



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. E015 OF 2021

PEEMA INVESTMENTS CO.LTD.....PLAINTIFF/APPLICANT

VERSUS

THE PRINCIPAL SECRETARY,

MINISTRY OF DEFENCE.....1ST DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....2ND DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion application dated the 26th of April 2021 and brought pursuant to *Article 159(2)(c) of the Constitution, Sections 1A, 1B, 3A and 63 e of the Civil Procedure Act and Order 40 Rule 1,2,3 and 4 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 4 & 7 of the Arbitration Act*, the plaintiff/applicant seeks particularly a temporary order of injunction to be issued against the defendants/respondents either by themselves, their agents and or servants from purporting to terminate contract agreement for supply of fresh meat (beef) on bone to unit No. MOD/423(0110139)2017/2018 Recruits Training School Moi Barracks Eldoret and 9th Battalion Kenya Rifles Eldoret and the Defendants/Respondents by themselves, or through their agents and/or servants be further restrained from sourcing meat/beef for unit No.MOD/423(0110139)2017/2018 Recruits Training School Moi Barracks Eldoret and 9th Battalion Kenya Rifles Eldoret from any other source including Kenya Meat Commission and the applicant be allowed to continue supplying fresh meat on bone as per contract pending the hearing and determination of the suit.

2. The application is supported by an affidavit of one Paul Waititu Ndungu, a director of the plaintiff/applicant's company wherein he avers that sometime in early January of 2020, the plaintiff entered into a contract with the 1st defendant effective 13th of January 2020 and valid up to 12th of January 2022 for supply of fresh meat beef on bone to Eldoret base unit No. MOD/423(0110139) 2017/2018 Recruits Training School Moi Barracks Eldoret and 9th Battalion Kenya Rifles Eldoret. To this end, the applicant avers that it has been and still does diligently supply the fresh meat to the school of recruits on the basis of the said contract until the 8th of April 2021 when Mr. Paul Waititu Ndungu received a call from the commandant in charge of recruits purporting to terminate the contract between the plaintiff and the 1st defendant.

3. Upon inquiry, the applicant's director submitted that he was informed that they had been directed by the Ministry of Defence henceforth to be sourcing their supply of meat from the Kenya Meat Commission in total breach and blatant disregard of the terms of the contract which stipulated for a 90 days notice when either party is unable to perform any of its obligations and a 60 days prior notice in case of termination of the contract.

4. Further, the applicant submitted that the matter has not been referred to arbitration as provided for in the contract when a dispute arises and further, that the termination will have adverse economic effects on the applicant considering that it took a loan of Kshs 30,000,000 to service the contract including purchase of 750 herd of cattle and a van for transportation of the meat products.

5. The application is opposed by the 1st defendant through its replying affidavit sworn on the 6th of March 2021 by Lieutenant Colonel Issa C. Said who deponed that the 1st defendant entered into a basic ordering agreement with the plaintiff herein for the supply of fresh meat beef on bone and that the executor of contracts is the Principal secretary who by law has the authority to amend, vary or terminate any contract. The same, he averred, has not been delegated to the commandant in-charge of recruits and as such the commandant cannot purport to cancel the contract as such would be null and void. In any event, he averred that clause 12 of the contract is clear on the modalities for termination of the contract by either party.

6. The 1st defendant also averred that considering that the contract was a basic ordering agreement, the 1st defendant is entitled to solicit other firms for the purchase of the contract material if deemed to be in the best interest of the buyer as per Article 4.1 of the Basic Ordering

Agreement. Further, Lieutenant Issa averred that it was not the intention of the parties that the plaintiff/applicant be the sole supplier of the contract material and therefore the orders sought are unlawful as they will restrain the defendants from exercising their free will to contract.

7. The defendants also averred that there is no prejudice or loss to be suffered by the plaintiff since the supply of meat is quantifiable and payable in monetary terms and in the event the applicant suffers any loss, the same can be adequately compensated through an award of damages. Further, it was averred that the filing of the suit despite existence of an arbitration clause in the contract offends the provisions of *Article 159(2)(c)* of the *Constitution* and thus the court lacks jurisdiction. In any case, it was averred, the arbitral tribunal has jurisdiction to issue protective orders.

8. Finally, the defendants submitted that the recruits training school is an institution for military training for recruits who undergo vigorous physical exercises and thus require to be fed properly. Consequently, the defendants averred that the injunction as prayed has the effect of stopping the institution from purchasing meat from any other supplier other than the plaintiff/applicant which is not fair trade and the defendants stand to suffer greater harm if the orders sought are allowed.

9. On the 8th of June 2021, the court directed parties to file their submissions and both parties have complied with the court's directive. In this regard, the plaintiff/applicant filed its submissions dated the 14th of June 2021 on even date while the defendants filed their submissions dated the 21st of June 2021 on even date.

Plaintiff/Applicant's Submissions

10. The applicant submitted that there is only one issue for determination and that is whether it is entitled to the interim order of protection pending arbitration.

