



REPUBLIC OF KENYA



**KENYA LAW**  
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**Jyothirmayee & another v Shah & another (Environment & Land Case  
E146 of 2024) [2024] KEELC 5723 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5723 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E146 OF 2024**

**LN MBUGUA, J  
JULY 30, 2024**

**BETWEEN**

**PABBARAJU JYOTHIRMAYEE ..... 1<sup>ST</sup> PLAINTIFF**

**PABBA RAJU SRIDHAR ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SHIRISH SHAH ..... 1<sup>ST</sup> DEFENDANT**

**OYSTER SPRINGS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiffs' application dated April 11, 2024 is for determination. They seek a temporary injunction restraining the Defendants from evicting them from the suit premises and/or in any way interfering with their peaceful enjoyment or obstructing their rights of ingress and/or egress into and /or out of Central Duplex B14 on the 9<sup>th</sup> & 10<sup>th</sup> Floor on L.R. NO. 1870/II/478 (Oyster Pearl) pending hearing and determination of the intended arbitration proceedings between the parties herein.
2. The application is based on grounds on its face and on the 2<sup>nd</sup> Plaintiff's supporting affidavit sworn on 11.4.2024 and his further affidavit sworn on 16.7.2024. He avers that pursuant to a sale agreement dated 20.12.2022 between herself and the 2<sup>nd</sup> Defendant, she paid a ksh. 15 million on behalf of the 1<sup>st</sup> Plaintiff as deposit out of the purchase price of ksh.50 million, whereby the 1<sup>st</sup> Plaintiff took possession of the suit premises.
3. That the transaction was entered into with the knowledge and approval of the 1<sup>st</sup> Defendant who is the 2<sup>nd</sup> Defendant's director.
4. She contends that the 2<sup>nd</sup> Defendant has by an eviction Notice dated 8.4.2024 unlawfully threatened to evict the 1<sup>st</sup> Plaintiff on allegation that she is in breach of the sale agreement. She avers that the 2<sup>nd</sup>



- Respondent was at all times aware that the balance of the purchase price would be financed through mortgage and not cash, thus they are estopped by their conduct from evicting the 1<sup>st</sup> Plaintiff.
5. She avers that the 1<sup>st</sup> Plaintiff is keen on completing the sale herein and that even prior to issuance of the completion notice, she was in constant communication with the Defendants on settlement of the outstanding purchase price which is to be paid through mortgage/financing, and the only issue pending is for the 2<sup>nd</sup> Defendant's financiers to issue an undertaking to the Plaintiffs' financiers.
  6. That being under duress, the 2<sup>nd</sup> Plaintiff paid ksh.10,250,000/= directly to the 1<sup>st</sup> Defendant's account on behalf of the 1<sup>st</sup> Plaintiff being payment of the alleged accrued interest contrary to the agreement, thus it would amount to unjust enrichment to demand that the plaintiffs vacate the suit premises while the defendants pocket the interest.
  7. She avers that pursuant to clause 18.2 of the sale agreement, the Plaintiffs have proceeded to declare a dispute between the parties vide a letter dated 8.4.2024 for the dispute to be resolved through arbitration. However, the plaintiffs will be evicted and exposed to insurmountable loss and damage defeating the arbitration process if the orders sought are not granted.
  8. The Defendants oppose the application vide their grounds of opposition dated 3.6.2024 and the 1<sup>st</sup> Defendant's replying affidavit sworn on 3.6.2024. The defendants admit that indeed there was a sale agreement between the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> Defendant entered into on 20.12.2022, but the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Plaintiff were not parties to the said agreement, thus there is no arbitration agreement between the Defendants (jointly) and the Plaintiffs (jointly) on which the Plaintiffs could commence arbitration.
  9. The defendants aver that the 1<sup>st</sup> Plaintiff unlawfully entered the suit premises. That the 1<sup>st</sup> Plaintiff had requested the 2<sup>nd</sup> Defendant to make certain alterations to the interior of the suit premises pending completion of the agreement. That following the said request, the 2<sup>nd</sup> Defendant granted access to the suit premises to the 1<sup>st</sup> Plaintiff's contractor to carry out alterations, but the 1<sup>st</sup> Plaintiff clandestinely moved into the suit premises and made representations that she was intent on completing the outstanding balance of the purchase price and interest and further agreed to make monthly rental payment at the market rate for the period of occupation prior to completion of the agreement and acquiring vacant possession as contemplated under the agreement.
  10. That the 1<sup>st</sup> Plaintiff's conduct demonstrates that she has not approached the court with clean hands since she has never paid further installments of the purchase price and she defaulted on payment of the rent agreed and interest.
  11. He avers that the sale agreement provided for payment of the purchase price in cash by instalments and not through financing. Further, the agreement provided for payment of interest for the delayed payment at the rate of 15% per annum, thus the 2<sup>nd</sup> Defendant levied interest in terms of clause 6.2 of the agreement as the unpaid instalments have attracted interest of ksh. 15,551,142 out of which the Plaintiff has paid ksh.9,750,000/= and it continues to accrue.
  12. That the 1<sup>st</sup> Plaintiff through the 2<sup>nd</sup> Plaintiff reached out to the 1<sup>st</sup> Defendant seeking the 1<sup>st</sup> Defendant's indulgence regarding payment of the interest of which they met and settled on the figure of ksh.13 million as at December 2023.
  13. The defendants contend that the 1<sup>st</sup> Plaintiff failed to pay the outstanding balance of ksh.35 million and the then accrued interest of ksh.12,632,388/=. That is why the 2<sup>nd</sup> Defendant issued the eviction notice dated 8.4.2024 as they reserved the right to exercise the remedies outlined under clause 6 of the agreement.



