



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 23 OF 2019

INVESCAN MATRIX LIMITED.....PLAINTIFF

VERSUS

KENYATTA INTERNATIONAL CONVENTION CENTRE.....DEFENDANT

RULING

1. On 24th January 2019, the plaintiff/applicant herein filed a suit against the defendant seeking orders for the payment of Kshs. 16,045,892.50 together with interests at prevailing commercial rates. The plaintiff also sought conservatory orders to restrain the defendant from commencing the construction of a prefabricated two storey International Conference Centre at Central Bank parking area within KICC precincts pending the hearing and determination of an intended arbitration process.

2. Concurrently with the plaint, the plaintiff also filed an application under Section 7 of the Arbitration Act (hereinafter “**the Act**”) seeking an interim measure of protection and a temporary injunction to restrain the defendant from commencing the construction of a prefabricated International conference Centre at said the parking area.

3. The application is supported by the affidavit of the applicant’s Managing Director one **Anne Waceke** and is premised on the grounds that:

1. That by means of an agreement entered into between the plaintiff and the defendant on and about January 2015, the plaintiff was contracted to provide and install concrete paving blocks for the so called Central Bank Parking Area within the KICC grounds.

2. Due to pressure from the defendant owing to the upcoming WTO conference in December, 2015 he plaintiff proceeded to supply and to install the cabro works within the 6 months duration and subsequently invoiced the defendant on 20th July 2015 for the same in the sum of Kshs 16,045,892.50.

3. That since then and up to date, the parties have held protracted negotiations in which the defendant acknowledges the debt but has flatly declined to pay the same despite being instructed to do so by a Special Audit Report of the Office of the Auditor General (OAG).

4. Despite demand, the defendant has failed, refused or neglected to pay the said sum insisting that it shall not pay since the contract was not properly procured.

5. That despite the non-payment, the defendant has initiated a new project for the construction of a prefabricated two –storey International Conference facility at the very same site that the plaintiff installed the concrete paving blocks meaning that crucial evidence for the arbitral process shall be destroyed beyond recognition.

6. This is an outright case of impunity where a party acknowledges supply and installation of concrete blocks but declines to pay for contrived reasons. It is a fit and proper case for the grant of the temporary injunction sought herein.

7. That the plaintiff seeks as an interim measure of protection, for the issuance of a temporary injunction order to restrain the defendant from the commencement of the construction of the prefabricated International Conference Centre at the Central Bank Parking Area within the KICC grounds which is the subject matter of the dispute herein pending the hearing and determination of the arbitration.

4. On the 7th June 2019, the applicant’s advocates M/S Kyala & Associates Advocates filed written submissions in support of the application which I have carefully considered. Counsel submitted that the plaintiff had established sufficient cause to warrant the exercise of the court’s

discretion under Section 7 of the Act to grant the orders sought. Counsel relied on the decision in *Safaricom Limited v Ocean View Beach Hotel Ltd & 2 others* [2010] eKLR wherein the Court of Appeal discussed the purpose of a preservation order and set out the factors to be considered before issuing an interim measure of protection.

5. Counsel submitted that an arbitration agreement exists between the parties herein as shown in Clause 13 of their contract. Reference was also made to the decision in *CMC Holdings Ltd & Another v Jaguar Land Rover Exports Ltd.* [2013]eKLR wherein Kamau J. held that:

“The measures are intended to preserve assets or evidence which is likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitration. The court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.”

6. It was the plaintiff’s case that the subject matter of the arbitration is under threat as the defendant has initiated a new project to construct a prefabricated conference facility at the very same site that the plaintiff had installed the concrete paving blocks thereby effectively destroying the only available evidence for the arbitral process.

7. Counsel further submitted that even though there was an arbitration clause in the contract that it signed with the defendant, there is no arbitrable dispute owing to the fact that the defendant unequivocally admitted the existence of the debt due to it through special audit conducted by the Office of the Auditor General at the defendant’s request and that the defendant offered to pay the amount but has since adamantly refused to pay.

The respondent’s case.

8. The respondent opposed the application through the replying affidavit of its Chief Executive Officer **Nana Wanjiku Gecaga** who avers that in the year 2014 and 2015, the plaintiff and three other companies were contracted, by the defendant/respondent, to undertake the supply of paving blocks (cabro) at its said parking area and that the plaintiff’s deponent was at the time a director in all the four companies that undertook the project.

9. She further avers that a total of Kshs 19,872, 813/- was paid to the applicant and the other three companies in full settlement of all the works that they had undertaken. She adds that the contract attached to the plaintiff’s supporting affidavit as annexure **“AW1”** is not known to the respondent as it did not sign it. She further states that the invoices attached to the applicant’s supporting affidavit do not bear the respondent’s or its agent’s signature.

10. In sum, the respondent denies owing the applicant the amount of money claimed in the plaint and maintains that plaintiff’s case is not merited. She concedes that the Office of the Auditor General measured the works carried out by the plaintiff as shown in the plaintiff’s annexure marked **“AW4”** which records are still available and adds that this means that any subsequent tender at the same site shall not prejudice the plaintiff in any way in the intended arbitral proceedings.

Determination

11. 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.

12. As rightly pointed out by the applicant, 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.

13. 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.

14. 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?

15. 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 applicants 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. I therefore find that the alleged arbitration clause cannot be said to be in existence or to be binding on the defendant. For this reason, I find that the instant application fails the first test/condition for issuance of the orders of interim measure of protection.

16. My finding on the existence of an arbitration agreement would have been sufficient to determine this petition but I am still minded, for good measure and in the interest of justice, 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.

17. 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.

18. 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.

19. To my mind, the dispute between the plaintiff and defendant is not whether the plaintiff supplied the concrete blocks, which is a fact expressly 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 16,054,892. 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 .

20. 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).

21. 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."

22. 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. 16, 045,892/- which, according to the plaintiff, the defendant had acknowledged but had refused to settle.

23. In view of 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.

24. 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