



**Lake Naivasha Crescent Camp Limited v Wagiciengo Holdings Limited & another;
Bark & Associates Limited Company & another (Intended Defendant) (Environment
& Land Case E38 of 2023) [2024] KEELC 352 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 352 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E38 OF 2023
MAO ODENY, J
JANUARY 31, 2024**

BETWEEN

LAKE NAIVASHA CRESCENT CAMP LIMITED PLAINTIFF

AND

WAGICIENGO HOLDINGS LIMITED 1ST DEFENDANT

ANASTACIA WAIRARA WAGICIENGO 2ND DEFENDANT

AND

BARK & ASSOCIATES LIMITED COMPANY INTENDED DEFENDANT

JAMES ODERA NDONJI INTENDED DEFENDANT

RULING

1. This ruling is in respect of two Notices of Motion dated 6th June, 2023 by the Intended/Defendant/Applicants and 19th October, 2023 by the Plaintiff/Applicant respectively.
2. The Intended Defendants/Applicants by a Notice of Motion dated 6th June 2023 sought the following orders:
 - a. Spent
 - b. That Bark & Associates Limited Company and James Odera Ndonji be granted leave and allowed to join these proceedings as the 3rd Defendant and 4th Defendant respectively.
 - c. That further, leave be granted to the intended Defendants/Applicants to file a Statement of Defense and Counterclaim that will assist in disposing of the matter.
 - d. That the costs of this application be provided for.



3. The application was premised on the grounds enumerated on the face of the motion and supported by the affidavit of James Odera Ndonji, the 4th intended Defendant/Applicant, dated 6th June, 2023 who deponed that they are the owners of the suit properties together with the 1st Applicant, having purchased the same for value from the 1st and 2nd Defendants.
4. He further deponed that they are necessary parties to this suit which will help the Court to effectually and completely adjudicate upon and settle questions involved in this suit. Further that the Plaintiff will not suffer any prejudice if the application is allowed as prayed.

3rd and 4th Intended Defendant/Applicants' Submissions

5. Counsel identified the following issues for determination: whether the applicants should be joined in this suit as Defendants and whether the court can grant leave to the Applicants to file a statement of defense and counterclaim that will assist in disposing this matter.
6. Counsel relied on Order 1, Rule 10(2) and Order 1 Rule 3 of the Civil Procedure Rules and the cases of JMK V MWM & Another [2015] eKLR and Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & Another [2015] eKLR and submitted that the Court has discretion in matters of joinder of parties, and that it is limited to the extent that the party should be a Defendant or Plaintiff, thus the words 'whether as Plaintiff or Defendant.'
7. It was counsel's submission that the Applicants have already stated that they are the beneficial owners of the suit properties having purchased the same for value from the 1st and 2nd Respondents and relied on the case of Joseph Njau Kingori v Robert Maina Chege & 3 others [2002] eKLR.
8. Counsel submitted that no prejudice will be occasioned on the Plaintiff as there will be an opportunity to give evidence on contested issues and urged the court to allow the application as prayed.

Plaintiff's Submissions

9. Counsel for the Plaintiff opposed the application on the ground that a party can only apply to be joined as an interested party and not defendants, That the suit was brought under the [Arbitration Act](#), between parties in the Lease Agreement and the Applicants are not parties hence under the doctrine of privity of contract they have no interest to be defended and that the applicants are not the owners of the property as they purport to be in view of section 24, 25 and 26 of the [Land Registration Act](#).
10. Counsel submitted that the Applicants have not met the threshold for the grant of the orders sought as there is no dispute before the Court for trial as the same will be determined by the Arbitrator as contemplated by the parties in the Lease Agreement.
11. Counsel relied on Section 6 and 7 of the [Arbitration Act](#) and Rule 2 of the Arbitration Rules, 1997 and the cases of Civicon Limited Vs Fuji Electri Co Ltd & Another [2020] eKLR and Paul Omondi Obiero vs Cyton Integrated Project LLP [2022] eKLR.
12. Mr. Manyara argued that vide a ruling dated 23rd October, 2023, the court granted the interim measure of protection pending arbitration as such the substance of the proceeding as contemplated under Section 7 of the [Arbitration Act](#) was determined at the pronouncement of the Honourable Court, hence there is no suit pending before the court.
13. Counsel submitted that the application should fail because of privity of contract. He submitted that the Applicants are not parties to the Lease Agreement dated 2nd December, 2023 which lease agreement provided for the dispute between the parties to be referred to Arbitration. Counsel questioned the



