REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS-NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT. NO. 30 OF 2017

RICHARD BORO NDUNGU.....APPLICANT

VERSUS

KPMG EAST AFRICA ASSOCIATION…..……..1ST RESPONDENT

KPMG KENYA……..……...……..2ND RESPONDENT

AND

KPMG INTERNATIONAL CO-OPERATIVE

(KPMG INTERNATIONAL)…….....1ST INTERESTED PARTY

KPMG AFRICA……2ND INTERESTED PARTY

RULING

Introduction

1. It would be no exaggeration to describe the hitherto calm relationship between the Applicant and the Respondents as ruffled and flustered. The calm relationship subsisted for nearly two decades with the Applicant as a partner in the 2nd Respondent firm and thus a member of the 1st Respondent firm. On 13 January 2017 however, by a resolution, the Applicant's partnership was terminated through compulsory retirement.

2. The termination prompted the Applicant to declare a dispute and invite the agreed mode of resolving the dispute; arbitration by a sole arbitrator.

3. Before the court however the Applicant has launched a suit seeking, inter alia, interim measures of protection pending hearing and determination of the arbitration. The application which was filed simultaneously with the Plaint for such interim measures is opposed and is what concerns this ruling.

Background facts

4. The conflict between the parties arose as a result of the resolution of 13 January 2017 by the

Respondents which effectively terminated the relationship between the parties.

5. The papers filed set out the history in a coherent and chronological fashion. Some finer details are however lacking, but that may be understood. The entire narrative, given that the dispute ought to be placed before an arbitrator, may not be necessary. I ought to and indeed will also refrain from giving a detailed repertory of the facts.

6. However to help understand the ruling, I give a brief narrative.

7. The Applicant has been a partner in the 2nd Respondent which is a member of the 1st Respondent since 2000. He has been an equity partner. Their relationships were guided by almost identical Partnership Agreements ("PAT Agreement(s)").

8. In October 2016 an anonymous complaint was lodged with the Respondents. The complaint concerned some alleged impropriety on the part of the Applicant. The complaint was investigated by the senior partner. Apparently the complaint was found not to be without merit and ultimately by a resolution of 13 January 2017 the Applicant was removed from the partnership and membership of the Respondent firms. The Applicant had in the meantime raised issue with the Respondents on how the complaint was being investigated and also on the investigator. Post 13 January 2017, the Applicant also raised issues of procedural impropriety on the process of his removal as partner in the 2nd Respondent and all advisory companies of the Respondents. The resolution had however been communicated to the Applicant.

9. Absent a positive response to his protestations, the Applicant declared a dispute under Clause 28 of the PAT Agreements. The Applicant also moved to court to affirm his declaration and also obtain interim measures of protection.

10. The Respondents naturally denied the Applicant's contest to the Respondents' actions. The Respondents do not however contest the existence of a dispute and the forum to adjudicate the dispute. Both parties are willing to move to arbitration.

Current status quo and the Application

11. The current state of affairs is that a notice to effectively terminate the relationship including bringing to an end any earnings and drawings by the Applicant is running and is set to lapse on 31 August 2017. This state of affairs is confirmed by the Replying Affidavit sworn and filed on behalf of the Respondents by Josphat Leonard Mwaura on 8 February 2017. Both counsel also confirmed this state of affairs to the court on 16 March 2017. Additionally, the parties are headed to arbitration having apparently agreed on an arbitrator.

12. The Applicant would however want to see the defined state of affairs subsisting until the determination of the arbitration. By his current application, the Applicant seeks to suspend or stay the resolution of the Respondents of 13 January 2017 which terminated his partnership/membership, whether by expulsion or retirement. The application also seeks to restrain the Respondents from curtailing, withdrawing or in any manner interfering with the Applicant's benefits including his vested annual earnings, monthly drawings and related emoluments.

13. The orders are sought as interim measures of protection pending the reference, hearing and determination of an arbitration between the parties.

