



**Achungo v Homes by Sung Limited & another; Mburugu & 3 others (Interested Parties)
(Environment & Land Case E053 of 2024) [2024] KEELC 5838 (KLR) (8 August 2024) (Ruling)**

Neutral citation: [2024] KEELC 5838 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E053 OF 2024**

**BM EBOSO, J
AUGUST 8, 2024**

BETWEEN

VALENTINE SITUMA ACHUNGO PLAINTIFF

AND

HOMES BY SUNG LIMITED 1ST DEFENDANT

MOSES NG'ANG'A KIOI 2ND DEFENDANT

AND

LINDA KATHURE MBURUGU INTERESTED PARTY

ERASTO OKUMBO ORARO INTERESTED PARTY

PHILIP YUMBYA NYAMAI INTERESTED PARTY

FRANCIS G KIBE INTERESTED PARTY

RULING

1. The plaintiff, Valentine Situma Achungo, initiated this suit through a plaint dated 17/4/23. He designated M/s Homes By Sung Limited as the 1st defendant and Moses Nganga Kioi as the 2nd defendant. He identified four (4) interested parties in the suit. His claim is anchored on section 7 of the [Arbitration Act](#), which provides a framework for seeking an interim measure of protection in a superior court, pending the hearing and disposal of a dispute by an arbitral tribunal.
2. Through the plaint dated 17/4/2024, he sought the following verbatim interim measures of protection:
 - a. That pending the reference to arbitration and the hearing and determination of the arbitral proceedings, this Honourable Court grants an interim measure of protection restraining the 1st and 2nd defendants, their agents, employees and or servants from commencing, continuing



or concluding any transactions for the selling, advertising for sale, disposing or, alienating, transferring, leasing, mortgaging, or in any other way dealing with the properties referenced as Ondiri Farm Scheme /929 and Ondiri Farm Scheme /1285 (or resultant titles) pending the hearing and determination of the Arbitral proceedings between the plaintiffs and the defendants.

- b. That there be an inhibition against properties referenced as Ondiri Farm Scheme/ 929 and Ondiri Farm Scheme /1285 (or resultant titles) pending the completion of the arbitral proceedings.
 - c. That in the alternative to prayer No. (a) and (b) hereinabove, pending the reference to arbitration and the hearing and determination of the arbitral proceedings, the Certificate of Titles referenced as Ondiri Farm Scheme /929 and Ondiri Farm Scheme/1285 (or resultant titles) be deposited with the Honourable Court or furnished to Honourable and deposited with the 1st and 2nd Respondents Advocates on terms.
 - d. Costs of this suit.
 - e. Any other relief this Honourable Court may deem fit to grant.
3. Together with the plaint, the plaintiff brought a chamber summons dated 17/4/2024 seeking the following orders:
1. Spent
 2. Spent
 3. That Pending the reference to arbitration and the hearing and determination of the arbitral proceedings, this Honourable Court grants an interim measure of protection restraining the 1st and 2nd respondents, their agents, employees and/or servants from commencing continuing or concluding any transactions for the selling, advertising for sale, disposing off, alienating, transferring, leasing mortgaging, or in any other way dealing with the properties referenced as Ondiri Farm Scheme/9292 and Ondiri Farm Scheme /1285 (or resultant titles) pending the hearing and determination of the arbitral proceedings between the applicant and respondents.
 4. That there be an inhibition against properties referenced as Ondiri Farm Scheme/929 and Ondiri Farm Scheme /1285 (or resultant titles) pending the completion of the arbitral proceedings.
 5. That in the alternative to prayer No. 3 and 4 hereinabove, pending the reference to arbitration and the hearing and determination of the arbitral proceedings, the Certificate of Title for the properties referenced as Ondiri Farm Scheme /929 and Ondiri Farm Scheme/1285 (or resultant titles) be deposited with the Honourable Court or furnished to Honourable and deposited with the 1st and 2nd Respondents Advocates on terms.
 6. Any other relief that the court deems fit in the interest of Justice.
 7. Costs of this application and of the suit be borne by the defendants.
4. The above application is the subject of this ruling. It was supported by an affidavit sworn by the plaintiff on 17/4/2024. It was canvassed through brief oral submissions tendered in the virtual court by Mr Benard Chenge on 10/7/2024. The applicant's case is that he entered into a tripartite agreement with the two defendants on 1/3/2023, pursuant to which he purchased Townhouse Unit No 4 which the



- 1st defendant was to build on land parcel number Ondiri Farm Scheme /929. The agreed purchase price was Kshs 9,500,000, which he paid in full. The agreed completion date under the agreement dated 1/3/2023 was six (6) months. The contract contains an arbitration agreement which provides for resolution of disputes through arbitration.
5. The plaintiff contends that in December 2023, the defendants intimated to him that the Townhouse had been “constructed partly on Ondiri Farm Scheme/1285 and there was need to amalgamate the two titles before sub-division and transfer of the sub-divided parcels to the respective purchasers”. It is the case of the plaintiff that the defendants have experienced financial challenges which have led to him remitting part of the purchase price directly to the defendants’ suppliers to facilitate completion of construction works on the Townhouse. He contends that he is apprehensive that in view of the financial challenges faced by the defendants, they may dispose, alienate and/or deal with the two properties, Ondiri Farm Scheme/ 929 and 1285 in a manner detrimental to his interest before the conclusion of the arbitral proceedings. The plaintiff adds that he has set in motion the process of appointing an arbitrator to adjudicate and resolve the dispute that has emerged. It is on the above basis that he seeks interim measures of protection.
 6. In his concluding oral submissions before the court, counsel for the plaintiffs stated thus:

