REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MISCELLANEOUS APPLICATION NO. 424 OF 2019

ELITE EARTHMOVERS LIMITED.....APPLICANT

VERSUS

MACHAKOS COUNTY GOVERNMENT.....1ST RESPONDENT

POINTMARK VALUERS LIMITED.....2ND RESPONDENT

RULING

1. By a Notice of Motion dated 4th November, 2019, the Plaintiff/Applicant herein seeks the following orders:

1) THAT this Application be heard ex-parte in the first instance.

2) THAT, an Order of temporary injunction do issue to restrain the 1st Respondent whether by itself, its agents and or servants or otherwise from re-advertising and re-issuing the tender now referenced as GMC/MTYCS/02/2019-2020 [proposed completion of Masii stadium at Mwala sub-county] pending the inter-parties hearing and determination of this Application.

3) THAT an urgent hearing date be set for inter-parties hearing of this Application.

4) THAT an Order of temporary injunction do issue to restrain the 1st Respondent whether by itself, its agents and or servants or otherwise from re-advertising and re-issuing the tender now referenced as GMC/MTYCS/02/2019-2020 [proposed completion of Masii stadium at Mwala sub-county] pending the hearing and determination of the Arbitration Proceedings herein.

5) THAT an interim mandatory injunction do issue compelling the 1st Respondent to continue or resume with the design contract pending arbitration.

6) THAT in the alternative to (4) above, the Applicant be allowed to remove its material and equipment from the site pending the pendency of the arbitration proceedings.

7) THAT the 1st Respondent be restrained from making payments to any other party other than the Applicant herein pending the hearing and determination of this Application.

8) THAT the costs of this application be costs in the cause.

9) THAT the OCS Athi-River Police Station to ensure compliance and/or enforcement of this order.

10) THAT the costs of this application be provided for.

2. The Application was based on the following grounds:

i) By an award of tender referenced as GMC/MTYCS/04/2018-2019, the 1st Respondent issued a tender for the designing and building of Masii Stadium at Mwala sub-county and related works to the 2nd Respondent.

ii) Pursuant to the aforementioned award, the Respondents entered into a contract dated 9th January, 2019.

iii) By an assignment of rights dated 9th January, 2019, the 2nd Respondent vide an affidavit of even date assigned its rights under the contract to the Applicant.

iv) On or about 27th August, 2019, the 1st Respondent wrote to the 2nd Respondent purporting to terminate the contract between it and the 2nd Respondent. That no termination notice was ever issued to the Applicant. This purported termination subsequently culminated in the arrest and institution of charges against employees of the Applicant in CG Crim Case 664 of 2019 (*Republic v Kirtik Jesani & 6 Others*) which is currently pending before court.

v) THAT the Applicant has since been denied entry onto the site to collect its material which continues to be laid waste and exposed to burglary adversely affecting the Applicant's proprietary rights to the material therein.

vi) THAT despite the Applicant preparing a detailed summary of works done pursuant to the contract as at 9th September, 2019 which was duly received by the 1st Respondent on 11th September, 2019, no payment has been made to the Applicant which is reasonably apprehensive that the payment therein shall be released to the 2nd Respondent.

vii) THAT the Applicant is reasonably apprehensive that it may not receive the payment as raised vide its interim payment certificate as the 1st Respondent has now reneged on the existence and validity of the contract between it and the Applicant.

viii) THAT as a consequence thereof, there is a dispute as to the validity of the contract between the Applicant and the 1st Respondent which dispute ought to be referred to arbitration as per the terms of clause 12 of the contract.

ix) THAT it is just and fair that the Application be granted to restrain the 1st Respondent from re-advertising, re-issuing the tender pending resolution of the dispute and consequently preserving the subject matter therein.

xi) UNLESS this Application is heard and interim Orders granted, the Applicant is apprehensive that the 1st Respondent may not make payment to it as duly required by the contract and further re-tender the design contract therein gravely prejudicing its rights therein during the pendency of this dispute.

3. The application was supported by two affidavits sworn by **Pravin Mavji Patel**, the applicant's Managing Director.

4. According to the deponent, the Applicant is a construction company duly incorporated under the ***Companies Act*** (CAP 486) (now repealed) and carrying on business within the Republic of Kenya. By an award of tender referenced as GMC/MTYCS/04/2018-2019, the 1st Respondent issued a tender for the redesigning and building of Masii Stadium in Mwala sub-county (the Stadium) and related works to the 2nd Respondent. Pursuant to the aforementioned award, the 1st and 2nd Respondents entered into a contract dated 9th January, 2019 crystallising the mutually agreed terms and scope of the contract. However, since the 2nd Respondent did not have the requisite technical capacity to meet the contract specifications and perform the contract, the 1st Respondent requested the Applicant seeking its involvement in the performance of the contract.

5. Consequently**,** the Applicant entered into a contract with the 1st Respondent dated 9th January, 2019 in respect of the construction of the Stadium pursuant to the request by the 1st Respondent. By an affidavit dated 9th January, 2019, the 2nd Respondent assigned its rights under the contract, as awarded by the tender to the Applicant which assignment vested all rights under the contract to the Applicant. Vide a Sub-Contractor Agreement dated 9th January, 2019, the Applicant agreed to remit to the 2nd Respondent a consultancy fee in the sum of Kshs. 4,904,548 being ten per cent (10%) of the contract sum stipulated under clause 3 of the contract as being Kshs. 49,045,478.60. Subsequently**,** an invoice was subsequently raised by the 2nd Respondent for the amount agreed as the consultancy fee. and pursuant to clause 9 of the contract, the Applicant secured a performance bond from **Mayfair Insurance** to secure the performance of its obligations under the contract.

