### **Conclusion & Disposition**

17. In conclusion, I find that the Plaintiff's Chamber Summons dated 29<sup>th</sup> September 2025 is dismissed, the Defendants' applications dated 14<sup>th</sup> October 2025 and 16<sup>th</sup> October 2025 are allowed with the consequence that the orders of 30<sup>th</sup> September 2025 are hereby vacated forthwith. The Plaintiff shall bear the costs of the applications

**DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF FEBRUARY 2026**

.....  
**J.W.W. MONGARE**

**JUDGE**

In the Presence of

1. Mr. Kiragu for the Plaintiff/Applicant.
2. Mr. Marube holding brief for Dr. Nyaundi for the Respondent.
3. Mr. Owiti for the 2<sup>nd</sup> Defendant.
4. Amos- Court Assistant