11. In this regard, the applicant noted that it is entitled to the orders sought and relied on the case of *Giella vs Cassman Brown [1973] EA 358* and submitted that it has met the threshold laid down in this case. In particular, the applicant submitted that it has established a prima facie case and relied on the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR* submitting that it entered into a contract which was breached by the defendants through the purported phone call and without following the terms of the contract on termination.

12. Secondly, the applicant also submitted it is likely to suffer irreparable loss that cannot be compensated in damages as it has nowhere else to take the over 750 herds of cattle it had bought and also that it is repaying a loan that had been taken to service the contract. In this regard, the applicant relied on the case of *Babs Security Limited vs Geothermal Development Limited [2014] eKLR*.

13. Finally, as regards the balance of convenience, the applicant submitted that it tilts in favour of granting the orders sought and referring this matter for arbitration and relied on Section 7 of the Arbitration Act and the case of *Safaricom Limited vs Ocean View Beach Hotel Limited & 2 others [2010] eKLR*.

Defendants Submissions

14. The defendants on their part submitted that there are 5 issues for determination namely;

- a. Whether the 1st respondent/defendant has terminated the Basic Ordering Agreement Ref MOD/423(0110139)2017/2018 between itself and the applicant/plaintiff herein.
- b. Whether the court can re-write a contract for the parties
- c. Whether the court is the appropriate forum to adjudicate the dispute, if any, between the parties in the face of an existing arbitration clause in the contract
- d. Whether the subject matter of arbitration is threatened and lastly,
- e. Whether on the evidence and material placed before court, the plaintiff/applicant has satisfied the conditions upon which temporary injunction can be granted.

15. On the first issue, the defendants submitted that the plaintiff/applicant has failed to adduce proof that the 1st defendant/respondent has terminated the agreement in question as only the principal secretary can amend vary or terminate the agreement. Further, the defendants submitted that article 12 of the agreement clearly stipulated the modalities of terminating the agreement and therefore the allegations that the commandant via phone call allegedly terminated the contract remain unproven. The defendants thus relied on the case of *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro [2015] eKLR and Section 107 of the Law of Evidence Act*.

16. On the second issue the defendants submitted that the court has no power to re-write the contract for parties. In particular, the defendants submitted that the prayer as sought especially the prayer to restrain the defendants from sourcing meat/beef from any other source goes against the express provisions of Article 3.6 of the agreement which clearly indicates that the buyer reserves the right to solicit other firms for the purchase of the contract material if deemed to be in the best interest of the buyer. Ergo, the defendants submitted that the orders as sought have the undesirable effect of re-writing the contract between the parties and relied on the case of *Trollope and Colls Limited vs North West Metropolitan Regional Hospital Board HL 1973 and Jiwaji vs Jiwaji [1968] EA 547*.

17. On the third issue, it was submitted that the matter ought to have been referred to arbitration pursuant to the provisions of Article 13.2 of

the agreement. In this regard, it was submitted by the 1st defendant that it has agreed to resolve all disputes by way of arbitration but no steps have been taken by the applicant to initiate the arbitration process as provided under *Section 22 of the Arbitration Act*. Thus, the defendants submitted that the filing of a suit and the application herein offends the provisions of *Article 159(2)(c) of the Constitution* and they relied on the authority in *Alison Jean Loius vs Rama Homes Limited [2020] eKLR*.

18. On the fourth issue, the defendants relied on section 7 of the Arbitration Act and noted that the principles that guide court in determining an application for interim measure of protection under the said section were clearly laid down in *Portlink Limited vs Kenya Railways Corporation [2015] eKLR* and in particular whether the subject matter of arbitration is under threat. In this regard, it was submitted that whereas section 7 is meant to offer relief pending arbitration where the subject matter is threatened, the same is not an avenue for final orders before/pending hearing of the suit. In the instant circumstances therefore, the defendants submitted, there is no subject matter being preserved and the status quo remains and the contract is still subsisting.

19. Finally, on the last issue, it was submitted that the applicant has not met the conditions upon which temporary injunction can be granted. In this regard, the defendants submitted that the applicant omission of Article 3.6 that reserves the right of buyer to solicit other firms for the purchase of contract material amounts to non-disclosure of material fact and relied on the case of *Hussein Ali & 4 others vs Commissioner of Lands & 8 others [2013] eKLR*. Further, it was submitted that the conditions set out in the *Giella vs Cassman Brown Case* have not been met as the applicant has not established a prima facie case with probability of success, the applicant has not established the irreparable injury to be suffered as he has failed to quantify or list the damages or loss occasioned to it by the purported breach and finally that the balance of convenience tilts in favour of the defendants as it is likely to be inflicted with greater hardship if the prayers sought are granted since the recruits require to be fed properly. To buttress these points, the defendants relied on the cases of *American Cyanamid Co. vs Ethicom Limited [1975] A AER 504*, *Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi & 5 others [2014] eKLR*, *Lucy Wangui Gachara vs Minudi Okemba Lore [2015] eKLR*, *Vlan Construction Limited vs Rama Homes Limited [2019] eKLR* and *Paul Gitonga Wanjau vs Gathuths Tea Factory Company Ltd & 2 others [2016] eKLR*.

