Ogwedhi Properties Limited & another v Ollerai Investments Limited & 3 others (Civil Appeal E096 of 2023) [2024] KECA 124 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KECA 124 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E096 OF 2023

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 9, 2024

BETWEEN

OGWEDHI PROPERTIES LIMITED ..... 1ST APPELLANT

KISUMU PARKVIEW RESORTS LIMITED ..... 2ND APPELLANT

AND

OLLERAI INVESTMENTS LIMITED ..... 1ST RESPONDENT

OLTEPESI PROPERTIES LIMITED ..... 2ND RESPONDENT

IMTIAZ KHAN ..... 3RD RESPONDENT

PRINCIPAL AUCTIONEERS ..... 4TH RESPONDENT

(Being an Appeal against the Ruling of the High Court of Kenya at Kisumu, (Kamau, J.) dated 28th July, 2022 in HCCC No. 20 of 2021(O.S))

JUDGMENT

1. The appeal herein is against the ruling by the High Court (Kamau, J.) delivered on 28th July, 2022. The ruling was with respect to a Chamber Summons application dated 22nd November, 2021 which was filed on the same day by the appellants herein. That application sought interim measures of protection pending arbitral proceedings under section 7 of the *Arbitration Act*. The learned Judge dismissed the application primarily holding that the suit was *res judicata* and that, therefore, the court "was not able to interrogate whether or not the [appellants] had satisfied the conditions for the granting of an order of injunction...."

2. The appellants are aggrieved by that decision of the High Court and have filed the present appeal to challenge it. They listed five grounds of appeal in their Memorandum of Appeal as follows:

    1. That the Learned Judge erred in law by disposing off the entire suit without hearing it on merit.

2. That the Learned Judge erred in law by dismissing the Appellants' Application and determining that there is no dispute for referral to arbitration, thus denying the Appellants the opportunity to access justice or have a fair hearing at arbitration.

3. That the Learned Judge erred in law by making a determination on the issue of arbitrability of the dispute between the parties when in fact this was a matter to be determined by the arbitrator, thereby overstepping her jurisdiction.

4. That the Learned Judge erred in law by refusing to grant the Appellants an injunction restraining the Respondents from interfering with the management and operations of the 2nd Appellant and from auctioning, selling off or in any way disposing the subject property, Title No. Kisumu Municipality/Block 12/182 located at Milimani Estate, Kisumu, pending hearing and determination of the dispute by an arbitral tribunal, hence putting the subject property at risk of being disposed of without parties exploring arbitration as provided by the underlying contracts.

5. That in all, the Learned Judge erred in law by misconstruing findings, and in the process arriving at the wrong determination unfair and prejudicial to the Appellants.

3. The essential facts of the case are as follows. The 2nd appellant and the 2nd respondent entered into a joint venture and shareholders agreement dated 3rd April, 2012 ("joint venture agreement"). The objective of the joint venture was to develop land parcel No. Kisumu Municipality Block/Block 12/182 located at Milimani Estate, Kisumu (suit property) by building a hotel and apartments. The joint venture incorporated a special purpose vehicle for the project in the form of the 1st appellant.

4. Under the joint venture agreement, the 2nd appellant and the 2nd respondent would be responsible to jointly develop and manage the suit property. The 1st appellant procured financing for the development of the property from Housing Finance Company of Kenya (HFCK) through a loan facility (HFCK facility).

5. Later, the parties entered into an agreement whereby the 1st respondent took over the HFCK facility. In exchange, the 1st respondent issued a loan facility for the sum of Kshs. 154,545,455 to the 1st appellant ("loan facility"). This latter loan was issued pursuant to a loan note instrument dated 26th January, 2016 ("loan note").

6. In order to securitize the loan, HFCK discharged the charge it had registered over the suit property after the 1st respondent paid off the HFCK facility. In turn, the 1st appellant created and registered a charge dated 11th May, 2016 on the suit property ("the charge") in favour of the 1st respondent.

7. It is not disputed that the funds were disbursed and the project was completed. Trouble started when the loan facility matured. According to the loan note, the loan facility was payable in one "bullet instalment" on 25th January, 2018. It is safe to say that the 1st appellant was unable to make the payment. The reason for this inability is the gravamen of the dispute between the parties.

