REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS , NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC CIV. APPL. NO. 550 OF 2016

IN THE MATTER OF THE ARBITRATION ACT, 1995

FUTUREWAY LIMITED.....APPLICANT

VERSUS

NATIONAL OIL CORPORATION OF KENYA.....RESPONDENT

RULING

Introduction

1. This is an application for injunctive relief pending hearing and final orders of an arbitration tribunal. At the time of the hearing of the application the arbitral tribunal was yet to be constituted by the parties.

2. The Respondent is a state corporation while the Applicant is a private entity. The matter itself generally concerns the transportation and distribution of the Respondent's petroleum products in Kenya. The battle, specifically is over the Respondent's decision to terminate a contract for petroleum product transport services between the two parties dated 1st August 2015. The Applicant seeks to have the Respondent restrained from awarding a contract allegedly for the provision of the same services to a(ny) third party until the arbitral process is completed.

Background and Litigation History

3. In August 2014 following a successful tender process, the Applicant and the Respondent executed a contract for the provision of transport services ("the Transport Contract"). It was dated 1st August 2014.The Respondent contracted the Applicant for a term of 5 years to provide at least six (6) automobile trucks for the exclusive use by the Respondent in transporting and distributing the Respondent's petroleum products.

4. On November 2016, following an incident involving one of the Applicant's trucks and drivers, the Respondent suspended the use of the Applicant's trucks. Subsequently, on 22 November 2016 the Respondent terminated the Transport Contract. This prompted the Applicant into declaring a dispute. The Applicant urged for arbitration and simultaneously moved the court for interim measures of protection

pending arbitration.

5. The Applicant had moved to court on 28 November 2016. It filed an originating Notice of Motion. It sought orders to refer the dispute to arbitration. It also sought orders, in a way, aimed at continuing the contractual relationship for the duration of the proceedings. The latter orders were specifically sought to restrain the Respondent from suspending or terminating the Transport Contract. The orders were also sought to cause the Respondent to resume allocating the Applicant petroleum products for transportation and distribution.

6. The Motion of 28 November 2016 was opposed vide a Replying Affidavit filed on 7th December 2016 (sworn by Pauline Kimotho) with the Respondent mainly insisting that there was nothing to be protected as the Transport Contract had been terminated. The Motion was later largely (not wholly) compromised as follows:

> ***1. THAT the dispute between the Parties, be and is hereby referred for dispute resolution by way of arbitration before a sole arbitrator in accordance with Clause 16.2 of the contract between the Parties dated 1st August 2014.***
>
> ***2. THAT the Parties shall have 30 days within which to agree on a sole arbitrator.***
>
> ***3. THAT the Applicant's application dated 28th November 2016, is hereby marked as adjourned generally with possibility of revival.***
>
> ***4. THAT each party is to bear its own costs for the said Application.***

7. That was on 14 December 2016.

8. The very next day, even as the parties' counsel engaged in the process of agreeing upon an arbitrator, the Respondent invited tenders for provision of transportation services for petroleum products. The closing date/time for the tender was 5 January 2017 at 1100 hrs. The tender reference was NOCK/PRC/03(1213)2016-2017("the Tender"). Then on 1 March 2017, the Applicant moved the court, once again under a Certificate of Urgency specifically to bar the Respondent from awarding the Tender or alternatively signing a contract with the successful bidder.

9. Again, the Respondent contested the Motion. The Replying Affidavit filed on 10 March 2017, in response, was sworn by Pauline Kimotho on the same day.

The Applicant's case and arguments

10. The Applicant's case which is pegged on the consent orders recorded on 14 December 2016 is relatively straightforward.

11. The Applicant contends that the consensual arbitral process is already set to kick off. The Applicant further contends that the Respondent's action in advertising a new tender was meant to defeat the arbitral process and if the tender is awarded and a contract signed the arbitral process would be of no value. According to the Applicant, the Respondent appreciates the existence of a dispute which involves a challenge to the termination of the transport contract. If the tender process is completed and the contract signed with the successful bidder the Applicant's remedies before the arbitral tribunal will be confined to an award of damages only and the option of reinstatement of the contract will be extinguished.