14. That subsequently, the 1<sup>st</sup> Plaintiff declared a dispute vide a letter dated 8.4.2024 which proposes arbitration issues to be completion of sale agreement, payment of interest and payment of costs. The defendants argue that occupation of the suit premises is not the subject of arbitration. Further, that the 1<sup>st</sup> Plaintiff has not demonstrated urgency of commencing arbitral proceedings as she is yet to respond to the 2<sup>nd</sup> Defendant's letter dated 29.4.2024 in which it proposed a number of arbitrators.
15. He contends that the Plaintiff does not stand to suffer irreparable loss as she can lease alternative premises or pay rent for the suit premises ranging at ksh. 400,000 - 425,000/= per month while in contrast, the 2<sup>nd</sup> Defendant continues to service a bank facility for the development of the suit premises.
16. When the application was brought before me on 11.4.2024, the court gave an order for maintenance of status quo and the application was listed for hearing on 10.6.2024. On 10.6.2024, the court extended the said orders of status quo and directed parties to file submissions. On 16.7.2024, it transpired that the plaintiffs had not filed any submissions, hence the defendants had none too. In that regard, considering the short timelines given in the prosecution of the matter as from 16.7.2024, and in order to ensure that no party has leverage over the other, the court will only consider the oral submissions of the parties proffered on 18.7.2024.
17. In their oral submissions, the applicants reiterated the averments set out in their application emphasizing that there is an arbitration clause in the sale agreement at clause 18 and that the arbitration is now threatened by the eviction notice. The cases relied upon by the plaintiffs are; Safaricom Ltd vs. Ocean Beach Ltd. & Others 2010 [eKLR], Isolux Ingeniera S.A V Kenya Electricity Transmission Company Limited & 5 Others [2018] eKLR, CMC Holdings Ltd & another v Jaguar Land Rover Exports Limited [2013] eKLR, Giella v Cassman Brown & Co. Ltd [1973] E.A 358.
18. Defendants similarly rehashed the averments set out in their replying affidavit and grounds of opposition, adding that no reasons have been advanced as to why the arbitration process has not commenced. It was also argued that the plaintiffs are occupying the premises in question, yet they have neither paid the purchase price, nor are they paying rent and that the 2<sup>nd</sup> applicant has no locus in the matter. The defendants too have relied on the case Safaricom Ltd vs. Ocean Beach Ltd. & Others 2010 [eKLR].
19. The issue for determination is whether the Plaintiffs have met the threshold for issuance of the injunctive orders pending the determination of the arbitration proceedings.
20. The provisions of Section 7 of the [Arbitration Act](#) provides as follows;
  - “ 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.
  - (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.”



