**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA AT MOMBASA**
**COMMERCIAL, TAX & ADMIRALTY DIVISION**
**CIVIL SUIT NO. E074 OF 2024 (CONSOLIDATED WITH CIVIL SUIT NO. E075 OF 2024)**

**REPLAY CAPITAL……..…1ST PLAINTIFF**
**STEEL MAKERS LTD……...…2ND PLAINTIFF**

**-VERSUS-**

**DIAMOND TRUST BANK KENYA LIMITED……1ST DEFENDANT**
**KOLLURI VENKATA KAMASTRY……..…2ND DEFENDANT**

## RULING

1. This suit comprises two consolidated suits initially filed separately by each of the plaintiffs against the defendants; that is, the two defendants are common in the two suits. The suits were consolidated because it is common ground that they are based, more or less, on the same facts and the applications filed in the two suits by both the plaintiffs and the defendants seek similar prayers. A determination of any particular application in one suit would be the determination of a similar application in the other suit, hence the consolidation.
2. Out of convenience, I will refer more to the pleadings and affidavits filed in High Court Civil Case No. E75 of 2024. In this particular case, there are two applications; the first is the motion dated 20 December 2024 in which the 1st plaintiff (which I will henceforth refer to as simply "the plaintiff") seeks the following orders:

*"2. That an injunction be issued against the Defendants whether by themselves, their servants, agents, advocates, assigns or or manager of the nominees or otherwise howsoever from taking any steps as receiver Deformed Iron Bar and Steel Angle stocks which do not belong to the Plaintiff, a fact that the First Defendant accepted and acknowledged in the Replay Agreement signed on the 19th October 2022 pending the hearing and determination of this application inter partes*.

*3.That an injunction be issued to restrain the First defendant form breaching the terms of the Replay Agreement dated 19 October 2022 pending the hearing and determination of this application inter partes.*

*4. That an injunction be issued against the Defendants whether by themselves, their servants, agents, advocates, assigns or nominees or otherwise howsoever from taking any steps as receiver or manager of the Deformed Iron Bar and Steel Angle stocks which do not belong to the Plaintiff, a fact that the First Defendant accepted and acknowledged in the Replay Agreement signed on the 19th October 2022 pending the hearing and determination of the reference to arbitration*.

*5.That an injunction be issued to restrain the First defendant form breaching the terms of the Replay Agreement dated 19th*

***October 2022 pending the hearing and determination of the reference to arbitration."***

3. The application is based on section 7(1) of the Arbitration Act, 1995 and supported by the affidavit of Nayen Kavia who has sworn that he is the duly authorised representative of the Plaintiff; the company is incorporated in Mauritius under Registration Number 143519AC.
4. According to Kavia, on 23 August 2024, Diamond Trust Bank Kenya Limited (which I shall hereinafter refer to as "the bank" or "the 1st defendant"), the 1st defendant, allegedly appointed Kolluri Venkata Subbaraya Kamasastry as a Receiver and Manager of the whole or substantially the whole of the property of Steelmakers Limited (or SML), the 2nd plaintiff. SML has maintained that the said appointment is wrongful and that the appointment is only intended to wrongfully take possession of and deal with stocks that do not belong to SML; a fact that is acknowledged by the 1st defendant itself.
5. It is alleged that in a demonstration of malice, the advertisement for the appointment of the receiver has not identified the appointing authority or the basis on which such the appointment was made. That notwithstanding, the 1st defendant had, on 19 October 2022, entered into a Debt Settlement Agreement (or DSA) with the plaintiff following a restructuring of the facilities availed to SML. Simultaneously with this

agreement, the 1st defendant entered into an agreement with the plaintiff ('The Replay Agreement') on the 19 October 2022.

