



REPUBLIC OF KENYA



**M'Liburu v Mahan Limited & another (Civil Case E026 of 2024)
[2025] KEHC 11633 (KLR) (29 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE E026 OF 2024
HM NYAGA, J
JULY 29, 2025**

BETWEEN

TARSILA KAWIRIA M'LIBURU PLAINTIFF

AND

MAHAN LIMITED 1ST DEFENDANT

ALI TEHRANI 2ND DEFENDANT

RULING

1. By an amended Notice of motion dated 28th November, 2024 the plaintiff/applicant has sought the following orders:-
 - a). Spent
 - b). That pending inter-partes hearing and determination of this application the Honourable court be pleased to issue an order of temporary injunction restraining the defendants respondents whether by themselves or their agents or their servants or anyone else acting at their behest from selling/transferring/leasing or in any other parting ways or removing from site the following motor vehicles/machinery
 - (a) Toyota Land Cruiser Registration No. KCR 222Q,
 - (b) Foton, Auman Tipper 25T C&C Registration No. KCR 5312,
 - (c) Foton, Auman Tipper Registration No. KCP 228T,
 - (d) Tunland Registration No. KCU 740Y, Sany,
 - (e) Roller/Grader/Crane/Combine/Harvester Registration No. KHMA804N



- c) That pending the hearing and determination of this application the Honourable Court be pleased to issue an order that the following motor vehicles/machinery be impounded and placed in the custody of police at the Meru Police Station or any other safe custody.
- (a) Toyota Land Cruiser Registration No. KCR 222Q.
 - (b) Foton, Auman Tipper 25T C&C Registration No. KCR 5317,
 - (c) Foton, Auman Tipper Registration No. KCP 228T,
 - (d) Tunland Registration No. KCU 740Y, Sany,
 - (e) Roller/Grader/Crane/Combine/Harvester Registration No. KHMA804.
- d). That pending the hearing and determination of this suit the Honourable court be pleased to issue an order of temporary injunction restraining the defendants/responden whether by themselves or their agents or their servants or anyone else acting at their behest from selling/transferring/leasing or in any other parting ways or removing from site the following motor vehicles/machinery
- a) Toyota Land Cruiser Registration No. KCR 222Q,
 - b) Foton, Auman Tipper 25T C&C Registration No. KCR 5312,
 - c) Foton, Auman Tipper Registration No. KCP 228T.
 - d) Tunland Registration No. KCU 740Y, Sany,
 - e) Roller/Grader/Crane/Combine/Harvester Registration No. KHMA804N
- e. That pending the hearing and determination of this suit the Honourable Court be pleased to issue an order that the following motor vehicles machinery be impounded and placed in the custody of police at the Meru Police Station or any other safe custody.
- (a) Toyota Land Cruiser Registration No. KCR 222Q.
Foton, Auman Tipper 25T C&C Registration No. KCR 5312,
 - (b) Foton, Auman Tipper Registration No. KCP 228T,
 - (c) Tunland Registration No. KCU 740Y, Sany,
 - (e) Roller/Grader/Crane/Combine/Harvester Registration No. KHMA804N
- e. That the OCS Meru Police Station and/or any other police officer wherever the motor vehicles/ machinery are located be ordered to oversee the impounding of the motor vehicles/machinery and ensure compliance.
- f. That the costs of this application be provided for.

The application is propped by the grounds set out on its face and is supported by the applicant's affidavit sworn on 28/10/2024.

2. In a nutshell, it's the applicant's case that she entered into an agreement with the 1st defendant/1st respondent, who had secured a tender No. RWC 494, to construct the road Known as Mikinduri Mulika Road at a costs of KSh. 40,000,000/=. That under the said agreement, the applicant agreed to finance the 1st defendant to the tune of Ksh. 20,000,000 while the 1st respondent was to provide the machinery and to the equipment necessary to undertake the construction. That the parties were



to share profits equally. the subsequent to that agreement, the applicant deposited a sum of Ksh. 200,000,000/= into the 2nd defendants account. That the 1st defendant completed the project and was duly paid for the work done, but has refused neglected to pay to the applicant the amount she invested and Ksh. 3,250,000/= being the profits due to her.

3. The defendants/respondents were served with the application and filed a notice of preliminary Objection dated 10th February, 2025. The preliminary Objection is based on Section 6 of the *Arbitration Act*, and the respondent's argument is that the court lacks the jurisdiction to hear and determine the suit. Directions were given that the objection be canvassed vide written submissions.

