Vshydro Kenya Limited v Settet Power Generation Company Limited (Commercial Case E054 of 2023) [2023] KEHC 24542 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)

Neutral citation: [2023] KEHC 24542 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E054 OF 2023

MN MWANGI, J

MAY 26, 2023

BETWEEN

VSHYDRO KENYA LIMITED ..... APPLICANT

AND

SETTET POWER GENERATION COMPANY LIMITED ..... RESPONDENT

RULING

1. Before me is a Chamber Summons application dated 16th February, 2023 brought under the provisions of Section 7(1) of the *Arbitration Act*, 1998 (as amended by Act of 2009) and Rule 2 of the *Arbitration Rules*, 1997. The plaintiff/applicant seeks the following orders -

    i. Spent;

    ii. Spent;

    iii. Spent;

    iv. Spent;

    v. That pending the reference to arbitration and the hearing of the arbitral proceedings, this Court grants an interim order and/or measure of protection restraining the defendants from assigning the EPC contract of Kipsonoi Small Hydropower Project (2.5MW) (sic) EPC contract of Chemosit Small Hydropower Project (2.5MW), dated 13th September, 2018 and 17th September, 2018 respectively, between the plaintiff and the defendants to any other contractor or third parties;

    vi. That an injunction be issued pending the reference to arbitration and the hearing of the arbitral proceedings restraining the defendants either by themselves, their servants and/or

agents from dealing with, releasing or taking possession of the plaintiff's material on site, including the drawing works in respect of the EPC contract of Kipsonoi Small Hydropower Project (2.5MW) (sic) and EPC contract of Chemosit Small Hydropower Project (2.5MW) as particularized in the schedule attached to the supporting affidavit of Prabodha Sumanasekera marked as Exhibit "PS-1";

vii. That pending the reference to arbitration and the hearing of the arbitral proceedings, the Court grants an order that the materials that are currently wasting away on the site be kept by the plaintiff in safe storage and custody; and

viii. That the costs of this application be awarded to the plaintiff.

2. The application is premised on the grounds on the face of it, and is supported by an affidavit and a further affidavit sworn by Prabodha Sumanasekera, the Managing Director of the plaintiff herein on 16th February, 2023 and 17th March, 2023, respectively. In opposition thereto, the respondents filed a replying affidavit sworn on 10th March, 2023 by Peter Macharia, the Ag. General Manager of the 1st defendant, which is the managing agent of the 2nd defendant.

3. The application was canvassed by way of written submissions which were highlighted on 28th March, 2023. The plaintiff's submissions were filed on 17th March, 2023 by the law firm of Aluvale & Company Advocates, whereas the defendants' submissions were filed by the law firm of Kipkenda & Company Advocates on 28th March, 2023.

4. Ms. Aluvale learned Counsel for the plaintiff cited the provisions of Section 7(1) of the *Arbitration Act*, 1995 and the case of *EON Energy Limited v Desnol Investment Limited & 4 others* [2018] eKLR and submitted that this Court has the jurisdiction to issue the orders sought herein. She also stated that the Court's duty in these proceedings is solely to preserve the subject matter of the arbitration proceedings and not to delve into the merits of the dispute. She relied on the Court of Appeal holding in the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR and stated that the net effect of the interim orders sought herein is purely to preserve the EPC contracts by restraining the defendants from assigning them to third parties, and to preserve the equipment on site pending the hearing and determination of the dispute between the parties by arbitration.

5. In submitting that the subject matter of the arbitration proceedings are under threat and that the orders sought herein will safeguard them, and prevent the parties from being prejudiced pending the final outcome of the arbitration proceedings, Ms. Aluvale referred to the holding by the Court in the case of *Elizabeth Chebet Orchardson v China Sichuan Corporation For International Techno-Economic Corporation & another* [2013] eKLR, cited with approval the case of *CMC Holdings Ltd &b Another v Jaguar Land Rover Exports Limited* [2013] eKLR.

