REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. E667 OF 2020

MACHIRI LIMITED.....PLAINTIFF

VERSUS

SOGEA – SATOM KENYA BRANCH.....DEFENDANT

RULING

1. These proceedings, commenced pursuant to Section 7 of the Arbitration Act, sought to restrain the encashment of two advance payment guarantees and a performance bond pending the hearing and determination of an Arbitration between the parties.

2. The application for restraint was in a Notice of Motion dated 21st May 2020.When it came up for directions on 9th June 2020, the Court made the following order:-

> **"….In the meantimeif the Bonds and Guarantees have not been encashed as at the time of this order being 12.01 p.mthen they shall not be encashed until 11th June 2020 or further orders of Court."**

3. It has turned out that the guarantees were encashed on 9th June 2020, the date on which the order was made.Whether the encashment was made in contravention of the Court order takes center stage in the Notice of Motion of 11th June 2020 which seeks the following substantive orders:-

> **3. ThisHonourable Court be pleased to issue an order that the 1st Respondent does reverse the transactions encashing the advance guarantee Nos; MD1824719404,MD1824790384 & performance bond No. MD1824774084 as issued by the Applicant to his bank accoubtNo.[….].**
>
> **4. This Honourable Court be pleased to issue an order suspending and/or attaching and/or freezing the 1st Respondents bank accounts being Bank of Africa A/C No. [….] and Bank of Africa A/C No. [….] held with the 2ndRespondent pending the constitution of the arbitral tribunal.**

4. An abridged background to the dispute. Desirous of rehabilitating Airside Pavements and AGR System at Moi International Airport Mombasa, Kenya Airports Authority (K.A.A) entered into a Kshs.7,008,241,561.59 contract with SogeaSatom (the Defendant) in joint venture with RazelBec (the Main Contract). On its part,SogeaSatom subcontracted Machiri Limited (the Plaintiff) in respect to certain works of the main contract. The works included construction of twin 3,500m^3rainwater harvesting tanks, 550m^3rainwater harvesting tank, two 500m^3 rainwater harvesting tanks, pipework, installation gutters and drainage works. The subcontract was executed on or about 4th September 2018.

5. Under the terms of clause 6B of the subcontract, Sogea was to make some advanced payment to the subcontractor. So as to secure itself in respect thereof, the provisions of that clause required Machiri to provide advance payment guarantees. It is common cause that in deference to this requirement,Machiri obtained two advance payment guarantees of Kshs.19,848,907.50 and Euro 169,864.09.

6. Further, clause 8 of the subcontract provided that the subcontractor would issue a performance guarantee representing 10% of the subcontract in the sum of a first demand guarantee. In this regard one of Kshs.39,697,815.10 was issued.The issuing bank of all the three guarantees was NCBA Bank Kenya PLC.

7. On 17th March 2020, Sogea terminated the subcontract citing Machiri's inability to fulfil its obligations and duties and breach of the subcontract. Machiri on the other hand asserts that it has dutifully performed its obligations. The parties agree that the differences they hold should be resolved within the remit of the arbitration contemplated in Clause 29 of the subcontract.

8. In the meantime, as it would wont to, Machiri moved this Court for protective orders under the provisions of Section 7 of the Arbitration Act:-

> **"(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. Part of the Respondent's answer to the main motion is that the Application of 21st May 2020 is not made within a suit and is therefore defective. That prefatory objection is what I am called upon to determine, for starters.

10. It is common ground that these proceedings were initially commenced by way of a Notice of Motion dated 24th March 2020. That application was however withdrawn on 3rd June 2020. The argument by the Respondent is that Rule 2 of the Arbitration Rules provides that an application under Section 7 of the Act shall be made by summons in a suit. It is argued that the proceedings must be predicated on a summon as the substratum of the suit.

11. For the Applicant, it was argued that the instant application, of 21st May 2020, was filed before the Notice of Motion dated 24th March 2020(the initial Motion) was withdrawn. It is submitted that the withdrawal of the initial Motion did not withdraw the suit in its entirety as the current application was yet to be determined.

