IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E426 OF 2019

BETWEEN

MOI UNIVERSITY PENSION SCHEME (REGISTERED TRUSTEES).....PLAINTIFF

AND

STANLIB KENYA LIMITED ..... DEFENDANT

RULING

1. The plaintiff is a trust corporation and has sued the defendant who was the manager of its Staff Retirement Benefits Scheme pursuant to the ***Retirement Benefits Act, 1997***. It seeks judgment for Kshs. 120,000,000/- together with interest and costs which it claims that the defendant negligently invested in certain banks that are now in receivership under the Kenya Deposit Insurance Corporation ("KDIC").

2. When the plaintiff filed this suit, it contemporaneously filed a Notice of Motion under **Order 39 rules 1** and **2** of the ***Civil Procedure Rules*** seeking an order directing the defendant to deposit Kshs. 120,000,000/- as security for its appearance in this matter. In response thereto, the defendant filed a Chamber Summons dated 17th December 2019 under **section 6(1)** of the ***Arbitration Act, 1995*** ("the ***Act***") seeking to stay the suit pending reference of the dispute between the parties to arbitration.

3. The matter came up before me on 28th January 2020 and since both parties had agreed that the matter should proceed for arbitration, I allowed the defendant's Chamber Summons dated 17th December 2019 and directed that the Notice of Motion dated 28th November 2019 be marked as withdrawn with liberty to the plaintiff to file a fresh application for interim measures of protection under **section 7** of the ***Act***.

4. The plaintiff did file a Notice of Motion dated 30th January 2020 under **section 7(1)** of the ***Act*** seeking an order that:

> *[3] THAT pending the hearing and final determination of this suit the defendant do deposit into court the sum of Kshs. One Hundred and Twenty Million (Kshs. 120,000,000/-) for its appearance at the hearing of this suit and as security for the satisfaction of the Plaintiff's Claim.*

5. The application was supported by the affidavit of Charles Nyamieno, the plaintiff's pension manager, sworn on 30th January 2020, grounds set out on the face of the motion and the submissions by Mr Keyonzo, its advocate. The thrust of the plaintiff's case is that the defendant negligently invested Kshs. 100,000,000/- and Kshs. 20,000,000/- in Imperial Bank and Chase Bank respectively whereupon both banks were place under receivership of KDIC by the Central Bank of Kenya. It is the plaintiff's case that it may be unable to recover the said sum and has been informed by the defendant that the money invested in those banks should be treated as bad debts.

6. The plaintiff further avers that the defendant is in the process of winding up its business in Kenya and will be selling or transferring its business to ICEA Lion Asset Management (ILAM) and has been advised to transfer the management of its pension funds to ILAM. Mr Nyamieno depones that since the defendant is winding up its business in Kenya and relocating elsewhere, it would be impossible for the plaintiff to recover the sums claimed unless the court orders the defendant to deposit Kshs. 120,000,000/- in court.

7. The defendant has opposed the application through grounds of opposition dated 17th February 2020 and the replying affidavit of Evelyn Kinara, its Risk and Compliance Manager, sworn on 17th February 2020. The objection to the application is based on technical as well as substantive grounds. As regards procedural grounds, Mr Waiyaki, counsel for the defendant, contended that the application is incurably

flawed and fatally defective as it is not an application for interim measures of protection pending arbitration contemplated under **section 7** of the ***Act*** as those orders can only be for orders for interim measures pending arbitration and nothing else. Second, that the application is wrongly anchored in a suit that was stayed pursuant to an application brought by the defendant under **section 6** of the ***Act***. In his view, the plaintiff ought to have filed its own suit that recognises the arbitration agreement but since the plaintiff's suit does not recognise such an agreement, the application is incompetent.

8. On the substance, the defendant's position is that the merits of the claim are the subject of arbitration and since the process is yet to commence, the matters of fact raised by the plaintiff are irrelevant, speculative and disputed and cannot form the basis for or justify any order under **section 7** of the ***Act***. The defendant submitted that based on the facts of the case, the defendant is able to meet any award that may flow from the intended arbitration hence the application is unjustified. Further, that the plaintiff has not established any basis for the grant of orders which are akin to the grant of orders of attachment before judgment.

9. In answering the plaintiff's claim that the defendant was winding up its business, Ms Kinara deponed that the defendant is a corporate body with perpetual succession and despite the proposed sale of certain of its assets, it has and will continue to have a substantial balance sheet and assets sufficient to meet any award. She further depones that the defendant has no intention of liquidating itself and would not do so until all claims against it are resolved.