8. Suffice to say that the 1st respondent reacted to the failure of the 1st appellant to make the payment by triggering its rights under the charge. The 1st respondent issued the requisite statutory demands and notices and appointed the 4th respondent to carry out a public auction of the suit property.

9. It is at that point that the appellants moved to the High Court vide an Originating Summons. The key objective of the suit, as aforesaid, was to obtain interim measures of protection under section 7(1) of the *Arbitration Act* pending the commencement of arbitration between the parties. The orders the appellants sought was an injunction restraining the respondents from interfering with the

management and operations of the suit property, and to further prevent the respondents from selling or otherwise disposing of the suit property. Contemporaneously with the Originating Summons, the appellants filed the application dated 22nd November, 2021 the ruling with respect to which is the subject of the present appeal. It is not disputed that the joint venture agreement and the loan note at clause 22.5 and clause 10, respectively, contain an arbitration agreement between the parties.

10. The application at the High Court was canvassed by way of written submissions. Only the 3rd respondent had filed a replying affidavit in response to the application. The other respondents raised legal arguments in opposition to the application.

11. In the impugned ruling, the learned Judge agreed with the respondents that the suit was res judicata as per the case known as *Moses Agumba & Another v Ogwedhi Properties Limited & Another* [2020] eKLR. In particular, the learned Judge found that the earlier suit had determined that the rights of the 1st respondent ranks in priority to that of the plaintiffs in that suit. Noting that the plaintiffs in that earlier suit are directors of the 2nd appellant herein, the learned Judge was persuaded that the doctrine of res judicata applied. The learned Judge held that:

> " Although the parties in Moses Agumba & Another Case were not between the same parties or between parties under whom they or any of them claimed or they were not litigating under the same title (sic),
>
> the suit in which a similar issue had been subsequently raised had been heard and finally decided by a competent court as was envisaged in section 7 of the *Civil Procedure Rules* (sic).
>
> As the issue in question herein related to the subject property which was the subject matter in the aforesaid ruling of Cherere J., having applied the law to the facts before it, this court was persuaded to find that the 1st, 2nd and 4the defendants have ably demonstrated that the proceedings herein were res judicata."

12. Having reached this consequential finding, the learned Judge concluded that the application for interim protections could not succeed. The learned Judge concluded that:

> " Having said so, whereas this court found and held that the parties had valid arbitration agreements and- that the High Court had power to grant interim measures of protection in the nature of an injunction as provided in [section] 7(1) and (2) of the *Arbitration Act*, its hands were tied for the reason that a court of equal and competent jurisdiction had already pronounced itself on the issue by the rights of the 1st defendant herein was the 2nd defendant in *Moses Agumba & Another v Ogwedhi Properties Limited & Another* by declaring that they ranked in priority to other interests as far as the subject property was concerned."

13. The appellants believe that these findings are a gross misunderstanding and misapplication of the facts and the law and urge us to reverse them in their entirety. On the other hand, the respondents are of the view that the learned Judge was correct in her assessment of the facts and the law.

14. The appeal was argued by way of written submissions followed by oral highlighting. Both the appellants and the 1st, 2nd and 4th respondents filed their written submissions. Learned counsel Mr. Amol appeared for the appellants during the plenary hearing while learned counsel Ms. Effie Amondi represented the 1st, 2nd and 4th respondents. Mr. Obed Orotwa, learned counsel, appeared for the 3rd respondent although the parties had previously entered in to a consent removing the 3rd respondent from the appeal.

15. We have considered the record of appeal, the ruling of the High Court, the appellants' grounds of appeal and the written and oral submissions made by the appellants and respondents. Deploying the standard of de novo review to re-consider and re-evaluate the evidence and come up with independent conclusions which we are obligated to do under our jurisprudence – see *Selle v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR - two substantive issues recommend themselves for determination on this appeal:

    a. First, whether the learned Judge was correct to delve into the question of res judicata in an application for interim measures of protection brought under section 7 of the *Arbitration Act*.

    b. Second, what corrective action to take on appeal if the response to the first question is in the negative.

