



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E468 OF 2019**

**GERTRUDE'S GARDEN CHILDREN HOSPITAL STAFF RETIREMENT**

**BENEFITS SCHEME.....PLAINTIFF/APPLICANT**

**-VERUS-**

**STANLIB KENYA LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling relates to the chamber summons dated 19<sup>th</sup> December 2019 that are brought under Section 7 and Rule 2 of the Arbitration Act and Rules respectively. The application is also brought under Order 40 Rule (1) of the Civil Procedure Rules. The applicant seeks orders that:

**1. Spent.**

**2. That the court issues an interim measure of protection directing the defendant to deposit the sum of Kshs 53,400,000.00 in court within seven (7) days pending commencement, hearing and determination of the Arbitral proceedings between the plaintiff and the defendant.**

**3. That in the alternative, a mandatory injunction do issue directing the defendant to deposit the sum of Kshs 53,400,000.00 with the custodian NCBA Bank/or in an escrow interest bearing account opened in the name of the plaintiff's and the defendant's advocates pending commencement, hearing and determination of the Arbitral proceedings between the plaintiff and the defendant.**

**4. That the costs of this application be provided for.**

2. The application is supported by the affidavit of the plaintiff's Trustee and Chairman Board of Trustees **Mr. Terry Davidson** and is premised on the grounds that: -

**i. That on 23<sup>rd</sup> July 2004 the plaintiff's Trustees appointed the defendant as its Fund Manager through an Investment Management Agreement (hereinafter Agreement) dated and duly executed by both parties on 23<sup>rd</sup> July 2004 in exercise of their power under Section 19 of the Trust Deed dated 1<sup>st</sup> November 2006 and in compliance with Regulation 5(1) of the Retirement Benefits (Managers and Custodians) Regulations 2000.**

**ii. That Clause 15 of the Investment Management Agreement dated 23<sup>rd</sup> July 2004 provides that if any dispute arises between the plaintiff and the defendant and which cannot be amicably settled between the parties, it should be referred to arbitration.**

**iii. That Regulation 38 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000as read together with Table G of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000 provides that before a Fund Manager invests a schemes asset in a non-listed bond and any other debt instruments issued by private companies, it must have obtained an investment grade rating by a credit rating agency registered by the Capital Markets Authority.**

iv. That in the first quarter of 2015, the defendant invested kshs 20,000,000.00 of the plaintiff's assets in the Chase Bank Limited 10 Billion, 7-year bond, which at the time of investment was an unlisted security, without obtaining the prior written consent of the Plaintiff's Trustee in breach of Clause 5.1 of the Investment Management Agreement dated 23<sup>rd</sup> July 2004 and Section 4.15 of the Investment Policy Statement dated February 2011 and an investment grade rating from a licensed agency.

v. That Chase Bank Limited first tranche of its billion, 7-year multi- currency bond was listed at the Nairobi Stocks Exchange on 22<sup>nd</sup> June 2015 trading in the secondary market with a coupon rate of 13.25%, months after the defendant had invested a sum of Kshs 20,000,000.00 in the bond.

vi. That on 24<sup>th</sup> August 2015, Imperial Bank Limited announced to the public and launched its 2 billion, 5-year bond offering a coupon rate 15% per annum which would be open for bids until 17<sup>th</sup> September 2015. According to the key dates for the transaction the bond was scheduled to be listed for trading at the Nairobi Stocks Exchange on 30<sup>th</sup> October 2015.

vii. That on 28<sup>th</sup> September 2015, the defendant negligently and in breach of the Retirement Benefits Act, Investment Management Agreement dated 23<sup>rd</sup> July 2004 and Investment Policy Statement dated February 2011 invested a sum of Kshs 33,400,000.00 in the Imperial Bank Bond, without obtaining written prior consent of the Plaintiff's Board of Trustees and an investment grade rating from a licensed agency.

viii. That on 13<sup>th</sup> October 2015, before the Nairobi Stocks Exchange could list the Imperial Bank Limited 2 Billion, 5-year Bond in the secondary market, Central Bank of Kenya placed Imperial Bank Limited under Statutory Management and with Kenya Deposit Insurance Corporation being appointed as the receiver with a moratorium being declared on payment of any deposits of bonds held with the bank.

