



Cresta Investments Limited & another v Adiungo Kenya Limited & another (Commercial Case E204 of 2023) [2025] KEHC 509 (KLR) (Commercial and Tax) (27 January 2025) (Ruling)

Neutral citation: [2025] KEHC 509 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E204 OF 2023
JWW MONG'ARE, J
JANUARY 27, 2025**

BETWEEN

CRESTA INVESTMENTS LIMITED 1ST PLAINTIFF

ALPKING HOLDINGS LIMITED 2ND PLAINTIFF

AND

ADIUNGO KENYA LIMITED 1ST DEFENDANT

IUNGO CAPITAL BV 2ND DEFENDANT

RULING

1. By a Loan Agreement dated 14th April 2021 (“the Loan Agreement”), the 2nd Defendant (“Iungo”) advanced the 1st Plaintiff (“Cresta”) USD 300,000 which facility was to be secured by a legal charge over the property Unit No. 8 situated on LR. No. 195/228, Karen Hills, Nairobi (“the suit property”) owned by the 2nd Plaintiff (“Alpking”). The 1st Defendant (“Adiungo”) was also appointed as Iungo’s security agent for the transaction. The Loan Agreement provided that Cresta would repay the loan in four installments, however, Cresta was not able to make the repayments accordingly and it fell into arrears prompting the Defendants to issue it with various statutory notices under the [Land Act](#) (Chapter 280 of the Laws of Kenya) and evincing their intention to sell the suit property.
2. Apprehensive that the suit property was about to be auctioned, the Plaintiffs filed the present suit together with an application dated 12th May 2023 made under section 7 of the [Arbitration Act](#) (Chapter 49 of the Laws of Kenya), section 1A, 1B & 3A of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) and Order 40 Rule 1 of the [Civil Procedure Rules, 2010](#) seeking to restrain the Defendants from selling the suit property and that the Defendants furnish them with a statement of account in respect of the loan facility so that they have all the information in readiness for the arbitration between the parties.



3. This application is supported by grounds on its face and the affidavits sworn by Alfred Omwansa Momanyi on 12th May 2023 and 29th May 2023. It is opposed by the Defendants through the replying affidavit of their director, Steven Lee, sworn on 23rd May 2023. The court (Mabeya J.) on 16th May 2023 granted an interim injunction stopping the sale of the suit property which orders were extended on 31st May 2023 as the parties pursued a court-mandated mediation. The mediation did not yield any settlement and this led to the Defendants filing the application dated 18th September 2023 under Section 1A,1B and 3A of the Civil Procedure Act and Order 40 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules seeking to discharge the interim orders or in the alternative, that said orders be varied so that the interim injunction is conditional upon the deposit of the outstanding loan amount in court.
4. The Defendants' application is supported by the affidavits of Steven Lee sworn on 18th September 2023 and 9th October 2023 and opposed by the Plaintiffs through the replying affidavits of Alfred Momanyi and Josiah Muoka Mumo all sworn on 4th October 2023. The Defendants' application was followed by an application by the Plaintiffs dated 7th November 2023 under Section 76 of the Land Registration Act(Chapter 300 of the Laws of Kenya), Order 51 Rule 1(1) of the Civil Procedure Rules, Section 3A & 63 of the Civil Procedure Act and Section 5 of the Judicature Act(Chapter 8 of the Laws of Kenya) and Order 52 of the Rules of the Supreme Court of England where they seek to cite the Defendants and their agents for contempt of the interim orders issued on 16th May 2023 and that their properties be attached to satisfy any loss suffered by Alpink arising from an auction that was apparently scheduled for 2nd November 2023. The Defendants have opposed this application through the Grounds of Opposition dated 16th November 2023.
5. The three applications were canvassed by way of written and oral submissions from the parties' respective counsel, which together with the pleadings, I will make relevant references to in my analysis and determination below.