- basis that the Applicants should come to claim rights and/or interests that are not provided by the lease agreement.
14. Counsel further relied on the case of *Mark Otanga Otiende vs Dennis Oduor Aduol* [2021] eKLR and submitted that parties can not enjoy or claim rights from contracts they are not parties to and urged the court to dismiss the application.
 15. The second application is by the plaintiff dated 19th October, 2023 seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this application, the Honourable Court be pleased to issue an interim injunction against the 1st and 2nd Defendants/Respondents jointly and severally restraining themselves, their agents (particularly James Odera Ndonji & Bark Associates Ltd), servants, employees and/or any other person or entity whomsoever and however claiming on their behalf from levying distress for rent and/or in any manner interfering with the quiet and peaceful possession of all that parcel of land known as Land Reference Number 396/9 and 396/10 situate at Naivasha within Nakuru County.
 - a. That pending the hearing and determination of the Intended Arbitration, the Honourable Court be pleased to issue an interim injunction against the 1st and 2nd Defendants/Respondents jointly and severally restraining themselves, their agents (particularly James Odera Ndonji & Bark Associates Ltd), servants, employees and/or any other person or entity whomsoever and however claiming on their behalf from levying distress for rent and/or in any manner interfering with the quiet and peaceful possession of all that parcel of land known as Land Reference Number 396/9 and 396/10 situate at Naivasha within Nakuru County.
 - b. That the Honourable court be pleased to allow the Plaintiff/Applicant to deposit all rent arrears of Ksh.1,500,000/= and all future rent as contemplated in the Leased Agreement dated 2nd December, 2011 into Court pending the hearing and determination of the Intended Arbitration.
 - c. That the Honourable Court do issue such other orders as it deems fit and necessary in the circumstances.
 - d. That the Defendants/Respondents do pay the costs of the application.
 16. The application was supported by the annexed affidavit of Samuel Warugu Kimotho, a director of the Plaintiff herein, who deponed that on 2nd December, 2011, the Plaintiff entered into a lease agreement with the 1st and 2nd Defendant and who fully observed the terms of the lease agreement for payment of quarterly rent which has been paid for both for the 1st and 2nd quarter for the year 2023: the 2nd quarter ended in June.
 17. He deposed that the Plaintiff has not paid rent for the 3rd and 4th Quarter of the year amounting to Ksh.1,500,000/- and the default in payment has been occasioned by circumstances created by the Defendant/Respondent and its agents James Odera Ndonji and Bark Associates Limited as there is confusion as to who is the owner of the suit premises and the Landlord of the Plaintiff.
 18. The 1st and 2nd Defendants also filed a replying affidavit sworn by Anastacia Wairara Wagiciengo on 14th November 2023 stating that the Plaintiff entered into a lease agreement with them over the suit



property and they later sold the property to third parties, James Odera Ndonji and Bark Associates Limited through a sale agreement dated 10th January, 2023.

19. She deponed that through the firm of S.K Oloo & CO, they wrote a letter to the Plaintiff's Managing Director on 3rd May, 2023 informing them of the notice of change of ownership and that James Odera Ndonji and Bark Associates Limited are the beneficial owners hence the assertion that James Odera Ndonji & Bark and Associates are strangers are untrue as they are now the beneficial owners having purchased the same.

Plaintiff's Submissions

20. Counsel submitted that the Plaintiff to be allowed to deposit the rent due from it as per the Lease Agreement dated 2nd December, 2011 into Court until the dispute between the Plaintiff and Defendants is determined through the intended Arbitration.
21. Counsel urged the court to look at the letter dated 3rd May, 2023 annexed at paragraph 3 of the replying affidavit that the Defendants are in cohort with third parties to try and avoid the obligations under the Lease signed between the Defendants and Plaintiff.
22. Counsel relied on the case of Britam Towers LLP Vs Alonaib General Trading Ltd [2021] eKLR and submitted that justice demands the amounts not to be paid either to the Defendants who are intent on railroading the Plaintiff or their co-conspirators being disguised as owners. Further that the amounts should also not be with the Plaintiff as he will be in use of the property contrary to the lease agreement without paying rent due.
23. Mr. Manyara submitted that the balance of convenience for the sake of all parties tilts in favour of having the rent deposited in Court pending the determination of the intended arbitration and relied on the case of Abdulrahman Mohamed Mwinzagu v Ali Mohamed Mwinzagu [2020] eKLR.

1st and 2nd Defendants' Submissions

24. Counsel identified the following issues for determination:
 - a. Whether the Plaintiffs/Applicants have satisfied the grounds for the issuance of interim injunctions,
 - b. Whether the interim orders sought should be issued pending an intended Arbitration,
 - c. Whether the Honorable court should allow the Applicant to deposit all rent arrears of Ksh.1,500,000/= and all future rent as contemplated in the lease agreement dated 2nd December, 2011 into court pending the hearing and determination of the intended arbitration.
25. Counsel relied on Section 3 of the *Distress for Rent Act* and the case of Peter Nthenge vs Daniel Itumo & Another HCCC NO 1242 of 1974 Nairobi .and submitted that a landlord has a remedy to recover rent that may be in arrears and it follows that the third parties have a right to levy distress for recovery of rent owed.
26. Counsel submitted that allowing the Applicants to deposit all rent arrears of and all future rent as contemplated in the lease agreement dated 2nd December, 2011 into court pending the hearing and determination of the intended arbitration would be in furtherance of keeping away the rightful beneficial owners from monies they rightfully deserve by dint of being the new beneficial owners and assuming the rights and responsibilities of a lessor.



