

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
COMMERCIAL, ADMIRALTY & TAX DIVISION
MISCELLANEOUS APPLICATION NO. 113 OF 2020

LALJI MEGHJI PATEL & COMPANY LIMITED.....APPLICANT
-VERSUS-
PRESBYTERIAN FOUNDATION.....RESPONDENT

RULING

1. By an application dated 6 July 2020, the applicant successfully applied to set aside an arbitral award published on 6 July 2020 by the arbitrator Arch. Julius M.F. Mutunga. The application was allowed on 24 April 2021 and while allowing the application, this Court (Chepkwony, J.) referred the dispute between the parties back to the arbitrator.
2. The applicant has now come back to this Court for interim measures pending the hearing and determination of the dispute by an arbitrator. To be precise, material prayers in the application are as follows:-

“3.The Respondent whether by themselves, their employees, servants, members, third parties, contractors, consultants, agents, proxies, or anyone else acting at their behest or otherwise be restrained from entering upon, remaining upon, providing security, trespassing, fencing, putting up a boundary wall, painting, hoarding, erecting signs, leasing, licensing, selling, advertising to lease, license or sale, constructing, developing,

demolishing, excavating or howsoever otherwise interfering with the unfinished construction comprised in LR. No. MN/1/11518 Bamburi Beach Mombasa pending referral of the dispute to Arbitration as per the Ruling and Order of this Honourable Court given by the Hon. Lady Justice D.O. Chepkwony on 23rd April, 2021 and affirmed by the Hon. Mr. Justice J.K. Ng'arng'ar on 26th September, 2024.

4.The Respondent whether by themselves their employees, servants, members, contractors, consultants, agents, proxies, persons or anyone else acting at their behest claiming from and through them otherwise howsoever be directed by an Order of this Honourable Court to vacate the suit premises on LR. No. MN/1/11518 Bamburi Beach Mombasa pending referral of the dispute to Arbitration as per the Ruling and Order of this Honourable Court given by the Hon. Lady Justice D.O. Chepkwony on 23rd April, 2021 and affirmed by the Hon. Mr. Justice J.K. Ng'arng'ar on 26th September, 2024.

5. This Honourable Court be pleased to issue an Order directing the Architectural Association of Kenya to appoint an Arbitrator as provided under Clause 45.1 of the Agreement between the parties.

6. The OCS Bamburi Police Station be directed to keep the peace and ensure compliance with this Honourable Court's Orders.”

3. The application is expressed to be brought under section 7 of the Arbitration Act, 1994, Rule 2 of the Arbitration Rules, 1997, sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Cap. 21; and Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules
4. Ms. Cynthia Sheunda, an advocate of this Honourable Court and the applicant’s legal officer, has sworn the affidavit in support of the application and stated that on 19 January, 2012, the Respondent contracted the Applicant to build four blocks of apartments with various amenities on LR. No. MN/1/11518 Bamburi Beach Mombasa dubbed “*Milele Luxury Apartments*”. It is alleged that protracted delays by the Respondent in promptly settling the applicant's payment certificates as approved by the project architect eventually led to contractual claims and a delay in completion of the Project.
5. On or about 27 January, 2014 the Applicant eventually suspended works and demobilised its equipment from the Project site. After the suspension of works, there was no further substantive developments or construction on the project site although the contract between the parties has never been terminated.
6. Subsequently, the Applicant declared a dispute and commenced the arbitration process provided for under clause 45.1 of the contract and

on or about 28 February, 2019, this Honourable Court sitting in **Mombasa High Court Civil Suit No. 85 of 2017 - Lalji Meghji Patel & Co. Ltd. vs. Presbyterian Foundation** referred the dispute for arbitration by an arbitrator to be appointed by the Architectural Association of Kenya.