21. The courts have considered applications of this nature contemplated under Section 7 above and provided guidance. In *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR, a case cited by the protagonists, the court stated that;

“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.”

22. There is no controversy that there is a valid arbitration clause in the agreement for sale dated 20.12.2022 at clause 18 and that plaintiffs are in occupation of the suit premises. However, defendants term the 1<sup>st</sup> plaintiff’s entry into the suit premises as unlawful as it was done without authority. The defendants do not dispute that they have issued the 1<sup>st</sup> Plaintiff with an eviction Notice dated 8.4.2024 on the basis that she has neglected to complete the sale herein by delaying to pay the balance of ksh.35 million.

23. It is also not in dispute that after being issued with an eviction notice, the 1<sup>st</sup> Plaintiff immediately declared a dispute vide a letter dated 8.4.2024. The defendants contend that on 29.4.2024, they even wrote to the plaintiffs proposing names of the arbitrators, though no response was given.

24. What I discern from the materials presented before this court is that there is a dispute in which parties exercised their free will to have it resolved through arbitration platform. That being the case, the court cannot purport to sever the issue of occupation of the suit premises since the same is intricately tied to the sale agreement.

25. This court is mindful that it should not exceed its jurisdiction and make findings which would fall into the arbitrator’s jurisdiction.

26. In the case of *County Government of Kirinyaga v African Banking Corporation Ltd* [2020] eKLR, cited in *Peema Investments Co. Ltd v Principal Secretary, Ministry of Defence & another* [2021] eKLR the court observed that: -

“The tenor and import of Article 159 (2) (c) of *the Constitution* as read together with Section 6 (1) of the *Arbitration Act* is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement.....”

27. While in *Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020)* [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) Neutral citation: [2021] KEHC 93 (KLR), the court stated that;

“Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes by an arbitral tribunal, as an alternative to adjudication by the courts or a public forum established by law. Parties by mutual agreement forgo their right in law to have their disputes adjudicated in the courts/public forum. Arbitration agreement gives contractual authority to the arbitral tribunal to adjudicate the disputes and bind the parties. The arbitration agreement being the product of a consensual contract, I refuse the invitation to “rectify the arbitration clause.” The applicant is inviting



the court to venture into the forbidden sphere of re-writing contracts willfully signed by consenting parties”.

28. In the same measure, this court will desist from delving into the merits of the dispute. The court’s intervention ought to be limited only to facilitate the determination of the dispute through the proper forum. However, the court is alive to the fact that the plaintiffs have not paid the full purchase as set out in clause 4 of the sale agreement. The plaintiffs are also not willing to pay rent because they are not tenants. Further, the court notes that arbitration proceedings have not commenced and that as at 18.7.2024 when the application was being heard orally, the plaintiffs were mute in regard to the letter of 29.4.2024 by the defendants where the plaintiffs were requested to choose arbitrators. The plaintiffs cannot certainly have their cake and eat it at the same time.
29. In that regard, the court will only grant conditional interim measures of protection as follows; An order of interim measure of protection of the plaintiffs is hereby issued which entails that the plaintiffs shall not be evicted from the suit premises on condition that;
1. Arbitration proceedings commence within 30 days from the date of delivery of this ruling,
  2. The plaintiffs shall deposit the sum of Ksh.35 million in a joint interest earning account of their advocates and advocates for the defendants within 30 days from the date of this ruling.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Jane Okoth for Plaintiff Applicant

Omuganda for Defendants Respondents

Court assistant: Eddel

