REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 20 OF 2020

CYKA MANPOWER SERVICES LIMITED....APPELLANT

-VERSUS-

TATA CHEMICALS MAGADI LIMITED.....RESPONDENT

RULING

1. This a ruling in respect of the Defendant/Applicant's Notice of Motion application is dated 15.12.2020 and filed on 16.12.2020. It seeks the following orders:

> **a. Spent.**
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> **b. That this Honourable court be pleased to discharge the injunction granted on 29th September, 2020 restraining the Applicant from terminating the contract with the Respondent in terms of the termination notices dated 24th January, 2020 pending the determination of the dispute by way of arbitration;**
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> **c. That the costs of this application be provided for.**

2. The application is premised on the grounds thereon and those contained in the Supporting Affidavit sworn on 15.12.2020 by the Applicant's Head of Legal Compliance, **Angela Anyango Lebu**. She avers that vide contracts dated 21.6.2018 and 19.9.2019 respectively, the Plaintiff agreed to offer among other services specified in the first schedule of the contract packing, offloading, containerization and record maintenance services at the Defendant's premises in Kajiado and Mombasa.

3. It is the Applicant's case that in order to facilitate a more rotational and effective service delivery system, its Board of Directors recommended some changes in their service and tendering process. Consequently, some contracts were affected one of them being the Plaintiff's, and the termination was communicated vide letter dated 24.1.2020 in total compliance with clause 20(d) of the Mombasa contract.

4. The Applicant states that since the Applicant can no longer terminate the Respondent's contracts vide a notice issued on 24.1.2020, the Plaintiff/Respondent has to continue providing the Defendant its services as per the contract. However, there has been a breach of clause 6 (a) of the Mombasa contract through poor service delivery coupled with a strike by the Plaintiff's personnel because of delayed pay, which led to the Defendant losing about three hours of the morning shift, thus prompting the Defendant's representative to request for an urgent meeting with the Plaintiff's supervisor. But the said representative did not arrive at the site by end of the day of the strike.

5. Further, the Defendant states that the Plaintiff is in contravention of clause 6(h) of the Mombasa contract since, ride a letter dated 23.11.2020, that they normally pay their casuals on a fortnight basis where the work done is computed from 1st to 15th then on 16th the wages clerks at site does the payroll computation based on work done by every employee as the same is piece rate.

6. The Defendant states that it has experienced various operational issues, which amount to breach of clause 6(b) of the Mombasa contract which requires the Plaintiff to ensure that at all times the minimum number of personnel having such qualifications and/or specialization as the Defendant may from time to time specify, shall be available for the performance of the services.

7. Further, the Defendant states that the Plaintiff is in breach of clause 7(g) of the contract as it has failed to ensure all the personnel it engages wear suitable safety clothing including hard-hats, overalls, protective footwear, dust masks and other equipment as may be necessary or advisable.

The Response

8. The motion is opposed by the Plaintiff/Respondent vide a Replying Affidavit sworn by **Dennis Mithamo Kariuki** who is the Plaintiff's Managing Director. He avers that the application is totally misleading, ill-informed and a deliberate effort by the Applicant to defeat and frustrate a yet to be commenced arbitration process.

9. The Respondent states that parties consented to the reference of the dispute to arbitration and an injunction issued restraining the Applicant from terminating the contract pending determination of the dispute through arbitration. However, the Respondent received a letter dated 19.11.2020 complaining of breach of contract as a result of an alleged strike by workers contracted by it to offer services at the Applicant's Mombasa Depot, which prevented them from receiving the contracted services.

10. Following the aforementioned letter by the Defendant, the Respondent avers that vide a letter dated 23.11.2020, it clarified all issues that the Applicant had raised, and more specifically clearly explained that the delay in payment was caused by a technical issue affecting their bank on 8.11.2020 that was resolved on the next day and payments done and clearly stated how it carried out payment as per clause 6(h) of the contract since commencement of the contract.

11. On the issue of "PPE's" as the Applicant alleges breach of clause 7(g) of the contract, the Respondent confirmed that the said "PPE's" were all approved by the Applicant's safety audit system and there has never been any complaint before.

12. On the allegation that the Respondent's representative was not available on the day of the alleged strike, the Respondent avers that its Operation Manager was out of Mombasa on the said date. However, there was a supervisor who was on site, who liaised with the Applicant's representative and resolved the matter. Therefore, there was no breach of clause 6(a) of the contract.

13. The Respondent also avers that it is curious that after a twelve (12) years business relationship, the Applicant has all of a sudden begun to raise unfounded claim and accusations yet the site workers have remained the same. Therefore, that can only be malice and/or bad faith on the part of the Applicant.

14. It is the Respondent's case that the allegations that it is taking advantage of the interim orders are misleading and the same has not been substantiated. Therefore, the main goal of the Applicant is to sabotage the arbitration process by rendering it a mere academic exercise, which they were reluctant to activate when the dispute arose.

15. It is also the Respondent's case that it would be highly prejudicial to the Respondent if the orders issued by the Court in relation to the two contracts are discharged, and yet the Applicant has not alleged any form of breach of the Kajiado contract. Therefore, if the Applicant is fully convinced that there was a breach of contract, they ought to invoke the provision of Clause 20 of the contract as they had earlier insisted in their Application dated 17.3.2020, which led to the dispute being referred to arbitration. Further, it would be prudent and in good order that any further dispute (if any) be referred to the arbitrator for determination as per the relevant arbitration clauses in both contracts.