6. It was averred that the contract between the Applicant and the 1st Respondent provided under clause 2 thereof that:

> ***"that the agreement shall endure for an initial period of three (3) years and shall, unless terminated by either party serving notice in writing at least thirty (30) day prior to the expiry of the initial period to the other party to the effect that the party serving the notice does not wish the Agreement to continue after the expiry of the initial period, endure for an indefinite period until termination by either party on 90 days prior written notice to the other party."***

7. It was deposed that on or about 27th August, 2019, the 1st Respondent wrote to the 2nd Respondent purporting to terminate the contract between it and the 2nd Respondent without any termination notice being issued to the Applicant. This purported termination subsequently culminated in the arrest and institution of charges against employees of the Applicant in **CG Crim Case 664 of 2019** (***Republic v Kirtik Jesani & 6 Others***) currently pending before court. Further, **t**he Applicant has since been denied entry onto the site to collect its material which continues to be laid waste and exposed to burglary adversely affecting the Applicant.

8. Since clause 3B of the contract required payment to be effected within thirty (30) days of submission by the Applicant of the payment certificate, the Applicant prepared a detailed summary of works done pursuant to the contract totalling Kshs. 15,753,979.02 as at 9th September, 2019 which was dispatched and receipt acknowledged by the 1st Respondent on 11th September, 2019. The Applicant was apprehensive that, since clause 5 of the Subcontractor Agreement between the Applicant and the 2nd Respondent required all payments under

the Contract to be remitted directly to the Applicant by the 1st Respondent, it may not receive the payment as raised vide its interim payment certificate as the 1st Respondent has now reneged on the existence and validity of the contract between it and the Applicant.

9. Based on the foregoing it was the Applicant's position that there is a dispute as to the validity of the contract between the Applicant and the 1st Respondent which dispute ought to be referred to arbitration as per the terms of clause 12 of the said contract since the Applicant has severally attempted negotiating with the 1st Respondent with a view to obtaining the payment herein but no response has been forthcoming from despite the subsequent demands for payment.

10. The Applicant averred that though it has now declared a dispute for reference to arbitration by having its advocates on record issue a notice to the Respondents, the 1st Respondent on 31st October, 2019 re-advertised the tender in respect of the construction of the Stadium vide an advertisement in the local dailies referenced as GMC/MTYCS/02/2019-2020 inviting members to the pretender site on 6th November, 2019. It was deposed that the arbitral tribunal, though not constituted, has the power to issue the remedy of specific performance of the Contract hence it is just and fair that the Application be granted to restrain the 1st Respondent from re-advertising and re-issuing the tender in respect of the Stadium pending resolution of the dispute.

11. The Applicant contended that unless this Application is heard and interim Orders granted, the 1st Respondent may not make payment to the Applicant as duly required by the contract and may proceed to further re-issue the design contract therein gravely prejudicing its rights therein during the pendency of this dispute.

12. It was the Applicant's case that it has substantially and materially relied on and performed a substantial part of the contract with the 1st Respondent and it would be unconscionable and contrary to the dictates of justice for the 1st Respondent to now renege on the existence of the contract. The Applicant reiterated that the contract entered into by the Applicant and the 1st Respondent had an elaborate dispute resolution clause which mandated the reference of all disputes to arbitration and that it has satisfied the essentials the court must take into account before issuing the interim measures of protection; there being an arbitration agreement, and the subject matter of the contract with the 1st Respondent being under threat. It reiterated that having taken out performance bonds, the it remains materially bound to the strict compliance with the performance of the bond and would materially be prejudiced if the orders sought are not granted.

13. It was submitted on behalf of the applicant that the Application is premised on Section 7 of the ***Arbitration Act***, Rule 2 of the rules thereof.

14. According to the Applicant, the essentials which the court must take into account before issuing an interim measure of protection were stated by **Nyamu J** in **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others [2010] eKLR**.

15. According to the Applicant, clause 12 of the agreement stipulates that "ANY DISPUTE" arising out of the contract which cannot be amicably settled between the parties shall be referred by either party to arbitration and it is uncontroverted that the Applicant has already declared a dispute thereof and referred the same to arbitration. It was therefore submitted that the existence of an enforceable arbitration agreement constitutes a *prima facie* case in the context of ***Giella v Cassman Brown*** and reliance was placed on the case of **Infocard Holdings Limited vs. Attorney General & 2 Others [2014] eKLR**.

16. Since a legally binding contract exists between the Applicant and the 1st Respondent, it was contended that the averment by the 1st Respondent denying the validity of the contract ought not be considered by this Court since the question of the validity of the arbitration agreement is a preserve of the Arbitral Tribunal and should not fall under this Court's consideration lest the court usurps the jurisdiction of the arbitrator in contravention of section 10 of the ***Arbitration Act***. In any event, the Arbitral Tribunal, which is currently pending constitution has the power to rule on its jurisdiction and also to determine the validity or otherwise of the agreement in question. In this respect the Applicant relied on the Court of Appeal's decision in **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 others CA 327 of 2009** which upheld the doctrine of Kompetenz where the tribunal can rule on both the validity of the arbitral clause and the underlying contract. It also relied on Section 17 (1) of the ***Arbitration Act***.

