REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

COMMERCIAL SUIT NO. 12 OF 2017

COAST APPAREL EPZ LIMITED…….……PLAINTIFF/APPLICANT

VERSUS

MTWAPA EPZ LIMITED……1ST DEFENDANT/RESPONDENT

I & M BANK LIMITED……..2ND DEFENDANT/RESPONDENT

RULING

(The Plaintiff's Notice of Motion dated 18th April, 2017; the 1st Defendant's Notice of Preliminary Objection dated 21st April, 2017; and the 1st Defendant's Notice of Motion dated 21st April, 2017)

1. By an agreement dated 17th November, 2017 (the Agreement) between Coast Apparel EPZ Limited (the Plaintiff) and Mtwapa EPZ Limited (the 1st Defendant), the 1st Defendant agreed to construct for the Plaintiff a purpose-built factory consisting of factory premises, an administration block and other allied infrastructure on Land Parcel Subdivision No. 952 (Original No. 975/1), Section IV, Mainland North, Mtwapa. I shall henceforth refer to the construction as the Project.

2. The Project was to be executed in accordance with the specifications and the timelines set out within the Agreement. Upon completion of the Project the 1st Defendant was to grant the Plaintiff tenancy over the suit premises for a term of nine years commencing on 1st August, 2016. The Project completion date was indicated as 30th July, 2016 with a possible extension of up to a maximum of six months. There was indeed an extension up to the end of November, 2016.

3. One of the terms of the Agreement was the provision of a bank guarantee by the Plaintiff in favour of the 1st Defendant. The said bank guarantee in the sum of United States Dollars (USD) 522,599.00 was issued by I & M Bank Limited (the 2nd Defendant).

4. Along the way, a dispute arose concerning the Project but the method for resolving disputes as provided in the Agreement was never resorted to by either of the parties. Letters and emails were exchanged culminating in the 1st Defendant's demand to the 2nd Defendant to honour the bank guarantee.

5. On 19th April, 2017 the Plaintiff filed a plaint dated 18th April, 2017 seeking orders as follows:-

"a) A DECLARATION that the 1st Defendant is not entitled to payment by the 2nd

Defendant, M/S I & M Bank Limited, pursuant to Payment Guarantee No. 021/COM/LG/0109/2016 issued to it by the said Bank before the dispute arising from or relating to the Agreement between the parties dated 17.11.2015 has been subjected to and conclusively resolved on its merits through the dispute resolution procedures set out in Clauses 8.4 and 8.5 of the said Agreement.

b) A PERMANENT INJUNCTION restraining the 2nd Defendant, M/S I & M Bank Limited, from honoring Payment Guarantee No. 021/COM/LG/0109/2016 by paying the amount guaranteed thereunder to the 1st Defendant before the dispute arising from or relating to the Agreement between the parties dated 17.11.2015 has been subjected to and been conclusively resolved on its merits through resolution procedures set out in Clauses 8.4 and 8.5 of the said Agreement

c) A DECLARATION that the dispute arising from or relating to the Agreement between the Plaintiff and the 1st Defendant dated 17.11.2015 should be subjected to the dispute resolution procedures set out in Clauses 8.4 and 8.5 of the said agreement.

d) An ORDER referring the dispute arising from or relating to the Agreement between the Plaintiff and the 1st Defendant dated 17.11.2015 to resolution in accordance with the dispute resolution procedures set out in Clauses 8.4 and 8.5 of the said Agreement.

e) Costs of the suit together with interest at court rates."

6. At the time of filing the plaint, the Plaintiff also filed the Notice of Motion dated 18th April, 2017 seeking orders as follows:-

"1.This Motion be and is hereby certified urgent, service thereof be dispensed with in the first instance and heard *ex-parte*.

2.Pending the *inter-partes* hearing and determination of this application, the Honourable Court be and is hereby pleased to grant an injunction restraining the 2nd Defendant, M/S I & M Bank Limited, from honouring, paying, or settling the Payment Guarantee No. 021/COM/LG/0109/2016 to the 1st Defendant before the dispute arising from or relating to the Agreement between the parties dated 17.11.2015 is subjected to and conclusively resolved through the dispute resolution procedures set out under Clauses 8.4 and 8.5 of the said Agreement.

