



REPUBLIC OF KENYA



KENYA LAW
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Enzyne Creations Limited v China Qingjian International Group (K) Ltd; Kenya Urban Roads Authority (Interested Party) (Miscellaneous Application E008 of 2022) [2023] KEHC 320 (KLR) (Commercial and Tax) (27 January 2023) (Ruling)

Neutral citation: [2023] KEHC 320 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E008 OF 2022**

A MABEYA, J

JANUARY 27, 2023

IN THE MATTER OF THE CONTRACT FOR PROJECT MANAGEMENT FOR CONSTRUCTION OF NGONG ROAD (DUALLING OF NGONG ROAD-DAGORETTI CORNER-KAREN ROUNDABOUT CONTRACT NO: KURA/DEV/307/2016-2017)

BETWEEN

ENZYNE CREATIONS LIMITED APPLICANT

AND

CHINA QINGJIAN INTERNATIONAL GROUP (K) LTD RESPONDENT

AND

KENYA URBAN ROADS AUTHORITY INTERESTED PARTY

RULING

1. Before court is the applicant's originating summons dated January 11, 2022. It was brought under sections 7 and 12(9) of the *Arbitration Act* 1995, rule 3(1) of the *Arbitration Rules 1997*, article 159(2) (c) of the *Constitution*, section 3A of the *Civil Procedure Act* and order 46, rule 20 of the *Civil Procedure Rules*.
2. The applicant sought an order directing the director general of the interested party to detain and hold any payments to a tune of Ksh 173,801,105.69 due to the respondent or its affiliates. This is to preserve any arbitral award that may be awarded in the dispute between the applicant and respondent in respect of contract for provision of various services and construction materials with regard to the construction of Ngong Road under contract known as dualling of Ngong Road (dagoretti Corner-karen Roundabout) Contract No Kura/dev/307/2016-2017("the Contract").



3. Further, the applicant prayed that the court do give such directions as may be necessary to preserve any award that may arise from the dispute between the parties which is already before an arbitrator.
4. The application was supported by the affidavit of Eng. Evans Omari. It was contended that the applicant and respondent entered into various sub contracts under the contract. That the interested party was the employer in the said contract.
5. That a dispute arose between the parties as the respondent failed to pay the applicant Kshs.173,801,105.69. Under the agreement between the parties, all disputes arising between them were to be referred to arbitration. The chairman of the Chartered Institute of Arbitrators appointed an arbitrator on August 2021 as the sole arbitrator to determine the dispute between the parties.
6. The applicant averred that the respondent was not cooperating with the process of arbitration. That the respondent was a Chinese company and the applicant did not know any of its assets, the location of its directors and any contracts they are involved in at the moment. That unless the amount sought in the arbitration is preserved the plaintiff will have total loss of the award and the arbitration shall have been in vain.
7. The respondent opposed the application *vide* a replying affidavit sworn on January 28, 2022 by Qu Gaolei, an employee of the respondent. He averred that the respondent was registered in Kenya in 2015 and established a reputation as a top tier road construction and engineering firm. That in the 2017, the respondent was awarded a tender by the interested party to construct 9.8 Kilometers Municipal road along Ngong Road within Karen Area, the contract. That the director of the respondent colluded with the local staff including the directors of the applicant to embezzle funds from the respondent, funds that the respondent can prove were already disbursed to the applicants.
8. That in a period of one (1) year over Kshs 197,438,200/- was fraudulently paid out to the applicant in unclear circumstances. That in the premises, monies owed to the applicant, if any, had been settled. That the applicant did not carry out any work but was involved in an elaborate plot to swindle and defraud the respondent.
9. That the mismanagement of the respondent between 2020 -2021 had led to major losses for the respondent including the dualling of 9.8 Kilometers Municipal Road along Ngong Road tender. That the delayed payment by the interested party have made it difficult for the respondent to settle its suppliers and subcontractors, who currently have judgments against the respondent, some of who have already executed putting the respondent's assets at risk.
10. The respondent further asserted that it is a Multi-National Company registered in Kenya with assets in Kenya and business interests all over Africa. That if it were a flight risk, then it would have endeavoured to close up shop and mitigate its losses. That the alleged debt is disputed as the same is not due and owing.
11. The interested party also filed a replying affidavit sworn on February 8, 2022 by its legal officer. It was contended that the subject application contravened section 68 of the [Kenya Roads Act, 2007](#). That this is an application for execution disguised as an application to preserve a subject matter pending an arbitral award. That preservation orders sought within the ambit of the [Arbitration Act](#), are generally restricted to the parties involved in the arbitration itself and not to any other party.
12. That the drafters of the [Arbitration Act](#) and in particular section 7 thereof intended that any preservative order sought should be on the subject matter of the arbitration, which is not the case in the instant suit. That this court is precluded from issuing any preservation orders against the interested party, who is not a party to the contract entered into by the applicant and the respondent.