17. According to the Applicant, the principle of separability of an arbitration clause in an agreement has been given the judicial stamp of approval and is applicable even where one of the parties is challenging the validity or illegality of the agreement itself. In support of this submission the Applicant relied on the decision of **Kimaru, J** in the case of **Kenya Airports Parking Services Ltd & Another vs. Municipal Council of Mombasa Civil case 434 of 2009.**

18. As regards the issue whether the matter of arbitration is under threat, it was submitted that the purpose of an interim measure of protection as was rightfully restated by your **Makau, J** in **Safari Plaza Limited vs. Total Kenya Limited [2018] eKLR** is that it must be of urgent nature to preserve the subject matter of the dispute, so that the proceedings before the arbitral tribunal are not rendered nugatory. In this case it was submitted that the subject matter of the intended arbitration is the termination of the contract for the construction of the stadium and unpaid dues.

19. It is uncontroverted that the Applicant has performed substantial works in the period antecedent to the purported termination of the contract by the 1st Respondent. The necessity of the Application was actuated by the 1st Respondent's re-advertisement and re-issuance of the tender referenced as GMC/MTCYS/02/2019-2020 [proposed completion of the stadium] before an agreeable valuation of the work done on the site had been finalized to enable the Applicant claim its fees and or lodge its claim. The Applicant's attempts at accessing the site to collect its machinery and material were hampered by the 1st Respondent's directive which led to the arrest of the Applicant's employees and prosecution in **Mavoko CG criminal case 664 of 2019 (Republic v Kirtik Jesani & 6 Others**) which is pending hearing. The Applicant has adduced a detailed summary of works done pursuant to the contract totalling Kshs. 15,753,979.02/= which was duly acknowledged by the 1st Respondent which communicated to the Applicant that they were processing the same. Since the 1st Respondent has since reneged on the existence and validity of the contract with the Applicant, it is the Applicant's apprehension, legitimately so, that the 1st Respondent's re-

advertisement and re-issuance of the contract devoid of a mutually agreed upon account of the figure of the works done would be gravely detrimental to the Applicant.

20. Though clause 2 of the agreement stipulated the term of the agreement as enduring for a period of three (3) years and that a thirty- day (30) notice termination period by any of the parties, no notice was ever issued by the 1st Respondent despite the mandatory requirement stipulated by the contract.

21. Regarding the appropriate measure of interim protection under the circumstances, it was submitted that the Court ought to injunct the 1st Respondent from re-issuing the advertised tender referenced as GMC/MTYCS/02/2019-2020 pending the determination of the intended arbitration. In the alternative, it is the Applicant's submission that, in order to preserve the substratum of the dispute between the parties, the Court ought to injunct the disbursement of funds to anyone other than the Applicant. The Applicant submitted that the landmark decision of ***Giella v. Cassman Brown & Co. Ltd [1973] EA. 358*** sets out the requirements to be met before the grant of interlocutory injunctions and submitted that it has satisfied those requirements to sanction the grant of interlocutory injunctions as has been demonstrated.

22. Flowing from the above, having met the required legal threshold for the grant of orders sought, and in occasioning the lower risk of injustice, the Applicant prayed that the Application be allowed as prayed.

1st Respondent's Case

23. In response to the Application the 1st Respondent relied on the replying affidavit sworn by **Henry Carlos Kioko**, the Chief Officer, Department of Youth & Sports in the 1st Respondent, being the accounting officer in the said department.

24. According to the deponent, the 1st Respondent conducted an open tendering procurement process for the designing and building of the Stadium. The said tender was referenced as GMC/MTYCS/04/2018-2019 and was advertised in the daily nation newspaper on 26/11/2018. The 2nd Respondent successfully bid and was awarded the said tender and upon notifying the 2nd respondent of the award of the tender, the 2nd Respondent dully accepted the award through an acceptance letter dated 8th January 2019. After receipt of the said acceptance letter from the 2nd Respondent, the County Government of Machakos entered into a contract with the 2nd respondent as required by law for the performance of the said works of designing and building of the said Stadium.

25. It was averred that in its acceptance letter dated 8th January, 2019, the 2nd respondent had requested that the contract be drafted in the name of the Applicant herein on ground that the applicant was part of its joint venture team and had attached affidavits to that effect to its letter. At first, the request was considered and a contract signed in the name of the Applicant herein. However, after getting proper legal advice and with the consent of all the parties involved (i.e. the Applicant and the 2nd Respondent), on the same day they agreed to cancel/revoke the agreement between the County Government of Machakos and the applicant herein because the same was unlawful and the 2nd respondent was advised to sub-contract the applicant herein if at all it required it to carry out any works with respect to the tender.

26. According to the 1st Respondent, the reason it could not enter into a contract with the Applicant herein with respect to tender reference number GMC/MTYCS/04/2018-2019 is because legally the contract should only be between the successful bidder and the County Government and the Applicant herein was not the successful bidder.

27. It was therefore averred that it is not true that there is a legally binding contract between the applicant and the 1st respondent herein since the contract the applicant is relying on was cancelled and that was the basis of the sub-contractor agreement between the applicant and the 2nd respondent. The 1st Respondent contended that it is not a party to the sub-contractor agreement between the applicant and the 2nd Respondent and as such it does not have any duty towards the applicant herein because it was not privy to that sub-contract. In its view, the 1st Respondent having entered into a contract with the 2nd respondent, it directed all payments and correspondence regarding tender reference number GMC/MTYCS/04/2018-2019 to the 2nd respondent. However, due to breach of contract by the 2nd respondent, the 1st respondent terminated the contract between it and the 2nd respondent in accordance with the terms of the contract and upon terminating the contract between itself and the 2nd respondent with respect to tender number GMC/MTYCS/04/2018-2019, the county dully valued the works done and is processing payment to the contractor in accordance with the law.