7. Through a Final Award dated 31 January, 2020 the Arbitrator Arch. Julius M.F. Mutunga gave his disposition in favour of the Respondent; but not before a site visit by the Arbitrator and both parties on 13 and 14 September, 2019 where the current status of the Project Site was ascertained.
8. On 23 April, 2021 this Honourable Court (Chepkwony, J.) set aside the entire award and referred the dispute back to the Arbitrator for fresh consideration. This decision was affirmed by Ng'arng'ar, J. when apparently the applicant sought clarification and import of the award of Chepkwony, J.
9. The applicant's representative has sworn that as at the time the applicant filed this application, the arbitration was yet to commence ostensibly because parties have failed to agree on an arbitrator.
10. On or about 24 October, 2024 during a routine inspection of the project, the Applicant learnt that there are construction works ongoing at the site. The Applicant is carrying out the impugned actions despite

being fully aware of the orders of this Court and the pending arbitral proceedings.

11. The Applicant has neither resumed works on site nor has it lifted or rescinded its notice of suspension of works. The Respondent has also not notified the Applicant that it has re-entered the Project Site or that it has terminated the contract so as to allow for the appointment of a new contractor in line with the general conditions of the Joint Building Council (JBC) and the contract between the parties.

12. According to the applicant, the Respondent is sabotaging any efforts to resolve the matter through arbitration as ordered and it is in contempt on the face of the Court. By its actions, the Respondent has placed in jeopardy the Applicant's contractual claim of close to Kenya Shillings Two Hundred Million (Kshs. 200,000,000/=) and the Project site constituting subject matter of the dispute is in real danger of being wasted and misappropriated.

13. It is sworn further that the subject matter of the dispute comprising the project site is now slowly dissipating and there is real likelihood that it will be extinguished in its entirety thereby rendering the arbitral proceedings otiose.

14. This Honourable Court, it is sworn, has the power under statute to issue an interim measure of protection in the way of an injunction to preserve the subject matter of the dispute pending the outcome of the

Arbitration. The *status quo* of the project as jointly ascertained by the parties and the arbitral tribunal on 13 and 14 September, 2019 ought to be maintained.

15. Peter Karanja, the respondent's legal officer, swore a replying affidavit on behalf of the respondent opposing the application. The applicant admits that the Applicant had been contracted by the Respondent to build apartments with various amenities on LR. No. MN/ 1/11518 Bamburi Beach Mombasa and that it suspended the works in 2014; demobilised and removed its equipment and abandoned the site in 2015.

16. Contrary to the applicant's allegations, the contract was constructively terminated when the applicant abandoned the site and did not resume works within sixty days after the suspension. This is as per clause 29 and 39 of the contract. And based on clause 38.1.1 of the contract, the contract was terminated 14 days after unlawful suspension of the works by the contractor.

17. It is also alleged on behalf of the respondent that in the process of demobilization, the Applicant vandalized the site and removed the respondent's materials valued at Kshs. 59,076,578.

18. When a dispute was declared, the applicant claimed Kshs. 207,774,620.13 against the Respondent but the latter filed a counterclaim of Kshs. 1,373,425,960.34. During the Arbitration, the

parties and the Arbitrator jointly visited the site on 13 September 2019 when it was confirmed that the applicant had abandoned the site and neglected the construction works. The site was overgrown with grass and bushes.

19. The Applicant also admitted having vandalized the site and removed materials on site valued at Kshs. 59,076,578. The respondent was awarded this amount and the sum of Kshs. 14,871,901.15 on the counter-claim.

20. When the award was set aside by this Honourable Court, the court did not direct that the arbitration be heard by a different arbitrator. After the court's decision on 24 April 2021, the Applicant took no action to progress the dispute. The Respondent, vide its letter dated 28 September 2023 wrote to the Arbitrator informing him of the court's decision and requesting for date for directions in the matter.