Analysis and Determination:-

6. I have carefully gone through the parties' applications, the responses thereto and the rival submissions. The main issues for determination are whether the Defendants are guilty of contempt of the interim orders issued on 16th May 2023; whether interim orders should issue pending the arbitral dispute or whether the interim orders in place should be discharged and/or varied.
7. On the issue of contempt, it is trite that once a court issues an order, it binds all and sundry, the mighty and the lowly equally without exception. It is meant to be obeyed and not otherwise and that the ingredients required to be proved for a successful contempt prosecution were set out by the Court of Appeal in Ochino & another v Okombo & 4 others [1989] KECA 65 (KLR) where it cited its own decision in Mwangi Mangondu v Nairobi City Council (Civil Appeal No. 95 of 1988) where it held that, "[T]he court will only punish as a contempt breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt." The position on the applicable standard of proof was later finessed in Gatharia K. Mutitika v Baharini Farm Limited [1985] KLR 227 where the Court of Appeal considered the fact that contempt of court was criminal in character hence the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. It added that, "the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge."
8. The Plaintiffs state that the Defendants are in contempt of the orders of 16th May 2023 for advertising the suit property for sale and yet the orders restrained the Defendants from selling, auctioning or in any manner interfering with the suit property. In response, the Defendants state that the court(Mabeya



J.,) while extending the interim orders on 31st May 2023 made the same conditional that the Plaintiffs ought to continue servicing the facility without fail. The Defendants aver that the Plaintiffs never made any payments towards paying the debt in the intervening period between 31st May 2023 and 16th October 2023 in violation of the court's directions. That on 16th October 2023, when parties appeared for mention to confirm filing of submission, the Court, having been made aware of the Plaintiffs' actions, declined to extend the interim orders meaning that the orders lapsed and that there existed no orders within the Defendants' knowledge.

9. As such, the Defendants state that the advertisement to auction the suit property, being the alleged act of disobedience, was carried on 18th October 2023 after the Interim orders had lapsed therefore the Defendants' actions were not in contempt of any Court order.
10. Going through the record, I am in agreement with the Defendants that the orders of 31st May 2023 were conditional upon the Plaintiffs continuing to service the facility without fail and that on 16th October 2023, the interim orders were never extended and were only extended on 2nd November 2023. It therefore follows that when the Defendants advertised the suit property for sale on 18th October 2023, there were no interim orders restraining them from advertising or dealing with the suit property. There is also no evidence that the Plaintiffs were servicing the loan facility as ordered by the court further buttressing the point that the interim orders were discharged for non-compliance by the Plaintiffs. It is therefore my finding that the Defendants were not in contempt of the interim orders of 16th May 2023 and extended on 31st May 2023 and the Plaintiffs' application dated 7th November 2023 fails.
11. Turning to whether an injunction ought to be issued pending the hearing and determination of the arbitration proceedings, it is not in dispute that the power of the court to grant this order is grounded in Section 7 of the Arbitration Act which provides as follows:-

7. 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.

12. I agree with both parties' submissions that the leading case in which the Court of Appeal outlined the principles governing the grant of interim measures of protection is Safaricom Limited v Ocean View Beach Hotel Limited, Salim Sultan Moloo & Alsai (K) Limited [2010] KECA 346 (KLR) where Nyamu JA., observed as follows:-

By determining the matters on the basis of the [GIELLA] principles the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names. In the case of Kenya, the Arbitration Act is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as "interim measures of protection" under section 7 of the Arbitration Act. On the other hand, in the English version of the ICC Rules for example,



they are known as “interim conservatory measures”. Whatever their description however, they are intended in principle to operate as “holding” orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation.

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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 the grant of injunctions as the High Court purported to do in this matter.

To illustrate the point Article 26-3 of the Unictal Arbitration rules states:-

“A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement.”