28. It was therefore the 1st Respondent's position that it would be unlawful to pay any monies to the applicant herein because it is not a party to the contract between the respondents. Also, such a payment would be in breach of the provisions of clause 3 of the contract between the respondents which states that payment should be made to the contractor.

29. The 1st Respondent maintained that for a court to grant a temporary injunction, it must be satisfied that the applicant has a *prima facie* case against the respondent. In this case, the applicant has not filed any suit against the 1st respondent and as such it should not be granted the injunctive orders sought. Further, there no being no valid contract between the applicant and the respondent, there is no dispute between the applicant and the 1st respondent to be referred to arbitration as alleged. Having terminated the contract with the 2nd respondent, the 1st respondent has since advertised the tender for completion of the Stadium, and has since received bids with respect thereto which said bids were have been opened. Therefore, the applicant's prayer for an order restraining the county from re-advertising and re-issuing the tender has been overtaken by events and this court should not issue an order in vain. To the 1st Respondent, granting the said orders would only serve to delay the said project to the detriment of the people of Machakos County and particularly the said sub-county.

30. As regards the materials allegedly at the site, it was deposed that the 1st Respondent has no interest whatsoever in the alleged materials and that the allegation that it has denied the applicant access to the site is false.

31. It was therefore the 1st Respondent's case that this application is an abuse of court process and that the same should be dismissed with costs to the respondent.

Determination

32. I have considered the application, the affidavits both in support and in opposition to the same and the submissions of counsel.

33. The matter before me is brought under Section 7 of the ***Arbitration Act*** which provides as hereunder:

> ***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.***

34. The parameters of the High Court when dealing with an application under the above section were succinctly set out by **Nyamu, JA** in **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009** the following terms:

> **"Although the right of intervention was specified in section 7 and the limit of intervention defined in the section, what happened is that the court misapprehended its role, declined to grant the interim measure by applying line, hook and sinker to the civil procedure preconditions for the grant of interlocutory injunctions as laid down in the celebrated case of *Giella vs Cassman Brown [1973] EA 358* and also delved into the rights of parties whereas under the provisions of section 7, there was no suit pending before it for determination because the interim measure of protection was being sought before the commencement of an intended arbitration. 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. However, where the arbitral tribunal has the power, it cannot issue interim measures until the tribunal itself has been established. On the facts before the court, no arbitral tribunal had been established hence the invocation of section 7 of the Arbitration Act by one of the parties. It takes time to establish an arbitral tribunal, and during the time between the arising of the dispute and the tribunal's establishment vital evidence or assets may disappear unless a national court (in our case, the High Court) is urgently asked to intervene. Moreover even where an arbitral tribunal has the power to issue interim measures such powers are generally restricted to the parties involved in the arbitration itself. Thus, under the Model Law system an arbitral tribunal may only order any party to take such interim measures of protection as the arbitral tribunal may consider necessary. On the other hand a national court would not necessarily be restricted to the parties when giving relief for example a temporary order attaching a debt due from a third party. An interim measure of protection such as that sought in the matter before the court is supposed to be issued by the court under section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for the grant of injunctions as the High Court purported to do in this matter. To illustrate the point Article 26-3 of the UNICTIRAL Arbitration rules states that a request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement. Section 7 of the Arbitration Act is modelled on this. However, in the matter before the court the learned Judge contravened the above principles by firstly either declining to issue any measure of protection or granting such a measure. The Court also failed to correctly address the principles for the issue of any such measures and worse still, the Supreme Court took over the subject matter altogether and ruled on the merits of the subject matter of the arbitration thereby prejudicing the outcome of the arbitration. This explains why in the special circumstances of this matter, this Court must take extraordinary measures to rectify an extraordinary illegality. 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? In the matter before the court, the Judge 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. There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made and not to take out of the hands of the arbitrators (or other decision makers) a power of decision which the parties have entrusted to them alone. In the present instance the latter considerations must prevail. If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide…Although the English Arbitration Act 1996 is not exactly modelled on the Model Law unlike our Act, the principles as outlined in the *Channel Case* are in line with the arbitral tribunal's jurisdiction as set out in section 17 of the Arbitration Act of Kenya. The section gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under section 17(6) of the Arbitration Act as the Commercial Court in this matter purported to do. In this regard, the Superior Court did act contrary to the provisions of section 17 and in particular violated the principle known as "Competence/Competence" which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this**

means is *"Competence to decide upon its competence"* and as expressed elsewhere in this ruling in German it is "*Kompetenz/Kompetenz*" and in French it is "*Competence de la Competence*". The entire ruling is therefore a nullity and it cannot be given any other baptism such as "acting wrongly but within jurisdiction."

