



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 57 OF 2019

CHINA TECH INTERNATIONAL CORP.....PLAINTIFF

VERSUS

1. SAKIMA INVESTMENT SARL

2. GULF BADR GROUP (KENYA) LIMITED.....DEFENDANTS

RULING

Outline of fact

1. The plaintiff/Applicant has approached the court and sought an injunctive order to conserve the subject of the dispute said to be a Bill of Lading No. EVGLV321900006023 and the good to which it evidences title pending resolution of the dispute between the parties by the chosen forum, in Hong-Kong under the ICC ruling commission in HONGKONG.

2. The relationship between the three parties is revealed in the agreement between the plaintiff and 1st defendant dated 20/3/2019 for the sale of goods described as TANTALITE ORE OF CONGO ORIGIN weighing 70,560 KGS(+or - 5%) at a provisional value and consideration of **USD 2,167,603.20**.

3. The mode of payment was agreed to be a deposit of USD 800,000 upon released of the original BL in favour of the plaintiff and the balance after ascertainment of all details relating to weight, unit price and quality upon presentation to the sellers of the final invoice.

4. It would appear that the provisional payment was not made in full and subsequent negotiations hit a deadlock after the plaintiff had paid USD 310,000 with a proposal and request that the cargo be kept in a bonded warehouse and the original Bill of Lading handed over. All the while the said original bill of lading was in the possession and custody of the 2nd Defendant as an agent of the carrier one Evergreen Marine (Singapore) plc Ltd. The negotiation towards variation of payment of the provisional sum seen to have failed because on the 11/7/2019 the 1st Respondent now made a demand for the plaintiff to respect the terms of the contract by payment of the balance of the provisional payment or be allowed to sell to a third party and effect the refund of USD 310, in two instalments.

5. That demand ruffled the plaintiff who then sought to invoke the arbitration clause in the agreement by seeking to preserve the cargo through an injunction to restrain alienation. The plaintiff complaint is that the contract between the parties was varied to allow the cargo be kept in a bonded warehouse by the plaintiff being issued with the original Bill of lading. It is then alleged that the defendant breached the agreement as varied by handing over to the plaintiff a forged a document and uttered same to the plaintiff's agent as **Bill of Lading NO. EGLV 321900006023** which document was found to have been doctored and thus withheld by the shipping line. The development, to the Plaintiff, presents a dispute calling for resolution by arbitration as the forum of choice by the parties. The need for interim injunction is said to be the threat by the defendant to transfer the Bill of Lading and sell the goods to third party in Turkey.

7. When served the 1ST defendant resisted the application by a Replying Affidavit sworn by one Richard Bisimwa, a director of the defendant. In the affidavit the agreement for sale is admitted but the defendant denies that the same was ever varied as alleged and that the payment of the USD 100 000 was towards the provisional sum and no more. There was no agreement to release the original Bill of Lading as alleged just as there was never any attempt to forge the bill. To the defendant, the original bill of lading are with the defendant to be released to the plaintiff upon compliance with the terms of the agreement. Lack of variation was repeated with a highlight that the plaintiff being the owner of the good had the duty to sell the goods so as to mitigate on losses as there had never been any arbitration proceedings commenced by the plaintiff. The plaintiff was blamed for being in breach leading to accumulation of demurrage charges and thus not deserving of the equitable remedy sought and that to grant the orders sought would amount to rewriting a contract for the parties.

8. For the 2nd defendant, grounds of opposition were filed whose gist was that the court's jurisdiction had been ousted by a clause in the Bill

of Lading which said any dispute would be exclusively handled by High Court of London; that the suit was an abuse of the court process because the 2nd defendant had no privity with the plaintiff and that in any event the cargo had been shipped to China thus collapsing the substratum of the suit. Having filed those grounds, however, when the matter came up for hearing that defendant chose not to oppose the application for injunction provided the demurrage charges are born by either the plaintiff or the defendant.

9. During the hearing the counsel largely rehashed the facts in the pleadings with the plaintiff pointing out that the parties are unable to agree hence there is a dispute that deserves reference to arbitration but in the meantime there be a conservatory order. He underscored the shown intention by the plaintiff to divert the cargo to Turkey for the purposes of sale and therefore the need for the injunction sought to avoid the substratum of the suit being destroyed and the plaintiff being left without a remedy.

10. For the 1st defendant reliance was placed on the common fact that the plaintiff was yet to pay the agreed provisional sum of USD 800,000 yet the goods had arrived in china but could not be verified. It was pointed out that the application was filed in July and as at the time of hearing no arbitration proceedings had been commenced. It was pointed out further that if the injunction was granted it would be indefinite period and the court would have rewritten the agreement between the parties. Ms Azei advocate thus urged the court to dismiss the application for lacking in merits.

11. In his closing remarks, Mr Karina urged that the 2nd defendant be treated as a necessary party being the person in possession of the bill of lading.

12. Having considered the rival arguments by both sides I have come to the conclusion that there is indeed an arbitration agreement between the Applicant and the 1st Respondent together for a dispute for reference to arbitration. Whether it be the question of whether or not the agreement for purchase was varied or be it who between the plaintiff and the 1st defendant has breached the agreement, the parties chose such to be referred to arbitration. That contract binds the parties and not even this court can release them from the obligation to abide by the terms of the contract as far as dispute resolution by arbitration is concerned. I do find that there is both an agreement and a dispute which need to be arbitrated upon concerning the goods which need to be preserved pending determination of the dispute. I therefore allow the Notice of Motion dated 18/7/2019 in terms of prayers (c) and (d) in order that the parties choice of forum be respected and made binding. However this shall not be a blanket order *ad infinitum*. It is conditioned on the arbitration proceedings being instituted or commenced within 40 days from today.

13. The costs of this application shall abide the outcome of the arbitration proceedings.

14. This matter shall be mentioned in court on 4/12/2019 to report on the progress made.

Dated and delivered at Mombasa this 25th day of September 2019.

P.J.O. OTIENO

JUDGE