21. The Arbitrator fixed the matter for mention on two occasions; however, the Applicant failed to attend on both occasions. The Respondent, through its advocates, wrote to the Applicant's advocates noting there was a frustration from the Applicant to progress the matter. The Applicant moved this court for interpretation which was resolved via ruling of the court delivered on 26 September 2024. Even then, the applicant has not taken any steps towards progressing the arbitration.

22.It is the respondent's position that the applicant has intentionally frustrated the resolution of the dispute since the award was set aside on 24 April 2021 and the application is a further attempt to frustrate the respondent.

23.The works were construction of hotel and apartments. At the time of suspension of the works, the respondent had already spent Kshs. 494,951,997.86 out of the contract price of Kshs. 705,000,000 towards the project. The defendant had taken a loan facility from National Bank Limited to finance the project ; the loan continues to accrue interest.

24.As a result of the failure to complete the works by the applicant, the respondent is getting no return on the invested capital and further delay in completion will endanger the entire property as the defendant will have no funds to repay the financier and it may lead to foreclosure on the property by the financier.

25.Further delay in completion continues to endanger the entire works due to damage by weather and continued costs of maintenance without a return. This will cause the respondent irreparable loss and damage. In any case, the applicant's claim is a liquidated claim, and the completion of the project will not cause the plaintiff any loss or damage.

26. In fact, it is in the interest of all parties involved that the construction be completed at the earliest opportunity to enable the defendant access return from the capital already invested and also to secure the property against any foreclosure by the financier. The defendant has been in possession of the site since 2015 when the plaintiff abandoned the works and vacated the site.

27. Apart from the replying affidavit, the respondent also filed a preliminary objection dated 2 December 2024 in which it is contended that since the dispute was referred back to arbitration and there is an existing tribunal, this Honourable Court has no jurisdiction to determine the applicant's application for interim reliefs.

28. A preliminary objection would ordinarily be determined at the earliest opportunity and the respondent's objection is no exception. However, to the extent that the objection is intricately intertwined with the question on the appointment of an arbitrator I will deal with the two issues together.

29. It is not in dispute that when this Honourable Court set aside the initial award and referred the dispute between the parties back to the arbitrator, the parties went back to the same arbitrator whose award had been set aside. Going by the affidavit of Karanja, some preliminary steps were taken before the applicant came back to court

in the instant application. The pertinent paragraphs in Karanja's affidavit read as follows:

“15. After the court's decision on 24th April 2021, the Applicant took no action to progress the dispute. The Respondent, vide letter dated 28th September 2023 wrote to the Arbitrator informing him of the court's decision and requesting for date for directions in the matter.

16. The Arbitrator fixed the matter for mention on two occasions, however, the Applicant failed to attend. The Respondent, through its advocates, wrote to the Applicant's advocates noting there was a frustration from the Applicant to progress the matter.

17. After the said letter the Applicant attended the next mention before the Arbitrator but disputed the Arbitrator's interpretation of the ruling of 24th April 2021. The Applicant moved this court for interpretation which was resolved via ruling of the court delivered on 26th September 2024.”

30. These facts have not been disputed and, of course they couldn't because according to the ruling delivered by Ng'ang'ar, J. on 26 September 2024, parties had taken some preliminary steps towards arbitration in the wake of the court's decision referring the dispute back to arbitration.

31. Of worth noting, the subsequent arbitration proceedings were started before the same arbitrator who had conducted the initial arbitration proceedings. This is reflected in paragraph 3 of the learned judge's ruling where he noted as follows:

“3. The parties appeared before Arch. M.F. Mutunga for directions pursuant to the decision of Hon. Lady Justice D. O. Chepkwony. However, a disagreement arose between the parties on interpretation of the ruling. That the Applicant was of the view that the court ordered a fresh arbitration on the entire dispute while the Respondent was of the view that the Arbitrator was directed to consider the documents that had been disregarded and come up with a fresh award. There being no consensus, the Arbitrator referred the parties back to this court for interpretation of the terms of the ruling.”