3.Pending the hearing and determination of this suit, the Honourable Court be and is hereby pleased to grant an injunction restraining the 2nd Defendant, M/S I & M Bank Limited from honouring, paying, or settling the Payment Guarantee No. 021/COM/LG/0109/2016 to the 1st Defendant before the dispute arising from or relating to the agreement between the parties dated 27.11.2015 is subjected to and conclusively resolved through the dispute resolution procedures set out under Clauses 8.4 and 8.5 of the said Agreement.

4.This Honourable Court to and is hereby pleased to refer the dispute between the Plaintiff and the 1st Defendant for resolution pursuant to the dispute resolution mechanisms set out under clauses 8.4 and 8.5 of the Agreement between the parties dated 17.11.2015.

5.The costs of this motion be provided for."

7. On 19th April, 2017 this court issued temporary orders in line with the Plaintiff's Notice of Motion.

8. Among the pleadings filed by the 1st Defendant in response to the Plaintiff's application are a Notice of Preliminary Objection and a Notice of Motion both dated 21st April, 2017.

9. The Notice of Preliminary Objection is a lengthy one but in summary, the 1st Defendant raises three grounds of objection as follows:-

a) That this court has no jurisdiction to hear and determine this matter for the reasons that this is a matter for the Environment & Land Court.

b) That arbitration is no longer available to the Plaintiff as it failed to commence the arbitration process upon being notified about a dispute by the 1st Defendant.

c) That the orders obtained from this court were obtained upon the non-disclosure by the Plaintiff of the fact that the bank guarantee issued by the 2nd Defendant in favour of the 1st Defendant is irrevocable and does not contain any arbitration clause.

10. In his Notice of Motion the 1st Defendant prays for orders that:-

"a) This application be certified as urgent and be heard *inter-partes* on 25.4.2017 and in any event before the hearing of the Plaintiff's application dated 18.4.2017.

b) The orders given on 19.4.2017 and issued on 20.4.2017 be declared null and void and be set aside as a matter of right.

c) In the alternative and without prejudice to the above, the orders given on 19.4.2017 and issued on 20.4.2017 be discharged and set aside.

d) This suit be struck out with costs.

e) The costs of this application paid by the Plaintiff in any event."

11. When the Plaintiff's Notice of Motion came up for hearing, it was agreed that the Plaintiff's Notice of Motion and the 1st Defendant's Notice of Preliminary Objection and Notice of Motion be heard together.

12. Upon reflection on the two applications and the Preliminary Objection, I note that the disposal of the Plaintiff's Notice of Motion will largely determine the 1st Defendant's Notice of Motion. The Preliminary Objection will be addressed separately.

13. I will start by dealing with the 1st Defendant's Notice of Preliminary Objection as it raises the question of jurisdiction. If the Objection fails, then I will proceed to deal with the Plaintiff's Notice of Motion. Finally, if it will be necessary, I will consider the prayer for striking out the suit as prayed by the 1st Defendant in his Notice of Motion.

14. One of the grounds of objection in the 1st Defendant's Notice of Preliminary Objection dated 31st April, 2017 is that this court has no jurisdiction to entertain this matter as the same belongs to the Environment & Land Court. It is the 1st Defendant's case that the Plaintiff's application and annextures are all populated by the terms land, lease and rent meaning that this is a matter dealing with land which is excluded from the jurisdiction of this court by the Constitution. Further, that the bank guarantee in question was meant to secure payment of rent and that matters concerning rent falls within the jurisdiction of the Environment & Land Court.

15. The 1st Defendant contends that the bank guarantee was to secure payment of rent. It is the 1st Defendant's assertion that the jurisdiction of the High Court on land matters is expressly ousted by Article 165 (5) (b) of the Constitution.

