REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 179 OF 2018

GEORGE KYAKA..1STAPPLICANT

DR JOHN JARED ODUOR...2ND APPLICANT

GERALD ODIWUOR KELLY..3RD APPLICANT

JULIUS W KIMANI..4TH APPLICANT

MOSES TANGANGARA..5TH APPLICANT

ZACHARY KIBALIACH...6TH APPLICANT

(Suing in their capacities as Officer Bearers of Kings Outreach Church occupying the respective position of Chair, Vice Chairman, Secretary, Ass. Secretary, Treasurer, and Assistant Treasurer**)**

=VERSUS=

HARRISON CHEGE KARIUKI...1ST RESPONDENT

WATAMU TOURS AND TRAVEL LIMITED..2ND RESPONDENT

ANNE GATHARA T/A GATHAARA J N AND ASSOCIATES ADVOCATES.......3RD RESPONDENT

RULING

1. This suit was initiated as a miscellaneous civil application seeking interim measure of protection in form of an injunctive order under Section 7 of the Arbitration Act, pending the hearing and determination of an arbitral dispute pursuant to an arbitration agreement contained in Clause 16.11 of a land sale agreement executed between Harrison Chege Kariuki (1st defendant) and the Registered Trustees of Kings Outreach Church. It was initiated through a notice of motion dated 16/10/2018. The Applicants sought the following verbatim orders:

> **1. That for reasons to be recorded and on the grounds set out in the certificate of urgency, service of this application be dispensed with and the application herein be certified as urgent and be heard ex-parte at the first instance for the grant of prayers 2 and 3 hereof;**
>
> **2. That pending the hearing and determination of this application and arbitration reference, this honourable court be pleased to issue a temporary injunction against the respondents from in any way interfering with and/or disposing of the property existing in Title Number Land Reference Number 7785/205, Nairobi.**
>
> **2. That the applicants be at liberty to apply for further orders and/or directions as the honourable court may deem fit and just to grant.**
>
> **4. That the costs of the application be borne by the respondents.**

2. The applicants brought the suit in their capacities as office bearers of Kings Outreach Church. It was supported by an affidavit sworn on 16/10/2018 by Bishop Major General (Rtd) George Kyaka. They contended that pursuant to representations made by the 1st and 3rd respondents in the said agreement for sale on the legality of Title Number IR 57100 in which Land Reference Number 1785/205 is

comprised, the applicants deposited a sum of Kshs 20,000,000 onto the bank account of the 2nd respondent as part-payment of the purchase price for the suit property. They further contended that it had subsequently become apparent that the said representations were false and that the vendor was incapable of passing a good title to the applicants. Consequently, they were constrained to rescind the contract and demand a full refund of the deposit paid. It was their case that they had duly rescinded the contract and wanted a refund of the deposit.

3. The applicants further contended that the 1st respondent who was the owner of the suit property had consequently threatened to dispose the suit property. It was the applicants' case that the threat to dispose the suit property was grossly in breach of the contract and they intended to refer the matter to arbitration in accordance with Clause 16 of the sale agreement dated 6/4/2017. It was the applicants' further case that the arbitral reference would be rendered nugatory unless a temporary injunctive relief was granted pending the hearing and determination of the arbitral reference. They contended that they stood to suffer irreparable loss in the absence of an injunctive order.

4. The 3rd respondent initially filed an affidavit opposing the application. She subsequently filed an affidavit on 16/1/2019 withdrawing her earlier replying affidavit. She deposed that she did not wish to oppose the application.

5. The 1st and 2nd respondents opposed the application through a replying affidavit sworn on 7/11/2018 by the 1st respondent. He deposed that he was a director of the 2nd respondent duly authorized to swear the affidavit on his own behalf and on behalf of the 2nd respondent. He admitted that indeed he entered into the material agreement for sale with Trustees of Kings Outreach Church. He stated that he had faithfully observed his obligations under the agreement. He added that the agreement allowed him to retain 10% of the purchase price as liquidated damages in the event that the purchaser failed to comply with the terms of the agreement, including payment of purchase price. He denied acting fraudulently in the transaction and contended that because of the purchasers' unilateral decision to rescind the agreement, the deposit paid by them stood forfeited under the explicit terms of the agreement for sale.

6. The application was canvassed through written submissions. Ms Kimetto, counsel for the applicants, focused on the following two issues: (i) the jurisdiction of the court in this matter and its limitations as provided under the law; and (ii) the threshold for the application for an interim injunction.

7. She submitted that there was a valid arbitration agreement within the meaning of Section 4 of the Arbitration Act. She added that the application was predicated upon the common law doctrine of *lis pendens*. She contended that there was real danger that the 1st defendant would dispose the suit property and render the deposit paid to him unprotected.

8. On the threshold for grant of an interim injunction, counsel submitted that the applicants had satisfied the criteria in **Giella v Cassman Brown & Co Limited [1973] EA 358**. She argued that there was no dispute that the deposit of Kshs 20,000,000 was paid; there was a valid sale agreement; the 3rd defendant had failed to secure the original title; and the land file relating to the suit property was missing. Counsel added that the plaintiff stood to suffer irreparable harm that cannot be adequately compensated by an award of damages because the recipient of the deposit is a shell company. Counsel added that the balance of convenience tilted in favour of the applicants because the defendants had not tendered any evidence to controvert the allegations of gross misrepresentation of material information pertaining to the suit property. She urged the court to grant the orders sought in the application.

