

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
MISC. APPLICATION NO. E342 OF 2024

BETWEEN

DUCHESS PARK DEVELOPMENT

COMPANY LIMITED.....1ST

APPLICANT

DUCHESS PARK MANAGEMENT LIMITED.....2ND

APPLICANT

VILLA CARE MANAGEMENT LIMITED.....3RD

APPLICANT

AND

ALICE OWUOR & 13 OTHERS.....

RESPONDENTS

RULING

Introduction and Background

1. In their application dated 18th April 2024, the Applicants seek an injunction to restrain the Respondents from taking over the interim

management of the property known as LR No. 209/5990/13 pending the hearing and determination of arbitration proceedings and that the 3rd Applicant and the Respondents be ordered to open a joint account to hold any funds collected as service charge to allow the 3rd Applicant pay for service provided in the premises. In the alternative, the Applicants seek to stay the implementation of the resolutions made in the Annual General Meeting (AGM) of 20th April 2024 pending the hearing and determination of the arbitration. The application is supported by the grounds on its face and the supporting affidavit of the 3rd Applicant's director, Jairo Tabu Angiyah sworn on 18th April 2024.

2. The Respondents oppose the application through the replying affidavits of the 10th and 11th Respondents, Stephen Radido and Beatriz Meijide. In addition to the pleadings, the parties have also filed written submissions that I have considered and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

3. The main issue for determination is whether the court should grant an order of injunction or stay implementation of any resolutions made in the AGM of 20th April 2024 pending the hearing and

determination of arbitration and order the 3rd Applicant and the Respondents to open a joint account. The Applicants' application is grounded under inter alia **section 7** of the **Arbitration Act** which 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.

4. 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.

.....

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 (Koome, 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]

5. The Applicants' case is that the Respondents have failed, refused, or ignored demands to pay service charge, accumulating a debt of Kshs. 6,781,148.00 and that to avoid paying this debt, they called an AGM for 20th April 2024. They contend that the main agenda of this meeting is to illegally and unlawfully remove the 3rd Applicant as the interim manager and that the Respondents' actions are a direct breach of the sale agreements and the sub-leases they signed. That if the meeting were to proceed, the 3rd Applicant would have been removed to its financial detriment, that the 1st and 2nd Applicants would be unjustly deprived of the substantial

sum of money they have spent on various services for the estate, which should have been covered by the service charge.

6. The Applicants state that the Respondents have not followed the dispute resolution mechanisms outlined in their contracts, such as objecting to the service charge through the Institute of Surveyors of Kenya and instead, they have taken matters into their own hands. They claim that they have already formally requested the appointment of an arbitrator from the Chartered Institute of Arbitrators, Kenya, to resolve the underlying dispute and that the court's intervention is sought to preserve the status quo pending that arbitration.
7. In response, the Respondents state they have fully paid for their apartments, but the 1st Applicant who is the Developer, has failed to provide them with crucial completion documents, including their registered Sub-leases, Share Certificates for the management company and Partial discharges from the bank's charge over the property claiming that some Respondents have been waiting for over ten years for these documents.
8. That contrary to the Applicants' claim that they initiated arbitration, the Respondents state that they were the ones who first invoked the arbitration clause in the sale agreements. They formally

requested the appointment of an arbitrator from the Chartered Institute of Arbitrators in August 2023 to resolve the wider dispute, but the Applicants neglected or refused to participate. On his part, the 10th Respondent states that no arbitration process has been commenced by the Applicants and that any requests from the owners for consultation or meetings have been met with hostility, meaning the Applicants did not exhaust the dispute resolution avenues they now cite in court.

