IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E335 OF 2020

BETWEEN

EAST AFRICAN BREWERIES LIMITED.....PLAINTIFF

AND

G4S SECURE DATA SOLUTIONS (KENYA) LIMITED.....DEFENDANT

RULING

Introduction

1. The Plaintiff ("EABL") has moved the court by the chamber summons dated 3rd September 2020 against the Defendant ("G4S") seeking the following interim measures of protection pending arbitration under the provisions of **section 7(1)** of the ***Arbitration Act*** ("the ***Act***"):

> [3] THAT as an interim measure of protection, pending the Arbitration commenced herein., a mandatory injunction Order do issue compelling the Respondent by itself and/or its agents, servants, assigns to release and deliver up to the Applicant forthwith, and in any event, within fourteen (14) days of the Order being made, the Stored Material as defined in Clause 2 of the Agreement dated 6th July 2016 in a deliverable state, as per the inventory maintained by the Respondent and annexed to this Application for collection by the Applicant subject to the following conditions;-
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> > a. Payment by the Applicant to the Respondent of Permanent Box Withdrawal Costs in the sum of Ksh. 4,053,000.00.
> >
> > b. Deposit by the Applicant of the alleged File Retrieval costs in the sum of Ksh. 10,933,125.00 in an interest-bearing Escrow Account to be opened in the joint names of the Advocates for the parties with ABSA Bank Kenya PLC or any such other bank as the Court may direct pending the hearing and determination of the Arbitration.
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> [4] THAT the costs of this Application be borne by the Respondent.

2. The application is supported by the affidavits sworn on 3rd September 2020 and 1st October 2020 by Karen Mate-Gitonga, EABL's Legal Manager. It is opposed by the replying affidavit of James Jalango, the G4S Managing Director, sworn on 16th September 2020.

Background

3. At the centre of the dispute between the parties is the Agreement for the Supply of Records and Management Services dated 6th July 2016 ("the Agreement") under which G4S agreed to provide EABL certain services specified in the Agreement including storing material stipulated in the inventory list supplied by EABL, retrieval, delivery and collection, archiving, indexing and racking stored material, stored material destruction and or disposal and digitalizing stored material. On its part, G4S was expected to maintain a full inventory of the stored material under the Agreement including some highly private and confidential records. The stored material includes financial information and records, employment contracts and records, banking information and records, contracts, production and distribution records, procurement records and AGM, Board and shareholding management records.

4. The Agreement was for a term of three years commencing on 6th July 2016 and expiring on 6th July 2019. By a letter dated 11th April 2019, EABL addressed G4S informing it of the imminent expiry of the Agreement. By its letter dated 23rd April 2019, G4S acknowledged receipt of the reminder by EABL but failed to express interest in an extension. By a letter dated 10th June 2019, EABL informed G4S that it would not be renewing the Agreement. It requested G4S to provide the stored material in a deliverable state for collection on the expiry date and in that regard forwarded an exit management plan for G4S to sign off in order to secure the timely release of the stored material before the expiry of the agreement.

5. At a meeting held on 18th June 2019, G4S indicated that according to its estimation, the reasonable time for the exit management would be eight months within which it would return the stored material. It furnished EABL with, *'Work Plan –EABL permanent withdrawal'* and *'EABL Permanent Withdrawal Process Map 1'*. EABL rejected the plan by G4S as the proposed eight months was too long and would amount to renewal of the Agreement.

6. At the expiry of the Agreement, G4S held 8,106 boxes of material. In order to release the boxes, G4S demands the following costs:

Permanent Box Withdrawal Costs	Kshs. 4,053,0000.00
File Retrieval costs	Kshs. 10,933,125.00
Monthly storage charges	Kshs. 1,215,900.00 accruing post expiry date now standing at Kshs. 30,501,021.25 exclusive of interest as at April 2020.

7. The parties agreed that the arbitration process has been invoked and is underway.

The Dispute

8. The dispute between the parties hinges on the money demanded by G4S as a condition for releasing the documents to EABL and the manner in which the documents are to be released.