Rejoinder

16. In rejoinder, the Applicant filed a Supplementary Affidavit sworn on 10.2.2021. Thein, the Applicant avers that it has been on the fore-front of propelling the arbitration process, and that in fact, it was the one that initiated the discussion regarding the arbitrators to be jointly appointed by both parties pursuant to Clause 22(e) of the Mombasa and Kajiado contracts and that it is the Respondent who has to date not responded to the e-mail confirming **Mr. Nyaaga** as an arbitrator nor challenged **Mr. Nyaaga's** ability to arbitrate the dispute. Clearly, that demonstrates the lax conduct of the Respondent, which is contrary to the nature of proceedings of arbitration, which require expeditious resolution of disputes.

17. The Applicant further avers that the injunction granted by the Court vide ruling dated 29.9.2020 did not grant the Respondent a carte blanche on its obligations under the contract. Therefore, the poor delivery of service breaches fundamental terms of the contract.

Submissions

18. The parties were directed to canvass the Application by way of written submissions. The Applicant filed submissions on the 8.3.2021, while the Respondent filed theirs on 11.3.2021. The submissions were highlighted on 15.3.2021.

ANALYSIS AND DETERMINATION

19. In consideration of the Application, affidavits in support and reply, and submissions filed before this Court by the parties, the sole issue for the determination that has arisen in my view is ***whether the orders of injunction issued on 29.9.2020 should be discharged.***

20. In the present case, a consent was recorded allowing the Defendant's Application dated 17.3.2020 whose effect was to refer the suit to arbitration in terms of the arbitration agreements dated 21.6.2018 and 19.9.2019 at Clauses 21 and 19 respectively.

21. Under **Section 10** of the **Arbitration Act**, this court lacks jurisdiction to deal with a dispute where parties have agreed to have a dispute between them resolved or determined by arbitration.

22. The Court of Appeal in the case of **Scope Telematics International Sales Limited v Stoic Company Limited & another [2017] eKLR** cited the case of **Celetem v Roust Holdings [2005] 4 All ER 52,** for the proposition that where a court is called upon to grant interim measure of protection it must take great care not to usurp the arbitral process and to ensure substantive questions are reserved for the arbitrator.

23. Similarly in the case of **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR**, the Court of Appeal on the issue of litigation of merits of a dispute referred to arbitration opined that-

> **"It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the *status quo* pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names…. Whatever their description however, they are intended in principle to operate as *"holding"* orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation."**
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> **…**
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> **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:-***
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> **"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.**
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> **"In addition, after the grant or failure to grant an interim measure under Section 7 of the Arbitration Act, there is no pending suit because the substance of the suit under Section 7 is grant or refusal of interim measure itself."**

24. In the case of **Iris Properties Limited & Another –vs- Nairobi City Council [2002] eKLR,** the court held;

> **"It is implicit from Rule 8 of the Arbitration Rules, 1997 that the effect of staying the suit and referring dispute to Arbitration under section 6 of the Arbitration Act is to terminate the suit save the question of costs of the suit. If parties in a pending suit reach an agreement that the matters in dispute be referred to Arbitration and be determined in accordance with the Arbitration Act, the Arbitral Tribunal under the Arbitration Act supersedes the court in which the dispute is pending.**
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> **Further, the arbitral proceedings supersede the suit and the suit becomes spent save the question of costs of the suit."**

25. This court is being called upon by the Applicant to discharge and/or set aside the interim measure of protection orders issued after the parties consented that the dispute be referred to arbitration as provided by the two contracts that were entered into by the parties. The grounds upon which this instant Application is grounded are that the Respondent is in breach of Clauses 6(a), (h), 7(g) of the Mombasa contract and therefore the Respondent is taking advantage of the interim measure of protection by rendering unsatisfactory services to the Applicant.

26. I find and hold that, for the orders sought to be granted by this Court, the Court is required to determine the veracity of the allegations by the Applicant that there has been breach of clauses of the contract of Mombasa on a balance of probabilities. That will then mean that this Court will have to go into the merits of each party's case when in fact that is the duty of the arbitrator.

27. In the case of **Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR**, the Court of Appeal reiterated the principle of non-intervention by the courts where parties have agreed to resolve any dispute between them by arbitration. The appeal arose from a decision of this court. At page 13 of its judgment, the Court of Appeal had this to say:

> **"A careful look at all the provisions cited in the heading in the application and invoked by the appellant in the superior court clearly shows that, all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of he Arbitration Acct makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states:**
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> > **"Except as provided in this Act no court shall intervene in maters governed by this Act."**
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> **In the light of the above, the superior court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act. This includes entertaining the application the subject matter of this appeal and all the other applications purporting to stay the award of the judgment/decree arising from the award."**

28. It is clear from the above decision of the Court of Appeal, that this court cannot intervene and consider matters to do with the merit of the dispute between the Plaintiff and the Defendant as that is an issue is squarely within the province of the arbitrator.

29. In the end, I decline the invitation by the Defendant/Applicant to consider issues regarding the breach of the Mombasa contract by the Respondent. The arbitrator shall determine that issue.

30. On the issue of appointment of an arbitrator, the Court is bound by the terms the parties contracted on appointment of the Arbitrator in **Clauses 19 and 22 of the** contracts. Failure to which the Court ought to be moved for an appropriate relief formally.

31. The upshot of the above reasoning is that the Defendant's notice of motion dated 15.12.2020 lacks merit and is hereby dismissed with costs to the Plaintiff.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA ON THIS 11TH DAY OF AUGUST, 2021

D. O CHEPKWONY

JUDGE