16. The 1st Defendant's case is that matters touching on breach of leases belongs to the Environment & Land Court and it cannot therefore be true that a dispute arising over a lease even if the same has an

arbitration clause belongs to the High Court. The 1st Defendant's position is that the fact that the Arbitration Act, 1995 gives jurisdiction to the High Court in arbitration matters cannot override Articles 162(2)(b) and 165(5)(b) of the Constitution which gives jurisdiction to the Environment & Land Court over environment and land matters. Further, that the Arbitration Act having been passed in 1995 predates the Constitution promulgated in 2010 and must therefore be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution as required by Section 7 (1) of the Sixth Schedule of the Constitution.

17. It is the 1st Defendant's proposition that Parliament, in giving jurisdiction to the Environment & Land Court never intended that it could determine disputes over rent between landlords and tenants but could not have jurisdiction if payment of rent is secured by a bank guarantee. The 1st Defendant therefore holds the view that the Environment & Land Court, can, in appropriate cases, grant temporary or interim orders of protection under Section 7 of the Arbitration Act. Further, that this matter relates to a lease and that issue belongs to the Environment & Land Court.

18. The Plaintiff opposed the Preliminary Objection contenting that the dispute herein belongs to this court and not the Environment & Land Court. According to the Plaintiff this is a matter touching on the payment of a bank guarantee which is by nature a commercial transaction. The Plaintiff's position is that a dispute relating to whether or not a bank guarantee should be paid belongs to the High Court, which is well placed to deal with commercial matters.

19. The Plaintiff cited several cases in support of its position. The cases cited are **Ernest Kevin Luchidio v Attorney General and 2 others [2015] eKLR; Patrick Musimba v National Land Commission [2015] eKLR**; **Republic v Governor, County Council of Kilifi & another, ex-parte Krystalline Salt Ltd [2016] eKLR**; and **Kisimani Holdings Ltd & another v Fidelity Bank Ltd [2013] eKLR**.

20. The 2nd Defendant's take is that this court has jurisdiction to deal with this matter. It is the 2nd Defendant's position that the dispute herein does not fall within the jurisdiction of the Environment & Land Court as provided by Section 13 of Environment and Land Court Act, 2011. It is the 2nd Defendant's case that the issue before this court is whether the 1st Defendant is entitled to payment under the guarantee, and if so, whether as a matter of fact the 2nd Defendant should make the payment. According to the 2nd Defendant, the resolution of that dispute is to be based on the interpretation of the guarantee itself and the Agreement will have no bearing on it.

21. It is the 2nd Defendant's position that the Plaintiff's pleadings relating to breach of contract are not for determination here and no findings should be made in respect to those pleadings. In support of this submission, the 2nd Defendant urges this court to follow the decision in **Sinohydro Corporation Limited v GC Retail Limited & another [2016] eKLR** wherein C. Kariuki, J stated that:-

> **"As matters stand now, I have to agree with the submissions of the respective parties that this court has no jurisdiction to hear the dispute between the Plaintiff and the 1st Defendant as no dispute had been placed before it for determination. Any dispute with regard to the breach of the main contract must be referred to arbitral proceedings for hearing and determination, as was the intention of the parties."**

22. The 2nd Defendant posits that the facts in this case are similar to those in the above cited **Sinohydro Corporation Limited** case and this court should reach a similar decision.

23. Does this court have jurisdiction to hear and determine this matter? That this court and the two courts of equal status have distinct and separate jurisdictions was recently confirmed by the Supreme Court in **Petition No. 5 of 2015 Republic v Karisa Chengo & 2 others** when it stated at paragraph 79 that:-

> **"It follows from the above analysis that, although the High Court and the specialized Courts**

are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165 (5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters *"reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162 (2)"."*

24. The jurisdiction of the Environment & Land Court is found in Section 13 of the Environment and Land Court Act, 2011 which provides:-

"13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) ***Deleted by Act No. 12 of 2012, Sch.***

(6) ***Deleted by Act No. 12 of 2012, Sch.***

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs."