9. EABL states that it is ready, able and willing to settle Kshs. 4,053,000.00 being the Permanent Box Withdrawal Costs calculated at Kshs. 500.00 per carton as these are provided for under Schedule 5 Clause 5 of the Agreement and payable upon termination.

10. EABL disputes the file retrieval costs in the sum of Kshs. 10,933,125.00 based on a file retrieval cost of Ksh.75/- per file for 145,775 files as this is not a permanent withdrawal charge in the Agreement. EABL also disputes the demand by G4S for monthly storage charges of Kshs. 1,215,900.00 now standing at Kshs. 30,501,021.25 on the ground that Agreement has expired and the parties have never agreed on performance of their respective obligations after the expiry date. However, in order to facilitate the retrieval and release of records and pending arbitration, EABL is offering to deposit Kshs. 10,933,125.00 in an escrow account. EABL contends that G4S has rejected its proposal and insists on upfront payment of the total chargeable costs in order to release the stored material.

11. EABL contends that the refusal by G4S to release the records is malicious and willfully calculated to enable it earn and claim accrued monthly charges. It asserts that some of the materials include documents necessary to enable it deal with an erroneous water bill demand from Nairobi City Water and Sewerage Company. It claims that the refusal by G4S to release the stored material has caused unwarranted prejudice to it. EABL further contends that the illegal retention of stored material, which includes highly sensitive and confidential information, by G4S will continue to prejudice it.

12. EABL complains that the eight-month exit process proposed by G4S is untenable as the expiry date for the Agreement was always known and that G4S has always maintained and sent to EABL an accurate inventory of the stored material demonstrating that the material is stored in an orderly state, ready for release on short notice. It points out that under Clause 12.3 of the Agreement, G4S is obliged to ensure that the stored material is always in a deliverable state.

13. EABL submits that pending the intended arbitration, G4S should avail the stored material in a deliverable state for collection as it contains highly sensitive and confidential information and which is absolutely essential to EABL's business.

14. The position taken by G4S is that Clause 12.2 of the Agreement provides that an Exit Management Plan is expected to detail all activities to be carried out in order to enable an orderly and smooth cessation and transition of the service. It must ensure that the volume of the stored material at the time of exit is ascertained, reconciled and signed by the parties. G4S states that the EABL proposal ignored the critical transition activities given that the volume of material accumulated over a period of ten years; 145,775 files contained in 8,106 boxes and weighing about 178 tons.

15. G4S states that it presented its exit plan at the meeting held on 18th June 2019. Its plan entails an eight-month permanent withdrawal period, involving digital and manual processes, in which it would be able to retrieve 4,500 files and 250 boxes per week which is reasonable in the circumstances. It asserts that given the volume of EABL's documents, the contractual withdrawal fee is necessary to facilitate the process.

16. Although EABL rejected its plan, the parties met again on 20th June 2019 where G4S indicated that it would consider a shorter withdrawal time if the extra expense arising therefrom would be borne by EABL. On 21st June 2019, G4S forwarded to EABL's authorized user, a File and Box Permanent Retrieval form to be filled by the Plaintiff, to enable G4S commence the withdrawal process, but that EABL failed to do so and that a year has passed since the termination was communicated.

17. While insisting that its exit plan complies with the provisions of the Agreement, G4S faults EABL for rejecting the exit management plan and proposing one that fails to detail critical transition activities in a proper sequence, taking into account the time required for those activities. It accuses EABL for refusing to settle its account which was due as at 6th July 2019.

18. Regarding the claim that EABL is unable to deal with the demands by NCWSW, G4S states that there lacks urgency as it arose a year ago and that it is willing to deliver up EABL's documents in the manner contemplated by the agreement, subject to EABL paying all the contractual sums due to G4S.

19. G4S contends that the claim for Kshs. 10,933,125.00 is merited as EABL's documents are archived randomly to ensure security and retrieval of any file or document, for perusal or permanent withdrawal or otherwise, is a necessary process and which attracts a cost element that is provided for in the Agreement. G4S adds that it would be impossible to permanently withdraw documents without retrieving the respective files for verification and reconciliation as provided under the exit management process in the Agreement.

