



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 388 OF 2016

RPM CREDIT LIMITED.....PLAINTIFF

VERSUS

VISIONFUND KENYA LTD.....1ST DEFENDANT/APPLICANT

VISIONFUND INTERNATIONAL..2ND DEFENDANT/APPLICANT

RULING

Notice of Motion of 8th December 2016

1. Before Court is a Motion of 8th December 2016 seeking the following prayers:-

(i) That the Honourable Court be pleased to grant an interim measure of protection in the form of a temporary injunction restraining the Plaintiff from interfering in the Defendants/Applicants' collection efforts of loans advanced under the Cooperation Agreement pending the hearing and determination of the arbitration proceedings between the Plaintiff/Respondent and the Defendants/Applicants;

(ii) That costs of the Application be provided for.

2. RPM Credit Limited (the Plaintiff or "RPM") entered into a Cooperation Agreement dated 5th September 2014 with Visionfund Kenya Ltd (The 1st Defendant or "VFK"). In the Agreement, it is stated the Visionfund Kenya Ltd seeks to improve the lives of children by offering small loans and other financial services to families living in poverty. The Agreement provides a framework through which Visionfund would implement this objective by way of a microfinance strategic partnership with RPM. Clause 3 of the said Agreement set out the respective roles and responsibilities of VFK and RPM, while clause 4 was on revenue and risk sharing.

3. RPM alleges that VFK is in breach of the terms of the said Agreement and filed this suit against VFK and Visionfund International Limited (hereinafter the 2nd Defendant or "VF International"). In the Agreement, VFK Limited is said to be part of World vision and Visionfund International Limited. In this suit, RMP sought the following orders:-

“(a) specific performance of the agreement, commencing with the disbursement of all the loans due to the 52 groups which were captured in the 1st defendant's computer system in September 2015 which ought to have received their loans within 2 days via the M-Pesa platform immediately after the date they were captured as per the agreement;

(b) specific performance of the agreement by the defendants, giving out loans up to September 2019 using the pattern applied from 5th September 2015 or as per the 2016-2019 budget approved by the defendants in August 2015 taking into account that the portfolio at risk was substantially caused by the 1st defendant;

(c) A permanent injunction restraining the defendants, either by themselves or their agents or employees, from interfering with the contractual obligations due to the plaintiff such as loan promotion, group formation, loan appraisal, loan monitoring and loan recovery for the remainder of the term of the Agreement up to September 2019 within the geographical jurisdiction of the Agreement;

(d) Payment to the Plaintiff the following as tabulated in the claim:-

- i. Kshs. 2,970,564/= being the unpaid interest due which accrued prior to September 2015;
- ii. Kshs. 429,826/= being the interest income for the Month of April and May 2016;
- iii. Kshs. 2,600,000/= being the cost incurred as transport costs between September 2015 and May 2016 in collecting the loan for the defendants;
- iv. Kshs. 28,000,000/= a commission payable to the Plaintiff for collecting Kshs. 140 Million between September 2015 to 31st May 2016;
- v. Salaries paid to the employees when income was minimal between September 2015 to May 2016 at Kshs. 1,495,500/= per month totaling Kshs. 19,441,500/=;
- vi. Rent paid for the premises between September 2015 to May 2016 of Kshs. 720,000/=
- vii. Kshs. 1,080,000/= accrued commission for the months of June and July 2016;
- (e) In the alternative, the defendants to pay the plaintiffs Kshs. 1,212,862,676/=, jointly and all severally as pleaded in paragraph 26 above for loss of profit and business upto September 2019.
- (f) General damages for breach of contract
- (g) Costs of this Claim
- (h) interest on the above d(i), (ii), (iii), (iv), (v) (v), (vii), e and f above at court rates from the date of filing this suit.

4. The Cooperation Agreement had Provisions relating to settlement of Disputes which required Parties to submit any dispute arising therefrom to mediation and where such mediation was unavailable or unsuccessful, to submit the dispute to a binding Arbitration. Invoking these terms of the Agreement, VFK Limited and Visionfund International Limited moved Court vide a chamber summons of 12th October 2016 seeking stay of these proceedings and a referral thereof to Arbitration. On 23rd November 2016, the following consent was entered;-

“By consent, this matter is referred to Arbitration in accordance with the Arbitration Agreement between the Parties.”

