REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION

HCCOMM. SUIT NO. E212 OF 2025

MY SPECTRUM ASSET MANAGEMENT KENYA LIMITED.....PLAINTIFF

VERSUS

TWO RIVERS LIFESTYLE CENTRE LIMITED.....1ST DEFENDANT

STANBIC BANK KENYA LIMITED.....2ND DEFENDANT

RULING

Introduction

1. Before the Court for determination are three related matters arising from the Plaintiff's Chamber Summons dated 18th March 2025, which seeks interim measures of protection pending arbitration under Section 7 of the Arbitration Act.

2. Principally, the Plaintiff in the application seeks a temporary injunctive order, restraining the Defendants from selling, transferring, or otherwise disposing of property known as **Two Rivers Mall and the**

adjacent Two Rivers Office Towers, pending the determination of intended arbitration proceedings between the Plaintiff and the 1st Defendant.

3. In response to the application, the 2nd Defendant, **Stanbic Bank Kenya Limited,** lodged a **Preliminary Objection (PO)** dated 3 April 2025 and **a Notice of Motion Application** dated 4 April 2025, challenging, inter alia, the Plaintiff's locus standi as against it on grounds of lack of privity of contract and urging that no interim relief can issue against it. It also seeks to be struck out of the proceedings and opposes the grant of any interim injunction. The 2nd Defendant also filed and relied on a supplementary affidavit sworn by **Ratemo Peterson Gwaro,** on 8th July 2025.

4. The 1st Defendant, **Two Rivers Lifestyle Centre Limited**, filed a Replying Affidavit sworn on 23rd April 2025 by James Mworia, opposing the application and urging that the Plaintiff has no proprietary interest and, in any event, can be compensated in damages.

5. The Plaintiff also filed and relied on a Replying Affidavit of **Gad Aguko,** sworn on 15th May 2025 (opposing the 2nd Defendant's application), and a Supplementary Affidavit (in response to the 1st Defendant's Replying Affidavit), sworn on the same date, also by Gad Aguko, one of the directors of the Plaintiff company.

6. Pursuant to directions of the Court, parties filed their written submissions covering both applications as well as the preliminary objection by the 2nd Defendant. The Plaintiff's submissions are dated 16 June 2025; the 1st Defendant's submissions are dated 19th June 2025; Those of the 2nd Defendant are dated 13th May 2025.

Analysis and Determination

7. Having carefully considered the pleadings, affidavits, and submissions filed by the parties, the Court is of the view that the following issues arise for determination:

    i. Whether the 2nd Defendant's Preliminary Objection/Application is merited (2nd Defendant's name be struck out of the proceedings).
    ii. Whether the Plaintiff has satisfied the threshold for the grant of interim measures of protection under Section 7 of the Arbitration Act.

8. Before addressing the issues identified above, it is necessary to briefly outline the background of the dispute as disclosed in the pleadings and submissions of the parties.

9. The dispute arises from a long-standing consultancy and asset management relationship between the Plaintiff, My Spectrum Asset Management Kenya Limited, and the 1st Defendant, Two Rivers Lifestyle Centre Limited, relating to the management and commercialization of the Two Rivers Mall complex.

10. According to the Plaintiff, the parties entered into a series of consultancy arrangements pursuant to which the Plaintiff provided strategic advisory and management services relating to the operations and commercial management of the Two Rivers Mall. The relationship between the parties was governed by several contractual instruments, including a Consulting Services Agreement dated 18 October 2019, a Deed of Novation and Variation dated 23 July 2021, a Consulting Services Agreement dated 1 August 2022, and a Memorandum of Understanding dated 5 January 2023.

11. The Plaintiff avers that under these arrangements, it provided consultancy services to the 1st Defendant and seconded one of its consultants, Mr. Yiannis Kyriakopoulos, to serve as the General Manager of the Two Rivers Mall.

12. The Plaintiff contends that the dispute arose on 27 December 2024 when the 1st Defendant issued a notice terminating the services of the Plaintiff's secondee who had been serving as the General Manager of the mall. According to the Plaintiff, that termination effectively dismantled the operational framework through which it had been rendering consultancy services.