25. Section 13 must be read in the background of Article 162 (2) of the Constitution which provides that:-

"Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

a) ….

b) the environment and the use and occupation of, and title to, land."

26. The key words are *'environment, use of land, occupation of land and title to land'*. Considering the facts placed before this court, the words relevant to this case are *'use of land'*. The jurisdiction of the Environment & Land Court flows from Article 162(2)(b) of the Constitution. There is no doubt that Section 13 of the Environment and Land Court Act is in consonance with the Constitution.

27. The term *'land use'* refers to the management and modification of the natural environment into settlements for human habitation that would include arable fields, pastures and forests. In short it is the use of the natural environment by people.

28. In my view the Constitution did not contemplate such a narrow definition and that explains the intentional application of the words *'use of land'* and not *'land use'*. The term *'use of land'* would cover 'land use" and other activities arising from utilization of land other than human settlement. I, however, doubt that the jurisdiction is so expansive to the extent that anything that refers to land is the preserve of the Environment & Land Court.

29. There is sufficient authority to demonstrate that not everything that touches on land belongs to the Environment & Land Court. Firstly, the Constitution itself narrows the jurisdiction of the Court to **"the environment and the use and occupation of, and title to, land."** The Constitution does not talk of *'environment and land'*. Had such terms been used then it would be obvious that all matters touching on environment and land including, for example, crimes motivated by disputes concerning environment and land is the preserve of the Environment & Land Court. Secondly, there is good case law pointing to the fact that not all matters that refer to land belong to the Environment & Land Court.

30. In **Kisimani Holdings Limited & another** (supra) J.B. Havelock, J, in my view, correctly pointed out that:-

"However before I leave this matter, I need to comment upon the Defendant Bank's submission that this Court lacks jurisdiction pursuant to Article 165 (5) (b) of the Constitution. As I understood the Defendant Bank's position in the matter, it is saying that as the Environmental and Land Court has now been set up under its own Act in 2011, it is the only Court that shall hear and determine all disputes relating to land…. I have considered this point and asked myself as to whether this case really relates to a matter of land or is it based on some other cause of action. In my opinion, the Plaint as drawn, as well as the Defence herein, relate to banking transactions as between the 2nd Plaintiff and the Defendant Bank with the 1st Plaintiff as guarantor thereof. The Plaint raises other issues other than whether the Defendant Bank's statutory power of sale has arisen as regards the suit property such as interest rates applicable to the banking transaction, the extent of the 1st Plaintiff's

liability to the Defendant Bank as guarantor, as well as to the amount necessary to be found by the Plaintiffs to redeem the suit property. All these matters related to the tripartite contract as between the parties evidenced by the offer and acceptance of the Defendant Bank's facility letter of offer dated 13th January, 2011. In my view, the charging of the 1st Plaintiff's property as security is a secondary issue to the main cause of action being the banking transaction to which I have referred. As a result, I do not consider that the suit before court is a dispute relating to land…. With all due respect to the learned counsel for the Defendant Bank, I do not consider that the suit before the court involved a dispute as regards to the environment, the use, or the occupation of and title to the suit property. As I see it, the suit property being offered by way of security to the Defendant Bank for the loan facilities availed to the 2nd Plaintiff, the same became a commodity which the chargee, the Defendant Bank, could sell off in order to recover monies lent to the 2nd Plaintiff."

31. This is the same road travelled by Said Chitembwe, J in ***ex-parte*** **Krystalline Salt Ltd** (supra) wherein the learned Judge held that: -

