REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

HIGH COURT CIVIL CASE NO. 253 OF 2018

SAJ CERAMICS LIMITED.....PLAINTIFF

-VERSUS-

HMS BERGBAU AG.....1ST DEFENDANT

I & M BANK LIMITED.....2ND DEFENDANT

RULING

1. The ruling relates to Chamber Summons Application dated 25th June 2018, brought under provision of Section 7 of the Arbitration Act, 1995, Order 5 Rule 21, 23, 25 and Order 40 of the Civil Procedure Rules and all other enabling provisions of the law.

2. The Applicant seeks for orders as hereunder reproduced:

> *a) Pending the hearing and determination of this Application inter parties, a temporary order of injunction do issue retraining the 2nd Defendant by itself, its agents, employees, assigns, advocates or servants or any other person acting under the instructions of the 2nd Defendant from paying to the 1st Defendant the sum of USD 2,636,699.01 secured by the letter of Credit issued by the 2nd Defendant on 15th February 2018, in favour of the 1st Defendant.*
>
> *b) Pending the hearing and determination of this application inter parties and due to the urgency and the need for the expeditious disposal of the matter, the Plaintiff be granted leave to serve the 1st Defendant with Summons for Appearance/Notice of Summons and all process.*
>
> > *i) Pursuant to Order 5 Rule 23, through substituted service by way of email or registered post being the Plaintiff's and the 1st Defendant's preferred mode of service of notices under Clause 15 of the Agreement dated 6th February 2018.*
> >
> > *ii) In the alternative, service in Berlin, Germany, through the Ministry of Foreign Affairs.*
>
> *c) An order of injunction do issue restraining the 2nd Defendant by itself, its agents, employees, assigns, advocates or servants or any other person acting under the instructions of the 2nd Defendant from paying to the 1st Defendant the sum of USD 2,636,699.01 secured by the letter of Credit issued by the 2nd Defendant and dated 15th February 2018 in favour of the 1st Defendant pending the hearing and determination of a dispute between the parties in Arbitration.*
>
> *d) The Court does give directions for the expedient determination of this application.*
>
> *e) Any other order/relief that the court may deem fit and just in the interest of justice.*
>
> *f) Costs be provided.*

3. The Application is supported by an affidavit dated 25th June 2018, sworn by Atul Parmar, a Director of the Plaintiff's Company. He deposes that the Plaintiff is engaged in among others, the business of manufacture of items made from ceramic. That the Plaintiff and the 1st Defendant entered into a Coal Purchase Agreement dated 6th February 2018, (herein the "Agreement") under which the Plaintiff agreed to

buy and the 1st Defendant agreed to supply Steam Sized Coal (herein "the Coal") of the size and specification of 30-100mm. That the Plaintiff uses coal in its production plants and that is the reason the coal was of a specific size, so that it can be compatible with its machines.

4. That for purposes of security payment upon delivery of the coal and pursuant to Clause 6.1 of the Agreement, the Plaintiff on 15th February 2018 procured an irrevocable documentary letter of Credit in the sum of USD 2,636,699.01 from the 2nd Defendant being the total cost of the Coal pursuant to the Commercial Invoice No. RA1800029 issued by the 1st Defendant. The letter of Credit will mature on 16th August 2018. Subsequently, the 1st Defendant delivered the Coal on 4th march 2018 at the port of Mombasa. However, upon delivery, it became apparent that the coal that had been delivered was contrary to the agreed specifications and not fit for the purpose of different sizes. That the Certificates of Sampling and Analysis issued through the 1st Defendant show that there was over 15.3% of the Coal that was not of the specification under the agreement. However, the 1st Defendant has remained adamant that the Coal was of the sizing specifications. Thus a dispute has arisen between the parties.

5. The Applicant avers that it sent a notification of a dispute to the 1st Defendant dated 17th May 2018, demanding that the 1st Defendant do deliver Coal of the correct size specification, whereupon the 1st Defendant respondent by its letter of 22nd May 2018, denying any liability. Subsequently, the parties have exchanged correspondences but the 1st Defendant has maintained that the Coal was of the correct specifications.

6. That, as it is evident that a dispute has arisen between the Plaintiff and the 1st Defendant, pursuant to Clause 14 of the agreement, the dispute is settled by way of Arbitration under the 2010 SIAC Rules (4th Edition) at the Singapore International Arbitration Centre. That the Plaintiff has already invoked Clause 14 of the Agreement and is keen to have the dispute resolved by way of Arbitration. However, there is an imminent risk that the 2nd Defendant will proceed to honour the letter of credit and make payment on 16th August 2018 when the same matures, despite the pending dispute between the Plaintiff and the 1st Defendant. In that regard, the Plaintiff vide a letter dated 23rd April 2018, demanded from the 2nd Defendant that it should not honour the terms of the letter of undertaking until the dispute between the Plaintiff and the 1st Defendant is resolved, but the 2nd Defendant has however indicated that it will honour the terms of the Letter of Credit. Therefore, unless the orders sought are granted, there is a real and imminent danger that the Plaintiff will suffer substantial losses in the region of not less than USD 2,636,699.01 in the event that the 2nd Defendant honour the terms of the Letter of Credit.

7. Thus it is in the interest of justice that the 2nd Defendant be restrained from honouring the terms of the letter of Credit until the hearing and determination of the dispute by way of Arbitration or until such further orders of the Court. It was further averred that the 1st Defendant is based in Berlin Germany which is not a commonwealth country and that under Clause 15 of the Agreement, it was agreed that service of notices can be made by way of email or registered mail. Therefore, for the expeditious disposal of this case, the Plaintiff be allowed to serve the 1st Defendant by way of substituted services or such other means as the court shall order.

8. However, the Application was opposed by the 1st Defendant on the following grounds:-

a) The orders sought cannot lie as they seek to restrain enforcement of a Letter of Credit.

b) Where a bank has given performance guarantee implicit in a letter of Credit, it is, in law, required to honour the guarantee according to its terms and it ought not to be concerned whether either party to the contract which underlay the guarantee, is in default.

c) The only exception is where fraud by one of the parties to the underlying contract has been established and the bank has notice of the fraud. Fraud is neither alleged nor demonstrated in the instant application.

d) In law, it is only in exceptional cases that he Courts will interfere with the machinery of irrevocable obligations assumed by banks. No exceptional circumstance is alleged or has been demonstrated.

e) It is well settled that the Courts are not concerned with difficulties to enforce claims in transactions underlying letters of Credit as parties take the risk of the unconditional wording of the guarantees.

f) Grant of the orders sought would be inimical to well settled principles that the machinery and commitments of banks in issuing Letters of Credit are on a different level and must be allowed to be honoured, free from interference by the Courts. Otherwise, trust in international commerce could be irreparably damaged.