13. Following the termination, the Plaintiff sought clarification from the 1st Defendant regarding the status of the consultancy arrangements. It is the Plaintiff's case that the 1st Defendant subsequently disclosed that the 2nd Defendant, Stanbic Bank Kenya Limited, through its nominees or subsidiaries, was in the process of selling the property known as Two Rivers Mall together with the adjacent Two Rivers Office Towers.

14. The Plaintiff contends that the intended sale would fundamentally undermine the subject matter of the consultancy agreements and render the intended arbitration proceedings nugatory.

15. The Plaintiff therefore invokes the arbitration clauses contained in the various consultancy agreements and has moved this Court under Section 7 of the Arbitration Act seeking interim measures of protection pending the commencement and determination of arbitration proceedings.

16. The 1st Defendant opposes the application on the basis that the consultancy agreements did not confer upon the Plaintiff any proprietary or beneficial interest in the Two Rivers Mall property and that the Plaintiff therefore lacks any legal basis to restrain dealings with the property.

17. The 2nd Defendant, Stanbic Bank Kenya Limited, has taken the position that it is not a party to the consultancy agreements between the Plaintiff and the 1st Defendant and that no privity of contract exists between it and the Plaintiff. On that basis, it filed a Preliminary Objection dated 3 April 2025 and a Notice of Motion dated 4 April 2025 seeking to be struck out from these proceedings.

18. It is against this factual backdrop that the Court now turns to determine the issues framed above.

Whether the 2nd Defendant's Preliminary Objection/Application is merited

19. The law governing preliminary objections is well settled. The locus classicus remains **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, where the Court held that a preliminary objection consists of:

> "a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit."

20. Sir Charles Newbold P. further explained that:

> "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct."

21. The principle emerging from that decision is that a preliminary objection must raise a pure point of law, and it must be capable, if upheld, of disposing of the suit or application without the need to ascertain contested facts.

22. In the present case, the 2nd Defendant's objection (and application) is premised on two legal propositions: first, that there is no privity of contract between the Plaintiff and the 2nd Defendant; and secondly, that the Plaintiff lacks locus standi to restrain the 2nd Defendant from exercising its rights over the suit property.

23. These questions arise from the pleadings and are, in principle, capable of constituting proper points of law.

24. However, in this case, the Court notes that the Plaintiff's application is founded not on the enforcement of contractual rights against the 2nd Defendant, but rather the Plaintiff invokes the jurisdiction of this Court under **Section 7 of the Arbitration Act** for the grant of interim measures of protection pending arbitration.

25. The scope of the Court's jurisdiction under Section 7 is settled. The Court of Appeal in **Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 Others [2010] eKLR**, held that the purpose of Section 7 is to preserve the subject matter of arbitration so that the arbitral process is not rendered futile.

26. More recently, the Court of Appeal revisited the issue in **Ogwedhi Properties Limited & Another v Ollerai Investments Limited & 3 Others [2024] KECA 124 (KLR)** and emphasized that when dealing with an application under Section 7, the Court is required to undertake only a prima facie analysis and must refrain from determining issues that fall within the jurisdiction of the arbitral tribunal. According to the Court of Appeal, the role of the Court in such circumstances is limited to determining:

i. Whether an arbitration agreement exists;
ii. Whether the subject matter of the dispute is under threat;
iii. What measure of protection is appropriate; and
iv. The duration of such measure.

27. The Court further emphasized (***in Ogwedhi – supra***) that questions relating to the scope of the arbitration agreement or arbitrability of the dispute fall within the competence of the arbitral tribunal in the first instance pursuant to **Section 17 of the Arbitration Act**.

28. In this case, the 2nd Defendant's objection and application, to the extent that they are based on privity of contract, would inevitably require the Court to determine whether the dispute between the parties falls within the scope of the arbitration agreements and whether the Plaintiff can seek protective relief affecting the 2nd Defendant. These questions touch directly on issues of **jurisdiction and arbitrability**, which the Court of Appeal in **Ogwedhi** cautioned should not be determined at the stage of an application under Section 7.

29. In the circumstances, the Court is therefore persuaded that determining the Preliminary Objection would require the Court to venture into matters reserved for the arbitral tribunal under the **competence-competence principle** embodied in Section 17 of the Arbitration Act.