ix. That Chase Bank Limited was placed under Statutory Management by the Central Bank of Kenya on 7<sup>th</sup> April 2016 with Kenya Deposit Insurance Corporation being appointed as the receiver with a moratorium being declared on payment of any deposits or bonds held with the bank.

x. That as a result of the defendant's negligent and reckless decision the plaintiff has suffered loss and damage in the sum of Kshs 53,400,000.00.

xi. That on 31<sup>st</sup> October 2019, the defendant issued a sixty (60) day notice to all its clients, the plaintiff included, informing them that ICEA Lion Asset Manager were purchasing its business as it was divesting and exiting the Kenya market by 31<sup>st</sup> December 2019. The plaintiff is therefore apprehensive that if the defendant exits the Kenyan market it will not recover the sum of Kshs 53,400,000.00 and the Pension Scheme will suffer irreparable loss and damage.

xii. That the defendant was issued with demand letter dated 9<sup>th</sup> December 2019 requiring it to pay the plaintiff the sum negligently invested in Chase Bank and Imperial Bank Bonds in 2015. To date the defendant has not responded to the said demand letter which has necessitated the filing of this application.

xiii. That it is therefore in interest of justice that the plaintiff be granted an interim measure of protection pending the commencement, hearing and determination of Arbitral proceedings between the plaintiff and defendant.

3. The defendant opposed the application through the Grounds of Opposition dated 10<sup>th</sup> January 2020 wherein it lists the following grounds;

1. The application is unjustified and unmerited in that; -

- a. The defendant is able to meet any award that may flow from the intended arbitration, if ever commenced and prosecuted;
- b. The subject matter is not under threat or at risk;
- c. The measure of protection by way of mandatory injunction is not appropriate in the circumstances;
- d. The plaintiff has no sustainable claim in the proposed arbitration.

2. The measure of protection by way of mandatory injunction is unmerited and inappropriate in that:

- a. There are no special circumstances to warrant a mandatory injunction;
- b. The circumstances of this matter do not meet the high standard required of mandatory injunctions;
- c. It amounts to condemning the defendant unheard and inviting the court to pre-judge the arbitration;
- d. The present case is not a clear case to warrant such an injunction;

e. It will occasion loss to the defendant which is disproportionate to the benefit conferred to the plaintiff;

f. It would confer on the plaintiff a preferred creditor's status contrary to law;

g. It may amount to fraudulent preference in favour of the plaintiff;

h. Such injunction in the circumstances would be uneconomical and contrary to business prudence.

**3. The application is an abuse of the court process in that there is no urgency in bringing the application and none has been demonstrated; no arbitration has been notified or commenced.**

**4. The application is based on non-factual grounds and un-substantiated assumptions.**

4. In addition to the Grounds of Opposition, the defendant filed the replying affidavit of its Risk and Compliance Manager **Ms Evelyne Kihara** who avers that since the parties herein have an arbitration agreement, the merits of the applicant's claim against the defendant will be tried in an arbitration which is yet to commence, in which case, the averments in the supporting affidavit consist of speculative and disputed matters.

5. She states that no loss has been incurred or crystallized to the plaintiff herein as there has been no finality on the Chase Bank Bond or the Imperial Bank Bond as the 2 banks are still under receivership as mandated by the Central Bank of Kenya.

6. She further states that even if loss were to crystallize, the defendant will adequately demonstrate, at the arbitration that it was not negligent, reckless or otherwise in breach of any obligation as alleged or at all. She adds that unproved allegations in respect to alleged loss that is yet to crystallize cannot form the basis of an application for mandatory injunction.

7. She states that the entire application is founded on unsubstantiated apprehension of the defendant's exit from the Kenyan market without explaining how such an exit would happen. She states that the applicant has not explained the nexus between its presumed loss and damage to the actions or omissions of the banking and capital market regulators that approved the listing of both Chase Bank Bond and Imperial Bank Bond and the regulatory action of putting both banks under receivership soon thereafter, and sought to visit such presumed loss only on the defendant.