13. That the applicant’s application sought to attach, in disguise of a preservation order, an amount that is unverified, uncertified, and unascertained. There is no confirmation that the said amount is due and owing to respondent. That a number of parties had instituted claims against the respondent, which suits had been heard and determined and decrees issued unlike in the applicant’s case. That the applicant had no decree and was neither a creditor but only a claimant in a yet to be determined arbitration.
14. The interested party pleaded that the order sought would be prejudicial to it as it has not certified and/or verified conclusively that there is any amount due to the respondent and that interest would accrue to the amounts owing to the respondent at the cost of the interested party as stipulated in the contract between the interested party and the respondent.
15. The Court has carefully considered the record, the contending affidavits and the submission. The first issue for determination is whether the Applicant has met the threshold for the grant of an interim measure of preservation by directing the interested party to detain any payments to the tune of Kshs 173, 801, 105.69.
16. Section 7 of the *Arbitration Act* provides: -
 - 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.”
17. In *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR, laid down the factors to be considered before granting an interim measure of protection as follows: -

“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:- i. The existence of an arbitration agreement. ii. Whether the subject matter of arbitration is under threat. iii. In the special circumstances, which is the appropriate measure of protection after an assessment of the merits of the application? iv. For what period must the measure be given especially if requested for before commencement of the arbitration so as to avoid encroaching on the tribunal’s decision – making power as intended by the parties?... A court of law when asked to issue interim measures of protection must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration.”
18. In this case, it is undisputed that the dispute arising between the parties would be determined through arbitration. The arbitral proceedings are already on course. The rights of the parties therefore will be determined there.
19. The second issue to consider is whether the subject matter of the arbitration is under threat. The applicant averred that a dispute arose between the parties as the respondent failed to pay it Kshs 173,801,105.69, the subject matter of the arbitration.



20. The respondent denied owing any money to the applicant while the interested party asserted that it is yet to certify what amount, if any, it owes to the respondent.
21. It is alleged that the debt arose from works and or services offered in respect of the contract. Although the respondent denied that it owes that money, it did not deny having engaged the applicant for services. All it contended was that its director and that of the applicant had connived and defrauded it monies which it alleges goes to settle any debts owed to the applicant.
22. It is also not denied that although the respondent is registered locally, it is Chinese owned and has no known assets within the jurisdiction. It is not clear for how long it intends to be in operation in Kenya.
23. On the other hand, the interested party has not denied the contract. It has also not denied that it holds or may in future hold monies on behalf of the respondent arising out of the contract. All that it stated was that it had not certified such sum to the respondent.
24. If the arbitral proceedings proceed and conclude in favour of the applicant and by that time the respondent has folded business in Kenya, the said proceedings would have been in futility. On the other hand, if the monies continue to be held by the interested party and not paid over, that money would still be available to any of the successful parties in the arbitration. Neither of the parties would suffer prejudice as it would be if all the monies were to be released to the respondent and it lost the arbitration.
25. The court has to take a position that would not injure any of the parties. A position that will be less injurious to the parties involved.
26. The amount that the applicant seeks to have preserved by this court would have to be established at the arbitration. The court is satisfied that an interim preservatory order of injunction ought to be issued under the circumstances.
27. Accordingly, the court finds the originating summons dated January 11, 2022 to be meritorious and I allow the same in terms of prayer no 3. The applicant will also have the costs of the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2023.

A. MABEYA, FCIArb

JUDGE

