



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.20 OF 2019

COMPASSY TRADING COMPANY LIMITEDAPPLICANT

VERSUS

KENYATTA INTERNATIONAL CONVENTION CENTRE.....RESPONDENT

RULING

1. Through the application dated 21st January 2019, the plaintiff applicant herein seeks the following orders:-

1. Spent.

2. That as an interim measure of protection, a temporary injunction order do issue to restrain the defendant from the commencement of the construction of a prefabricated International Conference Centre at the Coca Cola Parking lot within KICC grounds which parking area is the subject matter of the dispute herein pending the hearing and determination the arbitration herein.

3. That in any event, the costs of the application be awarded to the plaintiff herein.

2. The application is supported by the affidavit of **Anne Waceke**, the applicant's Managing Director and is premised on the grounds that the applicant and the respondent entered into an agreement for the installation of concrete paving blocks at the respondent's parking lot within the KICC grounds. The applicant claims that it supplied and installed the said blocks at the cost of Kshs 10,024,280.00 which sum the respondent has blantly refused to settle thereby giving rise to the instant case and application.

3. The applicant contends that despite the existence of the respondent's liability to it, the respondent has moved to initiate a new project for the construction of prefabricated two-storey conference facility at the very site where the applicant had installed the concrete paving blocks thus effectively destroying the only available evidence for the intended arbitral process.

4. The respondent opposed the application through the replying affidavit of its Chief Executive Officer **Nana Wanjiku Gecaga** sworn on 13th February 2019. She concedes that on diverse dates in the year 2014 and 2015, the applicant and three other companies were contracted by the respondent to undertake the supply and installation of the said paving blocks at an agreed amount of Kshs. 8,364.464/= which the respondent paid in full and that an audit by the Office of the Auditor General found that the said amounts had been paid but recommended that the applicant be paid kshs. 985,383,45/=. The respondent however contends that it does not owe the applicant any amount of money in light of the statement of accounts that it availed to the court.

5. She further states that the Office of Auditor General measured the works carried out by the applicant and that the records are available such that any subsequent tender at the same site will not prejudice the applicant or the arbitral proceedings.

6. It is the respondent's case that the instant application does not meet the threshold set for the granting of orders of interim measure of protection or injunction.

Determination

7. I have considered the plaintiff's application, the defendant's response together with the parties' submissions and the authorities that they cited. The main issue for determination is whether the applicant has made out a case for the granting of the orders of preservation and injunction.

8. Orders for interim measure of protection pending arbitral proceedings is provided for under Section 7 of the Act which stipulates as

follows:

(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

9. The purpose of an order of protection is to preserve assets or in some way maintain the status quo as the parties await the outcome of the arbitral proceedings.

10. In the case of *Safaricom Limited v Ocean View Beach Hotel Ltd & 2 others (supra)*, the factors to be considered before the granting the interim measure of protection were outlined as follows:

i. The existence of an arbitration agreement.

ii. Whether the subject matter of arbitration is under threat.

iii. In the special circumstances, which is the appropriate measure of protection after an assessment of the merits of the application?

iv. For what period must the measure be given especially if requested for before commencement of the arbitration so as to avoid encroaching on the tribunal’s decision –making power as intended by the parties?

11. In the instant case, the applicant states that there exists an arbitration clause at Clause 13 of the contract that it signed with the defendant. The said agreement was attached to the applicant’s supporting affidavit as annexure “**AW1**”. On its part, the respondent denied having signed any such contract and observed that the alleged agreement (annexure (“**AW1**”) was not signed by them. I have perused the said annexure “**AW1**” and I note that even though Clause 13 thereof provides for an arbitration clause, the said agreement was not executed by the respondent/defendant in which case, the alleged arbitration clause cannot be said to be in existence or to be binding on the defendant.

12. For the above reason I find that the instant application fails the first test/condition for issuance of the orders of interim measure of protection.

13. My finding on the existence of an arbitration agreement would have been sufficient to determine this petition but I am still minded to consider the 2nd condition for the granting of orders of interim measure of protection which is the issue of whether the subject matter of arbitration is under threat.

14. It is not in dispute that the plaintiff herein was contracted by the defendant to supply and install the paving blocks. The supply and installation of the said blocks is admitted by the respondent who on its part maintains that it paid the plaintiff, in full, for all the work and supplies done. The respondent and the plaintiff are in agreement that the Office of the Auditor General measured the works carried out and that records to that effect are available.

15. My finding therefore is that no prejudice will be suffered by the plaintiff if subsequent works are carried out at the same site where the concrete blocks were installed as the issue of installation has been recorded by an independent office and is not disputed by the defendant. Under the above circumstances, I find that there will be no reason to “preserve” the site or restrain the respondents from going on with any projects at the same site.

16. To my mind, the dispute between the plaintiff and defendant is not whether the plaintiff supplied the concrete blocks, which is a fact admitted by the defendant. The dispute is on the amount due to the plaintiff for the said work and supply as while the defendant maintains that it paid the plaintiff in full, the plaintiff states that the defendant still owes it the sum of Kshs 10,024,2809. Clearly therefore, the dispute at hand is a dispute over a debt which the plaintiff can pursue as an independent claim without necessarily seeking to stop/restrain the defendant from continuing with any other project that it may wish to undertake at the same site.

17. Having regard to my finding on the issue of existence of an arbitration clause and whether the subject matter of arbitration is under threat, I find that the instant application does not meet the threshold for the granting of interim measure of protection as set out in the **Safaricom Limited v Ocean View Beach Hotel Ltd & 2 others** case (supra).

18. I also note that the plaintiff also sought an order of temporary injunction to restrain the defendant from commencing construction of the prefabricated conference centre. The principles governing the grant of temporary injunctions were well set out in the celebrated case of **Giella v Cassman Brown and Company Limited** (1973) E.A 385, at page 360 where Spry J. held that: -

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

19. In this case, I have already noted that the issue of whether or not the plaintiff entered into an agreement with the defendant to provide and install concrete paving blocks has not been denied. The plaintiff’s claim is for a liquidated sum of Kshs. 10,024,280 which, according to the plaintiff, the defendant had acknowledged but refused to settle.

20. Having regard to the above position, I find that an order of injunction to restrain the defendant from carrying out construction works at its parking area will not serve any useful purpose as this is a straightforward claim for a liquidated sum which the plaintiff has not stated it will not be able to recover from the defendant should it ultimately win the case, unless the order of injunction is issued.

21. In sum, I find that the instant application is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main case.

Dated, signed and delivered in open court at Nairobi this 24th day of October 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Chengo for Kyalo for the applicant

No appearance for respondent

Court Assistant- Sylvia