REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

COMMERCIAL CASE NO E006 OF 2020

(FORMERLY HCCOMM MISC APPLICATION NO E1133 OF 2020

COMMERCIAL & TAX DIVISION MILIMANI)

EON ENERGY LTD.....APPLICANT

VERSUS

ADVANCE AFRICAN TRADERS TECHNOLOGY LTD.....1ST RESPONDENT

HENRY OLUOCH ADANJE.....2ND RESPONDENT

MILDRED AKOTH.....3RD RESPONDENT

RULING

1. In its Notice of Motion dated 9th October 2020, the Applicant sought interlocutory injunction orders to restrain the Respondents herein from commencing, continuing or concluding any transactions for sale, transfer or lease of business of the 1st Respondent situate at Katito and Muhoroni Townships wherein the Respondents ran a business known as Advance Petrol Station and more particularly known as L.R. No Kisumu/West Agoro/2647, Kisumu/West Agoro 2698 and Kisumu/ Muhoroni/1282 and property situate at Kisumu and Siaya Counties more particularly known as L.R. No Kisumu/Konya/5604 and South Sakwa/Barkowino/8159 without express authority of this court.

2. It also sought interlocutory injunctive orders pending the *inter partes* and at the *inter partes* hearing barring the Respondents from utilising the real, movable and cash assets of the 1st Respondent without express authority of this honourable court.

3. It also sought interlocutory injunctive orders pending the *inter partes* hearing and pending the determination of arbitral proceedings barring the Respondents from commencing, continuing or concluding any transactions for sale, transfer or lease of business of the 1st Respondent situate at Katito and Muhoroni Townships wherein the Respondents ran a business known as Advance Petrol Station and more particularly known as L.R. No Kisumu/West Agoro/2647, Kisumu/West Agoro 2698 and Kisumu/ Muhoroni/1282 and property situate at Kisumu and Siaya Counties more particularly known as L.R. No Kisumu/Konya/5604 and South Sakwa/Barkowino/8159 without express authority of this court.

4. The said application was supported by the Affidavit of the Applicant's director, Dwalo Ariaro, that was sworn on 9th October 2020. The Applicant stated that both the 2nd and 3rd Respondents were directors and shareholders of the 1st Respondent. It averred that on or about 31st July 2018, it entered into a contract with the 1st Respondent in which it was to supply and sell petroleum products for the 1st Respondent's two (2) petrol stations.

5. It pointed out that the terms of the contract were that it was to supply the 1st Respondent with the goods and that the 1st Respondent was to pay it for the goods it supplied not later than five (5) days of delivery. It contended that despite supplying the 1st Respondent with the goods, the 1st Respondent breached the supply contract by failing to pay for the goods and even after further negotiations in which settlement terms were agreed upon. It was its contention that the 1st Respondent owed it a sum of Kshs 3,151,360.44 which had remained unpaid as at the time it filed the present application.

6. It added that pursuant to the said agreements, any dispute was to be referred to arbitration and that in fact, Patrick Mwiti advocate had been appointed by the Chairman of the Chartered Institute of Arbitrators as the sole arbitrator in the dispute herein.

7. It averred that in order to scuttle the arbitration proceedings, the Respondents had hatched a plan to sell, transfer and/or lease their petroleum business and/or the properties on which the petrol stations stood and/or or other properties to third parties. It was its averment that if the said lease and/or transfer of the lease was not stopped, the substratum of arbitration would be lost rendering the arbitral proceedings superfluous.

8. In opposition to the said application, on 5th February 2020, the 1st Respondent swore a Replying Affidavit. The same was filed on 8th February 2021. He pointed out that L.R. No Kisumu/West Agoro/ 264 and L.R. No South Sakwa/Barkowino/8159 did not form part of the proceedings as they were not subject of the aforesaid Agreement.

9. He added that the only property that was subject to the Debt Settlement Agreement dated 7th November 2018 had already been leased to Inter Max Company Limited vide a Lease Agreement dated 10th September 2020 and registered on 22nd October 2020 under Presentation Book No 142/10/2020 by the Lands Office Nyando Sub County. It was his contention that if the orders were granted, they would affect a party who was not party to the proceedings herein.

10. He stated that Clause 16 of the Agreement dated 17th **(sic)** November 2018 did not make it mandatory for the matter to be referred to arbitration and consequently, the application herein was fatally defective and ought to be dismissed. He further stated that the Applicant appointed an administrator to operate the petrol station to recoup the debt, which administrator operated the petrol station until 14th October 2019 but that instead of the debt reducing it had in fact escalated. It was his contention that the Applicant had not approached the court with clean hands. The Respondents thus urged this court to dismiss the present application with costs to them.