Arguments in court

The Applicant's case

14. The Applicant's case as argued by Mr. Kithinji Marete is relatively straight forward.

15. The Applicant contended that there is need for an interim measure of protection as the Respondents'

action effectively will equate the complete removal of the Applicant from the partnership in the Respondents yet that will be the core question before the arbitral tribunal. The notice period is set to cease on 31 August 2017 and then if the arbitration would not have been wrapped up there will be nothing more to litigate upon before the arbitrator.

16. According to the Applicant, he has a good case before the arbitral tribunal as there was manifest illegality in the process of his removal. In this regard the Applicant highlighted the fact that he was never given any advance notice of the proposed motion for his removal.

17. Urging the Applicant's case, Mr. Marete submitted that the court had a duty to ensure that all the parties before the arbitrator operated and proceeded on an equal footing. In the instant case, it would be almost impossible to prosecute the claim fairly before the arbitrator with the resolution and subsequent notice "hanging over the Applicant's head".

18. Mr. Marete additionally argued that the PAT Agreements did not contemplate a situation where the Applicants partnership ceased once a dispute was placed before an arbitral tribunal. Instead, it was counsel's view that the PAT Agreements were tailored to ensure that the state of affairs was not disturbed until after the arbitration had been concluded. Counsel added that the Applicant would pursue the arbitral process with the necessary due diligence and, at the courts prompting, expedition. Counsel concluded that the interim measure of protection was also necessary to avoid subjecting the Applicant to pecuniary embarrassment.

19. In support of his arguments, counsel referred to the case of **Giella *vs.* Cassman Brown & Co Ltd [1973] EA 358** as well as **Teradyne *vs.* Mostek Corp 797 F 2d 43 (1st Cir. USCA).**

The Respondents' case

20. The Respondents' case was urged by Mr. Kenneth Frazer SC.

21. As articulated in the heads of argument filed on 15 March 2017, Mr. Frazer submitted that while the court had jurisdiction to issue an interim measure of protection pursuant to Section 7 of the Arbitration Act, a reference to arbitration did not equate a stay of any action already undertaken by a party to the proceedings.

22. Whilst placing reliance on the Replying Affidavit filed in opposition to the application, Senior counsel submitted that the relationship between the parties had fundamentally broken down and it would be inappropriate in the circumstances to intervene. Senior Counsel stated that in matters employment or partnership, the court should never compel any unwilling person to continue with such relationships especially, where there is need for continual supervision. In this regard, counsel relied on the 3rd edition of Meagher, Gummow & Lehane's treatise **Equity Doctrines and Remedies** at paragraphs 2011-13 as well as the 16th edition of **Lindley & Barks on Partnership** at paragraphs 23-40.

23. Mr. Frazer wound up his submissions by asserting that as the parties have agreed to refer the matter to arbitration and as the Respondents are still continuing to effect payment of the Applicant's drawings and emoluments, the Applicant stood to suffer no prejudice and indeed the subject matter was intact. For completeness, senior counsel added that the Respondents were willing to complete the arbitral process prior to the 31 August 2017 when the notice given to the Applicant is set to lapse.

24. In a pithy rejoinder, Mr. Marete asserted that even in a partnership relationship an order to continue the same could be issued pending the completion of the arbitral process, especially where there had been an invalid exercise of the power to terminate the partnership.

Discussion and Determination

The issue

25. I have considered the application as well as the affidavits filed in support and in opposition. I have also reflected on the arguments by counsel. The only issue before me is whether the Applicant is entitled to any interim measure of protection pending the intended arbitration.

The law

26. The concept of interim or provisional measures of protection has received attention of our courts on various occasions. I do not find any need to rehearse the jurisprudence in this regard or restate in detail what guides the court when faced with an application for provisional relief pending arbitration as lodged under Section 7 of the Arbitration Act, 1995. It would simply suffice to cite the following passage from the Court of Appeal decision in **Safaricom Limited *vs.* Ocean View Beach Hotel Limited & 2 Others [2010] eKLR** (Per Nyamu JA).