9. The 2nd Defendant opposed the Application vide a Replying Affidavit dated 4th July 2018, sworn by Andrew Muchina, Manager, wherein he stated that; the Bank is not a party to the alleged dispute between the Plaintiff and 1st Defendant and consequently takes no position in respect of the application, save to inform the Court of the basis of its position in respect to the encashment of the Letters of Credit issued on 15th February 2018 at the Plaintiff's behest.

10. That the Letters of Credit issued on 15th February 2018, are an irrevocable documentary credit that is governed by the International Chamber of Commerce's Uniform Customs and Practice for Documentary Credits (herein "UCP 600"). The relevant provisions are:-

a) Article 3 - a credit is irrevocable even if there is no indication to that effect;

b) Article 4:

i) A Credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the Credit. Consequently, the undertaking of the bank to honour, to negotiate or to fulfill any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationship existing between banks or between the applicant and bank.

ii) An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, profoma Invoice and the like.

c) Article 6 – Banks deal with documents and not with goods, services or performance to which the documents may relate.

d) Article 7:

i) 7 (a) – provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour if the credit is available by; and

ii) 7 (b) – an issuing bank is irrevocably bound as at the time it issues the credit.

e) Article 14 (a) - A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.

f) Article 15 (a) – when an issuing bank determines that a presentation is complying, it must honour.

g) Article 34 – a bank assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document, or for the general or particular conditions stipulated in a document or superimposed thereon; nor does it assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance represented by any document, or for consignor, the carrier, the forwarder, the consignee or the insurer of the goods or any other person.

11. Mr. Muchina averred that UCP 600 was created to clearly delineate Uniform Rules for operation of letters of Credit and as per Articles 3, 4, and 6 set out in paragraph 5 hereinabove, the letter of Credit is irrevocable and the bank is neither concerned with nor bound by the contractual relationship between the Plaintiff and 1st Defendant, nor with the performance thereof. Further, the bank cannot rely on a dispute between the Plaintiff and 1st Defendant.

12. Further, as per Articles 7, 14 (a), and 15 (a), the bank's duty upon presentation of a demand under a letter of credit is to confirm whether the same is complaint and if it so finds on prima facie basis, it must then honour the demand. That under Article 14 (b), the bank has a maximum of five working days following the presentation of the demand to determine if it is complying. Therefore, under the UCP 600, the bank has neither duty nor obligation to ascertain performance of the underlying contract nor can it rely on any allegations of breach of contract or non-performance to withhold payment where a complying demand is presented. Finally, it is long established practice that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of credit are satisfied. Any dispute between a buyer and seller must be settled between themselves and the bank must honour the credit.

13. Further to the grounds of opposition, the 1st Defendant filed a Replying Affidavit dated 12th July 2018, sworn by Steffen Ewald, Director. He deponed that the Application is a grave abuse of the Court process and a mischievous attempt to detract from its contractual obligations in the "Agreement". He reiterated the grounds by deposing that it has long been held by the Courts that:-

a) When a letter of Credit is issued and confirmed by a bank, the bank has an absolute obligation to honour and pay it if the documents are in order and the terms of credit are satisfied;

b) Any dispute between a buyer and seller must be settled between themselves and the bank must honour the credit ; and

c) The only exception to the above noted general rule is where a bank has notice of collusion or fraud being perpetrated by one of the parties to the contract.

14. Mr. Ewald averred that, the Plaintiff has by its own volition admitted under Paragraph 7 of its Affidavit that it procured an irrevocable Letter of Credit on 15th February 2018 and at Paragraph 4 of the Affidavit that the 1st Defendant performed its contractual obligation by delivering coal to the Plaintiff on 4th March 2018; and Finally at paragraph 10 of the Affidavit, it is averred that the impugned portion which forms the substratum of the Plaintiff's Application merely represents 15.3% of the total consignment of Coal delivered to it by the 1st Defendant/Respondent. Consequently, the Plaintiff's Application must be struck out and dismissed, as it is not permissible under applicable the law to obtain an injunction to restrain the payment of the Letter of Credit. Further, the Plaintiff has failed to demonstrate that the Agreement herein was intrinsically unfair or unconscionable to warrant the court's interference or to demonstrate a prima facie case. Similarly, the substratum of the Application fails to raise any bonafide triable issues and has thus collapsed; Neither has the Plaintiff demonstrated that it shall suffer irreparable harm that cannot be remedied by damages in that the dispute relates to 15.3% of USD $ 2,636,699, which is easily quantifiable and can be easily recovered. The Plaintiff has also failed to prove its case on a balance of convenience as it would be unjust to impose a restraining order against the 2nd Defendant to the 1st Defendant's detriment over a dispute concerning only 15.3% of a consignment and as such interference would be inimical to the sound principles of international commerce and trade.

15. Finally, the 1st Defendant averred that its contractual obligation as provided for in clause 2 of the Agreement which was to deliver what was typical, that is, the coal was required to have similar, rather that exact, distinctive qualities of a regular piece of coal in the industry, which is what was delivered to the Plaintiff.

16. Furthermore, the orders prayed for by the Plaintiff/Applicant are not peripheral but rather go to the root of the Agreement. Therefore, the issues canvassed in the Application are substantive and thus fall within the preserve of Arbitration proceedings as unequivocally admitted and championed by the Plaintiff in Paragraph 15 of its Affidavit. In the premises, the Plaintiff/Applicant's Application is misconceived and without merit and should therefore be dismissed with costs.

17. The parties agreed to dispose of the Application by filing submissions. The Plaintiff submitted that the only issue for determination in the Application is whether the 2nd Defendant should be restrained from making payment to the 1st Defendant or any of its agents pending referral of the dispute for resolution by way of arbitration. That Clause 14 of the Agreement provides that either of the parties can apply for interim reliefs pending resolution of a dispute by way of arbitration and Section 7 of the Arbitration Act provides that a party can seek an interim measure of protection from the High Court either before or during arbitral proceedings.

18. That in the case of; *Safaricom Limited –vs- Oceanic beach Hotel limited & 2 Others [2010] eKLR*, Hon. Justice Nyamu JJA held that;

> *"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 grant of an injunction..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:-*
>
> *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 merits of the application.*
>
> *iv. 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"*

19. The Plaintiff argued that the grounds upon which the Application should be allowed are that it has a good case that warrants the grant of the interim injunction as prayed in the Application and the Court has jurisdiction to hear and determine the Application which has been brought under Section 7 of the Arbitration Act. That it is not in dispute that there is an arbitration clause in the agreement and as aforesaid, Clause 14 of the agreement provides for arbitration at the Singapore International Arbitration Centre and that there is a dispute capable of being resolved by way of arbitration. The Defendant has not denied that there is no dispute of being referred to arbitration. That the dispute arose because whereas Clause 2 of the Agreement provides for the delivery of coal whose sizing is between 30-100mm, the Certificates of Sampling and Analysis issued by the 1st Defendant agents being Certificate Number 18052307EC show that 15.3% of the coal supplied is over 100mm.