6. She stated that there exists a valid Arbitration Agreement between the parties herein under clause 20.8(b) of the General Conditions of the EPC contracts. She further stated that the plaintiff through its various correspondence including the letter dated 6th February, 2023, demanded for payment of the outstanding invoices and notices of claim, but the defendants in their replying affidavit averred that the plaintiff is not entitled to any payment since it had breached the contracts. She stated that it was evident that there exists a dispute between the parties herein.

7. She indicated that the plaintiff has produced a list of various equipment and materials that are currently not secured, which are wasting away on site, and that the said materials need to be safely stored and preserved to prevent further degeneration and depreciation. She contended that it will be difficult to maintain the condition of the materials and equipment in a satisfactory state, considering that security had been withdrawn. She also contended that the substratum of the EPC contracts will be

defeated in the event that the defendants assign the contracts in issue to third parties, or take away the plaintiff's materials and equipment on site. To this end, Ms. Aluvale relied on the case of *Seven Twenty Investments Limited v Sandhoe Investment Kenya Limited* [2013] eKLR,

8. She referred to the Court's finding in the case of *Evanson Kariuki Kamau & 14 others v Tamarind Meadows Ltd & another* [2021] eKLR and submitted that it is not only in the interests of justice but of both parties, for the orders sought herein to be granted because if the plaintiff keeps the equipment and materials in safe storage and custody, it will mitigate the defendants' loss arising out of breach of contract, if such a case is filed. She further submitted that the defendants shall not suffer any loss and/or prejudice if the instant application is allowed, since the materials and equipment on site if safely stored and preserved, will be beneficial to both parties.

9. Mr. Odoyo, learned Counsel for the defendants submitted that in as much as the contracts herein contained an arbitration clause at clause 20.6, the plaintiff was trying to by-pass the requirement under clause 20.2 of the General Conditions for resolution of disputes by the Dispute Adjudication Board and jump straight to arbitration. He cited Section 7 of the *Arbitration Act* and stated that the purpose of orders of an interim measure of protection are aimed at preserving evidence, to protect assets or in some other way to maintain the status quo, pending the outcome of arbitration proceedings. He also relied on the Court of Appeal holding in the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* (supra) and contended that this Court has to determine whether the plaintiff has met the threshold for the grant of an interim measure of protection as outlined therein.

10. It was submitted by Counsel for the defendants that the perceived dispute herein cannot be referred to arbitration before it is heard by the Dispute Adjudication Board pursuant to clause 20.0 of the General Conditions of the contracts. He further submitted that it is upon the aggrieved party to invoke the provisions of clause 20.2 on joint appointment of the Dispute Adjudication Board but the plaintiff has never written to the defendants proposing appointment of a Dispute Adjudication Board. He posited that it was misleading for the plaintiff to allege that there is currently no Dispute Adjudication Board. He relied on the case of *Lagoon Development Limited v Beijing Industrial Designing and Research Institute* [2014] eKLR, where the Court held that he who comes to equity must do so with clean hands.

11. Mr. Odoyo referred this Court to clause 7.7 of the General Conditions of the contracts and stated that the materials on site belong to the defendants as they were procured and/or paid for, by them. He also stated that the said materials are not wasting away since they are secured and properly covered from the time the plaintiff abandoned the site. He pointed out that the materials listed on table 1 marked as PS-2 were supplied by a nominated sub-contractor for electromechanical equipment- Andriz pvt Co. and have been paid for and delivered to the site hence they are the employer's property. He added that they are stored in containers and they are well secured. He stated that the site is still under possession of the plaintiff, thus the plaintiff has an obligation to provide safety procedures and security even after suspending works pursuant to the provisions of sub-clause 4.8 (d) & 4.22 (a) of the contracts. He contended that the claim for termination of security services is an afterthought since it cannot be a coincidence that the security contract was terminated a day before the further affidavit was sworn.

12. Mr. Odoyo relied on the case of *CMC Holdings Ltd & another v Jaguar Land Rover Exports Limited* [2013] eKLR and the case of *China Young Tai Engineering Co. Ltd v L.G Mwacharo t/a Mwacharo & Associates & another* [2015] eKLR and contended that there is no justification for granting the interim reliefs sought herein. He further relied on the case of *Portlink Limited v Kenya Railways Corporation* and *Ongata Works Limited v Tatu City Limited* [2015] eKLR and submitted that interim measures are granted when the subject matter of Arbitration is under threat, however, in this case, the plaintiff had not demonstrated that the subject matter is under threat.

