



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**HCCC NO. E 461 OF 2019**

**HIGHLAND CARRIERS LIMITED.....PLAINTIFF**

**VERSUS**

**NATIONAL OIL CORPORATION OF KENYA LIMITED.....DEFENDANT**

**RULING**

1. Two applications under the provisions of section 7 of the Arbitration Act are brought by Highlands Carriers Ltd (the Plaintiff or Highlands) against National Oil Corporation of Kenya Limited (the Defendant or NOCK). The second application became necessary because, after the presentation of the first application, NOCK terminated the Dealer License Agreement (DLA) it had with Highlands.

2. The Application of 17<sup>th</sup> December 2019 seeks the following orders:-

1. ....

2. Spent.

3. *That this Honourable Court be pleased to direct that the Defendant/Respondent immediately furnish to the Plaintiff/Applicant the requisite stocks of fuel and fuel products for use by the petrol station pending Arbitration.*

4. Spent.

5. *THAT IN THE ALTERNATIVE this Honourable Court be pleased to direct that the Plaintiff/Applicant be IMMEDIATELY allowed the purchase of requisite stocks of fuel and fuel products from third party suppliers for use by the Petrol Station, pending Arbitration.*

6. Spent.

7. *That any demands by the Defendant/Respondent against the Plaintiff/Applicant vide a set off or deduction from its deposit with the Defendant/Respondent, more specifically, set offs and deductions relating to losses accessioned by the former's installation of faulty equipment at the Petrol Station and/or the acknowledged contamination by its nominated transporter of its fuel produces, be restrained, and the quantum of the said deposit be restored to its original figure, pending the arbitration.*

8. *That this Honourable Court be pleased to make all such further orders and/or directions as it deems fit and just to grant.*

9. *That costs of this application be provided for.*

3. That of 16<sup>th</sup> January 2020 reads:-

1. ....

2. Spent

3. *THAT pending the hearing and determination of the main suit, an order of injunction do issue compelling the Defendant/Respondent whether by themselves or their representatives, servants, agents, and/or assigns to return all assets that were taken from the suit property on 16<sup>th</sup> December 2019, in the precise condition that they were when they were taken by the said Defendant/Respondent.*

4. *Spent*

5. *THAT pending the hearing and determination of the main suit, an order of injunction do issue compelling the Defendant/Respondent whether by themselves or their representatives, servants, agents and/or assigns from interfering with the assets domiciled in the Suit Property.*

6. *Spent*

7. *THAT pending the hearing and determination of the main suit, an order of injunction do issue compelling the Defendant/Respondent whether by themselves or their representatives, servants, agents and/or assign, to reconnect electricity that the Defendant/Respondent disconnected, on the Suit Property.*

8. *THAT IN THE ALTERNATIVE, and due to reasons hereinabove stated, the Defendant/Respondent be declared contemptuous of the Court process.*

9. *That this Honourable Court be please4d to make all such further orders and/or directions as it deems fit and just to grant.*

10. *That costs of this application be provided for.*

4. From Highlands's standpoint, Colin Otieno, its Director, explains the background to the dispute. The DLA was entered in September 2016 and granted Highlands a license to ran and operate National Oil Oyugis Service Station (*the Petrol Station*). Highlands avers that, soon after the entry of the dealership it noticed that, despite prudent measures it undertook, it suffered a monthly loss of approximately 1.4% of supplied petroleum, which figure was beyond the industry average of a 0.25% loss.

5. The case by Highlands is that, upon inquiring, it learnt that the previous dealer experienced similar losses and Highlands therefore concluded that NOCK had made faulty installations. There was exchange of correspondence by the parties over these issues.

6. The Plaintiff's grievance does not end there. It alleges that on 14<sup>th</sup> November 2019, NOCK's nominated Transporter contaminated super petrol with diesel petrol and that while the transporter admitted liability, the Defendant refuted the claim.

7. Further, that in breach of clause 16 of the DLA, NOCK has failed to timeously supply it with petroleum and related products. Highlands blames this state of affairs to an alleged financial distress faced by NOCK.