20. The Plaintiff invited the Court to have regard to the correspondences between the parties as follows;

> *a) The 1st Defendant was notified of the wrong delivery in the email of 19th March 2018 and 25th April 2018;*
>
> *b) In the email of 26th April 2018 sent by the 1st Defendant, the 1st Defendant alleges that the coal was between 30mm-100mm which is contradictory to the Certificate of Sampling and Analysis which is final and binding;*
>
> *c) In the letter dated 22nd May 2018, the 1st Defendant denies liability at paragraphs 2 and 5 of the letter. The letter was in response to the Plaintiff's letter dated 17th May 2018 . In the letter, the Plaintiff notified the 1st Defendant that it was clear that the 1st Defendant had failed and neglected to address the issue raised including whether the coal was of the agreed sizing.*

21. It is thus clear that the Plaintiff and the 1st Defendant therefore hold different views on the performance or non-performance of the contract by the 1st Defendant; therefore there is a dispute capable of being referred to arbitration.

22. As to whether the subject matter of the arbitration is under threat, the Plaintiff submitted that the 2nd Defendant issued a letter of Credit whose maturity date is 16th August 2018. The beneficiary thereof is the 1st Defendant. That the 2nd Defendant has confirmed that it will proceed to make payment to the 1st Defendant notwithstanding the dispute between the Plaintiff and the 1st Defendant unless a Court Order is issued to stop the payment.

23. That, one of the issues to be determined is whether the 1st Defendant is entitled to full payment of the consignment secured by the Letter of Credit and whether the 1st Defendant has breached the terms of the Agreement and the remedies. These issues form the subject matter and are core issues for the arbitral tribunal, and that the confirmation from the 2nd Defendant in the email dated 27th April 2018 is sufficient evidence that the subject matter is under threat. And that if the payment, the subject matter of the arbitration will have been eroded. That the purposes of the interim measure of protection is not to determine the issues between the parties but rather to protect the subject matter of the arbitration and to protect party autonomy in settlement of disputes through arbitration.

24. That in the case of; *CMC Holdings Ltd & Another –vs Jagua Land Rover Exports Limited* (2013) eKLR quoted in *Talewa Road Contractors Ltd –vs- Kenya National Highways Authority [2014] eKLR*, where the Court held that:-

> *"The measures are intended to preserve assets or evidence which are 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 arbitral proceedings. The Court must be satisfied that the subject matter of the arbitral proceedings will not be in the same stated at the time the arbitral reference is concluded before it can grant an interim measure of protection".*

25. The Plaintiff submitted that to prevent the Arbitration being nugatory and for purposes of preserving party autonomy in settlement of their disputes, it is in the interests of justice that an interim measure of protection be granted as prayed in the Application in order to safeguard the subject matter of the arbitration. Otherwise, if there is no interim measure of protection granted, the 2nd Defendant will pay the money to the 1st Defendant which is inequitable based on the circumstances of this case.

26. The Plaintiff further submitted that as to the conditions precedent under the Letter of Credit, the Defendant's view is that the Letter of Credit is irrevocable and it ought to be honoured by the 2nd Defendant notwithstanding the dispute between the Plaintiff and the 1st Defendant and that the Plaintiff has not alleged fraud. However, the Plaintiff submits that this view is unfounded. Firstly, it is not for the Defendants or the Court to speculate the nature of the claim to be filed before the tribunal as this will depend on the pleadings to be filed with the Arbitral tribunal. That these proceedings relate to an interim relief pending referral to arbitration. Secondly, the Letter of Credit is not 'payable upon demand' and can thus be distinguished from a Letter of Credit that is unconditional. The Defendants arguments relate to Letters of Credit which are unconditional or which are payable upon demand which is not the case in this matter. The argument must be rejected.

27. That the authorities relied on by the Defendants relate to Letters of Credit which are unconditional and payable on demand without the need of the bank to ascertain the obligations between the seller and the buyer.

28. Thirdly, payment under the Letter of Credit is conditional on certain issues. These are the conditions precedent which must be satisfied before the Letter of Credit can be honoured.

29. That these conditions are contained in page 2 of the Letter of Credit under which the beneficiary who is the 1st Defendant is under an obligation to provide a Certificate of Quality indicating that the quality of coal supplied is as per the purpose of the Agreement dated 6th February 2018. The Letter of Credit is conditional to the fulfillment by the 1st Defendant of the terms and conditions under the Agreement. As such, the Letter of Credit cannot be read separately from the agreement. By dint of this link, the 2nd Defendant is under an obligation to also ensure that it has received confirmation that the quality of the coal supplied was as per the agreement. The 1st Defendant has not confirmed that the coal is of the quality agreed. The quality of the coal is a condition precedent to be satisfied prior to payment. Thus any payment before the determination of this issue would be contrary to the terms of the Letter of Credit.

30. Fourthly, the Plaintiff has established special circumstances to warrant intervention by the Court. That in the case of; *Kenindia Assurance Company Limited –vs- First National Finance Bank Limited* Civil Appeal No. 328 of 2002, quoted in *Republic - vs – Commissioner of Customs Services Ex parte Imperial Bank Limited [2015] eKLR* the Court of Appeal stated as follows in respect of conditions precedent in Performance Bonds and Letters of Credit;

> *"As to the fulfillment of the conditions incorporated in the guarantee the statement of the beneficiary shall be taken at its face value unless the contractor can establish that the beneficiary's stand is motivated by fraud, misrepresentation, deliberate suppression of material facts or the like of which would give rise to special equities in favour of the contractor. In absence of such elements the bank guarantee has to be honoured by the bank and the beneficiary cannot be restrained from enforcement…"*

31. The Plaintiff submitted that it has established prima facie in that:-

> *a) The letter of credit was conditional in the terms of the agreement between the Plaintiff and the 1st Defendant. The Defendant have not challenged any of the terms of the Letter of Credit.*
>
> *b) There is a dispute about the quality of the coal delivered. The 1st Defendant has not denied that it issued the Certificates of Sampling and Analysis showing that 15.3% of the coal delivered was not within the 30mm-100mm sizing. The 1st Defendant has confirmed at Paragraph 5 (f) that the dispute is over 15.3% of the coal delivered.*
>
> *c) The 1st Defendant has in the Replying Affidavit indicated that it supplied coal as per the Agreement. Its argument is unfounded and it does not reconcile with the Certificates of Sampling and Analysis provided under Clause 5 which are prima facie proof that some of the coal is not as per the agreed sizing.*
>
> *d) The condition precedent in respect to the conformity with the size (as agreed under the agreement) before payment can be made has not been satisfied. This is because there is still a dispute over the 15.3%.*
>
> e) *If payment is made despite the dispute and the conditional Letter of Credit, the arbitral proceedings will be rendered nugatory and the subject matter of the arbitral proceedings will have been eroded*.