27. Mr. Oloo submitted that the Applicants have not demonstrated sufficient reasons for the grant of the orders sought hence the application should be dismissed with costs.

Analysis and Determination

28. The issue for determination in the first application for joinder is whether they are a necessary party in this suit and whether they should be granted leave to file a defence and counterclaim.

29. Order 1, Rule 10 (2) of the Civil Procedure Rules provides that:

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

30. In the case of *Pravin Bowry v John Ward and Another* [2015] eKLR the Court of Appeal considered the principles to be considered in an application for joinder of parties to a suit.

31. This is a case that is pending arbitration as per the court's ruling dated and delivered on 23rd October 2023 with the following orders:

“an interim injunction for a period of ninety (90) days from the date of this ruling is hereby granted restraining the defendants whether by themselves, their agents, servants, assigns and/or employees from evicting, entering into, trespassing, blocking, locking and/or interfering in any manner with the plaintiff's quiet possession of LR No's 396/9 and 396/10 pending the commencement and final determination of the arbitration proceedings before a single arbitrator to be agreed upon by the parties and in case no such agreement is reached to be appointed by the Chairman of the Kenya Chapter of the Chartered Institute of Arbitrators in line with clause 12 of the Lease Agreement dated 2nd December, 2011.”

32. If these parties were to be joined at this stage when the arbitration is ongoing it will change the character of the case. The lease agreement was between the plaintiff and the defendants and there is no evidence that the ownership has changed hands.

33. Similarly, it is trite that once the court exercises its jurisdiction under Section 7 of the *Arbitration Act* by either granting or declining the interim measure the substance of the proceedings as contemplated is concluded save for the progress of the arbitration proceedings.

34. The court had already given interim measure in the ruling dated 23rd October 2023 which the applicant seeks to extend as the arbitration is still ongoing. The court cannot therefore add other parties to this suit. The application for joinder is therefore dismissed. The arbitration to proceed with the original parties.

35. In respect of the application dated 19th October, 2023, by the Plaintiff/Applicant, the issue for determination whether the court should allow the Plaintiff/Applicant to deposit all rent arrears of Ksh.1,500,000/= and all future rent as contemplated in the Lease Agreement dated 2nd December, 2011 into Court pending the hearing and determination of the Intended Arbitration.



36. Section 7 (1) of the *Arbitration Act*, 1995 provides that:

“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. In the case of *Portlink Limited –v- Kenya Railways Corporation* (2015) eKLR the court outlined the principles that should guide the court in determining an application for interim measure of protection under Section 7 of the *Arbitration Act* as follows:

“In issuing an interim measure of protection as provided in Section 7 the court’s determination of the parties dispute is restricted. The court’s role was eloquently outlined in the decision of J. G. Nyamu JA, in the case of *Safari Limited –v- Ocean View Beach Hotel Limited & 2 Others* (2010) eKLR where it was stated that the court faced with such application should take into account the following:

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.”

38. It is not in doubt that the issue of ownership is contested and not clear who is the actual owner of the leased premises. There is a threat and that is why the parties moved to court to seek for interim measure of protection pending the hearing and determination of the arbitration proceedings which were granted and extended by the court.

39. The court finds that the Plaintiff’s apprehension on ownership of the property in respect of the subject lease agreement has merit. The Plaintiff/Applicant has also met the prerequisites that warrant the grant of interim measure of protection pending the outcome of the arbitral proceedings.

40. The upshot is the application dated 6th June, 2023 is dismissed and the one dated 19th October, 2023 is allowed in terms of prayer 5 on the following conditions:

- a. The Plaintiff to deposit all rent arrears of Ksh.1,500,000/= and all future rent as contemplated in the Lease Agreement dated 2nd December, 2011 in a joint interest earning account in the names of the advocates for both parties pending the outcome of the arbitration proceedings within 30 days from the date of this ruling.
- b. Failure to comply with clause (a) above, the orders of interim protection to lapse automatically.
- c. Interim measure of protection is hereby granted pending the hearing and determination of the Arbitration proceedings.
- d. Costs of the application to abide the outcome of the arbitration.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 31ST DAY OF JANUARY 2024.

M. A. ODENY



JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure.