"It should be clear to litigants that not every dispute which involve land should be heard by the Environment and Land Court. Succession disputes involve the distribution of deceased peoples' estate. Part of the estates usually involve land. There is no requirement that succession cases be heard by the land court. Majority of human activities take place on land. Even those charged with criminal cases such as trespass or affray, face cases where the dispute occurred on the land. Where people fight over the ownership of land, the criminal element involves the ownership of the land being the reason for the fight. Should such cases be heard by our colleagues in the Environment and Land Court [?] In essence therefore, most activities occur on the land. Where the Government compulsorily acquires a citizen's land and compensation is delayed, the dispute relates to land but the core issue is the compensation. We should learn how to differentiate between what belongs to the historical High Court and what belongs to the Environment and Land Court. Recently, litigants have formed a habit of raising the issue of jurisdiction between the two courts not necessarily for good reasons. Counsel for the respondent have happily cited the case of REPUBLIC V REGISTRAR OF TITLES AND ANOTHER, *EX-PARTE* DAVID GACHINA MURIITHI (supra). That case was determined by Justice Odunga in 2014. The Judge does not deal with land cases. Counsel for the respondents are not complaining that Justice Odunga ought not to have determined the dispute as it involved a prayer for an order of certiorari relating to the revocation of the *ex-parte* applicant's title. We should be sincere on this issue of jurisdiction."

32. I agree with Havelock, J and Chitembwe, J that the mention of the word land, rent or lease in a document is not of itself sufficient to confer jurisdiction upon the Environment & Land Court. An examination must be carried out in order to establish if the issue falls within the jurisdiction of the Environment & Land Court as conferred to that Court by the Constitution and statute. In my view, the question(s) for the determination of the court will always give a guide as to where jurisdiction should fall.

33. Turning to the facts of this case, I note that the dispute herein involve the issuance of interim protective measures to the Plaintiff in order to allow it to refer to an arbitral tribunal its disagreement with the 1st Defendant over a construction matter. The questions of environment, use of land, occupation of land or title to land have not arisen in this matter. In the circumstances, I find that this court has jurisdiction to handle this matter. The 1st Defendant's Preliminary Objection in so far as it relates to the question of jurisdiction is therefore found to be without merit. Having reached this conclusion, there is no need to pursue any further the other issues related to the question of jurisdiction.

34. The big question in this matter is whether the Plaintiff is deserving of an interim measure of protection pending arbitration. The Plaintiff's case is that there is in existence an arbitration agreement binding on it and the 1st Defendant. It is the Plaintiff's submission that a dispute has arisen which requires arbitration as agreed by the parties to the Agreement. Lastly, the Plaintiff contends that there is a

financial asset that is at risk of permanent dissipation in the event that this court does not grant an interim measure of protection pending arbitration.

35. The 1st Defendant opposed the application stating that there is nothing special about applications under Section 7 of the Arbitration Act as the principles governing the issuance of injunctions are applicable when considering the issuance of orders contemplated by that provision. The 1st Defendant's assertion is that crucial information was not placed before this court by the Plaintiff at the time it sought and obtained a temporary order of injunction *ex-parte.*

36. The 1st Defendant cited the case of **Bao Investments & Office Management Services Limited v Housing Finance Company of Kenya Limited [2006] eKLR** in support of the proposition that a party who goes to a judge in the absence of the opponent assumes a heavy burden and must put before the Judge all relevant materials including material which is against him and that failure to discharge that burden will result in the dismissal of the application because courts must protect themselves from parties who are prepared to deceive the courts in order to obtain orders.

37. To buttress the assertion on the necessity to disclose all the facts, the 1st Defendant also cites the decisions in **Josephat Supare Ole Sakunda and 10 others v Harrison Musau & another [2016] eKLR, Tiwi Beach Hotel v Starum EALR [1990 – 1994] 565; Brink's MAT Ltd v Elcombe & others [1988] 3 ALL ER 180** and **Republic v City Council of Nairobi [2008] eKLR**.

