



Rift Gas Limited v Muigai & 3 others (Environment & Land Case E209 of 2023) [2024] KEELC 3726 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3726 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E209 OF 2023**

MD MWANGI, J

APRIL 23, 2024

BETWEEN

RIFT GAS LIMITED PLAINTIFF

AND

GLADYS NJOKI MUIGAI 1ST DEFENDANT

EUNICE WANJIRU NJUGUNA 2ND DEFENDANT

JOSEPH WARUIRU MUIGAI 3RD DEFENDANT

EDWARD NGIGI MUIGAI 4TH DEFENDANT

RULING

(In respect of the Plaintiff's Application dated 11th December, 2023, seeking an interim measure of protection under the provisions of Section 7(1) of the *Arbitration Act*, 1995, Rule 2 of the Arbitration Rules, 1997 and Section 13(2) of the *Environment and Land Court Act*, No. 19 of 2011)

Background

1. This Ruling is in respect of the Plaintiff's application dated 11th December, 2023 expressed to be brought under Section 7 (1) of the *Arbitration Act*, 1995, Rule 2 of the Arbitration Rules, 1997 and Section 13 (2) of the *Environment and Land Court Act*, No.19 of 2011. The Plaintiff seeks the following orders: -
 - a. Pending the hearing of the intended arbitration, this Honourable Court do issue an interim measure of protection restraining the 1st, 2nd, 3rd and 4th Defendants whether by themselves, their agents, employees, assigns, servants or any other person claiming under them whatsoever from evicting, harassing and or intermeddling in any manner whatsoever with the Plaintiff's quiet and peaceful possession of all that parcel of land known as Title Number Dagoretti/ Mutuini/1370.



- b. Costs of and incidental to this Application be awarded to the Plaintiff.
2. The application is premised on the grounds on the face of it and the Supporting Affidavit of Javan Omondi Otwoma deponed on the 11th December, 2023. The deponent who is the Plaintiff's Legal Officer, averred that the Plaintiff is a tenant on the parcel of land known as Title Number Dagoretti/ Mutuini/ 1370 ("the Land"), by virtue of a Lease Agreement executed between itself on the one part and the 1st, 2nd and 3rd Defendants on the other part as the Landlords. It is averred that the Land is registered in the name of the late Geoffrey Muigai Njoroge but Letters of administration intestate were issued to the 1st, 2nd and 3rd Defendants in Nairobi High Court, Family Probate and Administration Cause No. 369 of 2016.
 3. In reference to the Lease Agreement, the Applicant avers that it was for an initial period of 7 years from 1st September, 2017 with a further provision for renewal for another 7 years. In return, the Plaintiff/ Applicant would pay rent and enjoy quiet and peaceful possession during the term of the Lease. The Applicant was at liberty to erect structural developments such as buildings, canopies, fuel gas tanks, and pumps among others. It was a further term of the agreement that all disputes would be resolved through arbitration.
 4. It is alleged that the Plaintiff has extensively invested on the land to the extent of a figure exceeding Kshs. 100,000,000/=. The Plaintiff has allegedly built and operationalized its liquefied petroleum gas storage and filling business.
 5. The Applicant avers that the 4th Defendant without any color of right issued it with an eviction Letter dated 29th November, 2023. The notice is issued in retrospect, the effective date being 30th June, 2022. The 4th Defendant has threatened to inform the authorities including 'EPRA' as well as the Plaintiff's customers to remove their valuables from the land on the basis of the intended eviction. The 4th Defendant's claim according to the Applicant is contrary to Clause 3.1 of the Lease Agreement.
 6. The Applicant therefore prays that the orders sought be granted as it has and continues to suffer damage as a consequence of the Defendants' violation of the Lease Agreement.