Section 7 of the *Arbitration Act* is modeled on this. However, in the matter before us and with due respect, the Commercial Court (Kooome, J.) contravened the above principles by firstly either declining to issue any measure of protection or granting such a measure. The Court also failed to correctly address the principles for the issue of any such measures and worse still, the supreme court took over the subject matter altogether and ruled on the merits of the subject matter of the arbitration thereby prejudicing the outcome of the arbitration. This explains why in the special circumstances of this matter, this Court must take extraordinary measures to rectify an extraordinary illegality. Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. 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. [Emphasis mine]

13. Whereas the Defendants have submitted that it is the Charge Document rather than the Loan Agreement that is to be considered as the main document in respect of this matter, I find that the two documents remain binding to the parties and they cannot be read in isolation. As such, I find that as per the Loan Agreement, there is indeed an arbitration agreement under Clause 34 therein. The Defendants have also submitted that there is no dispute between the parties and that the Plaintiffs have



always been indebted to them having only paid Kshs. 3,000,000.00/= which was against the agreement of the parties that the Plaintiffs pay USD 323,730 in one installment. From the annexures attached by the Defendants, there is letter dated 27th January 2023 from the Plaintiffs' advocates which seeks to know the position of the outstanding debt so that they can "prepare settlement". In a letter dated 6th February 2023 and issued on a "without prejudice" basis, the Defendants' advocates stated that even though the auctioneers' notice indicated an outstanding debt of USD 344,082, the Defendants were ready to waive the penalties and discount the amount due to USD 323,730 provided that the same shall be paid on or before 7th March 2023. There was no response to this letter as what followed was this suit.

14. From the above, it is clear that the Plaintiffs are admittedly indebted to the Defendants and that the Plaintiffs have not disputed the sums owing and they only sought clarification of whether it was USD 311,492 or USD 344,082. The Plaintiffs also acknowledge that the outstanding debt may include penalties, interest, legal fees and auctioneer's charges and that the outstanding debt is more likely than not ballooning because of the same. In the foregoing, I find that it would not be appropriate to issue an interim measure of protection as there are chances that the ballooning debt may outstrip the value of the suit property and the Defendants may not be able to recover their money in the long run even if they sell the suit property. This situation is exacerbated by the fact that the Plaintiffs have not even started the arbitration process. As KORIR J., (as he was then) stated in *Coast Apparel EPZ Limited v Mtwapa EPZ Limited & I & M Bank Limited* [2017] KEHC 4025 (KLR), for an interim order of protection to be granted "...the court must be satisfied that the parties have already commenced the process for putting in place an arbitral panel or arbitration proceedings have already started. It is not an order issued in a vacuum as it is premised on intended or ongoing arbitration proceedings."
15. I also reject the Plaintiffs' argument that the Defendants had no license under the *Banking Act* (Chapter 488 of the Laws of Kenya) and therefore the subject charge is invalid and that the Defendants cannot exercise their statutory power of sale. I find this argument to be an afterthought and a dishonest attempt by the Plaintiffs not to repay the outstanding debt. It must be properly understood by parties like the Plaintiffs that an injunction or an interim measure of protection is an equitable remedy. And he who seek equity must first do equity to the opposite party. I think it is inequitable to derive substantial financial accommodation through a charge and attack the same when the situation is unfavourable. Under all circumstances, a Plaintiff seeking an equitable remedy must approach the court with clean hands in order to benefit from the discretionary powers of the court (see *Cylinder Masters Limited V Barclays Bank Of Kenya Ltd* [2007] KEHC 2506 (KLR)).
16. For the above reasons, I find that an interim measure of protection by way of an injunction cannot issue to the Plaintiffs in the circumstances. Their application therefore fails and as a consequence, the interim orders in place are automatically discharged and the Defendants' application dated 18th September 2023 is allowed.

Conclusion and Disposition:-

17. In the upshot, the applications dated 12th May 2023 and 7th November 2023 are dismissed. The Defendants' application dated 18th September 2023 is allowed and the interim orders currently in force are hereby discharged. The Plaintiffs will bear the costs of the applications.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY 2025

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J.W.W. MONG'ARE



JUDGE

In the Presence of:-

1. Mr. Makau for the Plaintiff.
2. Mr. Omemo for the Defendants.
3. Amos - Court Assistant