32. It was submitted that the 1st Defendant is keen to steal a match on the Plaintiff through misrepresentation and deliberate suppression of

material facts. This creates special equities and special circumstances and exceptions for purposes of the Court exercising its discretion in favour of the Plaintiff. That the Court should be careful not to interfere with matters and issues which will be the subject matter of the arbitral proceedings, and its only jurisdiction is to order an interim relief pending determination of the dispute between the Plaintiff and the 1st Defendant. All other issues are to be determined by the arbitral tribunal. In the case of Safaricom (Supra) the Court of Appeal stated;

> 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. This point was also considered in the famous English arbitration case of *Channel Tunnel Group Limited –vs- Balfour Beatty Construction Ltd [1993]* AC 334 where the English Court rendered itself as follows:-
>
> > *"there is always a tension when the Court is asked to order, by way of interim relief in support of an arbitration a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the Court to make a tentative assessment of the merits in order to decide whether the Plaintiff's claim is strong enough to merit protection, and on the other hand the duty of the Court to respect the choice of tribunal which both parties have made and not to take out of the hands of the arbitrators (or other decision makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the letter considerations must prevail…"*

33. On the issue of the balance of convenience, it was submitted that the 1st Defendant argues that it lies in its favour because at least 85% of the coal can be utilized and that as such this payment should be made. However, the question of whether the 1st Defendant is entitled to payment in full under the Letter of Credit or whether the 1st Defendant has performed its obligations under the Agreement is an issue for determination by the arbitral tribunal. It may be that the Arbitral Tribunal will rule in favour of the Plaintiff and rule that 15.3% of the value should not be paid to the 1st Defendant. By the fact that there is a dispute between the Plaintiff and the 1st Defendant over the quality of the coal (which is tied to the Letter of Credit) and which can only be resolved by way of arbitration, the 2nd Defendant ought to be restrained to make payment until after the determination of the dispute.

34. Therefore, the balance of convenience thus lies in favour of the Plaintiff in allowing the Application as prayed and the Court be pleased to exercise its discretion in favour of the Plaintiff.

35. The 1st Defendant on its part submitted that the Black's Law Dictionary, 6th Edition at page 903 defines a Letter of Credit as:-

> *"An engagement by a bank or other person made at the request of a customer that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit. A credit may be either revocable or irrevocable…Letters of Credit are intended generally to facilitate purchase and sale of goods by providing assurance to the seller of prompt payment upon compliance with specified conditions or presentation of stipulated documents without the sellers having to rely upon the solvency or good faith of the buyer".*

36. Further Halsbury's Laws of England, Fourth Edition Volume 41 at page 819 on performance Guarantees and Bonds, provides are follows:-

> *"960. Nature and effect. Some commercial contracts include provision for one party, often the seller, to procure a so-called performance guarantee or bond from a bank or an insurance or other company in favour of the other contracting party. A performance guarantee or bond commonly provides for payments to be made on the demand of the beneficiary. The contractual obligations arising under such guarantees or bonds are separate from and not dependent upon those existing under the sale contract between the seller and the buyer".*

37. That in this vein, the High Court, in the case of *Synohydro Corporation Limited -vs- GC Retail Limited &Another [2016] eKLR*, invoked with favour the leading case of *Edward Owen Engineering ltd. -vs- Barclays Bank International ltd [1978]* 1 ALL ER 976, which concerned a Performance Guarantee. Lord Denning quoted American Practice in the case of *Sztejn -vs- Hennry Schroder Banking Copn* ((1944) 31 NY Supp 2d 631 at 633) where it was held that:-

> *"it is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller".*

38. That as a result of the foregoing, the 2nd Defendant is a stranger to these proceedings as it cannot be drawn into the dispute between the Plaintiff and the 1st Defendant as it emanates from an Agreement in which it is not a party. Consequently, the Plaintiff's application herein is fatally incompetent as the 2nd Defendant has no locus standi to the drawn in these proceedings.

39. The 1st Defendant argued that Plaintiff's prayers herein are misconceived as they arbitrarily seek to uproot well founded principles, concerning guarantees and long established by the Courts. The 1st Defendant reiterated the averments that;

> *a) When a letter of Credit is issued and confirmed by a bank, the bank has an absolute obligation to honour and pay it if the documents are in order and the terms of the credit satisfied;*
>
> *b) Any dispute between a buyer and a seller must be settled between themselves and the bank must honour the credit; and*
>
> *c) The only exception to the above noted rule is where a bank has notice of collision or fraud being perpetrated by one of the parties to the contract.*

40. That in declining to grant an injunction in similar circumstances, the High Court in the case of *Civicon Limited -vs- Kivuwatt Limited [2013] eKLR* premised its holding on the grounds that:-

> *"fraud has not been pleaded. What is pleaded is unlawful termination of the contract".*

41. Therefore, the substratum of the Plaintiff's case must fail as it is patently clear that the Application does not fall within the exception provided in law to restrain the 2nd Defendant from honouring the letter of Credit. That in similar circumstances in the High Court case of *R.H. Devanil Limited -vs- Transfuel Enterprises Limited & Another [2015] eKLR*, the Court held that: -

> *"…disputes between the parties to the contract should not concern the guarantee who has issued a performance security bond unless there is fraud by one of the parties of which the 2nd defendant had notice".*

42. That the importance of honouring letters of Credit was highlighted in the High Court case of *Lagoon Development Limited -vs- Beijing Industrial Designing & Research Institute [2015] eKLR* where the Court held that:-

> *"…performance bonds fulfil a most useful role in international trade. If the seller defaults in making delivery, the buyer can operate the bond. He does not have to go to [sic] far away countries to get damages or go through a long arbitration. …on a notice of default being given, the buyer can have his money in hand to meet his claim for damages…"*

43. It was submitted that the Application herein has no merit, as it raises no bona fide triable issues, and thus constitutes an abuse of the Court process. It be must be struck out with costs. The Court further held that:-

> *"Therefore, as the law stands, and looking at the kind of defence the 2nd Defendant has put forward, it is not a question of whether the defence will succeed or not; there is simply no triable issue; no bona fide triable issue at all which is raised in the defence worthy trial between the Plaintiff and the 2nd Defendant. The defence is a mere sham. As a whole, this is plain and obvious case which does not require the adducing of evidence and making of submissions in the full hearing in order to ascertain that the defence by the 2nd Defendant is a perfect candidate for striking out. To allow such a defence to go for trial would visit great injustice on the Plaintiff; it will be unfair postponement of the Plaintiff's judgment for no apparent reason".*

44. Therefore, the Plaintiff cannot lawfully restrain the 2nd Defendant from honouring the impugned letter of Credit in favour of the 1st Defendant upon its maturity on 16th August 2018. In further submissions, the 1st Defendant argued that it is not in dispute that Clause 14 of the said Agreement provides for the settlement of disputes by way of Arbitration under the 2010 SIAC Rules 4th Edition at the Singapore International Arbitration Centre as highlighted in Paragraph 15 of the Plaintiff's said Affidavit.

