



REPUBLIC OF KENYA



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**Kimeu v Family Signature Limited & 2 others (Commercial Case E106 of 2021)  
[2022] KEHC 14487 (KLR) (Commercial and Tax) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14487 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E106 OF 2021  
DAS MAJANJA, J  
OCTOBER 28, 2022**

**BETWEEN**

**ANTONY MUNYWOKI KIMEU ..... PLAINTIFF**

**AND**

**FAMILY SIGNATURE LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ANILKUMAR VIRPAR MALDE ..... 2<sup>ND</sup> DEFENDANT**

**RAHAB MWIHAKI KAROKI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiff has moved the court by the Amended Notice of Motion dated March 9, 2022 seeking, inter alia, the following interim measures of protection pending arbitration under the provisions of section 7(1) of the *Arbitration Act* (“the Act”):

[2] Pending the inter-partes hearing and determination of this Application and the intended Arbitration proceedings, a temporary injunction do issue restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves, their employees and agents from selling, advertising for sale, charging, transferring, alienating, disposing or otherwise interfering with the 1<sup>st</sup> Defendant’s suit properties known as: Ngaraiam House Plot No 209/136/65 located at Ngariama Road, Brighton House Plot No 209/542 located at Tom Mboya Street, Amber House Plot No 209/4987 located at Mfangano Street, Bektel Building Plot No 209/555 located at Tom Mboya Street, Kings Way Plot No 209/4360/60 located at University Way, Quran House Plot No 209/3842 located at Mfangano Street, Formation House Plot No 209/3842 located at Mfangano Street, Lenana Forest View Apartments Limited Plot No Dagoretti/Riruta/3484 located at Dagoretti Riruta which was a joint venture with Family Signature Limited.



- [3] Pending the inter-partes hearing and determination of this Application and the intended Arbitration proceedings, a temporary injunction do issue restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves, their employees and agents from selling, advertising for sale, charging, transferring, alienating, disposing or otherwise interfering with the 1<sup>st</sup> Defendant's interest of Kenya Shillings Ten Million (10,000,000/-) paid as a deposit to uptown Agencies for purchase of Hotel Pearl located at Pangani but never registered in the name of Family Signature Limited and other properties which have been acquired using the company's funds but registered in other names.
  - [4] Pending the inter-partes hearing and determination of this Application and the intended Arbitration proceedings, a temporary injunction do issue restraining the 2<sup>nd</sup> Defendant by himself, his employees and agents from diluting, pledging dealing, interfering and/or intermeddling in any manner whatsoever with the Plaintiff's/Applicant's shareholding in the 1<sup>st</sup> Defendant company and the 900 unallotted shares in the 1<sup>st</sup> Defendant company.
  - [5] Pending the inter-partes hearing and determination of this Application and the intended Arbitration proceedings, an order compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to disclose to the Court all the known Bank Accounts operated on behalf of the 1<sup>st</sup> Defendant/Respondent and for the Applicant to be made a signatory to any such accounts.
  - [6] Pending the inter-partes hearing and determination of this Application and the intended Arbitration proceedings, a status quo Order do issue against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as a measure of interim protection, not to change the bank operations mandate of the 1<sup>st</sup> Defendant/Respondent's accounts as disclosed to the Court.
  - [7] Pending the inter-partes hearing and determination of this Application and the intended Arbitration proceedings, the 3<sup>rd</sup> Defendant be restrained from holding out and acting as a director and/or shareholder of the 1<sup>st</sup> Defendant/Respondent company.
  - [8] Pending the interpartes hearing and determination of this Application and the intended Arbitration proceedings, this Honourable Court do order and direct the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein to file in Court audited account statements of the 1<sup>st</sup> Defendant, from 2009 to date.
  - [9] That Pending the interpartes hearing and determination of this Application and the intended Arbitration proceedings, this Honourable Court do order and direct the Interested party herein, the Registrar of companies not to cause any changes or interference with the original shareholding in the 1<sup>st</sup> Defendant Company.
  - [10] That this Honourable Court do Order that the dispute between the Plaintiff and the Defendants be referred to Arbitration for hearing and determination in terms of Article 31 of the 1<sup>st</sup> Defendant's Articles of Association.
2. The application is supported by the Plaintiff's affidavit sworn on September 3, 2020. The Defendants did not oppose the application despite service of process. The 2<sup>nd</sup> Defendant however filed a replying affidavit to the original application.
  3. Before I deal with the substance of the application, a background of the matters leading to the suit as is apparent from the pleadings will suffice. According to the Plaint dated September 24, 2021, the Plaintiff and the 2<sup>nd</sup> Defendant were shareholders of the 1<sup>st</sup> Defendant ("the Company") with each holding 50 shares leaving 900 unallocated shares. The Company, which was incorporated on November 22, 2007, was, according to the Plaintiff, capitalized by him and the 2<sup>nd</sup> Defendant and in



due course acquired several properties named on the face of the application registered in its name but which the Plaintiff claims to have a beneficial interest.