35. In the case of **Carzan Flowers (Kenya) Ltd & Others vs. Tarsal Koos Minck B V & Others Nairobi (Milimani) HCCC No. 514 of 2009 Kimaru, J** recognised the powers of the High Court in that regard when he said that the High Court has jurisdiction under section 7 of the ***Arbitration Act***. He further lamented the fact that in Kenya, it is evident that the law is not settled in regard to the principles which should be considered by the court in granting interim measure of protection where the parties have agreed to have the dispute between them resolved by arbitration. In his view:

"There are different types of interim measures which are available and which are applied differently by courts of various countries. The analytical commentary nevertheless gives clues as to which kinds of interim measures are deemed to be included: steps by the parties to conserve the subject-matter or to secure the evidence, measures required from a third party and their enforcement (i.e. pre-award attachments)…Some courts have held that such pre-award attachments were not consistent with the arbitration agreements and the purpose of the 1958 Convention because they would in fact impede expeditious arbitration proceedings. Yet, discourage resort to arbitration or obstruct the course of arbitral proceedings but would rather make the later award meaningful by preserving the subject-matter or assets intact within jurisdictions…In England it has been held that the English Court can support an ICC arbitration by granting interim measures (a) which ordered purely procedural steps which the arbitrators either could not order or could not enforce such as requiring an inspection of the subject matter immediately the dispute arose or compelling attendance of an unwilling witness, (b) which maintained the status quo pending the making of an award e.g. by an interlocutory injunction, so as to prevent one party from bringing about a change of circumstances adverse to the other which the arbitrators could not remedy and (c) which afforded remedies such as mareva injunction designed to ensure that the award had the intended practical effect by causing one party to provide a fund to which recourse could be had by the other party if the first party failed to honour an adverse award spontaneously. However, in determining whether to grant an interim measure in support of the agreement to arbitrate under the ICC rules, the English Court, as the local court, should have regard to (a) the fact that the arbitration was a consensual process and that the court should strive to make the consensus effective by identifying, so far as possible, the kind of arbitrational process that the parties either expressly or impliedly indicated that they were contemplating when they entered into the arbitration agreement (b) the fact that the choice of an ICCC arbitration indicated that the parties intended that the arbitration should, as far as possible, be independent of the national legal system of the country in which the arbitration was to take place, and (c) the degree to which any interim measures would encroach on the arbitrator's function. There is plainly a tension here. On the one hand the concept of arbitration as a consensual process, reinforced by the ideal of transnationalism, leans always against the involvement of the mechanisms of state through the medium of a municipal court. On the other side there is the plain fact palatable or not, that, it is only a court possessing coercive powers which can rescue the arbitration if it is in danger of floundering, and that the only which possesses these powers is the municipal court of an individual state. Whatever extreme positions may have been taken in the past, there is a broad consensus acknowledging that the local court can have a proper and beneficial part to play in the grant of supportive measures. Total consistency cannot be expected and each domestic court has its own practical methods, developed in the context of litigation, which it will instinctively tend to bring to bear when similar questions arise in the context of arbitration; each country will have its own traditions of arbitration and its own traditions of the relationship between arbitration and the courts… In the case of COPPEE-LEVALIN SA/NV VS. KEN-REN CHEMICALS AND FERTILIZERS LTD (IN LIQ) [1994] 2 ALL ER 449 , the courts of justice in England accepted as a principle that even in international arbitrations, it may be necessary in certain instances for domestic courts to issue interim measures of protection to secure the substratum of the arbitration process… The court has the jurisdiction to grant the injunction since the whole purpose of giving the court power to take such orders is to assist the arbitral process in cases of urgency before there is an arbitration on foot. Otherwise it is all too easy for a party who is bent on a policy of non-cooperation to frustrate the arbitral process. Of course, in any case where the court is called upon to exercise the power, it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertakings from the claimant, that the substantive questions are reserved for the arbitrator or arbitrators…As is evident, in considering whether or not to grant an interim measure of protection pending resolution of a dispute by arbitration, the courts have been cautious not to render determination on the merits of the issues in dispute lest it interferes with the jurisdiction of the arbitrator to whom the parties have granted exclusive jurisdiction to determine their dispute. The courts are not oblivious of the fact that there are times when the courts will be called upon to issue interlocutory orders in order to preserve the subject matter of the dispute pending hearing of the dispute by arbitration…It is clear that in granting an interim measure of protection the court is not rendering any opinion in regard to the matters in dispute between the parties: the court is issuing orders which would in effect assist the arbitral tribunal discharge its mandate by preserving the subject matter of the dispute. Whereas the court is mindful that the decisions cited above were made after the courts interpreted an English statute, however, the general principle set out in the said cases in regard to when a court can intervene in arbitration proceedings to grant appropriate orders with a view to rendering justice to the parties are applicable with equal force in Kenya…In considering an application under section 7(1) of the Arbitration Act, the court is not being called upon to determine the merits of the matters in dispute but rather it is being called upon to aid the arbitration process by putting the disputing parties at a footing that will ensure none of the parties would be prejudiced during the hearing of the dispute by the arbitral tribunal. Of course, as is apparent from some arbitral proceedings, a party to such proceedings who considers himself to have been put at a position of disadvantage and therefore likely to be prejudiced, prior to or during the arbitral proceedings, may have no option but to seek the coercive jurisdiction of the court in order to protect the essence of the arbitral proceedings…The position in Kenya is that for a party to succeed in an application under section 7 of the Arbitration Act, 1995 for interim measure of protection pending hearing of the dispute by arbitration, he must firstly establish that there exists an arbitration clause in the agreement between the parties that is capable of being invoked to have the dispute referred for determination by arbitration. Secondly, such a party must establish that it would suffer irreparable damage or loss that by the time the arbitration is heard; such a party may not be able to obtain an appropriate remedy. Generally the courts have accepted that for interim measure of protection to be granted, the applicant must establish a case broadly under the established principles for the grant of interlocutory injunction…A court hearing an application for the grant of interim measures of protection must always act cautiously and must put in mind the fact that, in considering the application, it should not exceed its jurisdiction and make a determination that is clearly within the province of the arbitrator. The court should not lose sight of the fact that a grant of any interim measure of relief is meant to preserve or conserve the subject