13. He referred to clause 15.2 of the General Conditions of the contracts which provide for the procedure to be followed before a contract can be terminated and asserted that the defendants have neither threatened to terminate the contracts nor shown any intention of assigning the said contracts to a third party, thus it cannot be said that the contracts herein are under threat.

14. In a rejoinder, Ms. Aluvale submitted that the existing dispute relates to the contracts, and that inspection and valuation reports would have to be prepared but that will not be possible if the contract is assigned to a third party. She further submitted that the materials purchased by the plaintiff such as trucks and generators are properties of the said plaintiff.

Analysis and Determination.

15. I have considered the application herein, the grounds on the face of it and the affidavits filed in support thereof, the replying affidavit by the defendants as well as the written and oral submissions made by Counsel for the parties. The issues that arise for determination are –

    i. Whether the instant application is premature; and

    ii. If the application herein is merited.

16. In the affidavit filed by the plaintiff, it deposed that it entered into a contract with the defendants on 17th September, 2018 for the Engineering, Procurement and Construction (EPC contract) of the proposed 2.5MW Chemosit Small Hydro Electric Power Project on River Chemosit (Chemosit Project). It averred that it got into another EPC contract with the 2nd defendant on 13th September 2019 for the of the proposed 2.6MW Kipsonoi Small Hydro Electric Power Project (Kipsonoi Project).

17. It was stated by the plaintiff that pursuant to the said contract agreements, it was required to among other things, design, execute and complete the works under the said contracts. The defendants on the other hand were required to amongst other things, pay the contract price in accordance with the terms and conditions of the contracts, purchase all project related lands, provide full and unrestricted access to the lands and provide evidence of their financial arrangements.

18. The plaintiff deposed that from the beginning, the contracts were faced with several difficulties such as failure to pay the invoices according to the terms of the contracts, delays in approval of invoices, failure to approve and make payment of the notices of claims, extensive delays due to lack of access to various sites, and refusal to supply particulars of the Board of Directors of Settet as well as the management contracts between KTDA and Settet, all of which were attributable to the defendants. It further deposed that as a consequence, it incurred additional costs, expending additional time, money, and resources in order to keep the projects on schedule. The plaintiff asserted that as a result of the foregoing, it made several claims against the defendants but despite the fact that they admitted some of the said claims in writing, they failed, neglected and/or refused to make payment thus such claims remain outstanding.

19. It was stated by the plaintiff that it had an express contractual right to suspend performance of any of its obligations pursuant to clause 16.1 of the General Conditions of the contracts, especially where the defendants failed to effect timely payment of invoices, and to provide documents on their financial arrangements. It further stated that on 12th July, 2021 having not received any satisfactory response from the defendants to justify non-payment of invoices, lack of access to the sites, evidence of availability of funds and refusal to supply particulars of the Board of Directors of Settet as well as the management contracts between KTDA and Settet, it notified the defendants of suspension of all its obligations.

20. The plaintiff deposed that as a result of a meeting between it and the defendants, a memorandum of understanding dated 17th October, 2022, was signed by the parties herein, where it was agreed that the defendant would pay the outstanding amount before the plaintiff could resume work. The plaintiff also deposed that vide a letter dated 12th October, 2022, the defendants confirmed to the plaintiff's bankers that they would make the requisite payment, but the said payments have never been made to date. The plaintiff averred that for the said reason, vide a letter dated 3rd February, 2023, the plaintiff notified the defendants of its intention to refer the dispute herein to arbitration, and demanded to be allowed to preserve the equipment and materials that are currently wasting away on the site. The plaintiff also averred that it is yet to receive any response to the said demand and the defendants have refused to allow it to take the items and materials on site for preservation.