9. The Respondents admit to setting up an escrow account and paying their service charge into it, but they justify this action by stating that the 2nd and 3rd Applicants have provided consistently poor and sub-standard services despite numerous complaints. They claim that the Applicants have failed to account for how the service charge money has been spent over the years and that they are holding the money in escrow to ensure their underlying issues are resolved first.
10. The Respondents aver that the Applicants' claim for KShs. 6.7 million in unpaid service charge is a tactic to distract from their own failures and they believe the monthly charge itself is exploitative given the poor services rendered. That no reconciliation of accounts has ever been done to verify this figure. The Applicants have refused all requests from the owners to review the accounts. They

claim that in an attempt to force them to pay, the 3rd Applicant sent threatening messages and subsequently disconnected water supply to their homes which action forced the Respondents to file a separate case at the Environment and Land Court to protect their rights and seek reconnection. The 10th Respondent further states that the Applicants obtained ex parte orders from the court without disclosing material facts, such as their own breaches of contract and the lack of any genuine attempt at reconciliation or consultation. For these reasons, the Respondents urge the court to find the Applicants' application to be devoid of merit and to dismiss it with costs.

11. In the court's ruling of 28th October 2024, the court found that it each of the Respondents herein entered into Sale Agreements and Sub-lease Agreements with the 1st Applicant in relation to the purchase of apartments. That Clauses 7.16 and 7.17 of the sale agreement states:

“ 7.16 Any dispute, controversy or claim arising out of or relating to this Agreement or a termination hereof (including without prejudice to the generality of the foregoing, whether in its interpretation, application or implementation), shall be resolved by way of consultation held in good faith between the parties. Such consultation shall begin immediately after one party has delivered to the other written request for such consultation. If

within fifteen (15) Business Days following the date on which such notice is given the dispute cannot be resolved, the dispute, controversy or claim shall be submitted to arbitration in accordance with clause 7.17.

7.17 Should any dispute, controversy or claim as is referred to in clause 7.16 arise between the parties and the consultation process referred to in clause 7.16 shall have not resolved such dispute, the dispute shall upon application by any party, be referred for arbitration to a person acceptable to the parties or if the parties cannot agree on the appointment of such person within a period of thirty (30) days from the date of such application, then the dispute shall be referred to arbitration by a single arbitrator to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch upon the written request of either party. The appointment of the arbitrator shall be final and binding on the parties. The arbitration shall take place in Nairobi, Republic of Kenya and the language of arbitration shall be English. The arbitration shall be conducted in accordance with the Arbitration Act, 1995. The decision of the arbitrator shall be final and binding on the parties and may be made an order of a court of competent jurisdiction. Notwithstanding the foregoing, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from a court in Kenya of competent jurisdiction pending the final decision or award of the arbitrator.”

12. Furthermore, Clause 6.1 and 6.2 of the Sub-lease Agreements state:

“6.1 Save as otherwise provided in this Sub-Lease, any dispute arising from or in connection with this Lease, its validity, the Parties’ rights and/or obligations thereunder or its termination shall, to all extent possible, be settled amicably by mutual agreement of the parties to such dispute and such agreement shall be confirmed in writing signed by both parties.

6.2 Any dispute arising from or in connection with this SubLease, its validity, the Parties’ rights and/or obligations thereunder or its termination, and which is not settled in accordance with Clause 6.1 above shall be finally resolved in accordance with the rules of the Chartered Institute of Arbitrators, Kenya Chapter (hereinafter called “the Institute”) and the Arbitration Act, 1995 (as amended from time to time) by an Arbitrator appointed by agreement of the Parties to the dispute and failing such agreement within fourteen (14) Days of a request therefore by either Party, by an Arbitrator appointed by the Chairman of the Institute, which shall have regard to the nature of the dispute in making such appointment .

13. The court found that both of the Agreements above provide that disputes would be solved through consultations and if that failed, the parties would resort to arbitration and that the dispute between the parties, which is on the payment of service charge, ought to be referred to arbitration for resolution.