30. Regarding the 2nd Application to have its name struck from the proceedings, the Court agrees with the Plaintiff's submission that the presence of a non-signatory party (in this case, the 2nd Defendant) in proceedings brought under Section 7 does not necessarily defeat the operation of an arbitration agreement, Courts have recognized that interim measures of protection may issue in proceedings where third parties are joined, provided that the purpose of the order is limited to the preservation of the subject matter of arbitration.

31. In **Titus Kitonga & Another v Total Kenya Limited & Another [2018] eKLR**, the Court held that the mere joinder of a party who is not a signatory to an arbitration agreement does not, of itself, defeat the arbitration clause. The Court stated that:

> "Further, I find that, whether, the Plaintiffs have a substantive claim against the 2nd Defendant or not, and whether the 2nd Defendant/Respondent is a necessary party to these proceedings, cannot be determined in this application. These are issues that can only be determined between the Plaintiffs/Respondents and the 2nd Defendant/Respondent in the arbitral tribunal process."

32. A similar approach was adopted in **Christopher Wainaina Mburu v Consumate Court Limited & Another [2019] eKLR**, where the Court held that the existence of a non-signatory party in proceedings does not preclude the enforcement of an arbitration clause as between the contracting parties. The Court concluded that:

> "It therefore follows that the arbitration clause cannot be enforced against the 2nd defendant. However, this is not to say that the arbitration clause cannot be invoked, since the arbitral clause is in itself a distinct agreement/contract between the plaintiff and the 1st defendant, and it is not disputed that the dispute relates to the lease agreement. Besides, it would appear a dispute continues to subsist between the parties and in my opinion, the 2nd defendant's enjoinment in the suit rides majorly on the fact that it is the water service provider mandated to provide water to Nairobi County. For this reason, this court's only reasonable option would be to respect and uphold the terms of the clause as is by referring the matter to arbitration. In so finding, I am persuaded by a similar reasoning assumed in *Titus Kitonga & another v Total Kenya Limited & another [2018] eKLR***."**

33. In light of the foregoing authorities, this Court finds that the issues raised in the 2nd Defendant's Preliminary Objection are not for determination at this stage of the proceedings. Accordingly, the Preliminary Objection dated 3 April 2025 is without merit and is hereby dismissed.

34. Similarly, the 2nd Defendant's application to have its name struck off the proceedings on account of lack of privity of contract between

the Plaintiff and the 2nd Defendant is equally dismissed for the same reason.

Whether the Plaintiff has satisfied the threshold for interim measures of protection under Section 7 of the Arbitration Act

35. The Plaintiff brings its application under **Section 7(1) of the Arbitration Act**, which provides that:

> *"It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from the High Court an interim measure of protection, and for the High Court to grant such measure."*

36. This provision, which is mirrored in **Article 26(3) of the UNCITRAL Arbitration Rules**, empowers the Court to issue interim protective relief without trenching upon issues reserved for the arbitral tribunal. The Court's role is narrow, that is, to safeguard the subject matter of arbitration and not to determine rights or liabilities between the parties.

37. The controlling jurisprudence is the **Safaricom Ltd v Ocean View Beach Hotel Ltd (supra)**, where the Court of Appeal set out a four-part test; that is:

i. Whether an arbitration agreement exists;
ii. Whether the subject matter is under threat;
iii. The appropriate protective measure;
iv. The duration of the measure to avoid encroaching on the tribunal's jurisdiction.

38. The above test was reaffirmed in ***Ogwedhi***, where the Court emphasized that once the Court finds an arbitration agreement exists, the primary inquiry becomes whether the subject matter is in danger, and if so, the Court must grant appropriate protection.

39. Applying the above tests to the present case, first, it is undisputed that the Plaintiff and the 1st Defendant executed multiple consultancy agreements containing arbitration clauses expressly allowing recourse to the High Court for interim measures pending arbitration. It therefore follows that the requirement for the existence of an arbitration agreement within the ***Safaricom*** and ***Ogwedhi*** line of cases has been met.

