



**Coastal Kenya Enterprises Limited v China City Construction International  
Engineering (Kenya) Co. Limited (Commercial Civil Case E695 of 2021)  
[2021] KEHC 253 (KLR) (Commercial and Tax) (19 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 253 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL CASE E695 OF 2021  
DAS MAJANJA, J  
NOVEMBER 19, 2021**

**BETWEEN**

**COASTAL KENYA ENTERPRISES LIMITED ..... PLAINTIFF**

**AND**

**CHINA CITY CONSTRUCTION INTERNATIONAL ENGINEERING (KENYA)  
CO. LIMITED ..... DEFENDANT**

**RULING**

1. The Plaintiff was contracted by the Kenya Rural Roads Authority for the upgrading to bitumen standard and maintenance of Tawa-Nguluni-Itangini Road by Contract No. RWC 312 (“the Project”). In order to carry out the contract, the Plaintiff engaged the Defendant by a sub-contract dated 3<sup>rd</sup> September 2018.
2. The gravamen of the Plaintiff’s claim against the Defendant is set out in the Plaint dated 19<sup>th</sup> July 2021, which is that the Defendant breached the contract by failing to complete the project within the time and in the manner stipulated in the Sub-contract, failing to provide funds to support the Project and preventing the Plaintiff and its agents from accessing the Project site to find out what was going on.
3. As a result of the alleged breaches, the Plaintiff issued a notice terminating the sub-contract to the Defendant and requested it to hand over the equipment and site. The Plaintiff avers that the Defendant failed to comply with the notice whereupon it issued a notice dated 12<sup>th</sup> July 2021 requesting the Defendant to concur to the appointment of an arbitrator. In its suit, the Plaintiff seeks several conservatory reliefs pending reference of the matter to arbitration; an order restraining the Defendant from removing any construction material and equipment from the construction site, an



- order restraining the Defendant from preventing the Plaintiff and its agents from accessing the Project site and a mandatory order directing the Defendant to hand over the Project site.
4. Together with the Plaintiff, the Plaintiff filed the Chamber Summons dated 19<sup>th</sup> July 2021 made, inter alia, under section 7 of the *Arbitration Act*, 1995 (“the *Arbitration Act*”) seeking orders that the Defendant be restrained from removing construction equipment and material on the construction site pending the hearing of the application. It also seeks an order restraining the Defendant from barring the Plaintiff and its agents from accessing the construction site pending further orders of the Arbitrator to be appointed and an order that the Defendant hand over the construction site pending the hearing and determination of the arbitral proceedings.
  5. The application is supported by the affidavit of the Plaintiff’s managing director, Bhupinder Singh Bhogal, sworn on 19<sup>th</sup> July 2021. In opposition to the Chamber Summons dated 19<sup>th</sup> July 2021, the Defendant filed the Grounds of Opposition dated 23<sup>rd</sup> September 2021 and the Replying Affidavit of its director, Liu Yongjun, sworn on 23<sup>rd</sup> September 2021.
  6. When the application came up for directions under Certificate of Urgency on 22<sup>nd</sup> July 2021, I issued an order “Restraining the Defendant ... from removing from the construction site of Tawa-Nguluni-Itangani Road project Contract No. RWC 312 site any construction equipment materials and stores pending further orders and directions.”
  7. The aforesaid order precipitated an application by the Defendant through the Notice of Motion dated 29<sup>th</sup> September 2021 made, inter alia, under Order 40 rule 1, 2, 7, 10(b) and 11 of the *Civil Procedure Rules* seeking to discharge, vary or set aside the order made on 22<sup>nd</sup> July 2021 and issue a mandatory order directing the Plaintiff to deliver up and or restore possession of the Project site to the Defendant together with all construction material and equipment. The application is supported by the affidavit of Liu Yongjun sworn on 29<sup>th</sup> September 2021. The Plaintiff opposed the application through the replying affidavit of Bhupinder Singh Bhogal sworn on 4<sup>th</sup> October 2021.
  8. The Notice of Motion dated 29<sup>th</sup> September 2021 was heard by Mabeya J., who delivered a ruling dated 22<sup>nd</sup> October 2021 and issued the following orders:
    - a. The application is declined.
    - b. The status quo obtaining as at 22/7/2021 be and is hereby maintained pending further orders on the application dated 19/7/2021.
    - c. The parties herein are restrained from continuing with any construction works on Tawa-Nguluni-Itangani Road Contract No. RWC 312 project until further orders of the Court.
    - d. Each party to bear costs.
  9. Thereafter, the Plaintiff also filed a Notice of Motion dated 11<sup>th</sup> November 2021 made, inter alia, under Order 40 rule 7 of the Civil Procedure Rules seeking to discharge the orders made by Mabeya J., on 22<sup>nd</sup> October 2021 and an order restraining the Defendant from accessing the Project site pending the hearing of the ongoing adjudication process. The application is supported by the affidavit of Bhupinder Singh Bhogal sworn on 11<sup>th</sup> November 2021. It is opposed by the affidavit of Liu Yongjin sworn on 18<sup>th</sup> November 2021, Grounds of Opposition dated 19<sup>th</sup> September 2021. The Defendant also filed a Statement of Defence and counterclaim dated 18<sup>th</sup> November 2021.