16. The appellants argue that they became aware that the 1st and 2nd respondents were not acting in good faith in their dealings with them; and that they had misrepresented their relationship with the 3rd respondent. They claim that the gist of their case is that the 1st, 2nd and 3rd respondents had "set them up" for the eventual stripping of their ownership of the suit property. Their legal claim is based on alleged misrepresentations; fraud; and breach of fiduciary duties. They say that since both the joint venture agreement and the loan note had arbitration clauses, the appropriate forum to ventilate their grievances is through arbitration. However, while the arbitration is pending, it is necessary to preserve the subject matter of the dispute, namely, the suit property hence their approach to the High Court.

17. The appellants argue that by determining the question whether the suit was res judicata, the learned Judge erred in law because she ended up making a determination on the issue of arbitrability of the dispute between the parties when, in fact, this was a matter to be determined by the arbitrator. The only issue before the High Court, the appellants contend, was whether or not to grant interim measures under section 7 of the *Arbitration Act*. The court was not required to delve into the merit of the dispute or to delve into matters that are reserved for the arbitral tribunal. The appellants argue that the issue of whether there was a dispute capable of being determined on merit was one to be determined by the arbitrator, and not the High Court presiding over an application under section 7 of the *Arbitration Act*. They placed reliance on the following decisions: *Scope Telematics International Sales Limited v Stoic Company Limited & Another* [2017] eKLR; *Carzan Flowers (Kenya) Ltd & Others v Tarsal Koos Minck B V & Others* Nairobi (Milimani) HCCC No. 514 of 2009; *Isolux Ingeniera, S.A. Vs Kenya Electricity Transmission Company Limited & 5 others* [2017] eKLR; *Seven Twenty Investments Limited -Vs- Sandhoe Investment Kenya Limited*, (2013) eKLR; *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* Civil Application No. 327 of 2009.

18. On their part, the 1st, 2nd and 4th respondents argue that the only issue before the trial court and the only applicable test in considering the appellants' application under section 7 of the *Arbitration Act* was whether there was an arbitrable dispute capable of arbitration. On this score, the 1st, 2nd and 4th respondents argue that the learned Judge correctly held that the issues were incapable of arbitration as the matter was res judicata. They argue that the suit was res judicata the former suit because:

    a. In both applications, the plaintiffs sought to stop the sale and disposal of the suit property (which was encumbered by a legally registered charge) through a public auction;

    b. The former suit was instituted by Moses Agumba and Bernard Omore who were purchasers of units owned by the 1st appellant. The 2nd appellant is a shareholder of the 1st appellant and Moses Agumba and Bernard Omore are directors of the 2nd appellant.

c. The 1st appellant and the 1st respondent were sued as respondents in the former suit.

d. In both suits, the plaintiffs are investors in the suit property;

e. On 28th February, 2020, the High Court dismissed an application in the former suit holding that the parties were aware that the suit property was encumbered and that the 1st respondent's right as a charge ranked higher in priority to other unregistered interests.

19. The 1st, 2nd and 4th respondents argue that, therefore, the learned Judge was correct to return the verdict that the application was res judicata. Relying on our established jurisprudence on the doctrine of res judicata, the 1st, 2nd and 4th respondents argue that the doctrine is founded on the twin public policy objectives of bringing finality to litigation and saving litigants from vexed twice on account of the same litigation.

20. The 1st, 2nd and 4th respondents contend that in holding that the application was res judicata, it followed that the only logical conclusion that the court could reach was a finding that there was no arbitrable dispute. They argue that it is not disputed that the appellants have failed to make the payments due and that our case law has established that when a party fails to pay a non- disputed sum, that does not amount to a dispute. They cite *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] eKLR for this proposition.

21. The 1st, 2nd and 4th respondents further argue that in any event, interim measures of protection could not be granted in this case for two reasons. First, there is no existing arbitration agreement binding on all the parties to the suit. They point out that the joint venture agreement is between the appellants and the 2nd respondent while the loan note is between the appellants and the 1st respondent. The 3rd and 4th respondents are not privy to either arbitration agreements.