32. Contrary to the applicant's allegations, the dispute was not about the appointment of another arbitrator and, it is also not true, as the applicant alleged, that the arbitration proceedings had not commenced. It is clear from the learned judge's ruling that it is in fact the arbitrator who was seized of the dispute that referred the parties back to this court for interpretation of the ruling.

33. While acquitting himself on the application before him, the learned judge made orders as follows:

“13. Accordingly, the orders of this court are as follows: -

(a) The Arbitral award published by Arch. Julius M. F. Mutunga on 6th April 2020 is set aside in its entirety.

(b) The dispute is referred back to the Arbitrator for fresh consideration.

(c) Parties to agree on when the fresh consideration of the award should be done.

(d) Each party shall bear its own costs.”

34. A few home truths critical to the determination of the applicant’s application are, first, that at the time the instant application was filed, the arbitrator was seized of jurisdiction of the dispute between the parties. Secondly, the arbitration proceedings having commenced, the question of appointment of an arbitrator need not arise. According to the rulings of both Chepkwony, J. and Ng’arng’ar J. it was never suggested that an arbitrator, different from the one who previously heard the parties and made the impeached award was going to be appointed.

35. As a matter of fact, according to the ruling of Ng’arng’ar, J. the question of appointment of a new arbitrator was never before him for determination. The learned judge framed the only issue in the application as follows:

“That the Applicant was of the view that the court ordered a fresh arbitration on the entire dispute while the Respondent was of the view that the Arbitrator was directed to consider the documents that had been disregarded and come up with a fresh award.”

36. Having found that the arbitrator is seized of jurisdiction of the dispute between the parties, the question that arises is whether this court has jurisdiction to entertain the applicant’s application. To the extent that the applicant is seeking interim relief pending the hearing and determination of the dispute before the arbitrator, the answer is in the affirmative; the court has the requisite jurisdiction. This is so because section 7 of the Arbitration Act, cap. 49 says so. It reads 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.

37. This provision has been adopted, word for word, from article 9 of the United Nations Convention on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.

38. Thus, the court can entertain the application for interim relief either before or during the arbitration proceedings and, doing so is not an exercise of excessive jurisdiction by the court or a negation of the

arbitration clause. Needless to say, whether the applicant in this case has made out a case for interim relief is a different question altogether

39. According to **Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kroll** in their book, **Comparative International Commercial Arbitration at page 586**, interim, conservatory or provisional measures are an important remedy and a tool in international litigation and arbitration. The relief sought in the principal action is frequently insufficient to protect effectively the rights or interests of the alleged innocent party.

40. Due to the time gap between commencement of the proceedings and the substantive hearing, the subject matter or necessary evidence may disappear; by the time the final relief is to be granted irreparable and non-compensatory harm may occur. One party may frustrate the rights of the other party and make enforcement impossible by dissipating or placing beyond reach assets or the subject matter in issue.

41. In these situations, one of the parties may seek to protect its rights or property by some appropriate interim measures. The authors quoted the European Court of Justice in **Van Uden Maritime BV, t/a Van Uden Africa Line vs Kommanditgesellschaft in Firma Deco-Line (1998) ECR 1 7091 at page 7133** para 33 where the court held that interim measures are intended to preserve factual or legal situation so

as to safeguard rights the recognition of which is sought from the court having jurisdiction as to the substance of the case. The effect of such measures is to distribute the risk for the duration of the main action between the parties, shifting it from the party applying for interim measures to the other party.

42. And in the **United States Third Circuit Court of Appeals in Blumenthal versus Merrill Lynch 910F2d1032** it was held:

“...the pro-arbitration policies reflected in the Supreme Court decisions are furthered, not weakened, by a rule permitting a district court to preserve the meaningfulness of the arbitration through a preliminary injunction. Arbitration can become a hollow formality if parties are able to alter irreversibly the status quo before the arbitrators are able to render a decision in the dispute. A district court must ensure that the parties get what they bargained for-a meaningful arbitration of the dispute...”

