

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. E460 OF 2024

JR MILES CONSTRUCTION LTD.....
.....APPLICANT VERSUS
BOMI ENGINEERING AND
CONSTRUCTION LIMITED.....1ST
RESPONDENT
FIDELITY SHIELD INSURANCE COMPANY
LIMITED.....2ND RESPONDENT

RULING

1. Before Court is the Applicant’s Notice of Motion dated 29th May 2024 brought pursuant to Section 7(1) of the Arbitration Act, 1995, Rule 11 of the Arbitration Rules, Order 51 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law.
2. The Applicant seeks, *inter alia*, temporary injunctive orders restraining the 1st Respondent from recovering or making any further claim under Advance Payment Bond No. 15826 and restraining the 2nd Respondent from honouring the demand thereunder pending the hearing and determination of this application and the intended arbitration.

3. The motion is supported by the affidavit of Ronald Wekesa, sworn on 29th May 2024, together with the annexures thereto.
4. The Court directed that the application be served for an *inter parties* hearing and that responses and written submissions be filed within the stipulated timelines. Despite service and the Court's express directions, no replying affidavit or submissions were filed by either Respondent in the CTS or physically in the court file. The application therefore, proceeded unopposed.

Background

5. From the material placed before Court, the Applicant and the 1st Respondent entered into a Construction Works Agreement for landscaping and planting works. Under the agreement, the Applicant was required to procure an Advance Payment Bond. The Applicant obtained Advance Payment Bond No. 15826 from the 2nd Respondent, naming the 1st Respondent as beneficiary.
6. The Applicant contends that despite its readiness to commence works, the 1st Respondent failed to grant access to the site in time, later issued an intention to terminate the contract, and subsequently demanded payment of Kshs. 9,240,000 under the Bond.
7. The Applicant has invoked the dispute resolution clause and moved to refer the dispute to arbitration.

Analysis and determination

9. The issue for determination is whether the Applicant has met the threshold for the grant of interim measures of protection under Section 7 of the Arbitration Act and for the grant of a temporary injunction.

10. **Section 7(1) of the Arbitration Act** provides:

“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.”

11. The principles guiding the grant of interim measures under Section 7 were articulated in **Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others [2010] eKLR**, where the Court of Appeal held that the Court must be satisfied of:

1) The existence of an arbitration agreement.

2) Whether the subject matter of arbitration is under threat.

3) The appropriate measure of protection after an assessment of the merits of the application.

4) The period for which the measure is to be given.

12. The existence of a binding Construction Works Agreement is not disputed on the material before the Court. The Agreement contains clause 28, which provides for the dispute resolution clause. The clause allows parties to negotiate before engaging in arbitration. The Applicant has demonstrated steps taken to invoke arbitration. The

demand on the Advance Payment Bond is not controverted. In the absence of any response, the Applicant's deposition that the 1st Respondent has triggered the Bond stands unchallenged.

13. It is trite that even where an application is unopposed, the Court must be satisfied that the legal threshold has been met. An unopposed application does not automatically succeed. The Court must evaluate whether a *prima facie* case has been established.
14. On the material presented, the Applicant asserts that delays were attributable to the 1st Respondent's failure to grant site access and that termination was unlawful. These matters fall squarely within the arbitral domain. However, the immediate threat is the liquidation of the Bond before the determination of the underlying dispute.
15. If the Bond is honoured, the Applicant will suffer immediate financial depletion and potential reputational harm. The arbitral proceedings would be rendered nugatory to that extent. Preservation of the *status quo* is therefore necessary to safeguard the integrity of the arbitral process.
16. In the **Safaricom and Ocean View Beach** case (*supra*), the Court of Appeal emphasized that interim protection is intended to preserve the subject matter pending arbitration. That principle squarely applies in the present circumstances. The Respondents, despite being afforded the opportunity, elected not to contest the

application. The factual depositions, therefore, remain uncontroverted.

17. I am satisfied that the Applicant has satisfied the threshold for the grant of an interim measure of protection to preserve the efficacy of arbitration.

18. For the foregoing reasons, the Applicant's application dated 29th May 2024 succeeds. I make the following orders:

i. A temporary injunction is hereby issued restraining the 1st Respondent from recovering or making any further claim arising from Advance Payment Bond No. 15826 pending the hearing and determination of the intended arbitration.

ii. A temporary injunction is hereby issued restraining the 2nd Respondent from honouring the demand by the 1st Respondent under Advance Payment Bond No. 15826 pending the hearing and determination of the intended arbitration.

iii. Costs of the application shall be in the arbitration.

RULING delivered virtually, dated and signed at **NAIROBI**

This **26th** day of **February** 2026.

P.M. MULWA
JUDGE

In the presence of:

Mr. Sarara for Applicant

Mr. Ochola for 2nd Respondent

Court Assistant: *Carlos*