45. That the Plaintiff's allegations are that the 1st Defendant has failed or refused to honour conditions in Clause 2 of the said Agreement concerning the quality, particularly the sizing specifications of the coal to be supplied by the 1st Defendant. That in High Court case of; *Civicon Limited -vs- Kivuwatt Limited (Supra),* the Court observed that:-

> *"Substantive dispute and differences can be referred to the arbitrator whereas the Kenyan Courts do retain residential jurisdiction to deal with peripherical matters."*

46. That by the Plaintiff's own admission, in Paragraph 4 of its Affidavit dated 25th June 2018, the size specifications of the coal are pivotal to its manufacture of items made of ceramic, as it uses the coal in its production plants which must be compatible with its machines. That in the immediate cited case, the Court stated that;-

> *"I am of the considered view that these are issues that are subject to arbitration proceedings. The separator machine is said to be pivotal to the project in Rwanda. The restraining orders prayed are not peripherical but go to the root of the contract agreement and I find to have no jurisdiction over that substantive issue."*

47. The 1st Defendant therefore submitted that the allegations and issues raised herein are substantial in nature as admitted by the Plaintiff. Therefore, this Honourable Court has no Jurisdiction over the same which must instead be dealt with in Arbitration proceedings as provided for in the said Agreement.

48. That the Plaintiff's case has no bona fide triable issue, is incompetent, misconceived and in any event falls outside the jurisdiction of this Honourable Court. Consequently, that the Plaintiff's summons dated 25th June 2018 be dismissed with costs.

49. I have considered the Application, the affidavit in support and in opposition thereto alongside the Grounds of Opposition filed. I find that, prayers (1), (2) and (3) of the Application are spent. The only remaining prayer is prayer (4) that seeks for an interim measure of protection, pending referral and determination of the dispute by way of Arbitration. Thus, the only issue to determine is whether, the Plaintiff has satisfied the legal requirement, for grant of an order of injunction, to restrain the 2nd Defendant and/or its agents from honoring the Letter of Credit dated 15th February 2018 and issued in favour of the 1st Defendant

50. There is no dispute that the parties herein entered into an Agreement described as "Coal Purchase Agreement" dated 6th February 2018. At Clauses 13 and 14, of the Agreement it is provided that, the mechanism of dispute resolution would be Arbitration. The said clauses stipulates as follows:-

"Clause 13:

Disputes

The parties agree to work together as partners and resolve any arising issues in mutual consent and good faith."

"Clause 14

Governing law/Arbitration

The contract shall be governed by and construed and interpreted in accordance with English Law (without any reference to any conflict of law rules). Where a party or the parties consider that a dispute cannot be resolved by mutual consent, in their sole discretion, as per clause 15, any dispute or difference between the parties in connection with this Contract shall be referred to and determined by arbitration under the 2010 SIAC Rules (4th Edition) at the Singapore International Arbitration Centre, Singapore. Singapore shall be the venue for any such arbitration. The language to be used in the arbitral proceeding shall be English. The decision of the arbitrator(s) shall be final and binding on the parties. For the avoidance of doubt, this will not prevent either party from taking proceedings in any other jurisdiction to obtain security or ancillary relief or to enforce any order or judgment."

51. These provisions are clear that any dispute between the parties that relates to the subject Agreement should be determined through Arbitration. However, the Applicant argues that, it has moved the Court under the provisions of Section 7 (1) and (2) of the Arbitration Act, 1995, for interim measure of protection in the meantime. The said Section provides that;-

"7(1), it is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings for interim measure of protection and for the High Court to grant that measure."

"7(2), where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled in 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."

52. Be that as it were, the power of the Court to issue interim measure of protection under the said section is settled. The Court will only issue the same to preserve assets and/or evidence, which are likely to be wasted if conservatory orders are not issued. Thus, the main objective of the protection is to preserve the subject matter of the dispute before the Arbitral Tribunal.

53. In the instant matter, the main issue in contest is the Letters of Credit issued by the 2nd Defendant. In that regard the 1st Defendant in its submissions made reference to the definition of a Letter of Credit, as stated under the Black Laws Dictionary 6th Edition and Halsbury's Laws of England 4th Edition. What comes out clearly from these definitions is that, the issuer thereof is bound to honour demand for payment upon the beneficiary complying with the conditions specified in the Letter of Credit. I concur with these definitions.

54. However, for further understanding and emphasis, it suffices to note that, a Letter of Credit (LC), which is also known as a Documentary Credit, and/or Banker's Commercial Credit, is an important payment method in International trade. Most Letters of Credit are governed by rules promulgated by the International Chamber of Commerce, known as, Uniform Customs and Practice for Documentary Credits. The current version, UCP 600, became effective ON July 1, 2007. The Letter of Credit is thus particularly useful where the buyer and seller may not know each other personally and are separated by distance, differing laws in each country, and different trading customs. (See: *Larson, Aaron (29 July 2016). "How do Letters of Credit work?" Expert Law.com.)*

55. Therefore, a Letter of Credit is a primary payment method in International trade, to mitigate the risk a seller of goods takes when providing those goods to a buyer. It does this by ensuring that the seller is paid for presenting the documents which are specified in the contract for sale between the buyer and the seller. That is to say, a Letter of Credit is a payment method used to discharge the legal obligations for payment from the buyer to the seller, by having a bank pay the seller directly. Thus, the seller relies on the credit risk of the bank, rather than the buyer, to receive payment.