20. G4S argues that the storage charges amounting to Kshs. 1,215,000.00 accruing monthly are justified on the ground that it has a lien over the stored material where the agreement is terminated or lapses and the contractual dues remain unpaid. It refers to the letter dated 17 th July 2019 in which EABL conceded that Invoice No. 7558 for Kshs. 348,000.00 was unpaid but settled it on 15th August 2019. Having made the payment, G4S contends that it is entitled to storage charges for the month of July 2019 for which it invoiced. G4S further states that EABL conceded Kshs. 4,053,000.00 was due on account of Permanent Box Withdrawal Costs as payable and outstanding in accordance with the Agreement.

21. G4S argues that under Clause 4 of the Agreement where the parties continue performing their obligations after the expiry, the Agreement remains in force in accordance with the terms unless it is terminated. Accordingly, G4S asserts that it is to that extent lawfully in possession of EABL's material and continues to provide the said storage services for which it is entitled to levy contractual storages charges.

22. G4S rejects EABL's proposal to hold the disputed sums in an escrow account as the basis of obtaining the orders it seeks, as the documents are securely stored and do not face any danger. It avers that EABL cannot avoid its contractual obligations for over a year and admit to some obligation partially a year later and then seek the court's intervention by way of interim measures of protection. It is contended that if EABL is successful in its claim, it would gladly refund any sums wrongly paid to it. That it is ready to secure any sum that may be ultimately be found to have been erroneously paid to it.

23. G4S contends that the present application does not meet the threshold required for granting of the orders given that the matters that are the subject of the arbitration are not under threat. It contends that since the permanent exit process is at the heart of the intended arbitral process, to order the same as an interim measure of protection, without delving into the practicalities of the process would be highly prejudicial. It invites the court, through its appointed officer, preferably the Deputy Registry in the presence of both parties to visit the Defendant's premises for purposes of understanding the process.

General Principles

24. The Application is brought under the provisions of **section 7** of the ***Act*** which provides as follows;

> 7. Interim measures by court
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> (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.
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> (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."

25. The leading case in which the Court of Appeal outlined the principles governing the grant of interim measures of protection is ***Safaricom Limited v Ocean View Beach Hotel Limited & 2 others*** **Civil Application No. NAI 327 of 2009 [2010] eKLR** (see also ***Scope Telematics International Sales Ltd v Stoic Company Ltd and Another*** **NRB CA Civil Appeal No. 285 of 2015 [2017]eKLR**) where Nyamu JA., observed as follows;

> 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.
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> ……

An interim measure of protection such as that sought in the matter before us 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 UNICTRAL Arbitration rules states:-

> "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 modeled on this. However, in the matter before us and with due respect, the Commercial Court (Koome, J.) 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.
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> 3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.
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> 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. [Emphasis mine]

Determination

26. From the respective arguments I have set out above, the dispute between the parties revolves around the terms upon which G4S will release the documents to EABL. In resolving the matter at hand, the court must exercise circumspection in commenting on or making findings on the merits of the case in a manner that would prejudice the decisional independence of the arbitral tribunal. In the ***Safaricom Ltd Case*** **(Supra)**, the Court of Appeal observed that:

> In the matter before us, the court 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.

27. In relation to the object of granting interim measures of protection, the same position was emphasized by the court in ***Cetelem v Roust Holdings*** **[2005] EWCA civ 618 as follows**:

> **[71] …… The whole purpose of giving the court power to make such orders is to assist the arbitral process in cases of urgency before there is arbitration on foot ……. 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 undertaking from the claimant, that the substantive questions are reserved for the arbitrator or arbitrators.**

28. Both parties agree that the underlying dispute has been referred to arbitration. Further both parties agree that the Agreement between them has come to an end and it is evident, they are not agreed on how to wind up their relationship in a way that EABL will get back its records in the manner it requires them while G4S will be paid for services rendered under the Agreement. Assuming that the subject matter of the arbitration are the documents which are in the custody of G4S and given the history of the relationship between the parties and the volume of documents handled by G4S on behalf of EABL, I do not see that the subject matter is under threat to the extent an interim measure of protection is viable. Noting that it is now a year since the Agreement lapsed by effluxion of time, I also do not see any difficulty in EABL accessing documents it may require from G4S from time to time.