> **"… Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-**
>
> ***1. The existence of an arbitration agreement.***
>
> ***2. Whether the subject matter of arbitration is under threat.***
>
> ***3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.***
>
> ***4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunals decision making power as intended by the parties".***

27. I would also add one further quote from the more recent decision in **Futureway Limited *vs.* National Oil Corporation of Kenya [2017]e KLR** where this court stated as follows:-

> **"[35]** ***I have no quarrel with the principles stated in*** **Safaricom Ltd** ***case. The prerequisites are sound. I would perhaps add that the grant of an interim order of protection is indeed discretionary and thus the court ought to take into account the factor of urgency with which the applicant has moved to court. The court should also, in my view, look into the risk of substantial (not necessarily irreparable) harm or prejudice in the absence of protection.***
>
> ***[36] The principles laid out in the case of*** **Giella –v- Cassman Brown & Co. Ltd [1973] EA 358** ***as to interlocutory injunctions do not however apply, if for any reason, but to avoid pre-empting or prejudicing the dispute before the arbitrator".***

28. The principles are clear. The onus is on the applicant to prove presence of a reasonable and genuine need for the interim measure(s) sought on a balance of probabilities. This is to be done on the basis of the prerequisites outlined in the *Safaricom case* and the *Futureway case*, while the court also keeps in mind the aim of interim measures of protection which is generally to ensure that the arbitral process is not compromised through a destruction of the subject matter.

Analysis

29. I start by stating that whilst the court has jurisdiction to grant the orders (interim measures of protection) sought, care must be taken to ensure that in the process of determining an application for interim measures, the arbitral process is not compromised. The court should not be looking out for the merits of the applicant's claim or demerits of the respondent's defense and vice-versa. This would lead to a situation where the arbitral process and decision is pre-empted and ultimately compromised. It is for that simple reason that I have as much as possible, ignored large portions of the Applicant's affidavits which seek largely to put across the Applicant's case for the impropriety on the part of the Respondents in suspending/expelling the Applicant. It is for the same reason that I have avoided making reference to or

comments on correspondence which was copiously referred to by the Applicant with a view to demonstrating mischief and bad faith on the part of the Respondents.

30. The aim of the court should be to ensure that the arbitral process is not defeated. Therefore interim measures of protection will take any form. The categories are not closed: see **Futureway Ltd *vs.* National Oil Corporation of Kenya (supra).** If it is necessary to protect the subject matter of arbitration the court may even make an order for the continuation or performance of a contractual relationship.

31. In **Sabmiller Africa BV & Tanzania Breweries Ltd *vs.* East African Breweries Ltd [2009] EWHC 2140 (Comm)**, the parties were breweries. They entered into various commercial agreements including share purchase, distribution and shareholders' agreements to increase cooperation. The Respondent later purchased shares in another third-party rival brewery in breach of a restraint clause in the distribution agreement. The applicant applied for many injunctions restraining the Respondent from amongst other things, completing the purchase of shares in the rival brewery, breaching the distributorship agreement until further orders of the arbitral tribunal which was yet to constituted.

32. The court granted the injunctions holding that not granting the injunctions would result in irremediable injustice as the subject matter would be lost. In the process the court overruled arguments by the respondent (EABL) that granting the injunctions would be dispositive of the issues between the parties.

33. It depends on the circumstances of the case and the will to ensure that the arbitration process is neither compromised nor defeated at time of completion. The subject matter ought to be preserved not just for purposes of the arbitration but also in the interest of the parties.

34. In casu, do the circumstances dictate an order in favour of the Applicant?

35. It is evidently clear that before the arbitral tribunal the thrust of the Applicant's claim will be that the termination of the Applicant's partnership on 13 January 2017 was invalid. The Applicant will be seeking to have the resolution of 13 January 2017 and any subsequent notice to the Applicant declared invalid. Quite evidently too nothing would restrain the Applicant from seeking a continuation of the partnership and or damages.

36. The Applicant contends that his status as a partner ought to be preserved. He must not be deemed, until at least after the arbitral tribunal, as an 'exiting partner'. He says there is support for this contention as even the PAT Agreements anticipated that where a partner is expelled then pending arbitration he must continue to be a partner with full benefits.