12. The manner of bringing an application under Section 7 of the Act was the subject of the Court of Appeal decision in **Scope Telematics International Sales Limited -vs- Stoic Company Limited & another [2017] eKLR**. In that, decision the Court of Appeal held:-

> ***"It must be borne in mind that the substantive provision that the 1st respondent invoked was Section 7 of the Act. The 1st respondent was seeing (sic) an interim measure of protection pending arbitration. The procedure applicable in such circumstances is clearly spelt out by Rule 2 of the Arbitration Rules, 1997. Suffice it to say, that the rule is couched in mandatory terms. Our jurisprudence reflects the position that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or Statute, that procedure should be strictly followed (See Speaker of National Assembly vs. NjengaKarume [2008] 1 KLR 425). The 1st respondent did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on Article 159 of the Constitution for the proposition that justice is to be administered without undue regard to technicalities. That Article also provides that alternative forms of dispute resolution mechanisms like arbitration should be promoted by the courts. There are however many decided cases to the effect that Article 159 of the Constitution should not be seen as a panacea to cure all manner of indiscretions relating to procedure (See Nicholas KiptooArapKorirSalat v IEBC & 6 Ors [2010] eKLR; DishonOchieng v SDA Church, Kodiaga (2012) eKLR; Hunter Trading Company Ltd v Elf Oil Kenya Limited, Civil Application No. NAI. 6 of 2010). Despite the foregoing, the court still went ahead to exercise its discretion in favour of the 1st respondent by invoking that Article, the overriding objective under the Civil Procedure Act, and the interests of justice, to hold that failure to anchor the application on a suit did not render the application fatal or incurably bad. The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised his discretion properly. There can be no other interpretation of Rule 2. The application should have been anchored on a suit. It was not about what prejudice the appellant or and 2nd respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective."*** **[Emphasis added]**

13. Two critical matters are highlighted by the decision. The first is that a party seeking the protection of Section 7 of the Act needs to bring an application which is mounted upon a suit. Second, that non-observance of that mandatory procedure cannot be cured through reliance of Article 159 of the Constitution whose theme is that justice is to be administered without undue regard to technicalities.

14. Although counsel for the Applicant sought to argue that the current proceedings were commenced by way of miscellaneous proceedings, the truth of the matter is that both the applications of 24th March 2020 and the current application were notices of motion. Neither was in the form of a suit. Since the motions were not mounted upon a suit then the entire proceedings are fatally defective.

15. While it may appear pertinently unfair that the current application should be struck out for non-observance of what may seem to be a mere technicality, that is the law as emphatically pronounced by the Court of Appeal and this Court is bound to follow it. This Court cannot remake the law in that regard and must surrender in deference.

16. Having to face a similar situation like the one presented in this matter Majanja J recently in Civicon Limited -vs- Fuji Electric Co Limited & Another [2020] eKLR observed:-

> **"10. Although there are good reasons why the filing of the suit is necessary, I sympathize with the applicant and I hope that the Court of Appeal may reconsider its position particularly in view of the fact that the respondents, as the court recognised,**

do not suffer any prejudice whatever procedure is adopted. I would also urge the Rules Committee to consider recommending amendment of rule 2 of the *Rules* to accord with good sense and justice."

17. The Judge then cited the case of MwaiKibaki -vs- Daniel ToroitichArapMoi[2008] 2 KLR (EP) 351 on the place of precedent in the administration of justice:-

"The High Court, while it has the right and indeed the duty to critically examine the decisions of the Court of Appeal, must in the end follow those decisions unless they can be distinguished from the case under review on some other principle such as that obiter dictum if applicable. It is necessary for each lower tier to accept loyally the decisions of the higher tiers."

18. This Court has no option but to strike out both Applications of 21st May 2020 and that of 11th June 2020, as it hereby does with costs to the Respondent.

19. I mean no discourteous to the parties for not considering the substance of the applications but that may not be necessary as the Applicant placed an insurmountable hurdle on its on paths.

Dated, Signed and Delivered in Court at Nairobi this 25th Day of August 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Fundi for Respondent

No appearance for Applicant