



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. E148 OF 2018

SHETH VIPUL JASVANTRAI.....APPLICANT

-VERSUS-

STEEL MAKERS LIMITED.....RESPONDENT

RULING

1. This ruling is in respect to the application dated 12th November 2018 wherein the applicant, **Sheth Vipul Jasvantrai**, seeks orders of injunction to restrain the respondent from blackmailing, harassing, threatening or causing physical injury to the applicant and/or his family or publishing information relating to the transaction between the parties.

2. The application is brought under Section 7 of the Arbitration Act, (the Act) Rule 2 of the Arbitration Rules (the Rules) and is supported by the applicant's affidavit sworn on 12th November 2018. The application is premised on the grounds that: -

i. By a contract dated 27th July, 2017, the parties herein entered a Facilitation Agreement where the plaintiff would assist the defendant obtain a loan of \$3 million from Financial Ltd UK (hereinafter referred to as "the lender") to enable it meet its capital requirements.

ii. As per the terms of agreement, the plaintiff was to have the Lender release the loan amount to the defendant in 3 weeks from the time of executing the agreement.

iii. However, due to factors beyond the control of the plaintiff, the Lender delayed in releasing the funds which have not been released to date.

iv. That the parties mutually agreed to extend the time for performance of the contract during which time the defendant requested the plaintiff to loan it sums of money amounting to \$183,000 which amount was to be repaid back in time to enable the plaintiff pay the Lender its fees for release of the loan.

v. The defendant never paid back the loan of \$183,200 to the plaintiff and consequently the plaintiff was unable to pay the Lender its full fees for release of the loan amount applied for.

vi. That the defendant has subsequently rescinded the contract and is now demanding back the sum of \$477,451 which it has initially paid to the plaintiff under the agreement in addition to interest accrued on the said sum.

vii. That the plaintiff on his part is willing to refund to the defendant the sum of \$326,800 being the sum paid to him less his facilitation fees of \$90,000 and an amount of \$183,200 which he has separately loaned to the defendant.

viii. That as a consequence thereof, there is a dispute in the amounts that the plaintiff should refund which dispute has now been declared by the plaintiff who intends to refer the same to arbitration as per the terms of the Facilitation Agreement.

ix. The defendants, on their part, have resorted to blackmailing, harassing, threatening and intimidating the plaintiff by hiring goons who are constantly calling the plaintiff and issuing threats on his life or that of his only daughter in order to compel the plaintiff to pay the amount they have demanded.

x. The defendant has also threatened to have the matter published in the media which action will be malicious on their part as the plaintiff is willing to follow the appropriate channels for resolving the dispute pursuant to the agreement.

xi. It is just and fair that the application be granted to restrain the defendant through its agents, from blackmailing, harassing, threatening and or causing physical injury or violent attacks to the plaintiff or his family.

xii. Unless this application is heard and interim orders granted, the plaintiff is apprehensive that the defendant may have him or his only daughter maimed or even killed during the pendency of this dispute.

3. The respondent opposed the application through the replying affidavit of its Manager-Administration, Mr. James Murigi, who confirms that the respondent entered into a contract with the applicant on 27th July 2017 which contract spelt out the parties' rights and obligations. He however challenges the veracity of some of the averments made by the applicant in the supporting affidavit and accuses the applicant of unwillingness to deliver on his obligations under the contract. He also confirms that the respondent is entitled to the repayment of £ 442, 702 that it demands together with interest thereon.

4. He avers that the respondent has responded to the applicant's overtures to refer the matter to arbitration but only after refunding to the respondent the admitted of the £ 326,800 and thereafter referring the balance to arbitration.

5. He denies all the accusations of blackmail, harassment, threats and intimidation as alleged by the applicant and reiterates that the respondent is a reputable company doing business in several countries and would not besmirch its good reputation by engaging in underhand dealings.

6. He further avers that the respondent is within its rights to undertake debt collection activities including but not limited to publishing the criminal and disreputable actions by the applicant in not repaying the debt. He takes issue with the applicant's failure to name the respondent's officers who are responsible for the alleged threats or harassment.

7. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the applicant has made out a case for the granting of the interim measures of protection through an order of injunction pending arbitration.

8. Section 7(1) of the Arbitration Act stipulates as follows:

(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.

9. By their very nature, orders made under Section 7 of the Arbitration Act are to preserve the status quo until such a time that the court tribunal will have heard and determined the matter on its merits. In the present case, the respondent argued that the applicant is not entitled to the injunctive orders sought in view of the fact that the applicant is yet to commence any arbitral proceedings and neither had he filed any substantive suit before this court. The respondent submitted that a miscellaneous application is not a suit for purposes of Section 7 of the Act and Rule 2 of the Rules. For this argument, the applicant cited the decision in ***Scope Telematics International Sales Limited v Stoic Company Limited & Another*** [2017] eKLR wherein the Court of Appeal held: -

“In some instances, a party could be allowed to file a Miscellaneous Application without the basis of a suit where such a party was not seeking to enforce any rights or obligations.”

10. In the present case, it is clear, from the summary of the case, that the application herein seeks to enforce certain obligations under their Facilitation Agreement. I find that in the absence of a substantive suit or arbitral proceedings, the temporary injunctive orders sought cannot issue.

11. My above findings notwithstanding and even assuming that the applicant had a filed a substantive suit, I still find that the orders sought cannot issue in view of the fact the complaints raised by the applicant do not fall within purview of a commercial dispute as they mainly border on allegations of criminal nature which, if true, the application should consider lodging with the police.

12. For the above reasons I find that the application dated 12th November 2018 is not merited and I therefore dismiss it with costs to the respondent.

Dated, signed and delivered via Microsoft Teams at Nairobi this 30th day of July 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

No appearance for the parties

Court Assistant: Sylvia