



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 20 OF 2020

CYKA MANPOWER SERVICES LIMITED.....PLAINTIFF

-VERSUS-

TATA CHEMICALS MAGADI LIMITED.....DEFENDANT

RULING

1. Both parties here filed an application each which applications were ordered to be heard together and on which each party filed written submissions. When the matter came up for hearing of the said applications, 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 agreement contain in the parties' agreements dated 21/06/2018 and 19/09/2019 at clauses 21 and 17 respectively.

2. The other consequence of the consent remains that only the plaintiff's application dated 9/3/2020 now pends determination by the court. That application seeks, in the main, an order that: -

THAT this Honourable Court be pleased to issue a temporary injunction restraining the Defendant/Respondent, its officials, agents, servants and/or employees from terminating the contracts dated the 21st June 2018 and 19th September 2019 on 1st April 2020 or on any other date, assigning them to any other person, advertising fresh tenders for the offloading and handling of soda ash at Mombasa and Kajiado depots whether internally or on the local newspapers, websites and other forms of media or interfering with the existing contracts in any manner pending the hearing and determination of this Suit.

3. The facts disclosed on the body of the application and the Affidavit sworn by one DENNIS MITHAMO KARIUKI are that while the agreement between the parties was running and due to expire on the 31/3/2021 and 31·08·2022, respectively, and with the plaintiff diligently executing its obligation, on the 24/01/2020, the defendant terminated the contract without advancing any valid reason and without hearing the plaintiff, a fact which, it is contended, exposes the plaintiff to huge loses including damage and labour suits. The plaintiff pleads that it had the legitimate expectation that the contracts would run full term and that any differences could have been resolved in accordance with the alternative dispute resolution mechanism provided in the contract itself. For those reasons a temporary injunction was sought to restrain the termination and to forestall any award of the same contract to any other person.

4. The Affidavit in support then annexed and exhibited the copies of the subject agreements together with the letter of termination and the ensuing correspondence between the parties.

5. In opposing the application, the defendant filed a Replying Affidavit sworn by one SHINE MATHEWS, the head of commercial at Tata Chemicals Magadi Ltd. That Affidavit confirms the execution of the contract between the parties and the terms on alternative dispute resolution while underscoring that there was also a termination clause which allowed the defendant to terminate the contract at any time and for any reason provided a 30 days' notice is served and full payment for the services rendered is made.

6. He confirmed that after termination discussions were held with the plaintiff on the rationale of the termination being founded on the terms of the contract. He concluded by reiterating the position that contract being grounded on freewill belong to the parties and the court has no duty to compel a terminated contractual relationship and that the contract between the plaintiff and its employees was contractually made to be separate and distinct from that between the parties in this suit. For those reasons it was asserted that there was no suit with probabilities of success to grant an application from injunction and further that any loss that could result in capable of quantification in monetary terms.

7. When parties attended court, the court gave directions on hearing of the matter including filing of submissions pursuant to which directions the plaintiff applicant filed its submissions on the 15/09/2020 while the defendant did so on 21/9/2020.

8. I have had the benefit of reading both sets of submissions as well as the papers filed regarding the application and I am satisfied that what I am called upon to undertake is to consider granting an order of injunction pending suit to preserve the subject matter of the dispute I have

referred to arbitration by the consent of the parties. It is also instructive that when a matter is referred to arbitration, it stands stayed pending the outcome of the arbitral proceedings.

9. The task of the court in an application of this nature is circumscribed and prescribed by the rules established in *Giela vs Casman Brown & co ltd* [1973] E.A 358. In applying those principles, the court must establish that the applicant has established a prima facie case with probabilities of success; that unless the injunction is granted the applicant stands to suffer damages incapable of repair by way of damages and in the event the court is still in doubt where the justice of the case lies, it employs the balance of convenience between the parties.

10. However, in determining the parameters of grant of injunction the court must remain reminded that it is yet to hear the substantive matter on the merits and refrain from making determinative finding of facts, by leaving such to the trier of facts, so as to avoid prospects of the trial being embarrassed.

11. In relation to arbitration proceedings the discretion is given to court by section 7 of the Act to grant an interim protection essentially to preserve and maintain the dispute so that the award if any is subsequently issues serves the purpose of its pursuit. That is what I understand the plaintiff here to be urging.

12. While in ordinary civil litigation before the court it is not uncommon to grant a temporary injunction and later dismiss the prayer for a permanent injunction and vice versa, because the court remains the same. That is acceptable because the court remains the same here, having referred the matter to the forum chosen by the parties, which forum is subordinate to this court as far as supervisory jurisdiction is concerned, I find that it would be inappropriate for me to find and express myself on the strength or weakness of the plaintiff's claim, without possibly embarrassing the arbitrator in its proceeding. All I can say at this juncture is that the plaintiff case does not appear to me to be flimsy, tenuous or just vexatious. That is what I get by parties' acknowledgment of a dispute and a desire to take it to arbitration to connote. I see a prima facie case disclosed and I understand the law to be that a prima facie case must not be one that must succeed.

13. I also appreciate that it would a pretense and of no benefit to the parties and the justice system that I refer them to arbitration only to attend there when the substratum has been removed by the termination taking effect.

14. I further appreciate that parties are bound by their bargain and that as a court that negotiated position needs protection and recognition. I take the view that the arbitration agreement would be best protected and respected by preserving the subject of the dispute being the manpower outsourcing contract pending the determination of the dispute by the arbitrator.

15. Before I conclude, a lot of premium was placed on the decision by the court in *MAXAM LTD & 2 OTHERS VS HEINKEN E.A. IMPORT CO. LTD & OTHERS* [2016] eKLR where the judge in allowing an application for injunction to prohibit termination of an ongoing distribution agreement observed that it was an ongoing contract deserved protection.

16. The upshot is that I do allow the Motion dated 09.03.2020 by grant of an interim relief in the nature of an injunction restraining the defendant from terminating the contracts with the plaintiff in terms of the termination notices dated 24.01.2020 pending the determination of the dispute by way of arbitration.

17. The cost of the motion shall abide the outcome of those proceedings before the arbitrator.

Dated, signed and delivered this 29th day of September 2020

P J O Otieno

Judge