12. The Applicant also contends that an award of the tender will also curtail the powers of the Arbitration Tribunal as to any remedies it (the arbitral tribunal) may order. According to the Applicant, this is the mischief the Respondent seeks to advance and which the court ought to avoid.

13. Finally, the Applicant asserts that the Respondent stands to suffer no prejudice if the interim orders of protection are issued.

14. The Applicant invoked the principle of the balance of convenience and also the fact that the loss the Applicant is likely to suffer will be disproportionate to that of the Respondent if interim measures of protection are not granted.

15. While urging the Applicant's case, Mr. Paul Maina submitted that the subject matter of the arbitration was the suspension and ultimate termination of the Transport Contract. Counsel contended that the Applicant would ultimately be seeking a reinstatement of the Transport Contract and that it would only be appropriate that the status quo is maintained to help preserve the integrity of the arbitral process which was set to commence.

16. Counsel contended further that the orders sought were only temporary and that the court had jurisdiction vide Section 7 of the Arbitration Act to grant interim measures of protection in terms of the prayers sought by the Applicant. Counsel pointed out that while the Respondent has a number of transporters the 'spaces' available for the transporters were very limited.

Respondent's case and arguments

17. Mr. I.O. Kazungu argued Respondent's case as otherwise contained in the rather prolix Replying Affidavit of Pauline Kimotho filed on 10 March 2017.

18. The Respondent maintained that the instant application is an abuse of the process of the court, incompetent, fatally defective and lacking in merit. It was also the Respondent's contention that the Applicant is guilty of falsehoods and misrepresentation of facts.

19. It was further the Respondent's contention that the court lacks the requisite jurisdiction to grant the orders sought by the Applicant as issues involving tendering and procurement process by public entities fall squarely within the realm of the Public Procurement Regulatory Authority ("the Authority") which had already determined that the Respondent could proceed with the Tender process. In this regard, Mr. Kazungu referred the court to a letter by the Authority, penned on 22 February 2017 and which dismissed a complaint by the Applicant on the Tender.

20. Secondly, the Respondent argued that the application is an abuse of the process of the court as there is still pending a similar application which was also filed as an originating notice of motion on 28/11/2016. The former application also sought interim orders but was never granted by the court. According to Mr. Kazungu, the Applicant could not approach the court by way of an originating notice of motion having filed an originating motion which was yet to be disposed of.

21. It was also the Respondent's case that the application is misconceived as it, among other things, seeks the court's determination of issues which go to the root of the intended arbitral process. In this regard, Mr. Kazungu pointed out that when the Applicant seeks that the Respondent be restrained from awarding the successful bidder a contract to ensure that any ultimate orders by the arbitrator as to reinstatement of the Applicant are honoured. The Applicant is effectively asking the court to make a determination on the actual termination of the transport contract.

22. With regard to the merits of the application, the Respondent contended that the Applicant had failed to meet the threshold set under Section 7 of the Arbitration Act. According to the Respondent, the Applicant had failed to show that the subject matter of the intended arbitration was going to waste. The Respondent further contended that Applicant had focused erroneously on the principles of **Giella *vs.* Cassman Brown & Co. Ltd [1973] EA368** which dealt with interlocutory injunctions.

23. Mr. Kazungu, referred the court to the case **of Safaricom Ltd *vs.* Ocean view Beach Hotels Ltd & 2 others [2010]eKLR** where Nyamu JA stated that for a party to succeed in an application for interim measures of protection, the party need to show and the court needed to take into considerations the following matters. Firstly, the existence of the arbitration agreement. Secondly, whether the subject matter was under threat. Thirdly, the appropriate measures of protection in the circumstances of the case and, finally, the period for which the interim measure was sought.

