



**Callfast Services Limited v Rwandair Limited (Civil Suit E777 of 2021)  
[2022] KEHC 11377 (KLR) (Commercial and Tax) (27 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11377 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E777 OF 2021**

**A MSHILA, J**

**MAY 27, 2022**

**BETWEEN**

**CALLFAST SERVICES LIMITED ..... PLAINTIFF**

**AND**

**RWANDAIR LIMITED ..... DEFENDANT**

**RULING**

1. The Applicant filed a Chamber Summons dated August 27, 2021 under section 7 of the *Arbitration Act*, 1995, rule 2 of *Arbitration Rules*, 1997, rules 17(1) and (2) of the *High Court (Organization and Administration) (General) Rules*, 2016 and order 40 rules 1 and 2 of the *Civil Procedure Rules* 2010. The Application was supported by the grounds on the face of it and the sworn Affidavit of Morris Wambua who sought for orders that;
  - a. The Court to certify this application as extremely urgent, hear it during the current recess both at the ex parte and at the inter partes stage.
  - b. An interim order do issue barring the defendant either by itself, its agents, servants, assigns and/or whosoever acting through and/or under it from in any manner whatsoever entering into and/or or performing another cargo general sales agency agreement with any other person and/or entity other than the plaintiff relating to the Nairobi territory, adversely interfering with the ongoing cargo general sales agency business arrangement between the plaintiff and the defendant and specifically from limiting the plaintiff's access to its cargo management tool for booking cargo and/or shipments also known as "Cargo Spot" as well as from supplying the plaintiff with less than 100 air waybills per month pending the hearing and determination of this application.



- c. An interim order do issue barring the defendant either by itself, its agents, servants, assigns and/or whosoever acting through and/or under it from in any manner whatsoever entering into and/or performing another cargo general sales agency agreement with any other person and/or entity other than the plaintiff relating to the Nairobi territory, adversely interfering with the ongoing cargo general sales agency business arrangement between the plaintiff and the defendant and specifically from limiting the plaintiff's access to its cargo management tool for booking cargo and/or shipments less than 100 air waybills per month pending the hearing and determination of either this suit or the arbitration proceedings to be instituted by the parties.
2. On or about August 20, 2020, the Applicant as the agent and the Respondent as the carrier entered into a Cargo General Sales Agency agreement effective retrospectively on August 6, 2020 on the terms elaborately set out in the said agreement relating to the respondents' cargo freight business in Nairobi.
3. It was not until March 8, 2018 when the Applicant and the Respondent once more entered into a formal written agreement whose effective date was retroactively agreed to be 1<sup>st</sup> January 2018 and was to run for two (2) years and renewable only in writing by both parties.

### **Applicant's Case**

4. The Applicant submitted that it has indeed met all the requirements for the grant of the interim measure of protection as couched in prayer number 3 of its Application dated August 27, 2021.
5. Further, the Applicant stated that as per the agreement executed on varying dates of 6<sup>th</sup> August 2020 in the case of the Respondent and August 17, 2020 in the case of the Applicant and provided to take effect on 6<sup>th</sup> August 2020 as per its Article 8, the parties expressly provided at Article 10 that all disputes arising therefrom should first be solved through amicable settlement failing which the same is to be referred to arbitration in accordance to Kenyan law. There is indeed a valid arbitration agreement between the parties.
6. It was the Applicant's case that there is a running renewal agreement between the parties on the same terms as the one signed in 2020 except with the renewal clause and which running contract is under threat and should, therefore, be protected in terms of the interim measures of protection as proposed in prayer 3 of the applicant's Chamber Summons Application dated August 27, 2021.

### **Respondent's Case**

7. The Respondent submitted that pursuant to Article 10 of the parties' agreement, it is clear that any dispute in this matter shall be referred to Arbitration in accordance with the Kenyan Arbitration Rules and procedures in force at the time. To date no arbitration proceedings have been referred to Arbitration.
8. The celebrated case of *Giella v. Cassman Brown & Company Limited (1973) EA358* laid down the conditions for granting an injunction. The Applicant has failed to show that it has a prima facie case with a high probability of success and whether the applicant stands to suffer injury which cannot be compensated by way of damages and where the court is in doubt, to decide the case on a balance of convenience.
9. In the instant case it is clear that at the time the suit was filed there was no contract subsisting between the parties. The Applicant's pleadings clearly state that the relationship between the applicant and the respondent was to last up and until not earlier than the August 5, 2021. This is pleaded in paragraph 30 of the Plaintiff and ground 2 on the Application. It is trite law that a party is bound by its pleadings hence the Applicant's pleadings are clear that the contract expired on the 5<sup>th</sup> August 2021. We submit that the



contract has expired and even at the time that this suit was brought to court the contract had expired. Therefore, the order sought is not capable of being granted because the contract has ceased to be.