21. The plaintiff averred that clause 20.2 of the General Conditions of the contracts provide for disputes to be referred to the Dispute Board (sic) and Arbitration, however, since there is currently no Dispute Board (sic) in place, clause 20.8(b) of the General Conditions of the contracts provides that disputes may be referred directly to Arbitration under clause 20.6 of the General Conditions. It further averred that unless the orders sought herein are granted, it will not only suffer substantial and irreparable loss, but it will also be seriously prejudiced in its claim against the defendants, since they will assign the contracts to third parties and take possession of its materials on site, hence nullifying the intended arbitral proceedings.

22. The defendants in their replying affidavit deposed that the plaintiff was under an obligation to comply with the terms of the contracts as regards timelines for execution of the works. They deposed that the Kipsonoi contract commencement date was 15th September, 2020, and it was to run for a period of 28 months, whereas the Chemosit contract commencement date was 15th October, 2018 which is twenty-eight days after signing of the contract, and it was to run for a period of twenty-four months. They averred that it was an understanding of the parties that the advance payment made to the plaintiff for design and mobilization would be recovered within twenty-four months from the commencement date. They further averred that advance payments were made against the advance payment guarantee which was taken out by the plaintiff, which was also required to take out a performance bond/security at its cost for proper performance of the contracts.

23. It was stated by the defendants that the plaintiff was required to complete and submit the design for approval by the defendant within six (6) months from the commencement date, and mobilize for construction within two (2) months from the commencement date and for that reason, the plaintiff was granted full access to the sites but he was slow in performing the works hence the work fell behind schedule. As regards the Chemosit project, the defendants deposed that from the progress report and weekly minutes of June, 2021, it is evident that the plaintiff failed to carry out works in most areas despite having access to the site. That consequently, the plaintiff was put on notice on the slow progress of the works in several instances. That as regards the Kipsonoi project, the plaintiff has never submitted a design that meets the defendants' requirements for approval despite being given the go-ahead on 7th September, 2020 thus affecting the works which were to be completed in September, 2022.

24. The defendants averred that the plaintiff withdrew its claim for IPC 01 as can be seen in the letter dated 11th April, 2022, and in the said letter, the plaintiff was also advised that parties were yet to reconvene and renegotiate on the date when the contractor could commence claims on the right to access the site for the Kipsonoi projects. In regard to the Chemosit project for 2.5 MW the defendant averred that the plaintiff had no right to suspend the works as no monies are due to it from the defendants and there is no dispute on payments due to the plaintiff since IPC 06 had been duly paid as advised by the defendants. The defendants stated that it is well captured in the weekly minutes of June, 2021 and the

letters attached thereto, that the plaintiff agreed that the defendants would recover the monies paid to the suppliers and advance payments made from subsequent Interim Payment Certificates.

25. The defendants deposed that they agreed for the works at Chemosit project to proceed on condition that the plaintiff renewed the performance bond and advance payment guarantee at its cost since that was its responsibility, but the plaintiff insisted that payments for renewal be made first and the amount be deducted from final payments of the project. They stated that having gathered that the plaintiff had a facility with the bank, in the best interest of the projects, they sought to know what percentage of the amount would be released to the contractor for works to resume vide a letter dated 12th October, 2022, since all payments were to be made through the contractor's financiers. That subsequently, the bank responded vide a letter dated 27th October, 2022 and based on the said response, it was clear that had the funds been disbursed, they would not have been for the furtherance of the project.

26. The defendants deposed that they had demonstrated that they have never breached the contracts, and they have accommodated the plaintiff despite its tardiness by extending the completion of the projects, thus the intended referral of the alleged dispute (sic) is misguided and baseless. Further, that the completion period for the Kipsonoi project was extended to 14th January, 2024 while that of the Chemosit project was extended to 30th June, 2023. They stated that the instant application is premature since they have neither expressed any intention of awarding the projects to a third party nor threatened to terminate the contracts herein.

27. The plaintiff in a rejoinder deposed that it is not in dispute that there exist valid agreements between the parties herein and a dispute has arisen, which should be referred to arbitration for determination. It averred that it was never granted full access to the sites and that for the Kipsonoi project, only 23% of the land has been bought.