matter of the arbitration pending hearing and determination of the dispute by arbitration. The interim measure granted should aid but not impede the realisation of the resolution of the dispute between the parties by arbitration. The court is therefore expected to tread on the thin line that separates the making of the decision in respect of a matter that is actually in dispute (and which the parties have by consensus granted exclusive jurisdiction to the arbitrator) and granting orders that will put the parties in such a position that when the arbitrator makes his award, the same would be of benefit to the successful party…In this case it is clear that the plaintiff unilaterally and without giving notice to the defendants stopped delivery of flowers to the 1st defendant. The court is of the considered opinion that the status quo as it existed before the 1st plaintiff stopped supplying the flowers to the 1st defendant should be restored pending the hearing of the declared dispute by arbitration…The court lacks jurisdiction to prevent the defendants from participating in the management of the 1st plaintiff since the said defendants are directors and shareholders of the 1st plaintiff. It would be a travesty of justice for the court to grant orders whose application and import would be to indorse a deliberate breach of contract by one of the parties."

36. In this application this Court is therefore called upon to determine whether there exist of an arbitration agreement; whether the subject matter of arbitration is under threat; in the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?; 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.

37. The first issue for determination is whether there exist of an arbitration agreement. In support of the application the applicant relies on the contract between the 1st and 2nd Respondent dated 9th January, 2019 in respect of the construction of the Stadium, an affidavit dated 9th January, 2019 by which the 2nd Respondent is alleged to have assigned its rights under the contract, as awarded by the tender to the Applicant which vested all rights under the contract to the Applicant and a Sub-Contractor Agreement dated 9th January, 2019 by which the Applicant agreed to remit to the 2nd Respondent a consultancy fee in the sum of Kshs. 4,904,548 being ten per cent (10%) of the contract sum stipulated under clause 3 of the contract as being Kshs. 49,045,478.60. The Applicant has exhibited a copy of the agreement between it and the 1st Respondent for the Tender for Designing and Building of Masii Stadium – Mwala Sub-County dated 9th January, 2019. That agreement contained an arbitration in clause 12 whereby any dispute arising out of the contract was to be referred to arbitration by an arbitrator to be agreed to by the parties.

38. That an agreement was entered into between the Applicant and the 1st Respondent is admitted by the 1st Respondent. The 1st Respondent however contends that after getting proper legal advice and with the consent of all the parties involved (i.e. the Applicant and the 2nd Respondent), they agreed to cancel/revoke the said agreement because the same was unlawful and the 2nd respondent was advised to sub-contract the applicant herein if at all it required it to carry out any works with respect to the tender. The 1st Respondent has however not exhibited any document in support of this contention. I associate myself with the opinion of **Kimaru, J** in the case of **Infocard Holdings Limited vs. Attorney General & 2 Others [2014] eKLR** that:

"A consensus seems to have emerged from the string of judicial authorities cited and which the Court is familiar with, that, if an injunction is sought as the interim relief under section 7 of the Arbitration Act, existence of an enforceable arbitration agreement constitutes prima facie case in the context of GIELLA v CASSMAN BROWN CASE."

39. The 1st Respondent has contended that since there was no valid contract between it and the Applicant there is no dispute between the two parties to be referred to arbitration. Section 17 (1) of the ***Arbitration Act*** however provides that:

The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.

40. In **Zahra S Mohamed & Another vs. Insurance Co. of East Africa Ltd Nairobi (Milimani) HCCC No. 521 of 2008 (OS), Kimaru, J** stated as follows:

"In the instant case, that there is an arbitration clause in the policy of insurance is not in dispute. Clause 11 of the Policy of Insurance provides that any dispute between the parties to the policy shall be referred for determination by arbitration. The clause envisages that the parties to the policy agreement would agree on a single arbitrator. In the event the parties are unable to agree on a single arbitrator, each party would appoint one arbitrator who would in turn appoint an umpire… According to the applicants, a dispute has arisen between the applicants and the respondents and the dispute was occasioned by the respondent's decision to refuse to pay the costs of repair of the motor vehicle but instead to pay an amount in cash that was not equivalent to the cost of the repair of the motor vehicle. It also apparent that the applicants seek to be paid for the loss which they allege is consequential to the respondent's refusal to repair the said insured motor vehicle in time. On the other hand, the respondent was of the view that it acted in accordance with the terms of the policy of insurance when it offered to pay the applicants cash in lieu of repairing the motor vehicle in light of the assessor's report which was to the effect that the spare parts of the motor vehicle were unavailable in the local market. The respondent is of the view that there is no discernible dispute capable of being referred to arbitration in view of its offer to pay cash to the applicants…It is evident that the respondent's refusal to participate in the appointment of an arbitrator was influenced by its belief that there exists no dispute between itself and the applicants. In its attempt to prove that no such dispute exists, the respondent delved into the evidence that ideally is the province of the arbitrator to determine. The court in determining the application before it cannot enter the arena of considering the merits of the evidence unless such evidence supports the assertion by one of the parties that there exists no clause in the agreement that forms the basis of the relationship between the two disputing parties that