6. In the Replay agreement, the 1st defendant acknowledged that it did not have any interest in the Deformed Iron Bar and Steel Angle stocks.
7. Subsequently, a dispute arose between the parties as to which of the two, SML or the 1st defendant was in breach of the Debt Settlement Agreement, following which the 1st defendant demanded the entire sum provided for under the Debt Settlement Agreement. The demand is alleged to have been in breach of that agreement.
8. Since August 2024, the 1st defendant and SML have been engaged in discussions to resolve the dispute between them and have sought what, in the plaintiff's opinion, is a wrongful receivership, lifted; the discussions have not been fruitful. Similarly, negotiations on the ownership of steel stocks have not been successful.
9. According to the plaintiff, it appears from the conduct of the defendants that the defendants' only interest in the appointment of the receiver over SML's property is the Deformed Iron Bar and Steel Angle stocks which do not belong to SML. The 1st defendant accepted and acknowledged in the Replay Agreement that these stocks belonged to the plaintiff. It is the plaintiff's position that the 1st defendant is using the excuse of 'receivership' in order to orchestrate or sanitize an alleged fraudulent sale

of the stocks to another party called, Bespoke Management Consultancy Limited.

10. By this application, the plaintiff has invoked the dispute resolution mechanism in Clause 4 of the Debt Settlement Agreement and it is intended that a Tribunal of arbitrators be appointed by the parties to resolve this dispute. Whilst the dispute is pending, it is imperative that that this Honourable Court does grant interim measures of protection as sought. It is on this basis that the plaintiff seeks an interim measure of relief and protection pending arbitration.

11. Going by the prayers in its application, the plaintiff must have meant the Replay Agreement and not the Debt Settlement Agreement. It is in clause 4 of the Replay Agreement that the arbitration agreement is captured. Nonetheless, for the sake of the 2nd plaintiff, a similar clause appears in the Debt Settlement Agreement as clause 20.

12. The defendants did not reply to the application; however, the 1st defendant filed its own application dated 17 January 2025. This is the second application before court and is by way of a motion, expressed to be brought under article 159 of the Constitution, section 7(1) of the Arbitration Act, Rule 2 and 11 of the Arbitration Rules, section 1A, 1B and 3A of the Civil Procedure Act, cap. 21 and order 2 rule 15; order 40 Rules 7 and 10; and Order 51 Rules 1 & 15 of the Civil Procedure Rules. The application seeks the following orders:

***"1. This Honourable Court do set aside, discharge and/or vacate the ex parte orders issued by this Honourable Court on 23rd December 2024, on the grounds that the same was made ex parte without disclosing all material facts and was otherwise based on misrepresentation of facts and is an abuse of the court process.***

***2. This Honourable Court do strike out the Plaintiff's Application dated 20th December 2024.***

***3. Pending the inter partes hearing of this application, it be ordered that the status quo prevailing as of 22nd December 2024 be maintained.***

***4. In the Alternative to the prayers above, this Honourable Court do order the Plaintiff to pay security for costs for the injunction orders issued in its favour by this Honourable Court.***

***5. This Honourable Court do(sic)order the preservation and inspection of the Deformed Iron Bar and Steel Angle Stocks claimed by the Plaintiff for the purpose of taking an inventory and for the Plaintiff and or its agents to account for the status of the said Stocks pending the hearing and determination of the instant Application and or the Plaintiff's Application dated 20th December 2024".***

13. The application is supported by the affidavits of Stephen Kodumbe and Anthony Maina.

14. Kodumbe has sworn that he is the Company Secretary and Director Legal & Debt Recovery for Diamond Trust Bank Kenya Limited. He has also sworn that he is aware that between the years 2010 and 2022, the 1st defendant advanced various credit facilities to SML, which were secured by various securities created in favour of the Bank, including charges and an all-encompassing fixed and floating debenture dated 24 March 2010 and supplemental debentures dated 17 February 2011, 23 November 2011, 20 November 2012, 28 October 2014, 27 July 2015 and 9 January 2019.

15. Kodumbe has been advised by the 1st defendant's advocates and he verily believes that SML defaulted in its repayment obligations. SML thereafter approached the 1st defendant with Replay Trading Limited, represented by one Nayen Kavia, requesting for a restructure of SML's debt exposure and for the grant of additional facilities. Mr Nayen Kavia was represented as an investment banker and a restructuring expert with extensive experience in restructuring debt.

*16.* The 1st defendant's records show that Replay Trading Limited, through Mr. Nayen Kavia, advised, *inter alia,* that for the restructuring to work, there should be a moratorium on the Deformed Iron Bar and Steel Angle Stocks stored at a bonded warehouse described as warehouse number 430, *"to preclude the applicant's enforcement action"*.