22. The 1st, 2nd and 4th respondents cite the Safaricom Limited Case (*supra*) for the proposition that interim measures of protection cannot be granted unless there is an existing arbitration agreement binding on all the parties; and in this case, there is none. Further, they cite *Eunice Soko Mlagui v Suresh Parmar & 4 Others* [2017] eKLR to make the argument that an arbitration clause could not bind third parties who were not party to the agreement, and that because the appellants sued four distinct and independent parties who are not all subject to the same arbitration agreements, the court could not invoke section 7 of the *Arbitration Act* to grant relief.

23. Finally, 1st, 2nd and 4th respondents submit that the subject matter is not under threat to warrant interim measures of protection. This is so, they say, because even if the subject matter of the intended arbitration is deemed to be the suit property, the charge itself remains unchallenged: all the appellants are attempting to do is to stop what the 1st, 2nd and 4th respondents see as a lawful process without any basis.

24. The crux of this controversy is the question whether, in an application for interim measures of protection pending an intended arbitration brought under section 7 of the *Arbitration Act*, the High Court has jurisdiction to entertain a preliminary objection based on the plea of res judicata. The appellants think that delving into that question sets the court on impermissible grounds reserved for the arbitrator, while the 1st, 2nd and 4th respondents think that a plea of res judicata is a foundational question that goes to determining whether there is an arbitrable dispute to warrant the grant of the interim measures of protection. The learned Judge was persuaded that it was within the purview of the court's jurisdiction to consider the plea of res judicata and having done so concluded that the present suit was res judicata and was, therefore, incapable of supporting any application for interim measures of protection.

25. The fundamental question presented in this appeal can, therefore, be stated bluntly: is it the court or the arbitrator who gets to decide whether a prior decision bars a subsequent arbitration by virtue of the doctrine of *res judicata*? The High Court was categorical that it was the court's role to delve into the question and make a determination. We are, however, of a different view. The plea of res judicata is a doctrine of substantive law that goes to the jurisdiction of a tribunal. Questions about jurisdiction are, essentially, questions whether a dispute is arbitrable under an existing arbitration agreement. These are questions that are to be determined, in the first instance, by the arbitrator. It is only if a party is dissatisfied by the findings of the arbitrator on the question that such a party can refer the question of arbitrability to the High Court under section 17 of the *Arbitration Act*.

26. This reasoning is based on the foundational understanding that the principle of party autonomy lies at the very heart of arbitration and permeates practically all aspects of it. Party autonomy allows parties a wide latitude to agree on almost all aspects of how a dispute is to be arbitrated – including what is covered by the arbitration agreement. For this reason, as a US court has stated, courts are "to exercise the utmost restraint and to tread gingerly before intruding upon the arbitral process." (*Lewis v. Ani. Fed'n of State, County, & Mun. Employees*, 407 F.2d 1185, 1191 (3d Cir. 1969)). The reason for this restrained approach is that "[a]rbitration is, above all, a matter of contract and courts must respect the parties' bargained-for method of dispute resolution." (*John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 136 (3d Cir. 1998).

27. Starting from this first principle, the general rule is that arbitrators should determine the res judicata effect of prior decisions on subsequent arbitration. This aggrandizes party autonomy and preserves the court's restrained approach in the arbitral process.

28. Hence, when a court is confronted by an application for interim measures of protection pending an arbitration, its duty is only to perform a prima facie analysis to determine:

    i. If an arbitration agreement exists;

    ii. If the subject matter is under threat;

    iii. The appropriate measure of protection; and

    iv. The period for which the measure is to be given.

    These factors are established in the leading authority namely the Safaricom Limited Case (supra).

29. In doing this analysis, the court is not permitted to delve into questions of whether the dispute as framed by the applicant is covered by the arbitration agreement since that is a matter reserved for the arbitrator in the first instance. This applies, too, to the jurisdictional question whether the dispute framed by the applicant is barred by a plea of res judicata owing to a previous decision related to the subject matter.

30. In view of this, we are, therefore, of the opinion, and we so hold that the learned Judge in this case erred by delving into the contested matters to determine if the plea of res judicata was applicable to the suit while that is a matter that should have been preserved for the arbitrator. The court was only obligated to determine, on the basis of the material placed before it and on a prima facie basis, whether there was an arbitration agreement between the parties covering dispute as framed by the applicant.

31. Once a court concludes that there is in existence an arbitration agreement between the parties, then the only analysis the court does is whether the subject matter is under threat. If so, then appropriate measures of protection should be issued for a period deemed necessary by the court.