56. In normal circumstances the bank will usually pay the seller the value of the goods when the seller provides negotiable instruments, documents which themselves represent the goods. (*See; "Letters of Credit for importers and exporters." Gov.uk. 1 August 2012).* Upon presentation of the documents, the goods will traditionally be in the control of the issuing bank, which provides them security against the risk that the buyer (who had instructed the bank to pay the seller) will repay the bank for making such a payment. In the event that the buyer is unable to make payment on the purchase, the seller may make a demand for payment on the bank. The bank will examine the beneficiary's demand and if it complies with the terms of the letter of credit, will honor the demand. *(See; "Understanding and using Letters of Credit, Part 1" Credit Research Foundation, 1999).*

57. In the instant case, the 1st Defendant has emphasized the fact that, the Letter of Credit herein, is an "irrevocable" type. It suffices to note that several categories of Letters of Credits exist which seek to operate in different markets and solve different issues. An example of these include:

a) Import/export: The same credit can be termed an import or export Letter of Credit depending on whose perspective is considered. For the importer it is termed an Import Letter of Credit and for the exporter of goods, an Export Letter of Credit. (See; "McCurdy, William E. (March 1922). "Commercial Letters of Credit." Harvard Law Review. 35 (5): 539-592. JSTOR 1328326).

b) Revocable/ Irrevocable: Whether a Letter of Credit is revocable or irrevocable determines whether the buyer and the issuing bank are able to manipulate the Letter of Credit or make corrections without informing or getting permissions from the seller. According to UCP 600, all Letter of Credit s are irrevocable, hence in practice this type of Letter of Credit increasingly obsolete. Any changes (amendment) or cancellation of the Letter of Credit (except if it is expired) is done by the applicant through the issuing bank. It must be authenticated and approved by the beneficiary.

c) Confirmed/Unconfirmed: A Letter of Credit is said to be confirmed when a second bank adds its confirmation (or guarantee) to honor a complying presentation at the request or authorization of the issuing bank.

d) Restricted/ Unrestricted: Either the one advising bank can purchase a bill of exchange from the seller in the case of a restricted Letter of Credit or; the confirmation bank is not specified, which means that the exporter can show the bill of exchange to any bank and receive a payment on an unrestricted Letter of Credit.

e) Deferred/Usance: A credit that is not paid/assigned immediately after presentation, but after an indicated period that is accepted by both buyer and ----------

58. The fundamental principle of all these letters of credit however is that, letters of credit deal with documents and not with goods. The payment obligation is independent from the underlying contract of sale or any other contract in the transaction. The bank's obligation is defined by the terms of the Letter of Credit alone, and the contract of sale is not considered. So, for example, where party 'A' enters into an agreement to purchase goods from party 'B', Party 'A' will engage with their bank to create a letter of Credit. (*See: United City Merchants (Investments) Ltd vs Royal Bank of Canada (The American Accord) (1983) 1 AC 168).* If the said bank is provided with certain documents, by 'B', then he is obliged to pay, regardless of whether the contract between 'A' and 'B' is subject to set-off or contractual issue. The specified documents are often bill of lading or other "documentary intangibles" which 'A' and 'B' would have previously specified in their original contract. (See; *Standard Chartered Bank vs Dorchester LNG (2) Ltd (2015).* The defenses available to the buyer arising out of the sale contract do not concern the bank and in no way affect its liability. (See; *Ficom S.A. vs Socialized Cadex (1980) 2 Lloyd's Rep. 118).* Article 4(a) of the UCP600 states this principle clearly. This is confirmed within the market-practice documents stated by Article 5 of UCP600.

59. As is a core tenant of Financial law, market practice comprises a substantial portion of how parties behave. Accordingly, if the documents tendered by the beneficiary or their agent are in order, then, in general, the bank is obliged to pay without further qualifications. (See; United City Merchants (Investments) Ltd (supra)). As a result, it is the issuing bank that bears the risk that is linked with non-payment of the buyer. This is advantageous because the issuing bank often has a personal banking relationship with the buyer.

60. The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in International trade is to give to the seller an assured right to be paid before he parts with control of the goods. It further does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment.

61. However, the only exception to this may be fraud. For example, a dishonest seller may present documents which comply with the letter of credit and receive payment, only to later discover that documents are fraudulent and the goods are not in accordance with the contract, this would place the risk on the buyer, but it also means that the issuing bank must be stringent in assessing whether the presenting documents are legitimate. (See; *United City Merchants (Investments) Ltd (supra*).

62. Similarly, a Letter of Credit like other Financial law instruments, utilizes several legal concepts to achieve the economic effect of shifting the legal exposure from the seller to the buyer. The policies behind adopting this principle of abstraction are purely commercial. Whilst the bank is under an obligation to identify that, the correct documents exist, they are not expected to examine whether the documents themselves are valid. That is to say, the bank is not responsible for investigating the underlying facts of each transaction, whether the goods are of the sufficient – and specified – quality or quantity. Because the transaction operates on a negotiable instrument, it is the document itself which holds the value - not the goods. This means that the bank need only be concerned with whether the document fulfills the requirements stipulated in the letter of credit.

63. Documents required under the Letter of Credit, could in certain circumstances, be different from those required under the sale transaction. This would place banks in a dilemma in deciding which terms to follow if required to look behind the credit agreement. Since the basic function of the credit is to provide a seller with the certainty of payment for documentary duties, it would seem necessary that banks should honor their obligation in spite of any buyer allegations of misfeasance. (See; United City Merchants (Investments) Ltd (supra)). If this were not the case, financial institutions would be much less inclined to issue documentary credits because of the risk, inconvenience, and expense involved in determining the underlying goods.

64. It is noteworthy that Financial Institutions do not act as 'middlemen' but rather, as paying agents on behalf of the buyer. Even then, the Courts have emphasized that buyers always have a remedy for an action upon the contract of sale and that it would be a calamity for the business world if a bank had to investigate every breach of contract. With the UCP 600 rules, the ICC sought to make the rules more flexible, suggesting that data in a document "need not be identical to, but must not conflict with data in that document, any other stipulated document, or the credit", as a way to account for any minor documentary errors. However, in practice, many banks still hold to the principle of strict compliance, since it offers concrete guarantees to all parties. If this were not the case, the bank would be entitled to withhold payment even if the deviation is purely technical or even typographical. (See; J.*H. Rayner & Co. Ltd and the Oil Seeds Trading Company Ltd vs Ham Bros Bank Limited (1942) 73 LI.L. Rep. 32).*

65. In the same vein, the general legal maxim *de minimis non curat lex* (literally "The law does not concern itself with trifles") has no place in the field. However, whilst the details of the letter of credit can be understood with some flexibility the banks must adhere to the "principle of strict compliance" when determining whether the documents presented are those specified in the Letter of Credit. This is done to make the banks' duty of effecting payment against documents easy, efficient and quick.

66. In the instant case, I have examined the subject matter herein against the above legal principles and I find that, the Letter of Credit herein

found at pages 8 to 10, of the bundle of documents annexed to the Affidavit in support of the Application reveal that, it is the "Form of Document Credit described as an IRREVOCABLE Letter of Credit. That is not in dispute. However, the issue of contention by the Plaintiff is that, the 1st Defendant has not complied with the terms of the Letter of Credit and in particular the condition which requires that a "Certificate of Quality be issued by the beneficiary indicating that the quality of Coal supplied is per Purchase Agreement/Contract Number C2278, dated February 6th 2018". The 1st Defendant on the other hand, argues that, the issues canvassed in relation to quality of goods fall within the preserve of Arbitration proceedings and not this matter. That, once a Letter of Credit is issued and confirmed by the Bank, the bank has an absolute obligation to honour and pay, so long as the documents are in order and the terms of credit are satisfied.