10. The Defendant thereafter moved the court alleging contempt of court by the Plaintiff's directors. By the Notice of Motion dated 15<sup>th</sup> November 2021 made, inter alia, under section 5(1) of the Judicature Act (Chapter 8 of the Laws of Kenya), seeking an order that the Plaintiff's directors, Bhupinder Singh Bhopal and Swany Bhagal, be committed to civil jail for 6 months or such other period that the court may deem reasonable for the disobedience of the court orders dated 22<sup>nd</sup> October 2021. The application is supported by the affidavit of Liu Yongjin sworn on 15<sup>th</sup> November 2021. It is opposed by the replying affidavit of Bhupinder Singh Bhopal sworn on 17<sup>th</sup> November 2021.
11. When the matter came up for directions on 19<sup>th</sup> November 2021, I directed that in view of what appeared to be the urgency of the matter and the acrimonious tone the proceedings has taken as evidenced by the application on record, I would consider all the applications and depositions on record and deliver this ruling.
12. Although the parties have filed counter applications as I have set out above, it must not be lost to the parties that the purpose of the suit is for the grant of interim measures of protection under section 7 of the Arbitration Act which provides as follows:
  7. 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.
13. From the pleading and depositions, it is not disputed that the Plaintiff sub contracted the Defendant to carry out the entire contract No. RWC 312 for the upgrading and maintenance of Tawa-Nguluni-Itanguni Road. The parties also agree the Sub-contract has now been terminated.
14. Whether the termination is legal or otherwise and the consequences of the termination is not a matter for determination in this suit, it is to be dealt with in the proposed arbitration. In fact, in the replying affidavit of Liu Yongjun sworn on 23<sup>rd</sup> September 2021, the Defendant accepts the termination of the agreement subject to payment of dues accrued to together with interest, return of its equipment and other assets and compensation for illegal termination. It further contends that the Plaintiff does not have a legal or equitable interest in the equipment, stores and other assets and that the Plaintiff does have not any basis for taking possession of the said property that does not belong to it.
15. The Defendant does not deny that the agreements between the parties have a dispute resolution clause. As regards arbitration, Liu Yongjun depones that, "the Defendant has no objection to the matter proceeding to Arbitration for taking of accounts and determining the other issues arising between the Plaintiff and the Defendant." In addition, the Defendant has filed a Statement of Defence and Counterclaim confirming that the agreements between the parties are subject to arbitration. I would point out that filing the Statement of Defence and Counterclaim does not constitute a waiver of arbitration as these proceedings are not under section 6 of the Arbitration Act, seeking stay of further proceeding pending reference to arbitration. By filing its Statement of Defence and Counterclaim, I understand the Defendant to be putting forth its own case and facts to support its own plea for interim measures of protection.



16. Since the issue of reference to arbitration is not in dispute, the issue the court ought to consider what are the terms this matter should be concluded to enable the parties proceed to arbitration. The principles governing the grant of interim measures of protection were elucidated by the Court of Appeal in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* Civil Application No. NAI 327 of 2009 [2010] eKLR where Nyamu JA., observed as follows;

By determining the matters on the basis of the [GIELLA] principles the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. 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. In the case of Kenya, the *Arbitration Act* is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as “interim measures of protection” under section 7 of the *Arbitration Act*. On the other hand, in the English version of the ICC Rules for example, they are known as “interim conservatory measures”. 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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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:-

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. [Emphasis mine]

17. It is evident from background I have laid out above that there are a multiplicity of applications and depositions which call for several factual issues to be resolved. In doing so, the court must exercise circumspection in commenting on or making findings on the merits of the case in a manner that would prejudice the decisional independence of the arbitral tribunal where the dispute will be resolved. In the *Safaricom Ltd Case* (Supra), the Court of Appeal observed that:

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.