1st, 2nd and 3rd Defendants' Replying Affidavit

7. The 1st, 2nd and 3rd Defendants opposed the application by the Plaintiff through the Replying Affidavit of Joseph Waruiru Muigai, the 3rd Defendant herein, deponed on the 15th January, 2024. The 3rd Defendant confirms that the 1st, 2nd and 3rd Defendants are indeed the Administrators of the Estate of the late Geoffrey Muigai Njoroge having been granted the Letters of Administration intestate in Nairobi High Court, Family Probate and Administration Cause No. 396 of 2016.
8. The Administrators deny existence of any valid Tenancy Agreement between them and the Plaintiff/ Applicant having terminated the relationship way back on 1st September, 2017 for non-payment of rent. They state that the rent owing to the Landlord was agreed on after both parties reconciled their records and determined the rent owing as a sum of Kshs. 16,122,763/= as evidenced by the resolution dated 3rd June, 2022.
9. The deponent contends that on 13th June, 2022, parties agreed to terminate the lease agreement by 30th June, 2022 and the Plaintiff was to clear the long outstanding rent arrears. The Plaintiff was further granted a rebate of 40% of the outstanding rent and allowed to pay by instalments of Kshs. 500,000 per month until payment in full. In default, the Plaintiff was to remove all its equipment from the land within 60 days.



10. Subsequently, the Plaintiff entered into a new lease agreement with the beneficiaries of the land; the 4th Defendant herein and one Peter Waweru Muigai. The Plaintiff then started dealing with the said beneficiaries directly to the exclusion of the Administrators of the Estate of Geoffrey Mungai Njoroge.
11. Based on the foregoing, the Administrators aver that they bear no obligation to the Plaintiff as there is no binding Lease Agreement with them. There is therefore no dispute to refer to arbitration. They assert that although the Plaintiff declined to execute the mutual termination agreement, it has nonetheless, consistently paid the outstanding rent as provided in the mutual termination agreement. The deponent avers that the Land the subject of the Lease is currently registered in the name of the beneficiaries of the deceased Geoffrey Mungai Njoroge and not the deceased as alleged by the Plaintiff.

4th Defendant's Replying Affidavit

12. The 4th Defendant avers that he is the registered owner of the subject land together with his brother, one Peter Waweru Muigai as beneficiaries of the Estate of the late Geoffrey Muigai Njoroge (deceased). The deceased was their father and the Grant of Letters of Administration in respect of his estate was confirmed on 5th August, 2022. The two are the joint owners of the land since a Certificate of Title was duly issued in their names.
13. The 4th Defendant avers that he engages in the business of Fuel and Gas procurement and sale through a company known as Fuel and Gas Limited, where he is one of the directors. He avers that he invested heavily on the subject land in the construction of a Fuel and Gas Depot. He further alleges that he constructed the Fuel and Gas Depot in 2015 with the approval of his late father. He sought and obtained the requisite approvals for the said project. His estimation of the amount spent is in the tune of Kshs. 50.0 Million for the said works. He alleges that the Plaintiff only spent half of that amount on the project.
14. In reference to the subject Lease Agreement, the 4th Defendant averred that it is set to terminate by effluxion of time on 31st August, 2024. He stated that at the time of signing the Agreement, the Grant was yet to be confirmed. He confirms issuing a Notice of Intention not to renew the Lease Agreement to the Plaintiff on 29th November, 2023.
15. The 4th Defendant further contends that the land which is the subject of the Lease is no longer in existence having been subdivided between the two beneficiaries of the estate of the deceased Geoffrey Mungai Njoroge, and two new Title Deeds issued thereto. Therefore, the 4th Defendant argues that by virtue of the termination of Lease by effluxion of time and by the extinguishment of the subject parcel of Land Dagoretti/Mutuini/1370, it is not tenable to renew the subject Lease.
16. He again contends that the subject Lease Agreement had mutually been terminated on 3rd June, 2022 and the rent deposit refunded to the Plaintiff. He therefore prays that the application be dismissed with costs.

Further Affidavit by the Plaintiff

17. The Plaintiff filed a further Affidavit sworn by Javan Omondi Otwoma on the 6th February, 2024. The deponent points out the contradictions by the Defendants in their responses. On one hand they argue that the subject Lease is set to terminate by effluxion of time on 31st August, 2024 and on the other hand they allege that the Lease was terminated on 3rd June, 2022.
18. The deponent therefore assets that the argument by the Defendants that there is no dispute to be resolved by arbitration is therefore a non-starter. In the absence of any assertion that the arbitration Agreement is null and void, inoperative or incapable of being performed, this court is bound by



Section 6 of the *Arbitration Act*, 1995 to allow the matter to proceed to arbitration. The Court has no jurisdiction to entertain this matter save for giving directions on interim measures of protection, if at all. He further argues that even if the Lease is terminated, the doctrine of separability leaves the arbitration agreement between the parties intact warranting an arbitration on the matter, particularly, because there is a dispute on the extension of the lease.

