



**Athi Minerals Company v East African Portland Cement Co PLC (Civil Suit E673 of 2021)
[2023] KEHC 23097 (KLR) (Commercial and Tax) (24 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 23097 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E673 OF 2021
DO CHEPKWONY, J
AUGUST 24, 2023**

BETWEEN

ATHI MINERALS COMPANY PLAINTIFF

AND

EAST AFRICAN PORTLAND CEMENT CO PLC DEFENDANT

RULING

1. What is before the court for determination are two Applications being the plaintiff's application dated June 11, 2021 and the defendant's application dated July 4, 2022 (erroneously dated July 4, 2021).
2. The plaintiff's Application seeks the following orders:
 - a. Spent;
 - b. That pending the hearing and determination of this suit, this Honourable Court grants an interim injunction compelling the defendant to issue the plaintiff with all the withholding tax certificates for payments made on diverse dates between July 2, 2015 to October 4, 2019 amounting to Kshs. 27,819,216.77.
 - c. That pending the hearing and determination of this suit, this honourable court grants an interim injunction compelling the defendant to pay the plaintiff Kshs.27,822,014.16 in the event the defendant does not issue the plaintiff with the withholding tax certificates amounting to Kshs.27,819,216.77 for the payments made on diverse dates between July 2, 2015 to October 3, 2019.
 - d. That costs of the application be provided for.



3. The plaintiff's application is supported by the grounds its the face and the affidavit of its partner Shamit Ghai sworn on June 11, 2021.
4. The plaintiff's application is opposed through the replying affidavit of Simon Peter, the Legal Officer of the defendant, sworn on July 4, 2022.
5. The defendant's application dated July 4, 2021 is supported by the grounds on the face of it and the Affidavit of its Legal Officer Simon Peter sworn on July 4, 2022.
6. It is opposed through the replying affidavit of Shamit Ghai sworn on August 23, 2022, which seeks the following orders:
 - a. That this honourable court be pleased to order stay of further proceedings in this matter pending interpartes hearing and determination of this application;
 - b. That this honourable court be pleased to stay proceedings in this matter pending the hearing the determination of arbitration between the parties in this matter;
 - c. That this honourable court be pleased to refer the matter to arbitration for hearing and determination.
 - d. That costs of this application be provided for.
7. The court will start with determining the defendant's application as it may have the effect of disposing off the plaintiff's application if it is successful.

A background of the Applications

8. The defendant states that it entered into an agreement dated May 14, 2014 with the plaintiff and it through the alleged breach of the agreement, the plaintiff has brought the suit against it for payment of Kshs.67,431,364.77 and withholding certificates amounting to Kshs.27,816,216.77. The defendant argues that it was an express term of the agreement under Clause 16 that all questions in dispute shall be referred to arbitration for settlement. The defendant therefore seeks to have the matter referred to arbitration and holds that the court lacks jurisdiction to hear and determine the suit herein.
9. The plaintiff on the other hand holds that not all disputes that arise from the agreement were to be referred to arbitration. It states that pursuant to Clause 16.5 of the Agreement it is allowed to seek urgent injunctive or interlocutory reliefs in a court having jurisdiction and therefore this court has jurisdiction to grant the injunctive reliefs sought and the Application dated July 4, 2021 should be dismissed with costs.

The submissions

10. In the defendant's submissions dated november 29, 2022, it argues that under section 10 of the *Arbitration Act*, a court should not intervene with matters governed by the said Act. It relies on section 6 of the *Arbitration Act* which empowers the court to refer a matter which is subject of an arbitration agreement to arbitration unless the court finds that the arbitration agreement is null and void or incapable of being performed or that there is not given any dispute between the parties with regard to matters agreed to be referred to arbitration.
11. The defendant also argues that in this case, there is an arbitration agreement whose Clause 16 provides for dispute resolution through arbitration and which the plaintiff has not disputed. The defendant holds that the prayers that the plaintiff is seeking can only be decided in an arbitration forum.



12. In the submissions dated December 9, 2022, the plaintiff holds that the defendant's application offends section 6 of the *Arbitration Act* which provides that a party can apply to court to refer a matter to arbitration not later than the time the party enters appearance. It holds that instead, upon service of the pleadings, the defendant entered appearance unconditionally, and filed Replying Affidavit thus submitted to the jurisdiction of the court. The plaintiff has relied on several cases in support of its claim. The plaintiff also argues that in the event the court is to allow the defendant's application, it should exercise the jurisdiction granted under Clause 16.5 of the Arbitration Agreement and issue the interim injunctive reliefs sought.

Analysis and Determination of the defendant's application

13. The court has carefully read through the submissions filed by either party in considering the prayers being sought in the defendant's applications and finds that for determination is:-
- a. Whether the court has jurisdiction to entertain this suit.
 - b. Whether the proceedings should be stayed and matter referred to arbitration.
14. The power of a court to stay proceedings and refer matters to arbitration is provided for under section 6 of the *Arbitration Act* which provides that:
- “A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-
- a. That the arbitration agreement is null and void, inoperative or incapable of being performed; or
 - b. That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”
15. From the provision of Section 16, it is clear that the defendant was required to file the present application either at the time of entering appearance or even before entering appearance. In the case of *Adrec Limited v Nation Media Group Limited* [2017] eKLR, the court held that:-
- “Any party who wishes to take advantage of the arbitration Clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration”
16. In this case, the application is dated June 11, 2021 and it was served upon the defendant who entered appearance on October 14, 2021. The defendant then filed its replying affidavit on July 4, 2022 followed by the present application dated July 4, 2022 on even date (which has been erroneously dated July 4, 2021). The fact that the defendant did not file its application on the day it entered appearance but did so about 9 months later, meant that it had, as rightly put by the plaintiff, submitted to the jurisdiction of the court. This was the position in the case of *Roofspec & Allied Works Ltd v George Kamau Thugge* [2014] eKLR wherein it was held: -
- “The mere fact that the defendant did not file its application at the time it filed its Memorandum of Appearance or as envisaged in section 6 of the *Arbitration Act* brought this matter within the ambit of this court. The court became fully sized of this matter.”