28. The plaintiff further averred that the defendants violated the contract by failing to provide it with the land for the project as stipulated in the contract. It was stated by the plaintiff that the notices on slow progress of works were occasioned due to force majeure situations like the community closures due to Covid, inability for the staff technical teams to mobilize due to travel restrictions, and constant disturbance of work caused due to lack of access to the specific locations, as a result of land clearance and payment issues attributed to the defendants It claimed that it was for the said reasons that the defendants granted extensions for the contract.

29. The plaintiff asserted that it was not possible to finalize the project designs for the Chemosit project since the alignment of the canal and structures kept changing continuously as the defendants tried to acquire different parcels of land when the initially envisaged land was not made available for the project. That it is for this reason, together with the defendants'failure to raise the financing as required for the project, approve and pay the outstanding invoices that delays were occasioned in the projects which resulted in the several Notices of Claims.

30. The plaintiff stated that as regards the Kipsonoi project, it submitted the full survey drawings and initial designs in draft form to the defendants despite the challenges it encountered on the site. It stated that subsequently, it was denied access to the site by the defendants on grounds that its presence would hamper their land negotiation process. It further stated that it was waiting for final confirmation from the client as to the submitted survey plans, and the initial project designs, which depends on the final lands acquired by the clients for the project.

31. It contended that it did not withdraw its claim for IPC 01, but only agreed to proceed with the project works pending the claim as requested by the SETTET Board of Directors, considering the relationship at the time. The plaintiff deposed that it constantly requested access to the project area and permission

to progress with the project works during the project meetings conducted by the SETTET Board, however, during the meetings held in early 2021, they were requested to be patient until the next SETTET board meeting which was never held. The plaintiff further deposed that the defendants' non-compliance had been admitted in various minutes and correspondence.

32. It was stated by the plaintiff that at the commencement of the EPC contracts, it obtained performance bonds which were valid until the various contracts' completion dates but due to the defendants' breach of the contracts, the bonds expired before the completion of the said contracts. The plaintiff averred that it was unconscionable for the plaintiff to pay for the renewal of the bonds when the defendants were in default. It further averred that the defendants were agreeable to its proposal that theypay for the renewal of the performance bonds and thereafter, deduct the payment from the final invoices.

33. The plaintiff averred that in view of the recent commencement of the rainy reason, the plaintiff's materials on site which include machinery, steel, cement, among others, will be exposed to adverse weather conditions thus resulting in further dissipation and depreciation. It further averred that the machines, equipment and materials on site belong to and were purchased by the plaintiff and that the defendants cannot claim the said equipment and machinery on account of having paid the plaintiff pursuant to the invoices raised for work done or advance payment. The plaintiff contended that clause 7.7 of the General Conditions of the contract refers to the plant under installation and the subject of the EPC contracts, the plaintiff's items, subject to the order for preservation are as per the annexed list, which include, generators, excavators, steel and cement, among others.

34. It asserted thatthe formwork material is constantly exposed to the rain and sun, and the plywood sheets used for formwork are wasting away and rotting due to dampness. It also stated that the steel bars although covered with a makeshift roof, are constantly exposed to the sun and rain, and have already started rusting, and hundreds of bags of cement are already unusable due to hardening. The plaintiff stated that the state of the said materials is unknown as the security company guarding the items terminated its services on 15th March, 2023 on account of non-payment therefore, in addition to the materials wasting away, they are now exposed to the risk of theft and/or vandalism.

Whether the instant application is premature.

35. It is not disputed that on 17th September, 2018, the plaintiff entered into a contract with the defendants for the Engineering, Procurement and Construction of the proposed 2.5MW Chemosit Small Hydro Electric Power Project on River Chemosit. Thereafter, on 13th September, 2019, the plaintiff entered into another contract with the 2nd defendant for the Engineering, Procurement and Construction of the proposed 2.6MW Kipsonoi Small Hydro Electric Power Project. From the evidence on record, it is clear that there is a dispute between the parties herein arising out of the contracts and/or execution of the works since the plaintiff is claiming that it is yet to be paid for invoices raised for work done so far, whereas the defendants in their replying affidavit aver that they have fully paid the plaintiff and they are not indebted to it in anyway whatsoever.