“In view of the fact that the two titles have been amalgamated and a single title issued, the applicant is not opposed to subdivision titles being issued in the name of the purchasers of the 9 units. We wanted the other titles to be protected.”
 7. The two defendants opposed the application through a replying affidavit sworn by the 2nd defendant, who is a director of the 1st defendant. They admit that they entered into the tripartite agreement dated 1/3/2023. Their case is that the impugned amalgamation was put in motion after the affected parties [the interested parties in this suit; the plaintiff; the two defendants; and the surveyor] entered into a collective addendum agreement dated 15/12/2023 consenting to amalgamation and subsequent subdivision of the amalgamated title.
 8. The defendants add that the purpose of the mutually agreed amalgamation was to collapse the two titles into one title and thereafter carry out a subdivision of the amalgamated title to create sub-division titles for the Townhouses. They further contend that the amalgamated title was issued on 1/7/2024, having been registered as Ondiri Farm Scheme/1737. They term this suit and this application as malicious. They oppose the plea for an interim measure of protection in form of injunctive orders. Their position is that damages will be an adequate remedy.
 9. The 3rd and 4th interested parties share the plaintiff’s concern about delay in completion of construction works but oppose issuance of the interim orders sought in the application. They are keen to have their individual titles, hence their opposition to the orders sought by the plaintiff. They want subdivision of the amalgamated title to go on and titling of the Townhouses to be completed expeditiously.
 10. The court has considered the application; the responses to the application; and the parties’ respective submissions. The key question to be determined in this ruling is whether the applicant has satisfied the criteria for grant of an interim measure of protection pending completion of arbitral proceedings.



11. The jurisdiction of this court to grant an interim measure of protection is donated by section 7(1) of the Arbitration Act which provides as follows:

“(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.

12. The Court of Appeal [Waki JA], in Safaricom Limited v Oceanic Beach Hotel Limited & 2 others [2010] eKLR, outlined the following criteria for grant of an interim measure of protection under Section 7(1) of the Arbitration Act:

“An interim measure of protection such as that sought in the matter before us is supposed to be issued by the court under Section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for grant of an injunction..... 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 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”

13. In the present application, the applicant came to court waving an arbitration agreement contained in Clause 32 of the Agreement for Sale dated 1/3/2023. The plaintiff and the two defendants are the only parties to the said agreement. The interested parties named in this suit are not parties to this particular arbitration agreement and cannot be compelled to submit to any arbitration proceedings anchored on the arbitration agreement contained in the tripartite sale agreement dated 1/3/2023. Neither can they be bound by any arbitral award made in furtherance of the agreement dated 1/3/2023. Only the three parties to the tripartite sale agreement dated 1/3/2023 are obligated to submit to the arbitral tribunal and be bound by its award. The fact that the interested parties may have their individual tripartite sale agreements with similar arbitration clauses does not alter the above legal position. That is, however, not the only hurdle that stands in the way of the plaintiff.

14. The interested parties have come to court in response to the summons and to the application served on them. They are opposed to the orders sought by the plaintiff. Their position is that, grant of the orders will stall the processing of individual titles for the Townhouses.

15. The third, and perhaps most significant, point is that, when the applicant came to terms with the fact that initial amalgamation had taken place and what was expected to follow was the processing of individual titles; and further that, any inhibition or restriction against the amalgamated title will stall



the processing of individual titles relating to the Townhouse, through counsel, he made the following concluding submissions:

“In view of the fact that the two titles have been amalgamated and a single title issued, the applicant is not opposed to subdivision titles being issued in the names of the purchasers of the 9 units. We wanted the other titles to be protected.”

16. It is clear from the above concluding submissions by Mr Chenge that at this point, the plaintiff wants subdivision of the amalgamated title to proceed and individual titles for the Townhouses to be processed.
17. Lastly, let me state that I have looked at the addendum agreement dated 15/12/2023 which the defendants relied on. There is nothing in it to suggest that the plaintiff signed it as alleged by the defendants. I will not say more at this point.
18. Suffice it to state that, for the above reasons, I do not think the plaintiff can be said to have satisfied the criteria for grant of an interim measure of protection under section 7(1) of the Arbitration Act. Consequently, the application dated 17/4/2024 is rejected.
19. Given the background that led to the filing of this suit [including the fact that the defendants acknowledged delay and financial challenges] there will be no award of costs.
20. This suit having been brought under section 7 of the Arbitration Act, and the application for interim measure of protection having been found unmerited, parties will attend before the Judge on a day to be appointed to show cause why the suit should be retained as a pending case in the Thika Environment and Land Court Registry.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 8TH DAY OF AUGUST 2024

B M EBOSO

JUDGE

In the Presence of: -

Mr Bernard Chenge for the Plaintiff

Mr Githui for the Defendants

Mr Otieno for the 3rd Interested Party

Mr Maina for the 4th Interested Party

Court Assistant: Elvis Hinga