17. Kodumbe has also been advised by the 1st defendant's advocates, which advice he verily believes to be true, that Mr. Nayen Kavia came up with a restructuring plan aimed at providing working capital for SML worth USD 9 Million to enable SML to operate and to continue servicing its debt to the 1st defendant.

18. On 19 November 2019, Mr. Nayen Kavia sent an email to the 1st defendant setting out the terms of the restructuring plan; in particular, he set out a plan for the restructuring of SML via stock financing. The plan entailed the pledging of the SML stock found in bonded warehouse number 430 for the purposes of SML receiving a facility by any bank or financier, secured by an undertaking or guarantee issued by the Bank.

19. In the meantime, a third-party buyer was to be procured for the Stock to ensure that the facility advanced under the pledge was paid to redeem the pledge, without calling upon the undertaking or guarantee issued by the 1st defendant. Agri Commodities and Finance FZ-LLC ("ACF") was introduced by Nayen Kavia or Replay Trading Limited to the Bank and SML as the party to whom the Stock was to be pledged.

20. ACF was to thereafter sell the Stock to Replay Trading Limited. If Replay Trading Limited were unable to pay ACF, the payment undertaking which would be issued by the 1st defendant would kick in and the Bank would be called upon to make payment, within 30 days. The Bank would use the period to arrange for the payment with the support of

Replay Trading Limited and Mr. Nayen Kavia. Thereafter, the 1st defendant implemented the restructuring plan of Mr. Nayen Kavia.

21. In 2020, Replay Trading Limited had not purchased the Stock from ACF, hence Nayen Kavia proposed an assignment of ACF's rights under the Stock Pledge and the Stock Sale Agreement. As such, Mr. Nayen Kavia introduced to the 1st defendant an entity known as Shield CE Fund SPC acting on behalf of its segregated portfolio, Pesa Capital SP ("Pesa Capital").

22. ACF and Pesa Capital executed an agreement assigning ACF's rights under the Pledge Agreement and the Stock Sale Agreement and issued a Notice of Assignment dated 18 March 2020 to the 1st defendant and Replay Trading Limited informing them of the same. The 1st defendant issued an Acknowledgement of Assignment in July 2020 following advice issued to it by Mr. Nayen Kavia.

23. As of 12 August 2020, Replay Trading Limited had not purchased the Stock and Mr. Nayen Kavia was unable to procure a buyer for the Stock. As such, Mr. Nayen Kavia came up with a restructuring plan for implementation by the 1st defendant and SML. SML defaulted on its obligations under the Pledge Agreement, prompting Pesa Capital to issue a Notice of Default and Acceleration on 20 August 2020. On the failure by SML to correct its default, Pesa Capital issued a Notice of Enforcement dated 26 August 2020.

24. On 27 August 2020, Pesa Capital issued a request for payment to Replay Trading Limited as per the terms of the Stock Sale Agreement. However, contrary to the restructuring plan, Replay Trading Limited failed to pay USD 9 million for the stock as had been agreed to in the Stock Sale Agreement.

25. Mr. Nayen Kavia thereafter came up with a plan for the payment which entailed the issuance of a Letter of Credit by the 1st defendant, which secured finances that were used to pay Pesa Capital.

26. In 2022, under Mr. Nayen Kavia's advice, SML and the 1st defendant signed various agreements, including the Replay Agreement which provided, *inter alia*, that SML was to pay to Replay Capital a structuring fee of USD. 1,675,000.00 plus applicable VAT on or before the two (2) year anniversary of the date of the agreement. Further, the agreement indemnified and "held Replay Capital harmless" on demand for any loss suffered as a result of any amount due from SML to Replay under Clause 2.2 of the DSA not being paid on the due date.

27. Between 2020 and 2022, various Letters of Credit were issued by the Bank as security for Replay Trading Limited to receive financing, with the final financing being issued by an entity known as Ulrinamix Pty Ltd.

28. To get funds to fulfil payments under the 2022 Letter of Credit, the 1st defendant advanced a facility to Bespoke Management Consultancy Limited and used the said funds to pay the USD. 14.170 million.