10. The contract in contention which has been referred to by both parties provides for termination under article 8 titled term and termination. In the instant case the contract provides for termination of the contract. The Respondent complied in that it issued notice in line with the contract informing the Applicant of the non-renewal. Pursuant to this the Respondent engaged other service providers hence any order issued would be detrimental to the Respondent.

### **Issues for Determination**

11. The Court has considered the pleadings and the written submissions filed by the parties herein and has framed the following issue is for determination;
  - a. Whether interim measure of protection should be granted pending arbitration?

### **Analysis**

#### **Whether interim measure of protection should be granted pending arbitration;**

12. The Applicant herein approached the court for interim measures of protection under Section 7 of *Arbitration Act* 1995 that reads;  
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.

13. It is not in dispute that the parties herein entered into a cargo general sales agency agreement. The agreement was to take effect on the August 6, 2020. Article 8 of the said contract provides for terms of the contract and grounds for the termination of the same as follows:

“This agreement shall be effective from August 6, 2020 and shall be valid for an initial period of one (1) year subject to renewal unless earlier terminated by either party in accordance with this agreement. The agreement may be terminated by either party at any time upon giving thirty (30) day written notice.”

14. The Court of Appeal in the case of *Safaricom Limited v Ocean View Beach Hotel Ltd & 2 others* [2010] eKLR, outlined the factors to be considered before the granting the 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?"
15. With regard to settlement of disputes between the parties, article 10 of the said agreement provided as follows:

“Should any dispute arise between the parties in relation to this agreement, parties should try amicable settlement of disputes, such settlement shall be done at RwandaAir headquarters. If no settlement is reached between the parties, the dispute shall be referred to Arbitration in accordance with the Kenyan arbitration rules and procedures in force at the time. The place of arbitration shall be Nairobi. The proceedings shall be held in English. The award/ judgment issued shall be final and binding upon the parties.”
16. There is clearly a dispute between the parties herein as they are not in agreement as to the effectiveness of their Contract bringing the contractual relationship between them to an end with the Applicant taking the position that the relationship is still in existence till at least on 6<sup>th</sup> August 2022 while the Respondent has taken the position that such a relationship came to an end upon the lapse of the notice. The said notice dated July 26, 2021 addressed to the Applicant was a notice of non-renewal of the agreement.
17. It is in light of the above that this court aligns itself with the finding of the Court in the case of *China Zhongxing Construction Company Ltd v Eden Development Limited (K)* [2020] eKLR

“I am bound by the decision of the Court of Appeal in the *Safaricom Limited vs Ocean View Beach Hotel Ltd & 2 others* (supra) that once the court finds that an arbitral agreement between the parties exist, and there is a dispute that should be determined by an arbitrator, the court is obligated to grant an interim order of preservation as I hereby do to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings.”
18. There is a dispute between the parties herein and the same ought to be resolved through arbitration as the parties mutually agreed upon in their agreement as their own forum of choice and process of dispute resolution.
19. This court is therefore obligated to grant an interim order of preservation of the subject matter pending arbitration proceedings.

### **Findings and Determination**

20. In the light of the foregoing this court makes the following findings and determination;
  - i. The application is found to have merit and it is hereby allowed;
  - ii. An interim injunctive order shall issue barring the Respondent either by itself, its agents, servants, assigns and/or whosoever acting through and/or under it from in any manner whatsoever entering into and/or performing another cargo general sales agency agreement with any other person and/or entity other than the applicant relating to the Nairobi territory, adversely interfering with the ongoing cargo general sales agency business arrangement



between the applicant and the respondent and specifically from limiting the applicant's access to its cargo management tool for booking cargo and/or shipments also known as "Cargo Spot" as well as from supplying the applicant with less than 100 air waybills per month pending the hearing and determination of this suit or arbitration proceedings to be instituted by the parties.

- iii. Mention on June 27, 2022 before the Deputy Registrar for directions.
- iv. Each party to bear its own costs.

Orders Accordingly.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF MAY, 2022.**

**HON. A. MSHILA**

**JUDGE**

In the presence of;

Malanga for the plaintiff/Applicant

Ndirangu for the Respondent

Lucy-----Court Assistant