8. Because of the alleged breaches, Highlands perceives that a dispute has arisen and seeks preservation of its investment in the station pending Arbitration.

9. After the filing of this suit there seems to have been some discussions between the parties. That, on 9<sup>th</sup> January 2020, Colin Otieno had a meeting with officials of NOCK but the same bore no fruit. That a week later, on 16<sup>th</sup> January 2020, without notice or taking of inventory, NOCK took away the assets well aware that they were the subject matter of the suit at hand. Further, that NOCK disconnected electricity and disabled the backup generator. Finally, NOCK terminated the contract.

10. In response NOCK, through an affidavit of Rose Njiru, states that up until 14<sup>th</sup> January 2020, the dealership between the Plaintiff and the Defendant was governed by a DLA executed by the parties on 28<sup>th</sup> June 2018, with a duration ending 21<sup>st</sup> July 2020. But that during this time, Highlands had persistently breached obligations of the contract by failing to maintain a bank guarantee of Kshs.2,500,000/= with a reputable bank (clause 2) and failing to maintain minimum stock levels of 4 days stock cover for fuels and 7 days cover for other products (contrary to clause 16).

11. On the contamination of products, NOCK blames it on Highlands. That Highlands failed to supervise the offloading of the fuel by the transporter, despite previous cautionary directives issued by the Defendant.

12. Regarding the loss in stock, NOCK attributes it to Highlands. It alleges that dip sticks were cut, possibly by the staff of Highlands, to facilitate product theft by way of erroneous readings. That NOCK had in the past facilitated replacement of the dip sticks.

13. NOCK's defence is that its failure to supply stock to Highlands has been caused by the latter's failure to provide the requisite bank or cash guarantee or to provide the necessary finances. It asserts that allegations by Highlands that it (NOCK) is facing a cash crunch is unsubstantiated and an attempt to divert the Court's attention from its own failings.

14. At to the order sought by Highlands that NOCK should permit it to source products from third parties, NOCK sees this as untenable because the station is branded and specific to the Defendant.

15. Citing breaches of clauses 3 and 16 of the DLA of 22<sup>nd</sup> July 2018, NOCK, on 14<sup>th</sup> January 2020, terminated the license. NOCK now takes the position that the substratum of its relationship with Highlands has been extinguished and there being no contractual relationship,

there can be no basis for grant of the orders sought.

16. Highlands approaches this Court for protection under the provisions of Section 7 of the Arbitration Act which 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.

(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. There is a dispute resolution clause (Clause 45) in the dealership agreement and which provides as follows:-

“[45] Dispute Resolution

45.1. The Parties hereto shall endeavor to amicably and mutually settle any disputes which may arise in connection with this License or interpretation thereof and for that purpose each Party shall have a right to select a Conciliator and the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) shall have the power to nominate an umpire or act as one if the Parties so agree.

45.2. Any dispute between the Parties arising pursuant to this License which cannot be settled amicably within thirty (30) days after receipt by one Party of the other Party’s request for such amicable settlement may be submitted by either Party to Court of competent jurisdiction or arbitration. Arbitration shall be in accordance with the Arbitration Act, 1995 or any succeeding legislation and determined by a sole Arbitrator mutually agreed upon and in the event of failure to agree on one within thirty (30) days, by an arbitrator appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) upon the request of either Party whose decision shall be final and binding to the fullest extent permissible by law.”