4. The Plaintiff alleges that he has been subjected to oppressive conduct by the 2<sup>nd</sup> Defendant as he has been excluded from the day to day management of the Company and denied information and accounts owned by the Company. He accuses the 2<sup>nd</sup> Defendant of carrying on fraudulent activities including siphoning money from the Company accounts to secret accounts, attempting to register fraudulent returns with the Registrar of Companies with a view to illegally taking sole and exclusive control of the Company, carrying on the business of the Company including investments without recourse to and sanction of the Board and failing to call for and hold a general meeting. The Plaintiff also contends that the 2<sup>nd</sup> Defendant's conduct has resulted in breach of the Company's Articles of Association as no general meetings have been called and that he has purported to call meetings without notice to members. He states that the 2<sup>nd</sup> Defendant has singlehandedly run the affairs of the Company, failed to publish the Company accounts and has failed to file annual returns since 2009.
5. The Plaintiff pleads that he has suffered loss and prejudice as a result of the 2<sup>nd</sup> Defendant's conduct. He complains that the 2<sup>nd</sup> Defendant has purportedly removed him as a director and shareholder of the Company. As a result, he has not received any emoluments for services rendered to the Company as a director and has been denied access to the Company premises and or any information relating to the Company's affairs.
6. The Plaintiff therefore seeks several reliefs including the following: a declaration his purported removal as a director and shareholder is contrary to the Companies Act, 2015 and the Articles of Association, an order directing the Registrar of Companies to rectify the Company Register by cancelling the unlawful transfer of shares by the 2<sup>nd</sup> Defendant, a permanent injunction restraining the 2<sup>nd</sup> Defendant from selling or in any way dealing with the Company's properties and an injunction restraining the 2<sup>nd</sup> Defendant from otherwise dealing with the Company accounts held at Equity Bank.
7. The Plaintiff's case in support of the application is along the lines I have set out above. Although the 2<sup>nd</sup> Defendant did not file a replying affidavit to the amended application, he did file a replying affidavit sworn on April 8, 2021 in which he set out his version of events.
8. The 2<sup>nd</sup> Defendant states that the application is bad in law as the alleged arbitrable dispute arose between the years 2009 and 2012 hence the matter is barred by limitation as it ought to have been filed latest in 2018. While he accepts that he and the Plaintiff incorporated the Company, he depones that the Plaintiff was always acting as a nominee director and shareholder of one Rahab Mwihaki Karoki ("Rahab") and her family. He also denies that the Plaintiff contributed funds to the Company as he and Rahab are the ones who sourced the funds for the business of the Company. He further avers that by a Settlement Agreement dated April 30, 2021, the 2<sup>nd</sup> Defendant transferred his 50 shares in the Company to Rahab and or her nominees and the share transfers were executed for onward transmission and registration by Rahab.
9. The 2<sup>nd</sup> Defendant avers that even prior to the Settlement Agreement, Rahab was running the Company and was publicly well known as its owner and that following the Settlement Agreement, Rahab took over the Company and has been running it since. He points out that although she is in possession of the Shares Transfer, she has not registered them. He avers that since he divested himself of all the interests in the Company following the Settlement Agreement, he has been wrongly sued and cannot be subjected to arbitration proceedings. He also states that issue of the Share Transfer was resolved the Registrar of Companies by the letter dated May 22, 2012.



10. The Company filed a Statement of Defence dated April 14, 2021 in which it simply denied all the allegations in the Plaintiff. The Registrar of Companies did not respond to the application.
11. The Plaintiff has filed written submissions which I have considered alongside the pleadings, application and depositions. Two issues arise for resolution; whether the court should refer the matter to arbitration and whether the Plaintiff has made out a case for grant of interim measures of protection under section 7 of the *Arbitration Act*.
12. In the application, the Plaintiff seeks an order that the dispute between the Plaintiff and the Defendants be referred to arbitration in terms of Article 31 of the Company's Articles of Association which provides that, "every difference shall be referred to the decision of an arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference".
13. I have read the Plaintiff's deposition and it is not clear why the court's intervention is necessary given that arbitration is a consensual process that does require court intervention. The Plaintiff has annexed several letters from its advocates, Amolo and Gachoka Advocates addressed to the 2<sup>nd</sup> Defendant in the year 2011 regarding resolution of the matters in dispute but none of them mention reference of the dispute to arbitration. What the Plaintiff seemed to threaten at the time was to wind up the Company.
14. Under section 10 of the *Arbitration Act*, the court can only intervene in arbitration matters in a manner prescribed by or permitted by the Act. The Plaintiff has not pointed to any provisions that allows the court to take over the right of the parties under the Articles of Association to refer the matter to arbitration in these circumstances. For completeness, under section 11 of the Act, the parties to an agreement are entitled to appoint an arbitrator. The process of appointment is provided for in section 12 as follows:

12

- (1) No person shall be precluded by reason of that person's nationality from acting as an arbitrator, unless otherwise agreed by the parties.
- (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators and any chairman and failing such agreement—
  - (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the arbitrator;
  - (b) in an arbitration with two arbitrators, each party shall appoint one arbitrator; and
  - (c) in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.
- (3) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default")—
  - (a) has indicated that he is unwilling to do so;
  - (b) fails to do so within the time allowed under the arbitration agreement; or
  - (c) fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party), the other party, having duly appointed an arbitrator, may give notice in writing



to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

- (4) If the party in default does not, within fourteen days after notice under subsection (3) has been given —
  - (a) make the required appointment; and
  - (b) notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.
- (5) Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.
- (6) The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.
- (7) The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator.
- (8) A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.
- (9) The High Court in appointing an arbitrator shall have due regard to any qualifications required of an arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.

15. Section 12 of the *Act* recognises party autonomy by giving each party an opportunity to participate in the appointment of the arbitrator. The Company's Articles of Association contemplates the appointment of a sole arbitrator hence under section 12(2) of the *Act*, the parties are required to agree on the arbitrator. Section 12(3) of the *Act* goes on to provide for what happens when a party defaults or does not participate in the appointment. Section 12(4) then stipulates that once notice has been given to the other party, the party not in default may appoint the sole arbitrator and the arbitrator so appointed shall determine the matter and make a binding award. It is clear from the forgoing provisions, the High Court is not involved in the process of appointment of an arbitrator in these circumstances.

16. In line with the principle of party autonomy, the process remains in the parties' hands. It is only after the party has made an appointment under section 12(4) of the Act, that the party in default is entitled to move the High Court to set aside that appointment. This section buttresses the fact that the party who is not in default is entitled to make an appointment. It is only after the High Court has dealt with the application to set aside the appointment and allowed the application, that it may, by consent of the parties or on the application of either party appoint a sole arbitrator (see also *Wachiuri Wabome t/ a Adili Communications v Kenya Automotive Repairers Association ML HC No 1057 of 2010 [2011] eKLR* and *Trustees, Tourism Promotion Services Staff Pension Scheme v GenAfrica Asset Managers ML HC No 161 of 2018 (OS) [2019] eKLR*). Since the process remains in the parties' hands and neither party has defaulted in a manner to invite the court's intervention, I decline to refer the matter to arbitration.



17. Turning to the application for interim relief, the Plaintiff has invoked section 7 of the 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.

18. 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 & 2 others Civil Application No NAI 327 of 2009 [2010] eKLR 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.

.....

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 UNICTRAL 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 (Koome, 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]

19. Although the amended application was not opposed, the court cannot ignore the 2<sup>nd</sup> Defendant's deposition and the issues raised therein. Further, the burden remains on the Plaintiff to make out a case for the grant of orders sought despite the lack of opposition to the application.
20. I have considered the facts and I am not inclined to grant interim measures of protection sought by the Plaintiff for several reasons. First, while the court under section 7 of the Act has jurisdiction to grant interim relief before the commencement of arbitration proceedings, such relief is intended to last pending the reference to arbitration and must not be open ended. In this case there is no indication of what steps the Plaintiff has taken to refer the matter to arbitration since the dispute arose in 2011.
21. Further, the length of delay in seeking relief militates against granting the orders sought. As the maxim of equity states, delay defeats equity. The acts complained of took place in 2011 or thereabouts. The Plaintiff's deposition is short on what happened over the last 10 or so years in relation to the Company and its property. In these circumstances without full disclosure this court is reluctant to grant relief.
22. The second reason I am not inclined to grant the application is because of non-disclosure of material facts. The 2<sup>nd</sup> Defendant, in his replying affidavit, has given a detailed account of what transpired in regard to the Company shares between himself, the Plaintiff and Rahab. It is apparent that the Plaintiff executed a Deed of Settlement which had the effect of divesting him and the 2<sup>nd</sup> Defendant of shares in the Company and leaving the Company under the effective control of Rahab. Whether the Plaintiff contests that account or not, in my view, the court cannot ignore a deposition that is on record (see *Trust Bank Limited v Amalo Company Limited Civil Appeal No 215 of 2000 [2002] 2 KLR 627 [2003] 1 EA 350*). The 2<sup>nd</sup> Defendant's account, which is unrebutted, casts doubt on the Plaintiff's case particularly in the absence of the response from him.
23. I am not satisfied that the Plaintiff has made out a case for the grant of interim relief under section 7 of the *Arbitration Act*. Consequently, I dismiss the Notice of Motion dated March 9, 2022. As the Respondents did not participate in the proceedings, there shall be no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2022**

**D S MAJANJA**

**JUDGE**



Ms Aisha instructed by Amolo and Gachoka Advocates for the Plaintiff.

Mr Njenga instructed by Muchoki, Kangata, Njenga and Company Advocates for the 1<sup>st</sup> Defendant.

Mr Odhiambo instructed Office of Attorney General for the Registrar of Companies.