32. In *Scope Telematics International Sales Limited v Stoic Company Limited & Another* [2017] eKLR this Court said the following in interpreting the scope of application of section 7 of the *Arbitration Act*:

> " In furtherance of the above, it behooves this Court to consider whether the Judge exercised his discretion properly. No doubt the power granted to court under Section 7 of the Act is a delicate one. The court is called upon to strike a balance to ensure that the intended arbitration proceedings are not prejudiced either by failing to protect the status quo and or the subject matter of the intended arbitration and at the same time to ensure or avoid making an order that goes to resolving the dispute between the parties which ought to be left exclusively in the hands of the arbitrator."

33. In the present case, the learned Judge came to the conclusion that there were arbitration agreements between the parties – but that the agreements could not be a basis for interim measures of protection because of the plea of res judicata. The learned judge held as follows:

> " 42. It is important to point out that the fact that there were two (2) different agreements that had arbitration agreement or that there was a misjoinder of parties herein and/or that there were parties to the arbitration agreements would not have been a sufficient ground for this court not to have granted interim measures of protection, if the same were, indeed, merited.
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> 43. To this end, this court perused the joint venture and shareholding agreement which showed that the same was between the plaintiffs and the 2nd defendant herein while the loan note instrument was between the 1st plaintiff and the 1st defendant. They both had valid arbitration agreements within the meaning of section 3 of the *Arbitration Act*.
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> .....
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> 46. Having said so, whereas this court found and held that parties had valid arbitration agreements and that the High Court had power to grant interim measures of protection in the nature of an injunction as provided in section 7(1) and (2) of the *Arbitration Act*, its hands were tied for the reason that a court of equal and competent jurisdiction had already pronounced itself by the rights of the 1st defendant herein...."

34. We agree with the learned Judge's analysis and conclusions that there were valid arbitration agreements. As the learned Judge correctly concludes, it does not matter that there is no single arbitration agreement binding all the four essential parties to this dispute: the fact is that the dispute as framed by the appellants is arbitrable under the two arbitration agreements. The only two parties to the suit who are not parties to the arbitration agreements are the 3rd and 4th respondents. The 3rd respondent has already been severed from the suit vide a ruling by the High Court dated 28th July, 2022 (followed by a consent entered in this Court). The 4th respondent is the auctioneer – a nominal party to the suit only enjoined due to the instructions given to them to carry out the public auction of the suit property by the 1st and 2nd respondents.

35. The final issue for analysis is whether the subject matter is under threat to warrant the requested interim measures of protection.

It was difficult to understand the respondents' argument that it was not: the subject matter herein is the suit property. It has been advertised for sale by public auction in the exercise of the 1st respondent's

statutory power of sale. The appellants claim that the 1st respondent is not entitled to exercise the statutory power of sale by virtue of misrepresentation, fraud and breach of fiduciary duties. These are matters which are within the purview of the arbitrator under the parties' arbitration agreement. If the respondents proceed with the planned sale, there will be nothing for the arbitrator to decide. We are, therefore, persuaded that the subject matter is under threat and an interim measure of protection is warranted to preserve it. Indeed, from the excerpts of the judgment of the learned Judge cited above, she was of the opinion that a case for interim measures of protection had been made but for the plea of res judicata.

36. The upshot is that the appeal herein succeeds. The final orders shall be as follows:

    a. The order made by the learned judge dismissing the application dated 22nd November, 2021 is hereby set aside and substituted with an order allowing the application.

    b. An injunction hereby issues restraining the 1st, 2nd and 4th respondents from interfering with the management and operations of the 2nd Appellant and from auctioning, selling off or in any way disposing the subject property, Title No. Kisumu Municipality/Block 12/182 located at Milimani Estate, Kisumu, pending hearing and determination of the dispute by an arbitral tribunal.

    c. The appellants shall formally declare a dispute and refer it to arbitration in accordance with the joint venture and shareholders agreement dated 3rd April, 2012 and the loan note instrument dated 26th January, 2016 within seven days hereof.

    d. In view of the nature of this dispute, each party shall bear its own costs both in the High Court and in this Court.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF FEBRUARY, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

__ DEPUTY REGISTRAR