Analysis & Determination

20. A careful perusal of the pleadings, annexures and rival submissions leads to only two issues for determination, namely; -

- a. Whether the court has jurisdiction to entertain the application and suit; and if so,
- b. Whether the applicant/plaintiff has met the threshold for grant of temporary injunction sought.

a. Whether the court has jurisdiction.

21. The defendants have submitted that the court has no jurisdiction to determine this application and the suit considering that under the agreement between the parties, disputes ought to be handled through arbitration.

22. It is trite law that a court without jurisdiction cannot proceed further. Thus, when an issue of jurisdiction has been raised, the court must first address itself to the jurisdictional challenge raised before proceeding.

23. Indeed, the High Court exercises its jurisdiction pursuant to Article 165(3) of the Constitution of Kenya. The said provision grants court with unlimited jurisdiction in Civil and Criminal matters. However, as rightly held in *Alison Jean Louis vs Rama Homes Limited [2020] eKLR*: -

‘where parties mutually agree and contract their own forum of choice and process of dispute resolution by virtue of Article 159 COK 2020, the court downs its tools and allows parties to pursue alternative dispute resolution mechanism, in this case, arbitration.’

24. There is no dispute that the parties herein entered into an agreement for supply of fresh meat (beef) on bone on the 14th of January 2020 which agreement has been annexed herein as PWN 1. According to the agreement, any dispute that arises out of the agreement SHALL be subjected to arbitration. In particular, Article 13.2 of the agreement provides as follows: -

“13.2 Any dispute arising out of or in connection with this agreement shall be finally settled by a single arbitrator mutually agreed upon by the parties failing the Chairman of the Chartered Institute of Arbitrators in accordance with the Kenya Arbitration Act.”

25. Moreover, both parties have affirmed in their respective pleadings and submissions that they are aware of this provision and have expressed the desire to submit the dispute to the said process. From the foregoing, it is clear that the intentions of the parties were that if any dispute arises, they wouldn't wish to rush to court, but to have the dispute settled through arbitration. This is in line with Judicial Authority, under *Article 159(2)(c) of the Constitution*, which mandate the court in the exercise of Judicial authority to be guided by a number of principles including promoting alternative forms of dispute resolution including reconciliation, mediation and arbitration.

26. In *County Government of Kirinyaga v African Banking Corporation Ltd [2020] eKLR*, the court observed that: -

“The tenor and import of Article 159(2) (c) of the Constitution as read together with Section 6(1) of the Arbitration Act is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement. Secondly, where a party elects to come to court and the other party seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance”

27. As indicated above, it is clear that the parties herein have both made reference to the existence of an arbitration clause in their contract/agreement. Furthermore, both parties seem to be in agreement that any dispute arising from the agreement ought to be subjected to arbitration. Indeed, both parties have submitted that they are willing to follow the arbitration clause in their agreement even though the 1st defendant submitted that there is no dispute.

28. The import of the above submissions by the parties confirms that their choice of forum for dispute resolution is not the court but the arbitration as provided for under Article 13.2 of their agreement.

29. In the foregoing, I do find that this court lacks the requisite jurisdiction to hear and determine the suit.

30. However, as regard the instant application, *Section 7* of the *Arbitration Act* and in particular on the issue of interim measures by the court, it 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.

31. The above provision has been interpreted to empower court to grant interim orders for purposes of preserving the subject matter and or maintaining the status quo so as to ensure tranquility before the hearing and determination of the dispute. The primary objective of the court when intervening under *Section 7* is to ensure that the subject matter of the arbitration proceedings is not jeopardized before an award is issued, thereby rendering the entire proceedings nugatory.

32. In ***Infocard Holdings Limited vs AG & 2 Others [2014] eKLR***, the court held that *Section 7* does not give courts the power to look into the merits of the agreement and the dispute generally lest it interferes with the jurisdiction of the arbitral tribunal. Similarly, in ***CMC Holdings Limited v Jaguar Land Rover Exports Limited [2013] eKLR*** the court held that: -

“In practice, parties to international arbitrations normally seek interim measures of protection. They provide a party to the arbitration an immediate and temporary injunction if an award subsequently is to be effective. 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 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.”

33. In the instant case, there is no evidence that the subject matter is affected or may be affected. Both parties have for example confirmed that the agreement/contract is intact with the applicant admitting that it is still supplying meat to the 1st defendant, while on the other hand the defendants have admitted that the contract is still valid and that there has been no termination of the same.

34. Consequently, I find no sound ground on which this court can grant the orders sought. As earlier on indicated, the court also lacks jurisdiction to hear and determine the suit as there is a valid arbitration clause in the parties’ agreement for purposes of resolving any dispute between them.

35. In the foregoing, the application dated the 26th of April 2021 lacks merit and the same is dismissed in its entirety. The parties herein should resort to arbitration to resolve their dispute. Costs goes to the respondent.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 29th day of July, 2021.

In the presence of:-

Mr. Muhoro for the Applicant

Ms Mung’ata holding brief for Mr. Mugira for the 1st and 2nd Respondent

Ms Gladys - Court assistant