11. Notably, the 1st and 3rd Respondents did not file any response to the Applicant's present application. In addition, the 3rd Respondent did not file any Written Submissions.

12. The Applicant's Written Submissions dated 19th May 2021 were filed on 20th May 2021 while those of the 1st and 2nd Respondents were dated and filed on 5th July 2021.

13. It is important to point out on 24th April 2021 and 6th July 2021, this court ordered the Respondents to pay Court Adjournment Fees (CAF) for failing to comply with the court's directions to file Written Submissions within the time lines it had been given thus occasioning adjournments and delays in the matter herein.

14. On 13th October 2021, the Respondents' counsel informed the court that they would pay the CAF whereupon the court fixed the matter for mention on 23rd November 2021 to confirm if the same would have been paid. The court also indicated that in the event the said CAF was not paid, the court would reserve its Ruling and proceed to determine the present application in the absence of the Respondents' Written Submissions as they clearly did not have audience of the court for disobeying its orders.

15. The Respondents did not appear on 23rd November 2021. There was also no evidence that they had paid the CAF that they had been ordered to pay as aforesaid. The court therefore reserved the Ruling herein which is based on the Applicant's Written Submissions only which it relied upon in its entirety.

LEGAL ANALYSIS

16. Right at the outset, this court found the manner the Applicant drafted the prayers it had sought to be extremely confusing and wanting. It had sought eight (8) different prayers. Having said so, it appeared to this court that the Applicant's Notice of Motion was actually seeking a prayer for interim measures of protection under Section 7 (1) and (2) of the Arbitration Act. The prayer was to restrain the Respondents from disposing of L.R. No Kisumu/ West Agoro/ 2647, Kisumu West Agoro/2698, Kisumu/Konya/5604, South Sakwa/Barkowino/8159 and Kisumu/Muhoroni/1282 which were registered in the names of the 2nd and 3rd Respondents who were guarantors of the 1st Respondent herein. It submitted that the 2nd and 3rd Respondents did not deny owning the said properties.

17. It submitted that there was an arbitration agreement in the Supply Agreement between it and the Respondents herein. The court perused the several documents and noted that they had arbitration clauses. Clause 6 of the Agreement for Management and Administration Services dated 12th November 2018 provided for the appointment of an arbitrator by the Chairman of the Chartered Institute of Arbitrators. Patrick Mwiti, had since been appointed by the Chairman of the Chartered Institute of Arbitrators.

18. There was also another Agreement dated 7th November 2018 between the Applicant and the 1st Respondent in which in Clause 19 it was indicated as follows:-

> **"The validity, enforcement, construction and performance of this Agreement shall be governed by the laws of Kenya and the parties consent and submit to the exclusive jurisdiction of the High Court of Kenya in respect of any proceedings relating to this Agreement."**

19. In Clause 16 of the said Agreement for Debt Settlement, it stated as follows:-

> **"a. Any type of dispute arising out of or in connection with this Agreement including any question regarding its existence, validity or termination, that is not resolved through dialogue or structured good faith negotiations between the parties, shall be at first instance be referred to either adjudication in a court of competent jurisdiction authority or arbitration in accordance with the laws of Kenya, as specified in the special conditions of contract.**

b. If the special conditions of the Primary Agreement specify arbitration as the mode of dispute resolution, then any unresolved dispute between the parties shall be referred by written request of any party to the decision of a single Arbitrator to be agreed upon by the Parties. In default of such agreement within 7 days, such appointment shall be made by the Chairman for the time being of the United Kingdom Chartered Institute of Arbitrators (Kenya) Branch or his appointee within 7 days of written request of a party…"

20. In Clause 15.2.2.1 of the General Terms and Conditions For Sales of Petroleum Products For Overland Deliveries, it stated that:-

"Except as provided for in Article 15.2.2.2 and Article 15.2.2.3 any dispute arising out of or in connection with the Agreement including any question regarding its existence, validity or termination shall be referred to the exclusive jurisdiction of the High Court in London."