67. The question that arises is can a bank decline to honour a Letter of Credit and if so on what grounds? To answer this question regard must be held to the relationship between the parties to the transaction. First, the Letter of Credit is a direct agreement between the issuing bank and the beneficiary (selling party) of the credit. Basically, the beneficiary of the Credit is the party who is to receive payment and the bank is the party who is to issue payment to the beneficiary (seller).

68. Second, a separate agreement lies between the account party (buyer) and the issuing bank. The account party (purchasing party) is a debtor and owes the bank money in the event that a letter of credit is exercised. The account party has a separate agreement with the bank, and under the terms of this agreement must pay the bank in advance or reimburse the bank for any monies paid under the Letter of Credit, that is, for any monies that the bank pays to the beneficiary. This agreement between the issuing bank and the account party is totally separate and distinct from the actual Letter of Credit, which is a separate agreement between the issuing bank and the beneficiary (seller).

69. Distinct and apart from the above two contracts, a separate contract exists between the beneficiary (seller) and the account party (buyer), which is the contract for the sale of the goods and the terms and conditions of payment for the goods by a letter of Credit.

70. Therefore, three contracts exist:

> (a) *a contract between the issuing bank and the beneficiary (the selling party) of the credit;*
>
> *(b) a contract between the issuing bank and the account party (the purchasing party) who is obligated to advance or to reimburse the bank for any monies paid out by the bank; and*
>
> *(c) the contract between the beneficiary (the selling party) and the account party (the purchasing party) who arranges for the issuance of the letter of credit.*

71. One of the results of the above contractual relationships is that, in a bankruptcy proceeding of the account party, the selling party is still entitled to enforce the letter of credit because the account party is not involved in nor has any connection with the agreement between the beneficiary and the issuing bank. The concept that each contract is separate and distinct from the other contract is most important to understand in the letter of credit transaction. Each contract is independent and can be enforced by the parties to the contract regardless of the other two contracts.

72. Thus where a seller delivers defective goods to a buyer, the buyer may attempt to persuade the bank not to pay the letter of credit. Because of the separateness of the contracts, the bank is under a direct obligation to fulfill the letter of credit, if the seller presents the proper documents of title to the bank. The failure of the bank to honor the said letter of credit will expose the bank to a lawsuit directly by the seller. After the bank pays the seller, the buyer may institute suit for a breach of contract or a breach of warranty (or whatever other remedies are available against the seller) for the seller's failure to deliver the merchandise as it was ordered. (Emphasis added).

73. On the other hand, situations arise where a bank may choose to dishonor a letter of credit even on presentation of proper documents or titles. If the buyer can produce a clear evidence of fraud in the underlying contract that was entered into between the buyer and seller, the bank may have a right to refuse to honor the letter of credit in a fraudulent situation. The buyer must produce convincing evidence that the entire transaction was a total fraud, for example, the shipment consists of empty cartons with no goods thereins. In that case, the buyer will make an application to Court, and have the Court issue an injunction directing the bank not to make payment under its obligation to the seller.

74. If the Bank however honors the letter of credit and pays the seller, the buyer may now sue the seller to recover all or part of the letter of credit proceeds from the seller. The seller cannot avail itself of the defense that a separate contract existed between the seller and the bank to defend itself against the buyer's suit, because the theory of independence is not applicable once the payment by the bank has been made. Whereas the separate contract guarantees that the money will reach the seller upon presentation of the proper documents of title, the independence theory does not affect the contract between the seller and the buyer after payment has been made by the bank. A buyer may sue the seller for a breach of contract.

75. Similarly, a situation where the Bank honors its obligation to the seller, but the buyer does not reimburse the bank, the bank may immediately commence suit against the buyer for reimbursement. The bank also may claim to be subjugated to the seller's rights against the buyer. Accordingly, the bank would have two claims against the buyer. The first claim would be under its contract with the buyer to reimburse, and the second claim would be under the seller's contract with the buyer to be paid for the goods.

76. The parties herein cited several cases which are relevant and very useful and I appreciate the research in relation to the same. In addition, I make reference to three English Court rulings on whether issuing banks were obliged to pay against what, on their face, appeared to be complying demands under standby letters of credit (SBLCs). These cases were:

- *National Infrastructure Development Co. Ltd. v. BNP Paribas* [2016] EWHC 2508 (the BNPP Case);
- *National Infrastructure Development Co. Ltd. v. Banco Santander S.A.* [2016] EWHC 2990 (the Santander Case); and

- *Petrosaudi Oil Services (Venezuela) Ltd v. Novo Banco S.A.* [2016] EWHC 2456 (the Novo Banco Case).

77. **In the first case above,** BNP Paribas (BNPP) had issued SBLCs in favour of NIDCO to secure advance payments made to OAS and to provide credit support for OAS's performance obligations under the Construction Contract. The amounts demanded were not paid and NIDCO sought judgment for those amounts in the English courts. Under Brazilian law, BNPP risked a penalty of 10 per cent of the amount of the SBLCs if it paid out in breach of the Brazilian Injunction. Did the Brazilian Injunction give BNPP grounds to refuse to pay under the SBLCs as a matter of English law? The court held that;-

> *"if a party who had opened a letter of credit could defeat the bank's obligation to pay by obtaining an injunction against the bank in its home jurisdiction" this would undermine the commercial purpose of letter of credit transactions. In addition, there was no suggestion that the fraud exception applied. BNPP therefore had to pay".*

78. **In the second case,** Banco Santander S.A. (Santander) had issued SBLCs in favour of NIDCO as a performance and retention "guarantee" under the Construction Contract. NIDCO served demands under the SBLCs. Santander claimed the fraud exception applied to these demands because, among other things:

- *what was "due and owing" from OAS was the subject of arbitration, so NIDCO's claim that the sums were due and owing was not honestly made;*
- *NIDCO had over-claimed under the SBLCs;*
- *the Brazilian Injunction prevented Santander from paying under the SBLCs; and*
- *in all the circumstances, NIDCO's demands were unconscionable.*

The Court held that:

- *the words "due and owing" in the demand did not mean "determined by a tribunal to be due and owing", or "due and owing as a matter of law". Instead, the trigger for payment of the SBLC was NIDCO's belief that the amounts demanded were due and owing;*
- *despite the ongoing arbitration, it was not seriously arguable that NIDCO did not honestly believe its demands were valid;*
- *the alleged overcompensation was not significant and did not indicate that NIDCO's demands were dishonest;*
- *the potential adverse consequences for Santander for paying out in breach of the Brazilian Injunction were part of the risk that Santander had taken; and*
- *unlike under Singapore law, unconscionability was not a basis for restraining payment under a letter of credit under English law.*

Santander therefore had to honour the demands.