36. In the instant application, the plaintiff is seeking interim measures of protection pending reference of the dispute herein to arbitration. It is not in doubt that there exist arbitral provisions the parties herein at clause 20.6 of the General Conditions of the contracts which state as hereunder –

> "Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both parties..."

37. The plaintiff contended that subject to clause 20.2 of the General Conditions of the contracts, disputes such as the one herein is to be referred to the Dispute Adjudication Board and to Arbitration. It further stated that since there is currently no Dispute Adjudication Board in place, the dispute herein may be referred directly to arbitration pursuant to the provisions of clause 20.8(b). The defendants on the other hand submitted that the perceived dispute cannot be referred to arbitration before it is heard by the Dispute Adjudication Board pursuant to clause 20.2 of the General Conditions of the contracts. Clauses 20.2, 20.4 & 20.8 of the General Conditions of the contracts are replicated here below. Clause 20.2 of the General Conditions states that –

> " Disputes shall be adjudicated by a DAB in accordance with sub-clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. The parties shall jointly appoint a DAB by the date 28 days after a party gives notice to the other party of its intention to refer a dispute to a DAB in accordance with sub-clause 20.4..."

38. Clause 20.4 of the General Conditions states that –

> " ...Except as stated in sub-clause 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] and sub-clause 20.8 [Expiry of Dispute Adjudication Board's Appointment], neither party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given by either party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both parties" (emphasis added).

39. Clause 20.8 of the General Conditions states that –

> " If a dispute arises between the Parties in connection with, or arising out of the Contract or the execution of the Works and there is no DAB in place, whether by reason or expiry of the DAB's appointment or otherwise;
>
> a. Sub-clause 20.4 [Obtaining Dispute Adjudication Board's Decision) and sub-clause 20.5 [Amicable Settlement] shall not apply, and
>
> b. the dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration]."

40. In view of the above, it is evident that a Dispute Adjudication Board (DAB) is appointed jointly by the parties 28 days after a party gives notice to the other party of its intention to refer a dispute to a DAB in accordance with sub-clause 20.4. On perusal of the plaintiff's affidavit in support of the instant application, it is clear that the plaintiff vide a letter dated 3rd February, 2023 notified the defendants of its intentions to refer the dispute to arbitration and demanded that it be allowed to preserve the equipment and materials that are currently wasting away on the site.

41. From a reading of clause 20.6 of the General Conditions of the contracts reproduced in this ruling, my interpretation of the clause is that before the parties' can resort to arbitration, they ought to first try to settle the matter amicably between themselves and in the event that they are unable to resolve the dispute amicably, the matter shall be referred to the DAB. Subsequently, if any of the parties is dissatisfied with the decision of the board, and/or if for some reason there is no DAB or the Board is unable to render its decision within the prescribed timelines, then the matter shall be finally settled by international arbitration.

42. From the foregoing, it is this Court's finding that clause 20.8 of the General Conditions of the contracts cannot be read in isolation but must be read in conjunction with clauses 20.2, 20.4, 20.5 & 20.6 which provide for other forms of dispute resolution that should be attempted first before resorting to arbitration. I am persuaded by the holding in the case of the *County Government of Kirinyaga v African Banking Corporation Ltd* [2020] eKLR where Judge Gitari held as follows–

> " The applicant has not tendered evidence to prove that the parties attempted to settle the dispute if any through negotiations and that the negotiations failed. It goes back to what I have already pointed out that the applicant has not proved that there is a dispute or the nature of the dispute. Clause 26(A) is a condition precedent and where it has not been complied with clause 26(B) has not come into force nor has it fallen due. It would therefore be premature to refer the matter to arbitration even if the court were to find that clause 26 applies. I refer to *Nanchaing Foreign Engineering Company (K) Limited v Easy Properties Kenya Ltd* 2014 eKLR."