19. The Plaintiff maintains that the alleged subdivision does not obliterate the subject-matter of the Lease. In any event, the beneficiaries of the estate, being the 4th Defendant and his brother, one Peter Muigai, have continued to collect and enjoy the rent from the Plaintiff. The Plaintiff denies being in any arrears. It prays that the application be allowed as prayed.

Court's direction

20. The Court directed that the application by the Plaintiff be canvassed by way of written submissions. Parties obliged by filing their respective submissions accordingly. The Plaintiff's submissions are dated 6th February, 2024, the 1st, 2nd and 3rd Defendants' submissions are dated 9th February, 2024 and the 4th Defendant's submissions are dated 14th February, 2024.

21. The court has had a chance to read through the submissions and consider them accordingly.

Issues for determination

22. Having carefully considered the application, the responses thereto and the parties' respective rival submissions, I find that the issue arising for the determination is whether the Applicant has established sufficient cause or reasons to warrant the grant of interim measures of protection pending the hearing of the intended arbitration.

Analysis and determination

23. It is clear from the record that the Plaintiff seeks orders under section 7 of the *Arbitration Act*, 1995. The Section provides that: -

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.
2. Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application."

24. In the case of *CMC Holdings Limited & CMC Motors Group Limited vs Jaguar Land Rover Exports Limited*, Nairobi Civil Case No. 752 of 2012, the court in acknowledging that it had jurisdiction to grant interim relief for preservation of the subject matter of the contract pending reference to arbitration stated as follows: -

“...the measures are intended to preserve the assets or evidence which are likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.”



25. Also in the case of *Lease Company Limited & Vital Bio Energy (Kenya) Limited vs Agricultural Development Company Limited* ELC Case No. 95 of 2014, the Court held that: -

“Where the court finds that an arbitral agreement between the parties exist and there is a dispute that should be determined by an arbitration the court is obligated to grant an interim order of preservation to ensure that the subject matter will be in the same state as it was at the commencement or during arbitration proceedings.”

26. It follows therefore that this court has jurisdiction to hear and determine the application herein, as presented by the Plaintiff.

27. It is important to note that although the court has powers to grant an order of interim measure of protection under section 7 of the *Arbitration Act*, the principle of party autonomy still reigns supreme as the court is precluded from making orders undermining the arbitration or which may be prejudicial to the outcome of the arbitration. The interim measures are otherwise supposed to be in a such way that would support the arbitral process and ensure the process is not undertaken in vain. The court should guard against undermining the arbitral process by the kind of orders it issues. It should only issue orders that are compatible with the arbitration agreement.

28. The principle upon which interim measure of protection will be granted under section 7 of the *Arbitration Act* 1995 are well settled. In the case of *Safaricom Limited –vs- Ocean View Beach Hotel Limited & 2 others* (2010) eKLR, Nyamu J, outlined the factors to be taken into account before granting of an interim measure under section 7 of the *Arbitration Act*, 1995 as: -

- i) The existence of an arbitration agreement;
- ii) Whether the subject matter of the arbitration is under threat;
- iii) In the special circumstances, which is the appropriate measures of protection after an assessment of the merits of the application?
- iv) For what period must the measure be given especially if requested for before commencement of the arbitration so as to avoid encroaching on the tribunal’s decision making powers as intended by the parties?”

29. I have considered the parties’ affidavits and annexures thereto and I find that although the Defendants are disputing that there is no dispute to be referred to Arbitration, they have not denied the existence of a valid arbitration agreement. Clause 4.13 of the subject Lease Agreement to which both the Plaintiff and the 1st, 2nd and 3rd Defendants have subscribed to; incorporates an Arbitration clause which prescribes that any dispute, question or difference between the Applicant and the Respondents should be resolved amicably, failure to which the matter will be referred to Arbitration.

30. In the case of *Seven Twenty Investment Limited Vs. Sandhoe Investment Kenya Limited* (2013) eKLR the Court stated that: -

“Perusal of Section 7 of the *Arbitration Act* clearly shows that the issue of whether or not there is a dispute or whether or not there would be losses by either side would not be a factor for a court to take into consideration when deciding whether or not it should grant an order for interim measure of protection or injunction to safeguard the subject matter of the arbitral proceedings. All that a court would be interested in is whether or not there was a valid arbitration agreement.”