29. The beneficial ownership of the Stock had reverted back to SML in 2023. SML is said to have defaulted in its repayment obligations under the DSA, failing to make the first two payments of USD 2,800,000.00 on 28 February 2023 and 29 February 2024, prompting the issuance of various demand notices to it. Upon SML's failure to remedy its breach, the Bank appointed Mr. Kolluri Venkata Subbaray Kamasastry ("the Receiver") as the receiver and manager over all of the assets of SML, including the Stock.

30. Kodumbe has also sworn that during the negotiations by the parties in 2024, SML admitted its indebtedness to the 1st defendant while Replay Capital claimed ownership of the Stock, a position which was opposed by the 1st defendant. The 1st defendant made SML and Replay Capital aware that the license for warehouse number 430, where the Stock was held, was to expire on 30 December 2024.

31. SML and Replay Capital are alleged to have colluded and denied the 1st defendant and the Receiver access to the bonded warehouse to take the inventory of the stock. According to the 1st defendant access to the stock by the parties together with the Kenya Revenue Authority's customs department ought not to have been unduly withheld. Further, knowing that the license for the bonded warehouse number 430 was to expire on 30 December 2024, placing the Stock at the risk of being auctioned by Kenya Revenue Authority, Replay Capital instituted this suit and an

application upon which an order for injunction was granted. According to the applicant, the injunctive orders were obtained by Replay Capital through non-disclosure of material facts and the misrepresented the facts of the transaction regarding the Stock and are, therefore, illegally obtained.

32. It is the applicant's position that the restructuring plan by Mr. Nayen Kavia failed to work leading to losses being incurred by the 1st defendant. As such, the 1st defendant intends to counterclaim against Replay Capital and SML for USD.86.5 million being the initial amount of USD.78.5 million owing from SML as at the time of the restructure plus USD.8 million which was thereafter advanced to SML as working capital to enable them to generate income for, *inter alia*, servicing their obligation to the 1st respondent. The 1st defendant has, therefore, sought that its application be allowed.

33. The dispute sought to be lodged before the arbitrator arises from the Replay Agreement clause 2.6.1 of which provided that a stock of steel in a bonded warehouse belonged to the applicant. The clause reads as follows:

> ***"It is irrevocably and unconditionally acknowledged and agreed by the Parties that the goods specified in Annexure A (Replay Goods) hereto, held by the Borrower in a bonded warehouse (Bonded Warehouse #430), are owned (both legally and***

***beneficially) by Replay (which purchased them from PESA pursuant to the enforcement by PESA of a pledge interest over such goods to secure sums outstanding under the Facility Agreement (PESA having purchased the loan claim of ACF against the Borrower secured by such pledge)), and are being held by the Borrower to Replay's sole and exclusive order in such warehouse."***

34. It is not denied that parties to the agreement agreed that in the event of a dispute, the dispute would be resolved by an arbitrator. The relevant clause in the agreement is clause 4 thereof which provides as follows:

***"4. GOVERNING LAW AND ARBITRATION***

***4.1. This Agreement is governed by and shall be construed in accordance with Kenyan law.***

***4.2. Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.***

***4.3. The number of arbitrators shall be three.***

***4.4. The seat, or legal place, of arbitration shall be Nairobi, Kenya.***

***4.5. The language to be used in the arbitral proceedings shall be English.***

***4.6. Any arbitral proceedings under this Agreement shall be consolidated with any arbitral impending or subsisting proceedings under the DSA".***

35. Against this background, I take it that the defendants are not contesting the jurisdiction of the arbitrator to hear and determine the dispute over ownership of the steel stock and such other related issues that may arise in the arbitration proceedings. As a matter of fact, they have stated in this suit and in this Honourable Court Insolvency Clause No. 27 of 2024 that they intend to lodge a counter-claim against the plaintiff, presumably, in the arbitration proceedings. In paragraph 27 of the affidavit in support of Kodumbe, it has been sworn as follows:

***"27.1 am also advised by the Applicant's Advocates and is aware that the restructuring plan by Mr. Nayen Kavia failed to work leading to losses being incurred by the Bank. As such, the Bank intends to counterclaim against Replay Capital and SML for USD.86.5 million being the initial amount of USD.78.5 million owing from SML as at the time of the restructure plus USD.8 million which was thereafter advanced to SML as working capital to enable them to generate income for, inter alia, servicing their obligation to the Bank."***

36. In any event, following the arbitration agreement embedded in both the Replay Agreement and the DSA, there would be no basis of disputing the jurisdiction of the arbitration subject, of course, to a determination of this question by the arbitrator under the principle of Kompetenz-Kompetenz, in the event a question as to his jurisdiction arises before him.