38. The principles governing disclosure in ex-parte applications were summarized in **Brink's-MAT Ltd** (supra) thus:-

> **"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (i) The duty of the applicant to make a 'full and fair disclosure of all the material facts'…. (ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers…. (iii) The applicant must make proper inquiries before making the application…. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant …., and (c) the degree of legitimate urgency and the time available for the making of inquiries …. (v) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains … an ex-parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty…' (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (viii) Finally 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded'…. The court has discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex-parte* order, nevertheless to continue the order, or to make a new order on terms."**

39. I will therefore proceed to apply the espoused principles to the facts of the instant case. The issue of non-disclosure of a material fact was raised by Alfeen Esmail, one of the directors of the 1st Defendant, in

his affidavit sworn on 24th April, 2017 in response to the Plaintiff's Notice of Motion dated 18th April, 2017. At paragraph 8 he averred:-

> **"That orders touching on the guarantee were obtained upon non-disclosure by the Plaintiff of the fact that the bank guarantee issued by the 2nd Defendant in favour of the 1st Defendant is irrevocable and does not contain an arbitration clause."**

40. In response to the 1st Defendant's assertion, Pankaj Mehta, the Finance Officer of the Plaintiff swore a further affidavit on 9th May, 2017 and averred at paragraph 9 that:-

> **"Paragraph 8 is vehemently contested. Coast Apparel disclosed all relevant material facts, including material that is actually adverse to its interests in these proceedings. The Guarantee itself has in fact been tabled before the court and is self-explanatory. In addition, as a matter of practice, Guarantees, flowing from their nature as commercial security instruments, are, by their nature, unless otherwise provided, irrevocable by the issuer once issued otherwise they would serve no purpose as security."**

41.If indeed the 1st Defendant's only complaint is that the Plaintiff did not disclose that the guarantee is not **"irrevocable and does not contain an arbitration clause",** then the 1st Defendant's allegation of non-disclosure has no basis at all. The Plaintiff exhibited the guarantee when seeking the *ex-parte* orders and it cannot be accused of non-disclosure of the contents of that guarantee. The 1st Defendant's allegation of non-disclosure of the terms of the guarantee lacks merit and the same stands dismissed.

42. I also note that the 1st Defendant claims that the Plaintiff withheld some communication between the parties to the Agreement from the court. Looking at the Plaintiff's affidavit in support of its Notice of Motion and the annextures thereto, I find that the Plaintiff placed before the court sufficient material to enable the court arrive at the decision it made. In my opinion, had the Plaintiff placed the omitted material before the court, I would still have granted the temporary orders *ex-parte.*

43. I now move to the crux of the matter. The Plaintiff's Notice of Motion is said to be brought under Article 159(2)(c) & (d) of the Constitution; Sections 1A, 1B, 3A, 63(e) of the Civil Procedure Act; Order 40 Rule 1 and Order 51 rules 1 and 4 of the Civil Procedure Rules, 2010; Section 7 of the Arbitration Act; and all the enabling provisions of the law. At the conclusion of the submissions it became quite clear that this is an application under Section 7 of the Arbitration Act, 1995. The said Section provides that:-

> **"7. Interim measures by court**
>
> **(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.**
>
> **(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on 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."**

44. The cited provision clearly empowers the High Court to protect arbitral proceedings by issuing injunctive orders protecting the subject matter of arbitration.

45. In **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR**, the Court of Appeal outlined the nature of interim protective measures and the factors to be taken into account before granting an interim protection order. The Court stated that:-

> **"Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to**

injunctions for example) and what is suitable must turn or depend on the facts of each case before the court or the tribunal – such interim measures include, measures relating to preservation of evidence, measurers aimed at preserving the status quo, measures intended to provide security for costs and injunctions. 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 tribunal's decision making power as intended by the parties."

46. It is not the duty of this court to go into issues such as whether the arbitral tribunal has jurisdiction. The court cannot also determine the dispute between the parties for that is a matter for the arbitral tribunal. In **Safaricom Ltd** (supra) the Court of Appeal stated that:-

"In the matter before us, the court went on to make orders which undermined the arbitration and the outcome of the arbitration contrary to section 17 of the Arbitration Act. 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."