43. In the present application, no evidence has been put forth and there is no allegation that the plaintiff notified the defendants of its intention to refer the dispute to a DAB so as to kick start the process of appointing a DAB. It is also worth noting that the plaintiff has not at the very least attempted to explain why it did not want to subject itself to the jurisdiction of the DAB for the provisions under clause 20.8 of the General Conditions of the contracts to come into force.

44. This Court finds that the application herein is premature having been brought pursuant to the provisions of Section 7(1) of the *Arbitration Act*, 1995 (as amended) which provides that the High Court can grant an interim measure of protection before or during arbitral proceedings, noting that clauses 20.6 & 20.8 (b) which provide for arbitration are yet to come into force for reasons explained hereinabove.

If the application herein is merited.

45. Despite the holding above, this Court has to determine if the application herein would have been granted if the correct process on Alternative Dispute Resolution had been followed by the plaintiff. There is no doubt that clauses 20.6 & 20.8(b) of the General Conditions of the contracts make provisions for arbitration. The instant application has been brought pursuant to the provisions of Section 7(1) of the *Arbitration Act* No. 4 of 1995 which provides as hereunder: -

> " 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."

46. Under the provisions of Section 7 of the *Arbitration Act*, 1995 the High Court has the jurisdiction to issue interim orders to preserve the subject matter and/or maintain status quo so as to ensure that there is a dispute for hearing and determination before the Arbitrator.

47. The guiding principles in dealing with an application of this nature were laid down by the Court of Appeal in the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR where Nyamu JA., held that-

> " 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."

48. On the issue of whether the subject matter of arbitration is under threat, it is the plaintiff's case that the materials and equipment on the site is depreciating and wasting away as they are exposed to bad weather conditions. In addition, the security firm that was providing security at the sites has since terminated its contract on account of non-payment hence the materials and equipment at the said sites are exposed to the risk of theft and vandalism. The defendant on the other hand submitted that the materials and equipment on site are well covered, thus they are protected from any adverse weather conditions. As for the issue of security, the defendants contended that it is the responsibility of the plaintiff to provide security at the site according to the contracts between them regardless of whether the plaintiff has suspended the works or not.

49. It was stated by the plaintiff that if the instant application is disallowed, there is a risk that the defendants will assign the contracts to third parties and take possession of the plaintiff's materials on site thus nullifying the intended arbitration proceedings. On the other hand, the defendants contended that there is no evidence that it intends to assign the contracts herein to third parties and/or terminate the contracts it has with the plaintiff. In any event, the completion period for the Kipsonoi project was extended to 14th January, 2024, while that of the Chemosit project was extended to 30th June, 2023. therefore, the subject matter of arbitration is not under threat.

50. In light of the foregoing, I am of the considered opinion that the subject matter of the intended arbitration proceedings consists of; the contracts herein since there are allegations of breach of contract, and the materials and equipment on site. In view of the fact that it is not disputed that the completion period of the contracts in issue were extended; and the defendants have not threatened and or issued notice of their intention to terminate the said contracts, this Court finds that there is no real danger and/or threat that the contracts herein shall be assigned to third parties.

51. When it comes to the materials and equipment on site, I am of the view that they are not only exposed thus at a risk of being affected by adverse weather conditions, but are also exposed to the risk of theft and vandalism due to the absence of security. For, this reason this Court finds that there is real threat of wastage and/or depreciation of the subject matter. It is however evident from the defendants' replying affidavit that they believe that the equipment on site belongs to them.

52. There is no way of ascertaining whether or not they shall lease and/or sell the said machines and/or equipment to third parties thus alienating the subject matter of the intended Alternative Dispute Resolution (ADR). Therefore, having found that there exists a dispute between the parties herein, and that the subject matter of the arbitration is under threat, it would have been fair and just to issue an interim order and/or measure of protection if the present application had not been file prematurely.

53. Consequently, the application dated 16th February, 2023 is hereby struck out with costs to the defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF MAY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Aluvale for the plaintiff/applicant

Mr. Kichwen h/b for Mr. Odoyo for the 1st and 2nd defendants/respondents

Ms. B. Wokabi – Court Assistant.