43. According to Comparative International Commercial Arbitration (supra) at page 616, despite the power of tribunals to order interim and conservatory measures, parties often apply to state courts for interim measures.

44. The reasons for this are that the tribunal may not yet have been composed or it may lack the requisite power; urgent relief may be required and the tribunal cannot be constituted quickly; an application

without the improvement of the respondent may be essential to prevent avoidance of the relief sought; effective authority may be required from a national court within whose jurisdiction the party against whom the relief is sought his resident; and, the public nature of the interim measures procedures in national courts may assist the position of the party seeking the relief. Of course, this list is not exhaustive because of the peculiarity of circumstances of each individual case.

45. Back home, Nyamu, JA. explained the application of section 7 of the Arbitration Act in **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others (2010) eKLR** albeit in an application under Rule 5(b) of the Court of Appeal Rules. Omolo JA and Waki, JA were of the opinion that the Justice Nyamu's exposition of the law on arbitration ought to have waited the hearing of the main appeal; however, they did not disagree with what Justice Nyamu postulated as the correct position of the law on the issue at hand.

46. In summary, the learned judge faulted the High Court for denying the applicant interim measures ostensibly because the application fell short of the threshold in **Giella vs Cassman Brown (1973) EA 358** on grant of interim injunctions. The learned judge held:

“With great respect to the superior court, although the right of intervention was specified in section 7 and the limit of

intervention defined in the section, what happened is that the court misapprehended its role, declined to grant the interim measure by applying line, hook and sinker the civil procedure preconditions for the grant of interlocutory injunctions as laid down in the celebrated case of Giella vs Cassman Brown (1973) EA 358 and also delved into the rights of parties whereas under the provisions of section 7, there was no suit pending before it for determination because the interim measure of protection was being sought before the commencement of an intended arbitration.”

47. While discussing the application of section 7 of the Act, the learned judge stated, *inter alia*, this provision of the law permitted interventions in arbitrations by the High Court to give interim measures of protection. He faulted the High Court for delving into the merits of the dispute because that was tantamount to usurpation of the jurisdiction of the arbitrator which, in itself was contrary to section 17 of the Arbitration Act. To the extent that the court fell into this error, the learned judge continued:

“This explains why I must not fail to invoke this power to strike out the application and to set aside the superior court ruling and in its place give the interim measure of protection in terms of section 7 of the Arbitration Act and at the same time direct the

parties to have recourse to the Arbitral process within a reasonable time as contemplated in sections 7 and 17 of the Arbitration Act. By dealing with the matter contrary to sections 7 and 17 of the Arbitration Act the superior court clearly lacked jurisdiction and therefore its decision constituted a nullity.”

48. As to when and why the court would intervene in arbitrations, the learned judge noted:

“On the facts before us, no arbitral tribunal had been established hence the invocation of section 7 of the Arbitration Act by one of the parties. It takes time to establish an arbitral tribunal, and during the time between the arising of the dispute and the tribunal's establishment vital evidence or assets may disappear unless a national court (in our case, the High Court) is urgently asked to intervene. Moreover even where an arbitral tribunal has the power to issue interim measures such powers are generally restricted to the parties involved in the arbitration itself. Thus, under the Model Law system an arbitral tribunal may only order any party to take such interim measures of protection as the arbitral tribunal may consider necessary. On the other hand a national court would not necessarily be restricted to the parties when giving relief for example a temporary order attaching a debt due from a third party. 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.”