29. Both parties have raised the claims based on specific clauses of the Agreement, they have submitted extensively on the meaning of those clauses and cited authorities to support their respective positions but as I stated earlier, it is not within the province of this court to divine the purport or import of those clauses for this is the very subject of the reference to arbitration. What I must determine is whether there are circumstances that warrant for granting interim measures of protection in the manner prayed for by EABL.

30. I have no doubt that EABL has the capacity to pay the amount demanded by G4S and in the event it succeeds in the arbitration, G4S would likewise be in a position to pay the amount ultimately found due. Apart from the financial aspects of the relief, the order sought by EABL is in the nature of a mandatory injunction compelling G4S to release and deliver up to EABL, within 14 days of the order being made, the stored material under the Agreement in a deliverable state, as per the inventory maintained by the G4S.

31. Since EABL seeks an order in the nature of a mandatory injunction, I think it would be proper to draw on the established principles that have guided the court in issuing mandatory orders. While the court may grant a mandatory injunction at an interlocutory stage, it will not normally be granted unless there are special or exceptional circumstances. These special circumstances include a case that is clear and one which the court thinks ought to be decided at once by a simple and summary act that can be easily remedied, or if the defendant attempted to steal a march on the plaintiff (see ***Kenya Breweries Limited and Another v Washington Okeyo*** **NRB CA Civil Appeal No. 332 of 2000 [2002] eKLR** citing ***Vol. 24 Halsbury's Laws of England 4th Edn. para 948*** and ***Locabail International Finance Ltd v Agroexport and others*** **[1986] 1 ALL ER 901).**

32. I do not think the act which EABL seeks to enforce is one that can be done by a simple or summary act. On the contrary, it involves doing several acts culminating in delivery of the documents. Further, the nature of the acts which are to be done are disputed. As I set out earlier in this ruling, the fundamental disagreement between the parties is on how termination of the Agreement is to be effected with each party giving different interpretations of the Agreement. On the one hand, EABL proposed its *Exit Management Plan* while G4S presented its, *'Work Plan –EABL permanent withdrawal'* and *'EABL Permanent Withdrawal Process Map 1'*

33. Granting the order in favour of EABL would amount to resolving the dispute in its favour. Since the order would be final in nature, the court would have to make findings of fact necessary to support the order thus usurping the jurisdiction of the arbitral tribunal.

34. The practical realities of a mandatory order cannot be ignored. G4S has also alluded to the difficulty of compliance with the orders within 14 days given the volume of documents which are to be individually retrieved, verified and repackaged for delivery within the time limit. As the Court noted in the ***Safaricom Ltd Case (Supra)***, the court must consider the period in which the measure is in force so as to avoid encroaching on the arbitral tribunal's decision making power.

35. Granting a mandatory order would, in the nature of the case, involve constant supervision of the parties thus forcing this court to conduct parallel proceedings at the risk of intruding on the arbitral tribunal's authority. In essence, the grant of the interim measures would exceed the limited period necessary to protect the subject matter pending arbitration. I therefore find and hold that this is not a proper case for granting interim order of protection as prayed by EABL.

Disposition

36. For the reasons I have set out above, I dismiss the Notice of Motion dated 3rd September 2020 with costs to the Defendant.

DATED and **DELIVERED** at **NAIROBI** this **14th day of DECEMBER 2020**

D. S. MAJANJA

JUDGE

Mr Regeru instructed by Njoroge Regeru and Company Advocates for the Plaintiff.

Mr Wandabwa instructed by Wandabwa and Company Advocates for the Defendant.