8. The applicant filed the supplementary affidavit of its Trustee **Mr. Robert Onyango** in response to the respondent's replying affidavit. The said trustee reiterates his averments in support of the application and maintains that the defendant negligently and recklessly invested a sum of Kshs 20,000,000.00 of the plaintiff's assets in the Chase Bank Limited 10 Billion, 7-year Bond and a sum of Kshs 33,400,000.00 in the Imperial Bank bond, without obtaining written prior consent of the Plaintiff's Board of Trustees and an investment grade rating from a licensed agency in breach of Clause 5.1 of the Investment Management Agreement dated 23<sup>rd</sup> July 2004 and Section 4.15 of the Investment Statement dated February 2011.

9. He further states that the plaintiff members have suffered loss of the principal sum and interest in return as they deprived of the funds of Kshs 53, 400,000.00 since 2015 which would have been prudently invested for the benefit of the plaintiff and the present and existing members of the Pension Scheme.

10. He avers that the subject matter of the arbitration is under threat by the exit and sale of the defendant assets and that the special circumstances of the case warrant the issue of an order of interim measure of protection.

11. Parties canvassed the application by way of written submissions which I have considered.

12. The main issue for determination is whether the applicant has made out a case for the granting of orders of mandatory injunction or interim measure of protection to deposit the sum of Kshs 53,400,000.00 in court or with the custodian NCBA Bank/or furnish a bank guarantee pending commencement, hearing and determination of Arbitral proceedings. The court however cautions itself that it should at this juncture not make any definitive findings on the issues that will be in dispute before the arbitrator.

13. Section 7 of the Arbitration Act ("**the Act** ") grants this court the power to grant an interim measure of protection before or during arbitral proceedings. The said section stipulates as follows: -

**"7. Interim measures by court.**

**(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."**

14. In **Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 Others** [2010]eKLR, it was held: -

**"Under our system of law on arbitration the essentials which the court must take into account before issuing the interim**

measures of protection are; -

1. **The existence if 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 arbitration.**
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.”**

**Arbitration Clause.**

15. On the existence of an arbitration Clause, I note that clause 15 of the Investment Management Agreement between the parties provided for arbitration in the following terms; -

**“Any dispute arising between the parties in terms of this agreement and which cannot be settled between the parties themselves will be referred to arbitration under the Arbitration Act 1995, (CAP. 4 of the Laws of Kenya).”**

16. Having regard to the above highlighted clause of the agreement, I am satisfied that the instant application satisfies the first condition for the granting of interim measures of protection.

**Subject matter under threat?**

17. On the second condition regarding threat to the subject matter, the applicant contended that it may lose its assets to the tune of Kshs 53,400,000 as a result of negligent investments made by the defendant in banks that had been placed under receivership. It was the plaintiff's case that its apprehension on the defendant's stability was exacerbated by the defendants notice of 31<sup>st</sup> October 2019 to the effect that it (defendant) was selling its business, divesting and would be exiting the Kenya Market by 31<sup>st</sup> December 2019.

18. On its part, the defendant did not deny the plaintiff's claim that it was intending to exit the Kenyan Market, but argued that it is a limited liability company incorporated in Kenya with perpetual succession and that the subject matter was therefore not under threat since the defendant will continue to have substantial balance sheet and total assets amounting to Kshs 909,126,000 as at 30<sup>th</sup> June 2019.

19. My finding is that while the plaintiff's fears over the defendant's financial viability and continued existence cannot be said to be completely unfounded, the said fears have been sufficiently allayed by the defendant's disclosure that it has a substantial balance sheet and total assets amounting to Kshs 909,126,000 as at 30<sup>th</sup> June 2019, a position which has not been disputed by the plaintiff. I am therefore not satisfied that the plaintiff has established that the subject matter of arbitration is under threat.

20. For the above reasons, I find that the instant applicant is not merited and I therefore dismiss it with no orders as to costs.

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

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Waiyaki for the Defendant/Respondent.

Miss Kwamboka for Plaintiff/Applicant.

Court Assistant: Sylvia