24. Counsel submitted further that the subject matter of arbitration was not under threat at all and that what the Applicant sought to preserve could actually not be preserved as the Transport Contract had been terminated and the Applicant's remedy now lay in damages. For this proposition, counsel relied on the case of **CMC Holdings Ltd & and *vs.* Jaguar Land Rover Exports Ltd [2013]eKLR**.

25. Then urging that the application be dismissed, Mr. Kazungu asserted that there were no special circumstances to warrant the issuance of the interim orders of protection as in any event the tender sought to be halted had nothing to do with the terminated contract. Mr. Kazungu then blamed the Applicant for inexplicable delay in moving the court and also delays in finalizing the appointment of the arbitrator.

Discussion and Determination

Issue(s)

26. The core question is whether the Applicant is entitled to the interim measures of protection as sought in the application dated 1st March 2017. I will also simultaneously address the issue of the court's jurisdiction which has been contested by the Respondent.

Interim measure(s) of protection: nature, aim and test

27. Interim measures of protection, also known as provisional reliefs are stated by Jean-Francois Poudret & Sebastien Besson in the 2nd edition of their treatise "**Comparative Law of International Arbitration " (Sweet & Maxwell,Lond 2007,p.519**) to be measures

> ***"…to preserve a factual or legal situation so as to safeguard rights recognition which is sought else where from the court having jurisdiction as to the substance of the matter"***

28. As I understand it, the aim of interim measures of protection is to protect the parties' rights for the duration of the arbitration proceedings. Ordinarily, they ensure that the subject matter of arbitration will be in the same state at the beginning of or during the arbitral proceedings: see **Elizabeth Chebet Ochardson *vs.* China Sichuan Corporation for Techno–Economic Corporation & another [2013]eKLR**. In consequence, they may be issued during or before the commencement of the arbitral proceedings in favour of either party.

29. I hasten to add that the categories are definitely not locked to any form and are dependent on the facts of each case. Thus the interim measure of protection may take the form of preserving or accessing evidence which would otherwise disappear before the trial commences or concludes. In such a case the interim measure is to help guarantee a fair arbitral process.

30. Likewise, an interim measure may be taken by either the court or arbitrator, for the provision of security for costs by the claimant. The idea is to guarantee a future enforcement of part of the award by the arbitral tribunal. To ensure realization of an award, an order may also be made for the party to refrain from disposing of its assets award: see **Kastner *vs.* Jason** [2004] EWCA1599. And, finally an order may be made by the court to enforce an interim measure of protection issued by the tribunal. The categories of interim measures of protection are by no means closed.

31. Both the court as well as the Arbitral Tribunal have jurisdiction to grant interim measures of protection under sections 7 and 18 of the Arbitration Act, 1995. The courts' power under Section 7 is also driven by the residual need to extend support to the arbitral process: see **Channel Tunnel Group *vs.*Balfour Beatty Ltd [1993]1 All ER 688 [f] & [g]**, which was cited with approval in the *Safaricom Ltd* case.

32. Caution must however be taken when it is the court dealing with a request for an interim measure of protection to ensure that the court confines itself to the provisional measure sought and does not encroach on the exclusive jurisdiction of the tribunal set to decide the issue in dispute. This is in view of the fact

that the court's jurisdiction under Section 7 or 18 of the Arbitration Act does not compete with the arbitrator's jurisdiction but is intended to supplement and compliment it.

33. The crucial question consequently is : when does the court intervene and issue an interim measure of protection?

34. In the *Safaricom Ltd* case, the Court of Appeal (per Nyamu JA) considered the effect of section 7 of the Arbitration Act and its application before concluding that for the court to act under section 7 of the Arbitration Act, the essential matters which the court

> ***"…must take into account before issuing the interim measure 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 tribunal's decision making power as intended by the parties"***

35. I have no quarrel with the principles stated in the *Safaricom Ltd* case. The prerequisites are sound. I would perhaps add that the grant of an interim measure 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 *vs.* Cassman Brown & Co. Ltd [1975] EA 358** as to interlocutory injunctions do not however apply, if for any reason, to avoid pre-empting or prejudicing the dispute before the arbitrator.