10. Before I deal with the substantive matters, I propose to deal with the procedural objections made by the defendant. The first is that the application does not fall within rubric of **section 7** of the ***Act*** which refers to interim measures of protection. Admittedly the plaintiff has prayed for an order directing the defendant to deposit the amount claimed in court. As Mr Waiyaki correctly pointed out the application is in the nature of an application for attachment before judgment under **Order 39** of the ***Civil Procedure Rules*** which he submitted was not appropriate in the circumstances. Counsel added that the plaintiff filed the same application seeking the same order as the one that was withdrawn save that it was now made under **section 7** of the ***Act***.

11. I accept the submission by Mr Keyonzo, counsel for the plaintiff, that the application is properly before the court and it seeks an interim measure of protection pending arbitration. I hold that this matter should be approached not as one of form but substance because **section 7** of the ***Act*** is unique and gives the court wide powers in the following terms:

> *7(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.*

12. The ***Act*** does not define an interim measure of protection but I think the judgment of Nyamu JA., in ***Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others*** **[2010] eKLR** is instructive on the meaning of an interim measure of protection. He observed as follows:

> *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.*

13. As I understand, the purpose of the interim measure of protection is to protect the substance of the arbitration pending the outcome of the proceeding hence it is not that label attached to the order sought but rather the substance it seeks to achieve in relation to the arbitral proceedings. The court therefore ought to direct its mind to the purpose of the order vis-à-vis the arbitration proceedings. I do not agree that the plaintiff's application is incompetent merely because it seeks an order directing the defendant to secure the amount claimed. Nyamu JA., further pointed and held that the forms of interim measures of protection are infinite and various, he stated that:

> *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, measurers aimed at preserving the status quo, measures intended to provide security for costs and injunctions.*

14. The second procedural objection is that the suit having been stayed then the application lacks substratum. The suit was stayed pursuant to my order of 28th January 2020 following the defendant's application. However, I did, in the same order, grant the plaintiff liberty to bring an application for interim measures of protection under **section 7** of the ***Act***. The motion for consideration was brought pursuant to that order. Counsel for the defendant relied on the decision in ***Scope Telemantics International Sales Limited v Stoic Company Limited*** **NRB CA Civil Appeal No. 285 of 2015 [2017] eKLR** where the Court of Appeal considered the import of **Rule 2** of the ***Arbitration Rules, 1997*** ("the ***Rules***") which states that:

> *Applications under section 6 and 7 of the Act shall be made by summons <u>in the suit</u>.* [Emphasis mine]

The court held that compliance with the rule was mandatory and proceeded to strike out the application which was not anchored in a suit. I read the rule to require that an application under **section 7** of the ***Act*** be brought in a suit filed only for that purpose. It does not require a party to file a separate suit where a suit has already been filed and where the issue of arbitration is a live issue. In this case, I did grant express leave to lodge the application. I therefore reject this ground of objection.

15. I now turn to the substance of the case and whether the plaintiff has made out a case for the grant of interim orders of protection. Before I proceed to deal with the matter, I must warn myself that the dispute between the parties will be settled by the Arbitrator hence I should avoid making any definitive findings on dispute issues. The principle upon which the court considers an application under **section 7** of the ***Act*** were considered by the Court of Appeal in ***Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others*** **(Supra)** and affirmed in the ***Scope Telematics Case*** **(Supra)** First, there must be in existence an arbitration agreement. Second, the subject matter of arbitration must be under threat. Third, the court ought to consider the special circumstances of the case are appropriate for a measure of protection after an assessment of the merits of the application. Lastly, 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.

16. Both parties agree that there is a binding arbitration agreement and in fact the suit has been stayed pending arbitration. At this point, I wish to point out that it does not matter that the arbitration has commenced as **section 7(1)** of the ***Act*** empowers the court to grant interim measures even before commencement of arbitral proceedings. The caveat is that, in line with the principles I have set out, the court ought to avoid encroaching on the arbitral tribunal's jurisdiction by providing a time frame for those orders.

17. The plaintiff's case is that the defendant is about to wind up its business in Kenya and in the event it succeeds it may be left with an award that is worth the paper it is written on. The defendant had placed before the court material that the defendant does not intend to liquidate itself without resolving any claims against it. Further, it has demonstrated that it holds sufficient assets to meet any claim that may be found due to the plaintiff. This evidence it not controverted at all. The plaintiff has not established that the subject matter of the arbitration, that is the Kshs. 120,000,000/-, is under threat as alleged or at all pending the arbitration.

18. The Notice of Motion dated 30th January 2020 lacks merit and is dismissed with costs to the defendant.

DATED and **DELIVERED** at **NAIROBI** this **28th day of FEBRUARY 2020.**

D. S. MAJANJA

JUDGE

Mr Keyonzo instructed by S. M. Keyonzo Advocates for the plaintiff.

Mr Waiyaki instructed by Mboya Wangong'u and Waiyaki Advocates for the defendant.