17. In the circumstances, this court finds that the defendant's application dated July 4, 2022 (July 4, 2021) lacks merit, hence the court has jurisdiction to hear and determine this matter.

The plaintiff's Application

18. As for the plaintiff's application, it is the plaintiff's case that it supplied the defendant with various products and it issued invoices which were paid, leaving a balance in the sum of Kshs.95,250,581.54. It holds being a tax agent appointed by Kenya Revenue Authority, the defendant was required to issue the plaintiff with withholding tax certificates for the payments made between July 2, 2015 to October 3, 2019 but it failed to despite numerous reminders. The plaintiff also holds that the defendant's actions have caused it hardship in reconciling its tax obligations which KRA is demanding from it. The plaintiff is therefore seeking injunctive orders for the defendant to issue it with the withholding tax certificates amounting to Kshs.27,819,216.77 or in the alternative liquidated amount of Kshs. 27,819,216.77.
19. In response, the defendant admits the existence of the contract dated May 14, 2021 and holds that goods and or services supplied were only to be paid upon proper verification by its procurement officers. It holds that it disputes the amount claimed of Kshs.27,819,216.77 since, according to its records, some of the goods/services were not yet verified and therefore the defendant did not have any obligation to pay them, withhold any amount as withholding tax or submit to the plaintiff any withholding tax certificates.
20. Further, the defendant argues that under section 31 of the *Value Added Tax Act*, a registered person who has made a supply and paid tax on the supply but has not received any payment from the person liable to pay tax, the person may after three years from the date of that supply apply to the Commissioner for a tax refund and thus the plaintiff ought to have applied to the Commissioner of Kenya Revenue Authority for refund of the sum of Kshs.27,819,216.77 being the amount claimed as withholding tax.
21. It is the defendant's contention that if the court grants the orders sought at this stage, it will be prejudicial to it since the case involves a multitude of issues which can only be determined at trial. The defendant has urged the court to dismiss the plaintiff's application.

The Submissions

22. In the plaintiff's submissions dated November 1, 2022, the plaintiff urges the court to allow its application as it holds that it has a prima facie case. It contends that the court should issue mandatory injunction compelling the defendant to pay its taxable amount in the event that it fails to issue the withholding tax certificates to enable the plaintiff to reconcile its tax obligations with Kenya Revenue Authority.
23. In the defendant's submissions dated November 29, 2022, it argues that the plaintiff's application is not based on section 7 of the *Arbitration Act* but on Order 40 of the *Civil Procedure Rules*. It however argues that the plaintiff's application raises issues that cannot be determined at an interlocutory stage but upon analysis of facts and evidence which can only be done during trial and therefore mandatory injunctive orders cannot issue.
24. The defendant argues that the plaintiff has not substantiated its claim that it received demands and notices from Kenya Revenue Authority. It further holds that the claim sought can be compensated by an award of damages if the court finds that there was a breach of contract. It is therefore its contention



that the plaintiff has not met the ingredients set in *Giella v Cassman Brown* case. The defendant therefore urges the court to dismiss the application dated June 11, 2021.

Analysis and Determination

25. It is trite law that there are triple conditions which must be met for an order of interlocutory injunction to be granted as stated in the celebrated case of *Giella v Cassman Brown* (1973) EA 358. These principles were rehashed by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 [2014]eKLR, which held that;

“in an interlocutory injunction application, the Applicant has to satisfy the triple requirements to (a), establishes his case only at a prima facie level, (b), demonstrates irreparable injury if a temporary injunction is not granted and (c), ally any doubts as to (b), by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

26. In essence, the plaintiff has to establish a prima facie case which was defined in the case of *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR I by the Court of Appeal as follows: -

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

27. In the instant case, the plaintiff argues that the failure by the defendant to issue it with withholding tax certificates, it failed to reconcile its tax obligations with Kenya Revenue Authority which is demanding from it the said sum. It is this Court’s humble view, that the plaintiff has not substantiated this position by evidencing the demand notices, if any or any correspondence from Kenya Revenue Authority to demonstrate that it is at risk of losing the amount claimed. Therefore, the plaintiff has failed to establish a prima facie case and therefore the court need not look at the other two conditions.

28. Further, it is clear that the injunctive orders being sought by the plaintiff are of mandatory nature, which can only be granted at interlocutory stage under special circumstances. In the case of *Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma* [2020]eKLR, the Court of Appeal reaffirm its decision in *Kenya Breweries Limited & another v Washington O. Okeyo* [2002]eKLR by stating that:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.”

29. In this case, having held that the plaintiff has not established that it has prima facie case and neither has it elaborated the special circumstances to warrant grant of the orders being sought, the court finds that the issues in question are substantive and require full trial for interrogation to ascertain their merit before the said orders can be issued. Therefore, dismiss the Application dated June 11, 2021 is dismissed.

30. For avoidance of doubt:-

a. The Notice of Motion application dated June 11, 2012 be and is hereby dismissed.



- b. The Notice of Motion application dated July 4, 2022 is also dismissed.
- c. The matter to be mentioned on September 18, 2023 for Pre-trial directions on the main suit before the Deputy Registrar.
- d. Costs to be in the cause.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS ...24TH... DAY OF ...AUGUST..., 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

Mr. Luchiri counsel for Respondent

No appearance for the plaintiff

Court Assistant – Martin/Sakina

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