Respondents Submissions

4. The respondents submit that the objection has been raised at eh earliest opportunity as required. That the agreement between the parties under clause 11 provides for an arbitration clause.
5. Citing the case of *Eucomec International Limited v Shanders Taikai Power Engineering Co. Limited* (2012) KEHC 93 (KLR) the respondents sought a stay of the suit herein as the parties proceed with arbitration.

Applicant's Submissions

6. Citing *Mukhisa Biscuits Manufacturing Ltd v West End Distributors Limited* (1969_EA 696, the applicant the parameters of what would constitute a preliminary objection. It was submitted that the orders ought herein are interim measurers of protection, for which the court is empowered to grant under Section 7 of the *Arbitration Act*.
7. It is further submitted that even the authority cited by the respondents, the court has jurisdiction to grant the orders sought.
8. The parameters of what constitutes a preliminary Objection were as set out in *Mukhisa Bisuits case (supra)*. It was held as follows:-XXXXXXXXXXXXXXXXXXXX
9. The objection by the respondents is premised on a provision under the contract between them that refers any dispute between the parties to the Arbitration. That, in my view is a valid ground for raising a preliminary Objection.
10. There is a concurrence, that the agreement between the plaintiff and the 1st defendant contained clause 11 which provides as follows:-

“That both parties undertake to act with utmost good faith towards each other in the joint venture herein and to diligently perform their respective obligations for the successful completion of the development intended ad in the event of any dispute arising between the parties in respect of the development the parties will attempt an amicable resolution between themselves in the first instance and in the event of an resolution not being reached the dispute will be referred to arbitration by an arbitrators appointed by the chartered Institute of Arbitration Kenya Chapter, under the *Arbitration Act*, Cap 49 Laws of Kenya and his/ her decision will be final save as provided under the Act”.

11. Section 6 o the *Arbitration Act* provides as follows:- XXXXXXXXXX
12. It is this provision that the respondents have sought to rely upon. For the applicant it is argued that the application is brought under Section 7 of the *Act* which provides as follows:-XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX



13. From the outset, it is so clear, that the 2nd defendant is not a party to the agreement in question. Since the decision in *Solomon v Solomon* (1897) A.C 78, it is Trite Law that a company in law on separate person from its members. It follows that the 2nd defendant cannot rely on an agreement between the 1st defendant and the plaintiff to seek a stay of the suit on account of the arbitration clause.
14. I will now deal with the issue as between the plaintiff and the 1st defendant.
15. In my view, where there is a reference to arbitration the parties can only come to court to seek protection orders as provided for under Section 7 of the Act. The court cannot deque into the substance of the dispute.
16. In *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* Civil Application No. 327 of 2009, Nyamu JA observed as follows regarding the application of Section 7 of the *Arbitration Act*:-
XXXXXXXXXXXXXXXXXX
17. A similar view was held by Majanja, J in *Jetways Airlines Limited v Ocean Airlines Limited* (2021) eKLR. He stated as follows:- XXXXXXXXX
18. It is clear that a party has the option to move the court for interim relief under Section 7 of the Act, or move the Arbitral Tribunal for similar orders under Section (8) thereof. The said Section provides as follows:-XXXXXXXXXXXXXXXXXX
19. Having considered the matter, I am of the view that the plaintiff was entitled to approach this court for interim protective measures and no more than that.
20. The plaintiff has sought Judgment against the 1st defendant for a sum of Ksh. 23,250,000/= as being entitled to her under the contract. In that regard, I am of the view that this court cannot delve into that issue.
21. So the question that arises is how is a party to move the court for protective interim measures is it by an application of by a suit?
22. There is divided opinion on the matter. In the *Jetways Case* (*supra*), the court was moved by a Miscellaneous Application and it granted the orders sought.
23. On the flip side, in the case of *Mukbisa v Mukbisa*, the court was of the view that Such an application ought to be hinged on a suit.
24. I am of the view that the manner of moving the court is not really fatal to the case in light of the provisions of Article 159(2) (d) of the Constitution. The court can grant or decline to grant, the orders and averred dealing with issues that one subject to the arbitration clause.
25. Therefore, in so far as the suit and application are limited to the interim orders, this court has the jurisdiction to entertain them, whether the application will be successful or not is another question altogether.
26. Following from the above, I find that :-
 - a. The 2nd defendant's reliance on the Arbitration clause is untenable.
 - b. The suit and application in so far as they are only in respect to protection interim orders can be determined by the court.
 - c. The preliminary objection is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 29TH DAY OF JULY, 2025.



**H. M. NYAGA,
JUDGE.**