14. In any case, applying the principles set out in **Safaricom Limited v Ocean View Beach Hotel Limited(supra)** above, I find that save

that there exists an arbitration agreement between the parties, the Applicants have failed to satisfy the other tests for the interim measure of protection to be granted. The Applicants have stated that the subject matter, that is the management of the estate and the collection of service charge is under threat because the Respondents are holding a meeting to remove the 3rd Applicant as the interim manager. In response, the Respondents have provided evidence that the "threat" is not to the subject matter, but to the Applicants' control over it. The Respondents have placed the disputed funds, that is the service charge into an escrow account which they say is preserved and there is no evidence that it has been dissipated. It is still available to pay for services. The Respondents have also shown that the real threat is to the habitability of their homes, as the Applicants have already disconnected water, an act of self-help that undermines any claim that the Applicants are acting to preserve the property.

15. It is therefore my finding that the subject matter of the arbitration which is the impugned service charge debt and management rights is not under threat of being destroyed or dissipated. It is merely being held in a neutral account pending resolution. Conversely, the Applicants' actions of disconnecting water and disrupting the

wellbeing of the residents, is the kind of behavior interim measures are designed to prevent.

16. On special circumstances, the court is to consider what would be the appropriate measure of protection after an assessment of the merits of the application? As noted by the Court of Appeal, interim orders are "holding orders" to preserve the *status quo*, not to anticipate the litigation or grant the final relief. The Applicants want the court to stop the Respondents' meeting, prevent the Respondents from taking over management and order the funds to be paid to them or into a joint account they control. The Respondents have raised a serious argument that the Applicants have come to court with "unclean hands." They have provided prima facie evidence supported by correspondence and CR12 reports that the developer has failed to issue title documents/leases for years, has failed to transfer shares in the management company to the owners and runs the management company and security company in a way that creates a conflict of interest. The question now becomes, what is the true *status quo*? The Applicants claim it is that it is the 3rd Applicant that manages the property. However, the Respondents have demonstrated that for a significant period, a parallel structure has been operating because the Applicants

refused to engage. This is the "status quo" and is actually a state of deadlock allegedly caused by the Applicants' breach of trust.

17. In my view, the most appropriate interim measure, given the facts, is the one the Respondents have already implemented, preserving the funds in escrow and preventing the Applicants from taking punitive action like disconnecting water until the arbitrator decides who is right. I am also of the view that the Applicants seek orders that effectively pre-determine the outcome of the arbitration for example, that the 3rd Applicant remains manager and collects all funds. If the court grants this, it strips the arbitral tribunal of their primary power to decide on the management structure and financial accounting. This directly contravenes the principle that the court must avoid encroaching on the tribunal's decision-making power.
18. The 10th Respondent has also stated that the arbitration is premature not because there is no clause, but because the Applicants failed to follow the multi-tiered dispute resolution process of consultation first and rushed to court for a tactical advantage. Given the Respondents' prima facie evidence that the Applicants refused to share accounts, refused to transfer shares, refused to allow owners into the management committee and they refused to

respond to requests for dialogue by disconnecting water, it is clear that the Applicants have not exhausted the "consultation" requirements in good faith. Therefore, the 10th Respondent's contention is valid that the Applicants cannot invoke the arbitration clause in court while simultaneously ignoring the pre-arbitration steps and acting in a manner that escalates the dispute.

19. It is therefore my finding that the Applicants have not made a case for an interim measure of protection. The funds are secure in escrow, the Applicants have fundamentally altered the relationship through their own alleged breaches and retaliatory actions and granting the Applicants' prayers would decide the core issues of who should manage and control the funds, which is the exact dispute for the arbitrator. On the balance of convenience, I find that the balance tilts in favor of protecting the residents from punitive actions and preserving the funds in a neutral account until the arbitrator can sort out the complex web of contractual breaches and counterclaims.

Conclusion and Disposition

20. The upshot is that the application dated 18th April 2024 now stands dismissed with costs.

**DATED SIGNED and DELIVERED virtually at NAIROBI this
19TH DAY OF MARCH 2026**

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Mr. Mwikali holding brief for Mr. Omwanza for the Applicant.
2. Ms. Achayo for the Respondents (except the 10th and 14th).
3. Ms. Oginga for the 10th Respondent.
4. Amos - Court Assistant