18. While it is true that NOCK has already terminated the dealership contract between it and Highlands, the termination does not invalidate the operation of an arbitration agreement that may be within the contract. This concept is explained in **Titus Kitonga & another v Total Kenya Limited & another [2018] eKLR** where the Court stated that:-

**“19. In my considered opinion, the law is settled that an arbitration clause in contract between the parties is considered as independent, separate and severable from the main contract. The doctrine of separability recognizes the arbitration clause in a main contract as a separate contract, independent and distinct from the main contract. The essence of the doctrine is that the validity of an arbitration clause is not bound to that of the main contract and vice versa. Therefore the illegality or termination of the main contract does not affect the jurisdiction of an arbitration tribunal based on an arbitration clause contained in that contract. The obligation to resolve all disputes by arbitration continues even if the main obligation or indeed the contract expires or is vitiated.**

**20. Thus separability protects the integrity of the agreement to arbitrate and plays an important role in ensuring that the party’s intention to submit disputes is not easily defeated. In this way it also protects the jurisdiction of the arbitration tribunal.**

**21. In the same vein, Article 16 of the Model Law and Section 17(a) of the Arbitration Act of No. 4 of 1995, clearly states that “an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract”. I therefore concur with the submissions of the Applicants that, the termination of the MLAs herein has no legal effect on the arbitral clauses therein.”**

19. The Arbitration Agreement provided under clause 45.2 survives the termination of 14<sup>th</sup> January 2020 and the parties herein have an obligation to adhere to it.

20. The Arbitration Rules 1997 provides the procedure by which a party seeking the protection of a Court under the provisions of Section 7 of the Act invokes the jurisdiction. Rule 2 reads:-

“Applications under sections 6 and 7 of the Act shall be made by summons in the suit.”

21. The rule contemplates, indeed requires, that the protection application be made within a suit. A procedure adopted by Highlands. It cannot be correct, as argued by NOCK, that this suit is therefore a waiver by Highlands of its right to arbitration under the arbitration agreement. On the contrary it is a procedure expressly required and sanctioned by statute.

22. On the principles applicable for the grant of an order of protection under section 7, the decision of Nyamu JA in **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR** provides a comprehensive guide:-

“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.

In the matter before us, the court went on to make orders which undermined the arbitration and the outcome of the arbitration contrary to section 17 of the Arbitration Act. 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. This point came up in the famous English arbitration case of CHANNEL TUNNEL GROUP LIMITED vs BALFOUR BEATTY CONSTRUCTION LTD (1993) AC 334 where the English Court rendered itself as follows:- "There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made and not to take out of the hands of the arbitrators (or other decision makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter considerations must prevail... If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide."

23. While counsel for NOCK argues that the application should be screened from the usual principles applicable for the grant of injunction (Giella vs Cassman Brown) for temporary injunction and for mandatory injunction), the tension between the application of those principles and those set out in Ocean View have been in the past acknowledged. No less in the Ocean View decision itself and in the case of Carzan Flowers (Kenya) Ltd & Others vs. Tarsal Koos Minck B V & Others Nairobi where Kimaru J explains:-

**"...In considering an application under section 7(1) of the Arbitration Act, the court is not being called upon to determine the merits of the matters in dispute but rather it is being called upon to aid the arbitration process by putting the disputing parties at a footing that will ensure none of the parties would be prejudiced during the hearing of the dispute by the arbitral tribunal. Of course, as is apparent from some arbitral proceedings, a party to such proceedings who considers himself to have been put at a position of disadvantage and therefore likely to be prejudiced, prior to or during the arbitral proceedings, may have no option but to seek the coercive jurisdiction of the court in order to protect the essence of the arbitral proceedings...The position in Kenya is that for a party to succeed in an application under section 7 of the Arbitration Act, 1995 for interim measure of protection pending hearing of the dispute by arbitration, he must firstly establish that there exists an arbitration clause in the agreement between the parties that is capable of being invoked to have the dispute referred for determination by arbitration. Secondly, such a party must establish that it would suffer irreparable damage or loss that by the time the arbitration is heard; such a party may not be able to obtain an appropriate remedy. Generally the courts have accepted that for interim measure of protection to be granted, the applicant must establish a case broadly under the established principles for the grant of interlocutory injunction...A court hearing an application for the grant of interim measures of protection must always act cautiously and must put in mind the fact that, in considering the application, it should not exceed its jurisdiction and make a determination that is clearly within the province of the arbitrator. The court should not lose sight of the fact that a grant of any interim measure of relief is meant to preserve or conserve the subject matter of the arbitration pending hearing and determination of the dispute by arbitration. The interim measure granted should aid but not impede the realization of the resolution of the dispute between the parties by arbitration. The court is therefore expected to tread on the thin line that separates the making of the decision in respect of a matter that is actually in dispute (and which the parties have by consensus granted exclusive jurisdiction to the arbitrator) and granting orders that will put the parties in such a position that when the arbitrator makes his award, the same would be of benefit to the successful party..."**