provides for resolution of any dispute between them by arbitration. The issue as to whether the applicants have a valid claim in accordance with the terms of the policy of insurance can only be determined by the person who will be appointed as an arbitrator…It appears that the respondent is confusing the validity of the applicants' claim with the question whether there exists a dispute between itself and the applicants that is capable of being referred for determination by arbitration. It is trite that where parties have put in place a mechanism for resolving any dispute that may arise in the course of their business relationship, and which mechanism ousts the jurisdiction of the courts in the first instance, the court has no alternative or option but to give effect to the wishes of such parties. In the present application, it was clear that, notwithstanding the expenses that will be involved in the arbitration that the parties herein agreed to have any dispute that may arise during the period that the policy was in substance be referred for determination by arbitration…Under section 12(4) of the Arbitration Act, 1995, where under procedure agreed by the parties for the appointment of an arbitrator or arbitrators one of the parties failed to act as required under such procedure, the aggrieved party may apply to the High Court to take the necessary measure for securing compliance with the procedure agreed upon by the parties. Therefore it is held that the applicants have established a case for the court's intervention in compelling the respondent to participate in the appointment of an arbitrator or arbitrators as provided under clause 11 of the Policy of Insurance. The applicants and the respondent are hereby directed to agree, within fourteen (14) days on a single arbitrator to arbitrate on the declared dispute between them and in default thereof, in accordance with the said clause, the applicants and the respondent shall each appoint one arbitrator who in turn shall appoint and umpire to arbitrate over the dispute. Such appointment shall be made within fourteen (14) days after the expiry of the first fourteen (14) days."

41. The issue of whether the contract between the Applicant and the 1st Respondent was terminated is therefore an issue that falls within the province of the Arbitrator. This was the position in **Hercules Insurance Co. Ltd vs. Trivedi & Co. Limited Civil Appeal No. 12 of 1962 [1962] EA 358**, where the East African Court of Appeal stated that:

"There is no inherent objection to parties agreeing to submit to arbitration the question whether or not an alleged contract between them is effective. Nor are the appellants helped by the rule that, generally speaking a dispute whether the contract ever existed, as contrasted with the question whether it has been ended, is not within the usual form of submission of differences arising out of the contract or the like, because if there was never a contract at all, there could never be disputes arising out of it. Ex nihilo nil fit. It is all a question of the scope of the submission. Hence, if the question is whether the alleged contract was void for illegality, or, being voidable, was avoided because it was induced by fraud or misrepresentation, or on the ground of mistake, it depends on the terms of the submission whether the dispute falls within the arbitrator's jurisdiction. The existence of the arbitrator's jurisdiction, as in other cases, is to be determined by the words of the submission. There is no objection to a submission of the question whether there ever was a contract at all, or whether if there was, it had been avoided or ended. Parties may submit to arbitration any or almost any question. But in general the submission is limited to questions arising on or under or out of a contract which would, prima facie, include questions whether it has been ended, and if so, whether damages are recoverable, and if recoverable what is the amount. It is essential to remember that the question whether a given dispute comes within the provisions of an arbitration clause or not primarily depends on the terms of the clause itself. If two parties purport to enter into a contract and a dispute arises whether they have done so or not, or whether the alleged contract is binding on them, there is no reason why, if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute whether the contract ever bound them or continues to do so. They might, for instance, stipulate that, if a dispute should arise whether there had been such fraud, misrepresentation or concealment in the negotiations between them as to make an apparent contract voidable, that dispute should be submitted to arbitration. It may require very clear language to effect this result, and it may be true to say that such a contract is really collateral to the agreement supposed to have been made, but there is no reason why it should not be done. The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (a) what is the dispute and (b) what disputes the arbitration clause covers."

42. Similarly, in the case of **Kenya Pipeline Company Limited vs. Datalogix Limited and Another Nairobi HCCC No. 490 of 2004 [2008] 2 EA 193**, **Warsame, J** (as he then was) held:

"It is clear from the reading of section 6(1) that the decision to refer the matter to arbitration is left to the discretion of the court and the court must give effect to the terms of the contract which provide for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give effect to the wishes of the parties and their contractual relationship. Arbitration is a modern way of resolving disputes quicker, amicably and in a friendly environment and manner. It is for that reason that the court would always endeavour to encourage parties to resolve their disputes through arbitration. It is against public policy to deprive parties of their choice and hinder their attempt to resolve their disputes through arbitration…Our system of law and dispute resolution should not countenance the existence and continuation of two parallel processes in respect of the determination of an issue arising between the same parties or parties claiming under them over the same subject matter."

43. It was also contended that the contract between the Applicant and the 1st Respondent was illegal. In the case of **Blue Limited vs. Jaribu Credit Traders Limited Nairobi (Milimani) HCCS No. 157 of 2008 Kimaru, J** stated *inter alia* as follows:

"It is now settled law that where parties have agreed to resolve any issue arising out of a commercial agreement, the courts are obliged to give effect to the said agreement of the parties by staying proceedings and referring the dispute for resolution by arbitration. Before staying proceedings, the court has to be satisfied that there is a valid arbitration clause in the agreement capable of performance. At the stage of the application for stay of proceedings, the court is not called upon to determine the merits or otherwise of the plaintiff's suit nor the counterclaim filed by the defendant. The court is further not required at this stage of proceedings to consider the validity, legality or otherwise of the agreement that was entered between the plaintiff and the defendant. The court is only required to consider whether there was a valid arbitration clause in the agreement capable of being enforced by the court...That principle recognises the fact that where there is an arbitration clause in an agreement, such clause is considered as a separate and severable agreement between the parties who have agreed to

resolve any dispute arising from the agreement by arbitration. A party to an agreement cannot raise issues relating to the validity or otherwise of the agreement to defeat the arbitration clause in the agreement. The issue as to whether the agreement which was entered between the plaintiff and the defendant is valid or not is an issue which can only be determined during the hearing of the dispute on arbitration. The court's concern is whether the arbitration clause in the agreement is valid and therefore capable of being performed as envisaged by section 6(1)(a) of the Arbitration Act, 1995. Having considered the agreement, the court holds that the arbitration clause is valid and is capable of being performed...Section 7(1) of the Arbitration Act, 1995 grants to the court jurisdiction to grant interim measure of protection where it is established that there exists a valid and enforceable arbitration agreement."