31. In view of the above, I find that the Plaintiff/Applicant has demonstrated from the contents of subject Lease Agreement, which is not contested by the Defendants, that there exists a valid Arbitration agreement, which was voluntarily entered into by the parties and which parties are therefore bound with.
32. Section 6 of the Arbitration Act binds this Honourable Court to abide by the arbitration agreement unless:
- a. the arbitration agreement is null and void, inoperative or incapable of being performed; or
 - b. there is no dispute between the parties with regard to the matters agreed to be referred to arbitration.
33. I now turn, to consider whether the subject matter of the arbitration between the parties is under threat warranting issuance of interim measures of protection. In the instant matter, the subject of arbitration is the termination of the lease Agreement over the parcel of land known as Title Number Dagoretti/Mutuini/1370. The Plaintiff argues that the 4th Defendant has threatened to evict it having issued an eviction Letter dated 29th November, 2023 with effect from 30th June, 2022 (retrospectively). The Plaintiff is apprehensive that it will suffer loss and irreparable damage as it stands to lose its investment and its business will be jeopardized despite duly paying the agreed rent.
34. The Defendants maintain that the Plaintiff ought to have vacated the subject land by now. The 4th Defendant has in deed confirmed that he issued the notice to vacate upon the Plaintiff. Interestingly though, the 4th Defendant at another point alleges that the lease agreement is due to expire by effluxion of time on 31st August 2024.
35. My understanding of the purpose of interim measures of protection, is that it is intended to preserve the subject matter of the dispute, so that the proceedings before the arbitral are not rendered nugatory. In the instant matter, the Applicant's apprehension is that without the protection by the court, the Defendants will effect the eviction; defeating the purpose of the arbitration.
36. The Applicant in its application is not seeking settlement or determination of the issues between the parties, which is not a mandate of this court anyway in view of the arbitration clause, but for an order which is intended to maintain the status quo until the dispute between the parties is referred to arbitration and determined.
37. In the case of Infocard Holdings Limited Vs. Attorney General & 2 others (2014) eKLR, the court stressed that the purpose of an interim measure of protection is to preserve the subject matter of the dispute pending arbitration.
38. In the case of Isolux Ingeniera, S.A. Vs Kenya Electricity Transmission Company Limited & 5 others [2017] eKLR, Onguto J. stated as follows: -

“The Act prescribes no standards applicable to applications for interim measure of protection but case law has essentially settled the standards. Unlike arbitral tribunals which will consider imminent harm and the likelihood of success on the merits of the dispute, a court faced with an application for interim measures must avoid venturing into the merits of the dispute for the obvious reason that this is not its remit. It is the remit of the arbitral tribunal. The court must thus be careful not to pre-empt the ultimate award, even as it considers an application for interim measures of protection. The court however has a



loose discretion to ensure that the aim and purpose of an interim measure of protection is achieved."

39. The issues raised by the Defendants regarding termination of the Lease Agreement and the alleged rent arrears are matters that should be raised before the Arbitral Tribunal. This court lacks the jurisdiction to determine the dispute.
40. In view of the foregoing, I am satisfied that Plaintiff/Applicant's application meets the test upon which an interim measure of protection will be granted under section 7 of the Arbitration Act. The application is hereby allowed.
41. Considering that the Plaintiff has not sought any other order in its Plaint, this file shall be marked as closed, upon grant of the orders sought in the Plaintiff's application.
42. Consequently, I proceed to make the following orders: -
 - a. Pending the hearing and determination of the intended arbitration, this Court hereby issues an interim measure of protection restraining the 1st, 2nd, 3rd and 4th Defendants whether by themselves, their agents, employees, assigns, servants or any other person claiming under them whatsoever from evicting, harassing and or intermeddling in any manner whatsoever with the Plaintiff's quiet and peaceful possession of all that parcel of land known as Title Number Dagoretti/ Mutuini/1370.
 - b. The Costs of this Application shall be in the cause of the intended Arbitration.
 - c. This file shall be marked as closed.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF APRIL, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Ndoigo for the Applicant.

Mr. Mbugua for the Respondents

Yvette: Court Assistant

M.D. MWANGI

JUDGE