24. There is a stated intention by Highlands to institute an Arbitration. In deciding the applications before it, the Court must be careful not to make comments that could embarrass the Arbitral Tribunal which will be tasked with deciding the matter on merit. The Court will resist any temptation to comment on the merits of the Plaintiff's case.

25. As stated in Safaricom Ltd (supra), an order for protection under section 7 operates as a "holding" order pending the outcome of the arbitral proceedings. The interim orders grantable are to preserve evidence, protect assets or to maintain the status quo so that the subject matter of the Arbitration is not threatened.

26. For an Applicant to benefit from an order under section 7 it is imperative for the Applicant to clearly define what the subject matter of arbitration is. If the Arbitration is already instituted, then this will be apparent from the claim before the Arbitrator but where the application comes before the Arbitral proceedings then the Applicant must state the subject matter in the affidavit in support. The importance of defining the subject matter of Arbitration is that the very essence of a Court's intervention under section 7 is to support the Arbitral process by, for instance, preserving evidence relevant to deciding the subject matter, protecting assets in respect to the subject matter or preserve the status quo so that the subject matter of arbitration is put beyond threat.

27. In the matter before Court the Highlands complains of certain breaches to the dealership agreement by the NOCK. For instance, NOCK has failed to supply it with petroleum and related products. Highlands also decries the manner in which NOCK terminated the dealership. A contention that it is unlawful. While Highlands is emphatic that it will refer the dispute that has arisen between it and NOCK to Arbitration, it is less clear on the nature of intervention it will seek before the Arbitrator. Will it be for an order for specific performance or for damages for breach of contract? Without specificity, the subject matter of the Arbitration is unclear. Because of this lack of clarity, this Court cannot find that the subject matter of the Arbitration is under any threat so as to make orders protecting it. Again, although the Applicant seeks preservation of the fuel pumps which were taken away, Highlands does not demonstrate how that preservation will support the Arbitral process. Are they, for instance, of any evidential value?

28. Another issue arises. The contract has been terminated. The orders sought by Highlands is for all intents and purposes a reinstatement of the contract and therefore in the nature of a mandatory injunction. The principles upon which a Court may grant a mandatory injunction are clear and restated in Kenya Breweries Limited & another v Washington O. Okeyo [2002]eKLR as follows:-

**“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury’s Laws of England 4th Edn. Para 948 which reads:**

**A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiffs .... a mandatory injunction will be granted on an interlocutory application.”**

29. I do not think that the circumstances here fit into the category of cases where the Defendant attempts to steal a march as the issues that eventually led to the withdrawal of supply of products and termination of the contract had been simmering for a while. Highlands would be, hard put, to prove that NOCK created an excuse on 15<sup>th</sup> January 2020 to terminate the contract simply to advantage NOCK in the Arbitral proceedings to be instituted.

30. If however the Court were to grant an order reinstating the dealership on the ground that Highland’s case is clear enough in which this Court is sufficiently assured that it can be summarily remedied by reinstatement, then the Court may well be determining the dispute. The result will be that the Court will have decided the merit of the dispute and would be making an order that is inimical and not in support of the intended arbitration.

31. For the reasons given the Court is disinclined to grant the orders sought. The applications of 17<sup>th</sup> December 2019 and 16<sup>th</sup> January 2020 are hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2021**

**F. TUIYOTT**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>TH</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Court Assistant: Nixon

Kegode for Agimba for Applicant

Miss Njagi for Defendant