47.The court went ahead and stated that:-

"Under the doctrine of Kompetez/Kompetez a tribunal can rule on both the validity of the arbitral clause and the underlying contract. In the circumstances of the matter before us, once appointed it would for example be entitled to rule on who are the parties to the arbitration agreement and on the validity of the agreement to lease and whether it has jurisdiction over the other two respondents who contend that they are not parties to the agreement to lease. The Commercial Court has no business acting against an Act of Parliament and ruling on a matter it was not competent to rule on in law. Such a ruling is a nullity"

48. Mr. Muthama for the Plaintiff extensively submitted as to why the bank guarantee could not be called for by the 1st Defendant. Mr. Kinyua for the 1st Defendant on his part submitted that arbitration is time-barred in this matter. With respect to both advocates, this court cannot come to their aid on those issues for those are matters to be considered by the arbitral panel. When the parties to the agreement opted to go for arbitration they severely limited the role of this court in solving any disputes concerning the Agreement. Their decision must therefore be respected.

49. As already pointed out, an interim measure of protection is for a limited time. It can issue before arbitration or during arbitration.

50. Upon reflection on this matter and in light of the material now before court, I find that this is one matter in which interim protection measures ought not to have been issued in the first instance. At the time the Plaintiff approached this court, it had not started the arbitration process using the procedure laid down in the Agreement. Clauses 8.4 and 8.5 of the Agreement states that:-

8.4 Any dispute, controversy or claim arising out of or relating to this Agreement or termination hereof (including without prejudice to the generality of the foregoing, whether as to its interpretation, application or implementation), shall be resolved by way of consultation

held in good faith between the parties. Such consultation shall begin immediately after one party has delivered to the other written request for such consultation. If within fifteen (15) Business Days following the date on which such notice is given the dispute cannot be resolved amicably, the dispute, controversy or claim shall be submitted to arbitration on in accordance with clause 8.5.

8.5 Should any dispute, controversy or claim as is referred to in clause 8.4 arise between the parties and consultation process referred to in clause 8.4 shall have not resolved such dispute, the dispute shall upon application by any party be referred for arbitration to a person acceptable to the parties or if the parties cannot agree on the appointment of such person within a period of thirty (30) days from the date of such application, then the dispute shall be referred to arbitration by a single arbitrator to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch upon the written request of either party. The appointment of the arbitrator shall be final and binding on the parties. The arbitration shall take place in Mombasa and the language of arbitration shall be English. The arbitration shall be conducted in accordance with the rules or procedures for arbitration under the Arbitration Act, 1995 as amended by the Arbitration (Amendment) Act 2009. The decision of the arbitrator shall be final and binding on the parties and may be made an order of a court of competent jurisdiction. Notwithstanding the foregoing, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from a court in Kenya of competent jurisdiction pending the final decision or award of the arbitrator."

51. The roadmap to arbitration is clearly laid down in the Agreement. The matter that drove the Plaintiff to court is the email addressed to it by the 2nd Defendant on 14th April, 2017 at 10.05 a.m. This matter was filed on 19th April, 2017. By the time the Plaintiff approached the court it had not engaged the mechanism provided in the Agreement by calling for consultations with the 1st Defendant. After the injunctive order was granted, the Plaintiff did not resort to the dispute resolution procedure provided in the Agreement. The idea I get is that the interim order of protection was not sought in good faith.

52.In my view, an interim order of protection is meant to protect the subject matter of arbitration. For it to be granted, the court must be satisfied that the parties have already commenced the process for putting in place an arbitral panel or arbitration proceedings have already started. It is not an order issued in a vacuum as it is premised on intended or ongoing arbitration proceedings.

53. A party to an arbitration agreement cannot come to court, in the manner the Plaintiff has done, to seek an order to refer a dispute to arbitration. Inherent in every agreement with an arbitration clause is the requirement for any aggrieved party to refer any dispute to an arbitration forum using the process provided in the agreement.

54. Before I conclude, I need to make reference to the 2nd Defendant's replying affidavit and submissions. A reading of the affidavit sworn on 9th May, 2017 by James Maingi Nganga, the Branch Manager of the 2nd Defendant's Mtwapa branch gives the impression that the 2nd Defendant was in the process of honouring the guarantee.