37. With the foregoing principles of law in mind, I will now determine the reserved issues.

Of the court's jurisdiction

38. Umpteen times , it has been held that jurisdiction is everything and in its absence the court must lay down its tools and move no further: see, for example, **The Owners of the Motor Vessel the ' Lilian SS' *vs.* Caltex Oil Kenya Ltd [1989] KLR 1** and also **Samuel K. Macharia & Another *vs.* Kenya Commercial Bank Ltd & 2 others [2012]eKLR.** A question of jurisdiction cannot be ignored by the court.

39. The Respondent has raised issue with the court's jurisdiction. The Respondent contends that the matter raised before the court concerns a tendering process and as to whether or not such a process ought to be halted is entirely the recluse of the Public Procurement Regulatory Authority ("the Authority"). It was submitted that the Applicant had already unsuccessfully approached the Authority to stall the tender process. Counsel for the Respondent did not however point out the relevant and specific provisions of law or rules which grant such jurisdiction exclusively to the Authority.

40. With unfeigned respect, I consider and view it that in this regard; the Respondent and its counsel have deliberately decided to misconstrue the Applicant's motion. What the Applicant seeks is to preserve a specific state of affairs or indeed the subject matter of the intended arbitration. It is not a contest on violation of procurement procedures which would invite the powers of the Authority under section 38 of the Public Procurement and Disposal Act, 2015 to investigate any alleged irregularities in a public tender process.

41. The dispute herein was purely a contractual one and a party has alleged breached or unlawful termination of contract. The party, being the Applicant, would still wish to have the contract in place and it is the contract that it seeks to preserve by stalling any other third party being engaged in its stead. It is simply not about procurement procedures and process.

42. I am satisfied that pursuant to the provisions of section 7 (1) of the Arbitration Act which stipulates that "*it is not incompatible with an arbitration agreement for a party to request from the High Court, before or during proceedings , an interim measure of protection and for the High Court to grant that measure*", this court has the jurisdiction to entertain the application.

An interim measure of protection?

43. It brings me to the core question as to whether I should grant the orders sought.

44. It is common ground that the Transport Contract was terminated by the Respondent. It is also common ground that there was an arbitration agreement in the event of a dispute. Further the parties are in agreement that a dispute has indeed arisen and have through a court order agreed to buttress the arbitration agreement by having the dispute resolved by an arbitrator.

45. Controversy is however generated when the Applicant seeks to preserve the subject matter, identified as the contractual right of the Applicant to render transport services to the Respondent. The Respondent retorts that there is nothing to be preserved.

46. My understanding of the application is that the Applicant seeks to ensure, by obtaining injunctive orders, that the status of the contract between the Applicant and the Respondent will be intact at the time arbitral proceedings commences up till it is concluded. The status currently is that the contract is terminated. The Applicant blissfully admits to this fact only adding that there is no replacement for the applicant *qua* transporter and that state of affairs ought to be maintained. One way of maintaining the state of affairs is ensuring that no new contract is awarded to an alternative transporter by the Respondent, hence the injunction sought to restrain the execution of a contract with any successful bidder.

47. According to the Applicant, by granting the injunction, the court would simply be preserving the subject matter of the arbitration which will also entail the question as to whether the termination was lawful and valid.

48. The Respondent asserts that the Applicant has not met the threshold.

49. In Mr. Kazungu's submissions, by seeking to preserve a contract already terminated the Applicant is, firstly asking the court to rewrite or re-draw the contract for the parties. Secondly, the Applicant, according to Mr. Kazungu is seeking to preserve that which is no longer there.