44. The same Court in the case of **Kenya Airports Parking Services Ltd & Another vs. Municipal Council of Mombasa Civil case 434 of 2009** stated that:

"...it is this court's view that where there exists an agreement with an arbitration clause, under the principle of separability of the arbitration clause, if a party to the agreement is of the opinion that the agreement is unlawful and therefore invalid, such view does not invalidate the arbitration clause in the agreement."

45. It was similarly held by **Warsame, J** (as he then was) in **Kenya Pipeline Company Limited vs. Datalogix Limited and Another Nairobi HCCC No. 490 of 2004 [2008] 2 EA 193**, as follows:

"The fact that the applicant's case is tainted with fraud does not preclude the matter from being referred to arbitration in terms of the agreement made between the parties. An arbitrator does not lose jurisdiction to handle a matter by the mere allegation of fraud in the pleadings. The arbitrator would be entitled to hear the evidence and determine whether fraud has been established. It would be against public policy to enforce a contract including an arbitration clause, where fraud was established. However, it would defeat the purpose of the legislature if the mere allegation of fraud, no matter how mischievous, was enough to oust the arbitrator's jurisdiction…Section 6(1) of the Arbitration Act gives the court discretion to order stay of proceedings where no sufficient reasons are shown why such order should not be made. It is a pre-requisite factor that before the court can exercise its discretion to make an order for arbitration, the applicant must satisfy the court that it is and was at all times willing to do everything necessary for the proper determination of the dispute. In the court's view, in exercising its discretion the court should take into account the circumstances of the particular case and a mere semblance of a convenience of a particular party is not a credible factor to sway the discretion of the court. The onus of proving that the matter in dispute fell within a valid and subsisting arbitration clause is on the party applying to the court for reference to arbitration. And once that burden has been discharged, then the burden shifts to the opposing party to show cause why effect should not be given to the arbitration clause…The court's understanding of section 6(1) of the Arbitration Act is that stay is not automatic but the court has to satisfy itself that circumstances exist to require parties to arbitration. It is clear from the reading of section 6(1) that the decision to refer the matter to arbitration is left to the discretion of the court and the court must give effect to the terms of the contract which provide for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give effect to the wishes of the parties and their contractual relationship. Arbitration is a modern way of resolving disputes quicker, amicably and in a friendly environment and manner. It is for that reason that the court would always endeavour to encourage parties to resolve their disputes through arbitration. It is against public policy to deprive parties of their choice and hinder their attempt to resolve their disputes through arbitration."

46. In **Shamji vs. Treasury Registrar Ministry of Finance [2002] 1 EA 173** it was held inter alia that as a matter of general principle, it has been stated that where a dispute between the parties themselves in terms of the agreement to be referred to the decision of the tribunal of their choice, the court would direct that the parties should go before the specified tribunal and should not resort to courts and that "any dispute" should not be read as excluding disputes involving fraud or misrepresentation since it is not the function of the court to rewrite and insert provisions to which parties could have agreed to deal with in a situation which might arise. Likewise, in **Telkom Kenya Limited & Another vs. Kamconsult Limited Nairobi (Milimani) HCCC NOS. 262 & 267 of 2001 [2001] KLR 683; [2001] 2 EA 574** it was held that fraud is something which can only be found after on the evidence after a hearing and an arbitrator cannot be expected to down his tools on the basis of mere allegations in the pleadings and the submissions of counsel, however robust.

47. Based on the evidence on record, I am satisfied that there exist of an arbitration agreement between the Applicant and the 1st Respondent herein.

48. The second issue is whether the subject matter of arbitration is under threat. It is not in doubt that the 1st Respondent has purported to terminate the contract which though it alleges was between the Respondents only, it is clear that the subject matter of the same contract was the one that was entered into between the Applicant and the 1st Respondent. In absence of any evidence before me that the contract between the Applicant and the 1st Respondent was terminated, I find that the subject matter of arbitration is under threat.

49. Should the said subject matter be protected? The Applicant is seeking orders restraining the 1st Respondent from re-advertising and re-issuing the tender for proposed completion of Masii stadium at Mwala sub-county pending the hearing and determination of the Arbitration Proceedings herein. According to the 1st Respondent having terminated the contract with the 2nd respondent, it did advertise the said tender and received bids with respect thereto which said bids were opened. That being the position, it is clear that this order is no longer tenable.

50. The Applicant also seeks an interim mandatory injunction compelling the 1st Respondent to continue or resume with the design contract pending arbitration. That issue, it is clear, will be central to the arbitration proceedings. By granting that order, this court is likely to prejudice the said arbitral proceedings.

51. The Applicant also seeks in the alternative an order permitting it to remove its material and equipment from the site during the pendency of the arbitration proceedings. That order was granted on 19th November, 2019.

52. It is also sought that the 1st Respondent be restrained from making payments to any other party other than the Applicant herein pending the hearing and determination of this Application. The 2nd Respondent has not opposed this application and it is my view that the subject matter of the arbitration can only be preserved by preserving the status quo. Accordingly, I grant the said order.

53. The costs of this application will be in the cause.

54. It is so ordered.

Read, signed and delivered in open Court at Machakos this 30th day of November, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of

Mr Munyao for Miss Mwau for the 1st Respondent

Mr Gitahi for the Applicant

CA Geoffrey