40. Regarding the second criterion, that is, whether the subject matter is under threat, evidence on record shows that Two Rivers Mall is actively being sold. The 2nd Defendant, a secured creditor, admits its intention to sell for purposes of loan recovery. The 1st Defendant's correspondence confirms that the sale process is underway. These are not speculative concerns.

41. The Plaintiff alleges, which allegation was not materially disputed, that the 1st Defendant is a foreign company, and that the Mall is its only known asset in Kenya. It is therefore plain that without protection, the substratum of the intended arbitration – the Mall, which forms the commercial platform upon which the parties' consultancy arrangements were structured– would be undermined if the sale proceeds before the arbitral process takes hold of the proceedings, with the resultant risk that enforcement of any arbitral award may be impossible.

42. The Court notes that the 1st Defendant heavily relied on the ***Giellan and Nguruman*** tests, contending the Plaintiff has no proprietary interest, that harm is commercial and compensable, and that an injunction would unfairly restrain a registered proprietor. However, with respect, the Court finds the tests inapplicable in the present case. While the *Giella principles* are central in deciding an injunction application brought under Order 40 of the Civil Procedure Rules, they are inappropriate at the Section 7 Arbitration Act plane.

43. In the ***Safaricom case,*** the Court of Appeal clarified that, unlike injunction applications under Order 40 of the Civil Procedure Rules, applications under Section 7 of the Arbitration Act are built on **UNCITRAL-modelled interim protection**, distinct from the equity-based ***Giella*** tests. The Court stated that:

> "By determining the matters on the basis of the ***GUILLA*** 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.”

44. The fourth limb under the ***Safaricom/Ogwedhi*** Section 7 framework is on the “duration of the protective measure.” It is settled held that once a prima facie arbitration agreement is established, the Court’s only remaining inquiry is whether the subject matter is in danger, and if yes, interim measures must be issued.

45. It is equally settled law that to avoid usurping the arbitral tribunal’s jurisdiction, interim measures under Section 7 must be time-bound and handed over to the arbitral process swiftly.

46. The upshot of the foregoing is that the Court finds and holds that the Plaintiff has met the statutory threshold under Section 7 of the Arbitration Act, and that a grant of a short and defined period, sufficient for the constitution of the arbitral tribunal, is appropriate.

Disposition

47. Accordingly, the 2nd Defendant’s Preliminary Objection dated 3 April 2025 is hereby dismissed.

48. The Plaintiff’s application dated 18 March 2025 for interim protective measures under Section 7 of the Arbitration Act is hereby allowed on the following conditions: -

(a) Within120 days from the date of this Ruling or until the arbitral tribunal assumes jurisdiction (whichever is earlier), the

Defendants, whether by themselves, agents, employees, nominees, or subsidiaries, are restrained from selling, transferring, alienating, disposing of, or completing any transaction relating to **Two Rivers Mall**, the **Two Rivers Office Towers**, and related facilities – For the avoidance of doubt, this order is purely to preserve the status quo and does not restrain negotiations, due diligence, or preparatory steps that do not effect completion/transfer.

(b) The parties (Plaintiff and 1st Defendant) shall, within 14 days of this Ruling, take steps to commence and prosecute the arbitral proceedings in accordance with their arbitration agreement**.**

(c) The parties (Plaintiff and 1st Defendant) shall jointly take all necessary steps to constitute the arbitral tribunal within 45 days from the date hereof.

(d) The Plaintiff shall file and serve an undertaking as to damages within 14 days of the date of this Ruling, in default of which the interim orders granted herein shall automatically lapse. – For the avoidance of doubt, the purpose of this order is to balance the equities between the parties and to safeguard the Defendants against the potential adverse economic impact of the temporary restraint on dealings with the Two Rivers Mall and associated properties.

(e) Upon its constitution, the arbitral tribunal is at liberty to vary, discharge, or extend these interim measures, including a determination on the adequacy of the undertaking.

49. Costs of the PO shall be in the cause.

50. Costs of the Section 7 application shall be costs in the arbitration to be disposed by the arbitral tribunal.

51. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MARCH 2026.

HON. JUSTICE M. ADO
JUDGE

In the presence of: -

C/A – *Moses*

Ochieng.....for the Plaintiff

Ms. Bett.....for the 1st Defendant

Mumu.....for the 2nd Defendant