50. In support of his submissions, Mr. Kazungu relied on the case of **National Bank of Kenya Ltd *vs.* PipePlastic Samkolit (K) Ltd & another [2002] EA 503** where the Court of Appeal held that a court of law cannot rewrite a contract between parties. Counsel also relied on the cases of **Inforcard Holdings Ltd *vs.* Attorney General & 2 others [2014]eKLR** and **CMC Holdings & Another *vs.* Jaguar Land Rover Exports Ltd [2013]eKLR** for the proposition that once a contract has been terminated there is nothing to be conserved as in any event " *a contract is not something that would be wasted if it was not conserved*".

51. While I agree with the Respondent that the correct legal principle is that parties must be held to their bargain and the court ought not relieve or burden either party to a bargain, I do not agree that in seeking an interim or provisional relief the Applicant is seeking to have the court redraw the contract for the parties.

52. It is true that the Transport Contract provided for a termination clause. The intended arbitration will, inter alia, be focused on this clause with a rider question as to whether the termination was valid also set

to occupy the arbitral tribunal. The Applicant contends and the Respondent denies that the termination was valid. The arbitral tribunal may be called to answer this question but in the meantime the Applicant would want to see to it that its slot in the transport services of the Respondent is not occupied by another party.

53. I do not see how it may be said that a consideration as to whether or not the status quo is to be maintained equates re-drawing or re-writing the contract for the parties.

54. In support of the contention, that where a contract has been terminated the court faced with an application for interim measure of protection cannot make orders akin to reviving the contract, the Respondent cited two High Court decisions rendered in 2013 and 2014. They were **CMC Holdings & another *vs.* Jaguar LandRover Exports Ltd [2013]eKLR** and **Inforcard Holdings Ltd *vs.* Attorney General and 2 others [2014]eKLR** .

55. I have read both decisions.

56. The decisions were to the point that ”a contract is not something that could be wasted if it was not conserved”. The two decisions sought to basically close the categories of interim measures of protection. I appreciate that it is good discipline for courts in the proper and efficient administration of justice to adhere to the doctrine of precedent: see **National Bank of Kenya Ltd *vs.* Wilson Ndolo Ayah [2009] KLR 762** . I however note that the decisions were both High Court decisions and am not strictly bound by them. I have discretion not to follow them in so far as they sought to limit the form an interim measure of protection may take.

57. I hold the view that the form an interim measure of protection takes may not be closed. It is a question of whether the subject matter of an arbitral process will be wasted beyond reach. An order aimed at clarifying a contractual relationship may actually touch on the merits of the arbitration proceedings so it may not be appropriate. However an order which seeks to preserve a contractual right may not be too far-fetched as an interim measure of protection where it has been sought timeously. Such an order may actually preserve the subject matter of arbitration if that is what the parties are wrangling over. It all depends on the circumstances of each case.

58. I must however make it clear that the question as to whether or not a party (in this case the Respondent) is entitled to terminate a contract is one to be resolved by the arbitrator and the court must make no attempt in trying to resolve such a question even as it considers whether or not to grant an interim measure of protection. The court’s power to grant interim measures of protection is only limited to this extent.

59. *In casu,* there is evidence before me in the form of correspondence exchanged between the parties that after 4th November 2016 the relationship between the Applicant and the Respondent which had been relatively smooth deteriorated so rapidly leading to the Transport Contract dated 1 August 2016 being terminated by the Respondent. The termination was on 22 November 2016.

60. The Applicant does not currently ask of the court order to ensure the parties respective contractual obligations and rights are observed. Instead, the Applicant seeks orders to preserve the status quo. That is to say that the Respondent is not to recruit any other transport provider until the intended arbitration is finalized. It is not any contractual right being preserved.

61. Ordinarily, it is true that under contract law a party faced with a threatened breach of contract or actual termination is not entitled to preserve his rights to have the contract performed but rather the primary obligation to perform gives way to a secondary obligation to pay damages: see **Photo Production Ltd *vs.* Securicor Transport Ltd**

[1980] 1 AC 827,848 . For purposes of section 7 of the Arbitration Act the court must be bold and open enough to preserve where need be any chose-in-action or contractual right. Such choses-in-action or contractual rights may, in my view, be appropriately deemed as assets. The Applicant herein seeks to

preserve its right to transport the Respondent's petroleum products.