37. While citing **Comparative International Commercial Arbitration**, **Julian D.M. Lew, Loukas A Mistelis and Stefan M. Kroll (at pages 99,100),** I held in Insolvency Cause No. 27 of 2024, which is related to this matter, that arbitration agreement is evidence enough of the consent of the parties to submit their disputes to arbitration. Beyond that, the agreement establishes the jurisdiction and authority of the arbitrator or tribunal over that of the courts. By entering into an arbitration agreement, parties express their intention that all disputes between them be referred to and settled by arbitration.

38. In the same spirit, the choice manifests a decision against resolution by the competent state courts. With the acceptance of party autonomy, the level of court intervention is significantly diminished and the general trend has always been towards limiting court intervention to those cases where it is either necessary to support the arbitration process or required by public policy considerations. Judicial, and effectively state, respect for the parties' agreement to arbitrate means that no court proceedings on merit of the dispute can be brought before courts and that all disputes

covered by that agreement are referred to arbitration. (See pages 355, 356).

39. Section 6(1) of the Arbitration Act provides a statutory backing for arbitration as opposed to court proceedings where a matter brought before court is or ought to be subject to arbitration proceedings; it states that:

> ***6. Stay of legal proceedings***
>
> ***(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—***
>
> ***(a)that the arbitration agreement is null and void, inoperative or incapable of being performed; or***
>
> ***(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.***

40. The principle that arbitration is consensual and that courts must give effect to the intention of the parties in arbitration agreement was addressed by the House of Lords in **Fiona Trust & Holding Corp. v. Privalov [2007] UK HL 40**. In this case, owners of vessels entered into charters with eight charterers. The contract provided, *inter alia*, that any dispute arising under this charter would be referred to arbitration. The

owners of the vessels sought to rescind the contracts, saying they had been procured by fraud and they commenced court proceedings for a declaration that the charters had been validly rescinded and that the arbitration agreement was rescinded also. The charterers sought a stay on the proceedings on the basis that the matter should have been arbitrated. A stay was refused at first instance but allowed by the Court of Appeal. The decision of the Court of Appeal was upheld in the House of Lords and the judgment was given by Lord Hoffman, who said:

> ***"[5]. .. arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intend to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen, in particular, are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.***

41. At page 1060, the learned judge continued as follows:

> ***"In my opinion, the construction of an arbitration clause should start from the assumption that the parties, as rational***

***businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same Tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore L.J remarked (at [17]):***

> ***'[I]f any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so '. "***

42. It has been held in **P. Elliot & Co Ltd v. FCC Elliot Construction Ltd, [2012] IEHC 361 (Aug 28, 2012) that** Article 8 of the Model Law directs courts to respect the arbitral process and stay court proceedings not out of deference to arbitration *per se* but rather as an expression of the most basic concept in the law of contract; which is that parties who have mutually exchanged promises for value may, at the suit of each other, be kept to their promises. Where parties promise to arbitrate their disputes, courts should stay their proceedings in favour of arbitration if that promise is proved.

43. The primary question in plaintiff's application and which this Honourable Court should restrict itself to is whether interim measures should be

granted. Section 7 (1) of the Arbitration Act provides for such measures; its states 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.***

44. Nyamu, JA. explained the application of this provision in **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others (2010) eKLR (** a decision relied upon by the plaintiff**)** 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.

45. 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."***

46. 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."***

47. 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."***

48. 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?"***

49. 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."***

50. Turning back to the applicant's application, the Replay Agreement states that the stock of steel belongs to the plaintiff but the 1st defendant, on the other hand, has urged that the beneficial ownership of the stock reverted

back to SML in 2023. And since SML is alleged to have defaulted in its repayment obligations under the DSA, the 1st defendant appointed the 2nd defendant as the receiver and manager over all of the assets of SML, including the Stock. SML has, on its part, also contested the appointment of the 2nd defendant as a receiver manager over its assets. The dispute over his appointment is  matter that should be subject to arbitration.