9. Mrs Wambugu, counsel for the 1st and 2nd respondents submitted under the following limbs: (i) *prima facie* case with probability of success; (ii) irreparable loss which cannot be compensated by an award of damages; and (iii) balance of convenience. Counsel argued that the applicants had not demonstrated a *prima facie* case against the defendants because it was explicit from Clauses (ix) to (xii) of the sale agreement that the suit purchasers purchased the property with full knowledge of its actual state and conditions and was to take it as it stood at the date of purchase. Secondly, counsel argued that the application was fatally and incurably defective and was not properly before the court because it was brought in violation of the mandatory requirements of rule 2 of the Arbitration Rules which required that an application under Sections 6 and 7 of the Arbitration Act be brought by way of summons in a suit. Reliance was placed on the Court of Appeal decision in **Scope Telematics International Sales Limited v Stoic Company Limited & Another (2017) eKLR** in which the Court of Appeal struck out a similar application and held that the requirements of rule 2 of the Arbitration Rules were mandatory.

10. Counsel for the 1st and 2nd respondents further submitted that the applicants had not demonstrated that they stood to suffer irreparable loss that cannot be indemnified through an award of damages. Counsel argued that equity aids the vigilant and contended that it was the obligation of the applications to confirm that the suit property was fit for the purpose for which they intended to utilize it. Lastly, counsel submitted that the order sought by the applicants could be granted because the applicants were not parties to the material sale agreement. She urged the court to dismiss the application.

11. I have considered the notice of motion together with the rival affidavits and submissions. I have also considered the relevant legal framework and jurisprudence. Two key issues for determination in this application. The first issue is whether, in the absence of a substantive suit, the notice of motion dated 16/10/2018 is properly before the court. The second issue is whether the applicants have satisfied the criteria for grant of an interim measure of protection in the form of an interim injunctive order

12. The first issue is whether, in the absence of a substantive suit, the motion dated 16/10/2019 is properly before the court. The procedure for invoking the court's jurisdiction under Sections 6 and 7 of the Arbitration Act is prescribed by rule 2 of the Arbitration Rules which provides as follows:

> **"Applications under Section 6 and 7 of the Act shall be made by summons in the suit."**

13. In 2017, the Court of Appeal had occasion to interpret the tenor and import of the above legal framework and answer exactly the same question as the one before me. The Court of Appeal rendered itself thus:

> **"It must be borne in mind that the substantive provision that the 1st respondent invoked was Section 7 of the Act. The 1st respondent was seeking an interim measure of protection pending arbitration. The procedure applicable in such**

circumstances is clearly spelt out by rule 2 of the Arbitration Rules 1997. Suffice it to say, that the rule is couched in mandatory terms. Our jurisprudence reflects the position that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or statute, that procedure should be strictly followed”

14. The Court of Appeal while allowing the appeal and dismissing a motion similar to what is before me stated thus :

> **“The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously in overlooking a statutory imperative and the above authorities, the Learned Judge cannot be said to have exercised his discretion properly. There can be no other interpretation of rule 2. The application should have been anchored on a suit.”**

15. Without saying much, jurisprudence abounds that a litigant seeking an interim measure of protection under Section 7 of the Arbitration Act is obligated to comply with the requirements of rule 2 of the Arbitration Rules by bringing a substantive suit and an application therein. The above pronouncement by the Court of Appeal binds this court. I cannot therefore purport to go against it in exercise of my discretion.

16. In light of the above jurisprudence, a stand-alone motion such as the one before me is ill-conceived. The motion before me is bare. It is not anchored on any suit. For this reason, and on account of the above binding jurisprudence, I find that the notice of motion dated 16/10/2018 is fatally and incurably defective. The motion is dismissed on that ground.

17. I will not consider the second issue which relates to the merits of the application because having found that the motion is not properly before the court, my view is that I should spare the purchasers the opportunity to bring and canvass a competent motion should they deem it necessary. I would only say that in the absence of a substantive suit, the applicants have not satisfied the criteria for grant of an interim measure of protection in the form of an interim injunctive order. The applicants or any other party entitled to, are at liberty to initiate appropriate proceedings to seek the relief contemplated herein.

18. My finding on the first issue is that the notice of motion dated 16/10/2018 is fatally and incurably defective and is rejected on that ground. My finding on the second issue is that in the absence of a proper application, the applicants have not satisfied the criteria for grant of an interim measure of protection in the form of an interim injunctive order. The 1st and 2nd respondents shall have costs of the application to be borne by the applicants. Because the 3rd respondent withdrew her response to the motion, there will be no order of costs in relation to her.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF DECEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Kimani Watenga holding brief for Ms Kimetto, Mr Kelly Oduor,

Ms Nyangesa, & Mr Litunda for the Applicants

Ms Odongo holding brief for Mrs Wambugu for the 1st and 2nd Respondents

Ms Gathara - 3rd Defendant

Court Clerk - June Nafula