62. In my judgment however the injunctions sought do not and would not preserve the Applicant's contractual rights, if any. I am unable to see how an injunction would preserve the Applicant's rights under the now terminated Transport Contract. If the Applicant wanted to preserve the contractual right to transport the Respondent's products pending arbitration, it ought to have sought an interim mandatory injunction compelling the Respondent to continue with or resume the transport contract pending arbitration.

63. There is the second limb of argument that the Respondent's action of seeking to engage another transporter has the effect of irretrievably and irreversibly displacing the Applicant's rights to carry out and perform the Transport Contract before the arbitral tribunal has the opportunity to pronounce on the parties' rights. Accordingly, it was contended that an injunction was necessary to preserve the contractual right to carry out and perform the Transport Contract.

64. On this, I must refrain from pronouncing whether the Transport Contract as a whole was one that was specifically enforceable or simply whether its breach could not be adequately remedied by an award of damages as suggested by Mr. Maina for the Applicant. It would amount to stepping on the arbitrator's realm**.** I must only focus on whether the subject matter may go to waste or be beyond the reach of the arbitral tribunal during or at the end of the arbitral proceedings.

65. The evidence before me is not in any way indicative of a situation where if the Respondent awards the advertised tender to any successful bidder and the arbitrator on the other hand ultimately finds for the Applicant that the Respondent ought not have terminated (or repudiated) the Transport Contract and indeed proceeds to order reinstatement, then it will be impossible to reinstate. Both parties freely admit that there are "many other" transporters. More critically, the Transport Contract does not limit a designated transporter to any quota of the petroleum products which may be said to be taken away and reassigned to another transporter.

66. I must consequently reject the Applicant's argument that the subject matter of the arbitration will be beyond reach during or at the conclusion of the arbitral proceedings.

67. It brings me to the related issue of delay.

68. It is critical that an application for an interim measure of protection is made to court as expeditiously as is possible. The notice of termination of the Transport Contract was issued on 22 November 2016 and the parties then agreed to move to arbitration on 14 December 2016. The Respondent subsequently and almost immediately advertised the impugned tender No. NOCK/PRC/03(1213) 2016-2017 on 16th December 2016. In the meantime the Applicant neither pushed for the arbitral process to commence nor pursued the initial application for interim measures of protection. It was not until two and half months later that the Applicant filed another application for an interim measure of protection seeking to secure the status quo allegedly disturbed more than three months earlier.

69. I find and hold that the Applicant did not move with the necessary alacrity in the circumstances of this case.

Conclusion and disposal

70. I have found that the Respondent's jurisdictional objection is without merit. This court has jurisdiction to entertain an application for an interim measure of protection and the provisions of the Public Procurements and Asset Disposal Act, No 33 of 2015 do not apply.

71. I have also found that it is within the court's reach and power to grant interim orders to secure and protect contractual obligations and rights but that the Applicant has failed to establish that necessity. The evidence availed was not adequate to convince me that the subject matter will be disturbed beyond reach. I would not exercise any discretion in favour of the Applicant in the circumstances and the application

dated 1 March 2017 must fail.

72. I do not find it necessary to make a determination on the Respondent's common law plea that the application dated 1 March 2017 is an abuse of process by dint of an earlier originating notice of motion which was partially compromised and adjourned generally by the parties when they agreed to appoint an arbitrator. This is in view of my conclusions above.

73. The application dated 1 March 2017 is dismissed.

74. The Applicant will pay costs of the application to the Respondent.

75. Orders accordingly.

Dated, signed and delivered at Nairobi this 23rd day of March, 2017.

J.L.ONGUTO

JUDGE