55. However, in the submissions filed on 11th May, 2017 the 2nd Defendant shifted gears and at paragraph 3.18 identifies the issue for the determination of this court as follows:

"What is essentially before this court is whether the 1st Defendant is entitled to payment under the Guarantee and if so, whether as a matter of fact the 2nd Defendant should make that payment. The resolution of that dispute is to [be] based on interpretation of the guarantee itself and the agreement will have no bearing on it."

56. The 2nd Defendant's assertion in the submissions is out of synch with the contents of the Agreement. The arbitration clauses in the Agreement provide that any disputes are to be resolved through

consultations and if consultations fail arbitration would be the next course of action. The requirement for a provision of a bank guarantee by the 1st Defendant is a term of the Agreement and any dispute concerning the bank guarantee is game for an arbitration panel.

57. The 2nd Defendant went ahead and submitted extensively on the question as to whether or not the bank guarantee was due for payment. With respect to counsel for the 2nd Defendant, I must state that the issue before this court was a narrow one namely whether an interim order of protection should be extended to the 1st Defendant. The 2nd Defendant is the one to make a decision as to whether the conditions for honouring the bank guarantee have been met. In doing so it should take into account the practices that have been established by the business community in respect to payment of bank guarantees.

58. Looking at the material placed before this court by the Plaintiff, I find that the conditions for grant of a protective measure pending arbitration have not been met. The Plaintiff's Notice of Motion therefore fails.

59. What remains to be decided is whether the Plaintiff's suit should be struck out. This is one of the prayers in the 1st Defendant's Notice of Motion. In **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR** the Court of Appeal stated that:-

> **"It is relevant to consider all averments and prayers when assessing under Order 6 rule 13 whether a pleading discloses a reasonable cause of action….**
>
> **The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits *"without discovery, without oral evidence tested by cross-examination in the ordinary way"*. (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.**
>
> **If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.**
>
> **No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable *c*ause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."**

60. The cited decision summarises the law applicable to applications for dismissal of cases. An application to dismiss a suit is not one to be taken lightly and neither should it be made in jest. Such an application should only be made where the applicant is convinced that the respondent has no arguable case at all.

61. The question herein is whether at this stage the Plaintiff still has a case that can be taken through a full hearing. In **Safaricom Ltd** (supra), the Court of Appeal opined that:-

> **"It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the *status quo* pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names…. Whatever their description however, they are intended in**

principle to operate as *"holding"* orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation."

62. Later in the judgement the Court observed that:-

"In addition, after the grant or failure to grant an interim measure under Section 7 of the Arbitration Act, there is no pending suit because the substance of the suit under Section 7 is grant or refusal of interim measure itself."

63. In essence, the plaint in a matter like the one before this court is merely a vehicle for accessing the court. It bears no cause of action by itself. Once the application for an interim order of protection is dispensed with, the plaint becomes a shell. In such circumstances the answer lies in striking out the plaint.

64. That should answer the prayer by the 1st Defendant for dismissal of the Plaintiff's suit. Having rejected the Plaintiff's prayer for an interim protection measure there remains nothing for the parties to litigate in this matter. The prayer for striking out the Plaintiff's suit therefore succeeds.

65. In summary the outcome of the matters that were the subject of this ruling are as follows:-

A. The Plaintiff's Notice of Motion dated 18th April, 2017 has no merit and the same is dismissed.

B. The 1st Defendant's Notice of Preliminary Objection dated 21st April, 2017 fails and the same is dismissed.

C. The 1st Defendant's Notice of Motion dated 21st April, 2017 partially succeeds and the prayer seeking the striking out of the Plaintiff's suit is allowed.

D. I suspect that the parties will still have to talk to each other in order to find a solution to the dispute that has arisen concerning the Agreement. In the circumstances and in order to give room for reconciliation, I will not saddle the Plaintiff with the costs of these proceedings. Each party is therefore directed to meet own costs of the proceedings.

Dated, signed and delivered at Malindi this 27th day of July 2017.

W. KORIR,

JUDGE OF THE HIGH COURT