79. **Finally in the last case,** Petrosaudi Oil Services (Venezuela) Ltd (Petrosaudi) provided oil rig drilling services to PDVSA Servicios S.A. (PDV), under a Venezuelan law contract (the Drilling Contract). As credit support for PDV's payment of Petrosaudi's invoices, Novo Banco S.A. (Novo Banco) issued an English law governed SBLC in favour of Petrosaudi. Under the Drilling Contract, if PDV disputed an invoice it had to tell Petrosaudi within a set time or it would be deemed to have accepted the invoice on a "pay now, argue later" basis. At arbitration, this arrangement was held invalid under Venezuelan law (which set out a prescribed process for approving invoices issued to a state entity, such as PDV, before that entity had to pay).

PDV failed to pay certain invoices and Petrosaudi demanded payment from Novo Banco under the SBLC. Petrosaudi's position was that the underlying debts arose once it had performed the relevant services under the Drilling Contract, and the invoices in respect of those services were "due" for payment when issued. By contrast, PDV argued that the Venezuelan arbitration rulings meant that the invoices were not due, so the demand certifying that PDV was "obligated to the beneficiary to pay the amount demanded under the drilling contract" was fraudulent.

80. The Court held that, at the time of the demand, the sums claimed under the SBLC had to be due for payment immediately, not at some defined or undefined point in the future. It further held that, in the light of the Venezuelan arbitration rulings, in certifying that PDV was "obligated" to Petrosaudi for the sums claimed under the SBLC the signatory of the demand either knew that the demand was false or was reckless as to its falsity. The fraud exception therefore applied and Novo Banco should not pay under the SBLC. This decision is under appeal.

81. To revert back to the matter herein, I find that based on the legal principles aforesaid, it is clear that, unless fraud is proved by the buyer, the bank is unlikely to be estopped from honouring the Letters of Credit. In the instant case, there is no allegation of fraud or fraudulent activity allegedly against the 1st Defendant. It is the obligation of the buyer who alleges fraud to provide evidence to support the same. As said there is no allegation of fraud and/or proof thereof.

82. Even then, the law is clear that, it is the Bank that has the obligation to verify that the 1st Defendant complies with the requirements in relation to documents required for payment. Therefore, even if the Court does not issue an order stopping the the 2nd Defendant herein, from honouring the Letters of Credit in issue, the 2nd Defendant is still obligated to make sure that the terms and conditions set and/or documents required to be produced by 1st Defendant are availed.

83. I also find that although the 2nd Defendant herein did not take position in respect of the Application, it filed a Replying Affidavit, whereby they drew the Court's attention to the fact that the Letters of Credit issued on 15th February 2018 is an Irrevocable Documentary Credit that is governed by the International Chamber of Commerce's Uniform Customs and Practice for Documentary Credits (UCP 600). The 2nd Defendant quoted heavily from the said provisions, drawing the Court's attention to the fact that, under the UCP600, the Bank has

neither the duty nor obligation to ascertain performance of the underlying contract, nor can it rely on any allegation of contract or non-performance to withhold payment where a complying demand is presented.

84. It therefore follows that; the Court cannot grant an order of injunction to restrain the bank from paying the seller upon receipt of the relevant documents. (See; *Hamzeh Malas & Sons vs British Imex Industries Ltd (1985) 1 All ER 264)*, and even where the buyer states that the goods do not comply with the contract terms, the Bank must pay. (See; *Power Curber International Ltd vs National Bank of Kuwait (1981) 3 All ER 607*).

85. Similarly, as held in the case of; *Discount Records Limited vs Barclays Bank Limited* (194) CH.O, the Courts are reluctant to interfere with irrevocable Letter of Credit and atleast in the sphere of international banking. The apparent reason for the reluctance is founded on the understanding that the decision would have an unfavorable effect on the international trade.

86. Finally in the case of; *R.D. Harbottle (Mercantile) Ltd and Another vs Naitonal Westminster Bank Ltd and Others (1977) 2 All ER 870*, the Court held that;

> *"it is only in exceptional cases that the Courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts."*

87. Be that as it were, as aforesaid, the contractual relationship between the Plaintiff and the 1st Defendant is completely separate and independent from the contractual relationship between the 1st and 2nd Defendant. In that regard, the Plaintiff can still enforce whatever rights it has against the 1st Defendant under the Sale of Goods Agreement. In any case, the issue of breach of the contract goes to the root of the matter herein and is a subject of Arbitration. It is in the said proceedings that the issues raised herein that relate to the specification of the Coal supplied that will be addressed. This Court cannot at this stage delve into the same.

88. Turning back to the prayers in the Application, I find that, the Plaintiff has sought for an order of injunction pending the hearing and determination of the dispute between the parties through Arbitration. As aforesaid, there is no doubt that the parties herein agreed that, any dispute relating to the Agreement would be resolved through Arbitration. However the Plaintiff seeks relief under Section 7 of the Arbitration Act, 1995. The provision thereof as aforesaid, empowers the Court to issue interim measure of protection to preserve assets (in this case, the Coal) and/or evidence to be used in the Arbitral proceedings evidence.

89. In any case, the Applicant is not seeking that the order for injunction be given pending the referral of the matter to Arbitration, but pending the "hearing and determination" of the Arbitration proceedings. In most cases then, the Court will issue interim measure of protection pending the referral of the matter and not the final determination thereof. The Arbitrator has a right to issue interim measure of protection under Section 18 of Arbitration Act, 1995. This is founded on the provisions of Section 10 of Arbitration Act, 1995 which restricts the Court's interference with matters governed by the Arbitration Act. In that regard, the Court will not even issue the order as prayed.

90. Be that as it were, I also note that prayer (1) in the Plaint and prayer (4) in the Chamber Summons Application are same, "word for word". It therefore follows that the grant of the prayer in the Chamber Summons Application will conclude the entire matter at this stage.

91. In conclusion, I find that, based on the facts herein and the analysis of the law, and in the absence of any allegation of fraud on the part of the 1st Defendant, an order of injunction to restrain the 2nd Defendant and/or his agents from honouring the subject Letter of Credit dated 15th February 2018 cannot be granted. It is therefore not necessary to even consider whether the principles that guide the grant of injunction have been met.

92. All in all, I find no merit in this Application. I dismiss it with costs to the Respondents.

93. Those then are the Orders of the Court.

Dated, delivered and signed in an Open Court this 15th day of August 2018.

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Mureithi.....for the Plaintiff/Applicant

Ms. Omamo for Mr Ongude.....for the 1st Defendant/Respondent

Mr. Wawire.....for the 2nd Defendant/Respondent

Dennis.....Court Assistant