18. Further, the court is cognizant that the dispute between the Plaintiff and the Defendant is between the Contractor and Sub-contractor. The Employer, Kenya Rural Roads Authority, who is the ultimate beneficiary of the services to be rendered by the parties herein, is not a party to these proceedings. This means that the court must be careful to make orders that affect the third party who has not had the opportunity to be heard on the matter and who, in any case, would not be party to the suit. Thus, any order made stopping construction would be detrimental to the Kenya Rural Road Authority and to the public interest.
19. What is the subject matter under threat? The Plaintiff seeks injunctive reliefs and mandatory orders in relation to the Project site, material, machinery and equipment. It has been held that while the court may grant a mandatory injunction at an interlocutory stage, it will not normally be granted unless there are special or exceptional circumstances. These special circumstances include a case that is clear and one which the court thinks ought to be decided at once by a simple and summary act that can be easily remedied, or if the defendant attempted to steal a march on the plaintiff (see *Kenya Breweries Limited and Another v Washington Okeyo* NRB CA Civil Appeal No. 332 of 2000 [2002] eKLR citing *Vol. 24 Halsbury's Laws of England* 4th Edn. para 948 and *Locabail International Finance Ltd v Agroexport and others* [1986] 1 ALL ER 901). This means that in order to grant mandatory order, the court would have to make conclusive or definitive findings on the facts which would in the circumstances of this case undermine the proposed arbitral proceedings (see *East Africa Breweries Limited v G4S* HC COMM E335 of 2020 [2020] eKLR).
20. On the other hand, it is clear from the depositions that the remedy for the Defendant is in the form of payment of outstanding dues and damages for breach of contract. The Plaintiff complains that despite having done substantial work on the Project, it has not been paid notwithstanding that the Employer has paid the Plaintiff substantial sums for the work done by the Defendant. In addition, the Defendant rebuffs the Plaintiff's attempt to take the site, material, construction equipment and machinery as these belong to it.
21. Further, in the Notice of Motion dated 11<sup>th</sup> November 2021 and the supporting affidavit, the Plaintiff states that the matter is before an Adjudicator who is on site to carry out quantification of work done by the Defendant so far. As regards the equipment, both sides accuse each other taking over the equipment and site in violation of court orders. This is a question of fact, that the court would be required to resolve by hearing the parties. I would however note that under the Sub-Contract dated 3<sup>rd</sup> September 2018 relied on by the Plaintiff, Clause 3.4 provides that, "the Sub-contractor shall provide all material, machinery, labour and workmen tools required for execution, completion and maintenance of the sub-contract works...." This clause is repeated at Clause 2.2 of the Addendum Agreement dated 17<sup>th</sup> November 2020. Without expressing a conclusive view of the matter, I think there is merit in the Defendant claiming an interest in the construction equipment given that the Plaintiff subcontracted to perform the entire contract between the Plaintiff and the Employer.
22. I think this is a case where there are special circumstances that call upon the court to frame appropriate measures of protection. First, the fact that a third party may be affected by any orders made by the court. Second, the public interest to ensure that the process of road construction is not affected by the dispute. Third, there is a process of the adjudication going on as alluded to by the Plaintiff. Considering the facts of the case and alongside the factors I have set out above and to ensure that the Project is not imperiled, I propose to grant the Defendant access to the site, material and equipment to enable it take measurements necessary for its case as it is common ground that the Sub-contract has been terminated.



In order to secure the Defendant's right to the construction equipment and material, the Plaintiff shall provide some form of security pending arbitration proceedings. These order I believe will ensure that the matter is resolved with alacrity and the Project goes on.

23. For reasons I have set out above, I now make the following orders:
- a. The Notice of Motion dated 11<sup>th</sup> November 2021 is dismissed.
  - b. The Notice of Motion dated 15<sup>th</sup> November 2021 is dismissed.
  - c. The Chamber Summons dated 19<sup>th</sup> July 2021 is allowed on the following terms pending the hearing and determination of the arbitral process:
    - i. The Plaintiff shall permit and facilitate the Defendant to access the Project site, machinery, equipment and all things necessary for the purpose of carrying out any inspection, assessments, measurements, or quantification of any monies due to it for a period of 7 days only from the date hereof.\*\*
    - ii. Thereafter, the Defendant whether by itself or its agents or otherwise is restrained from interfering and removing construction equipment and material on the Project site or otherwise interfering with the construction pending the hearing and determination of the arbitration proceedings or further orders of the Arbitral Tribunal.\*\*
    - iii. The Plaintiff shall provide a bank guarantee from a reputable bank for the sum of KES. 50,000,000.00 in favour of the Defendant as security for the use of the Project site, equipment and machinery within 21 days from the date hereof which shall remain in force pending the hearing and determination of the Arbitral proceedings or any further orders by the Arbitral Tribunal. In default of such compliance, the Defendant shall be at liberty, upon giving 7 days' notice to the Plaintiff, to retake its equipment and machinery.
  - d. There shall be no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER 2021.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Ms Mathenge instructed by Kale Maina and Bundotich Advocates for the Plaintiff.

Mr Kitulu instructed by Muema, Kitulu and Company Advocates for the Defendants.