51. Thus, the stock of steel and other SML's property that are exposed to disposal by the 2nd defendant are at the centre of the dispute between or amongst the parties and, for this reason, they form the substratum of the anticipated arbitration proceedings such that without this stock no effective arbitral award can be made. In these circumstances, it is necessary these assets be preserved pending the determination of arbitration proceedings. And from what I gather, both parties appear to be amenable to this middle ground; in paragraph 11 of the plaint, the plaintiff is categorical that it "*seeks an interim measure of relief and protection pending arbitration*". The 1st defendant, on the other hand, has prayed that the assets be preserved pending the hearing of this application. It would not hurt the 1st respondent if the assets were preserved for a little longer, pending the settlement of the question of their ownership. Speaking of the DSA and the Replay agreements, among other agreements, in the Insolvency Cause No. E027 of 2024, Kodumbe swore as follows:

***"31.Based on the above, I verily believe that there exist genuine, real and substantial disputes among the parties regarding the various debts, and the construction validity and enforceability of the various agreements from which these debts arise thus necessitating investigation by a neutral arbiter in line with rules of natural justice and fair hearing."***

No doubt, ***"a neutral arbiter"*** in these circumstances would be an arbitrator appointed in accordance with the arbitration agreements in those "various agreements".

52. That notwithstanding, I am satisfied that in the circumstances of this case, the Court may grant an injunction or orders to preserve the assets because, first, there is, what in my humble view, an arguable case for the disputes to be referred to arbitration and, second, because there is a real risk that, if the interim measures are not granted, the assets will be disposed of so as to render worthless any award subsequently obtained.

53. I will, therefore, allow the plaintiffs' applications only to the extent that the *status quo* as at 19 October 2022 when the relevant agreements were executed, be maintained pending the hearing and determination of the disputes by the arbitrator. To be precise, subject to any orders that the

arbitrator may deem appropriate to make, none of the parties to the agreements shall interfere with ***the Deformed Iron Bar and Steel Angle stocks*** in any manner that may frustrate the enforcement of the arbitral award.

54. Besides the the Deformed Iron Bar and Steel Angle stocks steel stock, interim measures have been sought in Civil Suit No. E074 of 2024 with respect to what has been described in that suit as:

*"…the whole or substantially the whole of the moveable and immoveable property of the Plaintiff and, in particular, the immovable properties known as Mainland North/ Section V/1077, 1078 and 1079, Subdivision Number*

*2027 (Original number 1948/3) Section V, Mainland North, Mazeras, Kilifi County, Subdivision Number 2028 (Original number 1948/2) Section V, Mainland North, Mazeras, Kilifi County, Mombasa Block*

*XVII/29, Liwatoni Area, Mombasa County and Tile No. Kisumu Municipality/Block 6/58…"*

55. To the extent that these properties are subject to the DSA which, as noted, provides for settlement of disputes arising out of that Agreement through arbitration, the *status quo* prior to 23 August 2024, when the receiver manager was appointed, shall be maintained pending the conclusion of arbitration proceedings. This again, is subject to any order that the

arbitrator or arbitral tribunal may deem appropriate to grant once the arbitration proceedings have been filed.

56. In the same breath, and for reasons I have given, the 1st defendant's applications dated 17 January 2025 are declined to the extent that they are inconsistent with the orders allowing the plaintiffs' applications.

57. Meanwhile, I have not been able to tell from the applicants' affidavits and pleadings whether arbitration proceedings have commenced; in certain instances, their pleadings and depositions suggest that the proceedings are yet to commence yet in other instances, they present the picture that the arbitration is underway.

58. Proceeding on the assumption that the arbitration proceedings parties are yet to commence, parties directed to set in motion the arbitration process within thirty days of the date of this order and, in any event, in line with the arbitration agreements.

59. Parties will bear their respective costs in the respective applications. Orders accordingly.

**Signed, dated and delivered on 10 April 2026**

**Ngaah Jairus**
**JUDGE**