21. Clause 15.2.2.2 of the said General Terms and Conditions For Sales of Petroleum Products For Overland Deliveries further provides that:-

"Notwithstanding Article 15.2.2.1, the Seller may refer any such dispute to be resolved by arbitration in London in accordance with the Arbitration Act 1996 as amended from time to time…"

22. Clause 6 of the Agreement for Management and Administration Services dated 12th November 2018 provides that:-

"Any dispute or claim arising out of or relating to this agreement and/or breach thereof, that is not resolved through negotiations between the parties, shall be determined by a single arbitrator to be appointed by agreement between the parties or in default of such agreement within fourteen (14) days of the notification of such dispute by either party to the other upon application by either party to the Chairman of the Chartered Institute of Arbitrators who shall appoint a single arbitrator to determine the dispute, The Arbitration shall be carried out in accordance with the provisions of the Arbitration Act 1995 or any stutory modification or enactments thereof."

23. This court highlighted the aforesaid clauses contained in different documents as they appeared to provide different ways for resolving disputes between the Applicant and the 1st Respondent herein. However, it restrained itself from commenting on the validity or otherwise of the same as that was not an issue that was presently before the court herein.

24. Further, it was also not clear from the affidavit evidence that had been placed before this court which agreement had been breached. Suffice it to state that an arbitrator had already been appointed to determine the dispute between them

25. Notably, the Applicant had sought an order for interlocutory injunction pending the hearing and determination of the arbitration proceedings as provided in Section 7(1) and (2) of the Arbitration Act which provides that:-

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.

26. Whereas there was also nothing to show that L.R. No Kisumu/ West Agoro/ 2647, Kisumu West Agoro/2698, Kisumu/Konya/5604, South Sakwa/Barkowino/8159 and Kisumu/Muhoroni/1282 were registered in the names of the 2nd and 3rd Respondents as the Applicant had contended, the said 2nd and 3rd Respondents did not deny the said averments. Be that as it may, a careful perusal of all the agreements and/or contracts that had been placed before this court did not make any reference to the said properties.

27. What this court discerned was that the subject matter in the Agreement for Debt Settlement dated 7th November 2018 appeared to have been monetary in nature. The subject matter was an unpaid sum of Kshs 1,957,056/= inclusive of interest in the sum of Kshs 27,161/=.

28. This court had due regard to the definition of **"subject matter"** in the Black's Law Dictionary and the case of **Sinohydro Corporation Limited vs G. O. Retail Ltd & Equity Bank Ltd** (eKLR citation not given) that the Applicant relied upon and was not persuaded that a debt was a thing that had to be preserved for the reason that it had no *sub stratum* that could be dissipated before the arbitral proceedings could be heard and determined.

29. An order for interim measure of protection is not intended to preserve the assets pending the hearing and determination of the arbitral proceedings to secure them for a successful claimant and/or decree holder. Any successful claimant and/or decree holder must institute the execution proceedings to recover monies owed to it.

30. In **CMC Holdings Limited & Another v Jaguar Land Rover Exports Limited [2013] eKLR**, this very court held as follows:-

"The measures are intended to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded

before it can grant an interim measure of protection."

31. It appeared to this court that the Applicant was seeking in an indirect way an order for security in respect of any claim or any amount in dispute as contemplated in Section 18(1)(b) of the Arbitration Act that states that:-

> **"Unless the parties otherwise agree, an arbitral tribunal may, on the application of a party order any party to provide security in respect of any claim or any amount in dispute."**

32. For the foregoing reasons, this court was not persuaded that it should grant an interlocutory injunction relating to L.R. No Kisumu/ West Agoro/ 2647, Kisumu West Agoro/2698, Kisumu/Konya/5604, South Sakwa/Barkowino/8159 and Kisumu/Muhoroni/1282 as there was no nexus that was established between them and the debt the Respondents owed the Applicant, if at all.

33. Whereas courts should encourage and support parties to have interim measures of protection while they are ventilating their disputes in whatever fora they opt for, courts must be careful not to grant orders that are not compatible with the law. This court was not persuaded that the Applicant had made out a good case for this court to grant an interlocutory injunction as it had also not demonstrated that it had met the criteria set out in the case of **Giella vs Cassman Brown (1979) EA 358**.

34. This court therefore took a different view from that of Makau J in **EON Energy Limited vs Desnol Investment Ltd & 4 Others [2018] eKLR** that the Applicant had relied upon in which he restrained the respondents therein from disposing of their properties pending the hearing and determination of the arbitral proceedings as the respondent therein was indebted to the applicant therein. The said case was also distinguishable from the facts of the case herein in that the respondent herein did not appear to have challenged the applicant's averments therein.

DISPOSITION

35. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 9th October 2021 was not merited and the same be and is hereby dismissed. Costs of the application will be in the cause.

36. It is so ordered.

DATED and **DELIVERED** at **KISUMU** this **26th** day of **January 2022**

J. KAMAU

JUDGE