37. I have read the relevant portion of the PAT Agreement with the 2nd Respondent. It is Clause 22(iii). It reads as follows:

> ***"(iii) Any question concerning the power to expel or the expulsion or purported expulsion of a partner under this clause may be referred to arbitration and if it is found in any consequent proceedings that such partner was unlawfully expelled then within (3) days after the final determination of such dispute the expelled partner may by notice in writing resign from the partnership with immediate effect".***

38. Firstly, and in so much as I have to be careful not to set a stringent standard, I do not hold the view that the clause could have been crafted with the Applicant's line of thought in mind.

39. Commercial efficacy and relationships vis-à-vis partnerships would dictate otherwise. I do not view it that Clause 22(iii) as read together with Clause 1.5.12 (Arbitration Agreement) was intended, once notice of dissatisfaction with a decision to expel and declaration of a dispute to be referred to arbitration was given by the removed partner, to detract the Respondents from the obligation to give prompt effect to the decision to expel. The Respondents could certainly do so subject to the implied rider that their decision if revised by the arbitrator would be void *ab origine*. This in my view is what Clause 22(iii) stands for. It

does not suggest an automatic continuation of the partnership. It does not also suggest an automatic detraction of a decision to expel one from the partnership.

40. Secondly, while the Applicant appears to contend that he was removed by expulsion pursuant to Clause 22(i) of the PAT Agreement, the Respondents' case appears to be that the Applicant was removed through compulsorily retirement pursuant to the provisions of Clause 1.5.2. The two contentions, I have no doubt, will be the subject of determination by the arbitral tribunal. They both lead to removal from partnership. It would consequently be inappropriate for me to determine that the Applicant was removed by expulsion and that Clause 22(iii) applies to his advantage in so far as the current application for provisional relief is concerned. Let the arbitrator decide this bit.

41. The current state of affairs, *in casu* ,is that the Respondents continue to pay the Applicant his drawings and emoluments. The notice period will lapse on 31 August 2017 when presumably the emoluments and drawings will also cease. The parties, in the meantime, are also all set to agree on the constitution of the arbitral tribunal. At the oral hearing of the instant application both counsel confirmed to the court that they had agreed on an arbitrator. The Applicant appears distressed that the arbitral tribunal proceedings may not be completed prior to 31 August 2017 hence the need to have an order not only suspending the resolution to remove him from the partnership but also to have his benefits intact until the arbitration is completed. The Respondents think otherwise

42. I tend to agree with counsel for the Respondents when he states that it is "far too early to extend the payments [of drawings and emoluments] beyond August 2017". Even though the notice period is running, the parties have agreed on an arbitrator. While it is true that arbitral process may not be completed prior to 31 August 2017, I hold the view that Applicant ought to have solace in the fact that even the arbitral tribunal has powers under Section 18(1)(a) of the Arbitration Act, upon application by any party, to:

> "***order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute…"***

43. The fears of the Applicant that the arbitral process may flip beyond August 2017 could be well taken care of and allayed by the arbitral tribunal acting pursuant to Section 18(1)(a) of the Arbitration Act. No doubt the arbitral tribunal would have occasion to address the suspension of the notice as well.

Conclusion and Disposal

44. I am satisfied that the state of affairs (a running notice period coupled with payment of drawings and emoluments) does not require any additional orders or measures of protection. The relief sought would not impact on the conduct of arbitration. It would also not impact on any final relief granted by the arbitrator. I am also satisfied that the Applicant will not suffer any irremediable prejudice either in the short run as the arbitral process proceeds or in the long run (post arbitral process). The Applicant has not shown that the subject matter will dissipate. If any prejudice becomes apparent, the arbitral tribunal will perfectly be able to stem in.

45. The state of affairs militates against the Applicant. It is a common cause that he is receiving his drawings and emoluments and further that he is not keen in going back to resume any duties. The arbitral tribunal will also be in a position to preserve the state of affairs if so satisfied that it ought to be preserved should it turn out then that the status quo is set to be disturbed. I find no merit in the application.

46. As to costs, though no reason may be advanced why costs should not follow the event as usual, the circumstances dictate and I am inclined to let each party to bear its own costs

47. The application dated 23 January 2017 is dismissed. Each party shall bear its own costs of the application.

48. Orders accordingly.

Dated, signed and delivered at Nairobi this 24th day of March, 2017.

J.L.ONGUTO

JUDGE