49. And as to what matters the court ought to consider in determining the question whether interim measures should be granted, the learned judge held as follows:

“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?”*

50. In discouraging the courts from considering the merits of the dispute, the learned judge held:

“In the matter before us, the court went on to make orders which undermined the arbitration and the outcome of the arbitration contrary to section 17 of the Arbitration Act. A court of law when asked to issue interim measures of protection must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration. This point came up in the famous English arbitration case of Channel Tunnel Group Limited vs Balfour Beatty Construction Ltd (1993) AC334 where the English Court rendered itself as follows:-

“There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made and not to take out of the hands of the arbitrators (or other decision makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter considerations must prevail ... If the court now itself orders an

interlocutory mandatory injunction, there will be very little left for the arbitrators to decide."

51. Turning back to the applicant's application, the applicant has sworn that

"the status quo of the Project site as jointly ascertained by the parties and the then Arbitral Tribunal on 13th and 14th September, 2019" should be maintained as the interim measure.

52. I have had opportunity to consider the report by the arbitrator on the status of the site as 13 September 2019. A copy of the report has been exhibited to the affidavit of Karanja and it reads, in part, as follows:

"RECORD OF SITE VISIT AT BANDARI MOMBASA on 13th September, 2019

Further to my Orders for Direction No. 5 issued on 28th August, 2019, and request by the parties during the Hearing held on 21st August, 2019, I now record the following:-

1. The parties conducted a Site visit on the 13th September, 2019 from 9:30am to 6:35 pm.

2. That during the inspection the scope of the Builders Works on disputed quantities was assessed and agreed upon by the parties under the supervision of the Tribunal.

3. The agreed scope and quantities was recorded by the parties for reconciliation.

4. That the adjustments reflected both additional (sic) and omissions on either quantities of the Contractor and also those by the Respondent.

5. That there was a day watchman and it was reported there was a night watchman in addition to a supervisor

6. The grounds were covered with grass and bushes as per attached Site photos

7. The Contractor reports to the Tribunal he was having the following items in his yard in Nairobi.

a) 2 standby Generators

b) Timber panels

c) Tiles

8. Materials on Site

a) Concrete railings 54 no.

b) Vent blocks 500pcs

c) Perforated drain covers 62 no”

53. Against this background, I am unable to understand the applicant's apprehension that the scope of its works as at the time it demobilised its equipment and abandoned the site may not be ascertained. Of course, it is not in dispute that any claim by the applicant against the respondent would necessarily be based on the works certified by the

architect as complete and, no doubt, the applicant's claim of Kshs. 200,000,000/= is for what, in its view, due on the works completed.

54. Certainly, it was, in part, for this reason that the arbitrator and the parties visited the site because according to the report, among other things, the team established the scope of the applicant's work. The team noted, inter alia, that *"during the inspection the scope of the Builders Works on disputed quantities was assessed and agreed upon by the parties under the supervision of the Tribunal"*.

55. If the case is as represented in the arbitrator's report, there is no danger that any further developments on the property either by the applicant, or any other contractor, for that matter, would alter, extinguish or dissipate the subject matter as to render the arbitral proceedings otiose or futile.

56. Balancing the interests of the parties, I note that the respondent's deposition that it borrowed a loan from National Bank of Kenya out of which half a billion Kenya Shillings has been sunk in the project has not been controverted. The loan continues to accrue interest; it would be difficult for a stalled project to generate any income out of which the respondent had projected to settle the debt due to the bank.

57. It must be remembered that, subject to what the arbitrator may decide, any loss arising from the stalled project will fall on the losing party at the conclusion of the arbitration proceedings. Irrespective of which

party may be adjudged to bear this burden, it is prudent to mitigate the inevitable loss or damage that may arise. This is why interim measures whose net effect is to expose the project to further waste would be detrimental to either of the parties.

58. In the final analysis, although it is trite that the court can and should in the right case provide reinforcement for the arbitral process by granting interim relief, I am quite satisfied that the applicant's case is not such a case, where interim relief should be granted. In short, interim measures are not necessary. Accordingly, I find no merit in the applicant's application. It is hereby dismissed with costs to the respondent.

Signed, dated and delivered on 10 April 2026

Ngaah Jairus
JUDGE