- 5. The summons before Court was filed a few days later on 14th December 2016. Mr. Philip Ochola who is said to be the Chief Executive Officer of VFK Limited gives an explanation as to why VFK deems the protection of an interim injunction necessary.
- 6. That pursuant to the Cooperation Agreement, VFK advanced loan facilities to Borrowers of over Kshs. 400 million. That RPM failed to collect the said loan facilities resulting in arrears of about Kshs. 198 million. A dispute subsequently arose and this has been referred to arbitration by the consent order of 23rd November 2016.
- 7. Prior to this, on 22nd July 2016, RPM wrote to VFK and indicated that with effect from 1st August 2016, it would stop the loan collection which VFK Limited sees as a primary responsibility of RPM under the terms of the Agreement. That so as to mitigate its losses, VFK has put in place measures to collect the outstanding loans.
- 8. The grievance of VFK is that RPM is now interfering with the loan collection efforts by informing Borrowers that loan collection has been suspended until further notice and asking them not to make any further payments in repayment of loans advanced to them. VFK believes that RPM actions are intended to irretrievably interfere with the status quo prevailing and this will render the Arbitration superfluous and a mere academic exercise.
- 9. RPM filed a response through the Replying Affidavit of one Justry P. Lumumba Nyaberi who is the Executive Chairman of RPM. That Affidavit was sworn on 8th February, 2017.
- 10. RPM contends that under the provisions of the Agreement, the duties of RPM (to the total exclusion of VFK) comprises of group formation, loan appraisal, loan monitoring and loan recovery. That in conformity with its obligations, RPM hired and paid loan officers and entered into a Lease Agreement with a Third Party to set up offices which housed officers of both RPM and VFK.
- 11. RPM undertook loan promotion and group formation and that about 16000 people benefited from the loans disbursed by VFK.
- 12. But some events have displeased RPM. It alleges that in August 2015, VFK failed to disburse loans to 40 groups without following the procedure in Article 13 of the Agreement. Further, that, VFK has failed to honour commissions and interest due to RPM. Details are set out in the Affidavit but may not be relevant for the resolution of the matter at hand.
- 13. Following a deterioration of their relationship, RPM entered into negotiations with VFK and Visionfund International in issuance of new loans and payment of better commissions. That, it was agreed that RPM will be paid **10%** commission of all loan amounts outstanding in order to assist in the loan collection exercise. That, in conformity with the Agreement, RPM collected loans of Kshs. 3,321,298/= and was paid commission of Kshs. 664,259/=, but that the Defendants have failed to settle other invoices.

14. Mr. Nyaberi avers that as it was impossible for RPM to continue with its obligation without receiving payments and through pressure for payment of salaries from loan officers, RPM closed down its offices temporarily to await payment from the Defendants.

15. It is deposed, on behalf of RPM, that instead of paying the said invoices, VFK has silently and maliciously recruited Blegif Consultant Auctioneers with instructions to attach all the cows of loanees with arrears in a bid to take over loans collections from RPM. RPM asserts that the Agreement does not give such powers to the Defendants to subcontract the services of loan collection.

16. That is the rival evidence of the Parties. The Court also has read and understood the written arguments of the Parties.

17. Before considering the merit of the Application, this Court must first decide whether the orders sought by RPM would be available to it in the first place. It is submitted by RPM that the Application before Court cannot be sustained without a suit or a Counter Claim by the Defendant. For this proposition, the decision of Ringera J (as he then was) in **Southern Credit Banking Corporation Ltd vs Ngundo(2000) LLR 1089 (CCK)** was cited. The Judge had held;

“The Applicant’s counsel is right that interlocutory injunctive relief cannot be granted whereas here, there is no relief in the nature of a permanent injunction prayed for. Interlocutory relief cannot be granted in vacuo.”

18. A further argument was that Applications under sections 6 and 7 of the Arbitration Act can only be made by summons in a suit. It must be premised on a suit (**Scope Telematics International Sales Limited vs Stoic Company Limited & Another (2017) eKLR.**).

19. The chamber summons before Court is brought under the anchor of Section 7 of the Arbitration Act (Chapter 49). Sub section (i) would be relevant and provides as follows:-

(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.

20. The procedure to be used in filing a request under section 7 is prescribed by Rule 2 of the Arbitration Rules 1937 which reads;-

“Applications under section 6 and 7 of the Act shall be made by summons in the suit.”

21. Let me first deal with the issue whether the summons before Court has been brought in a suit. RPM filed this claim on 23rd September 2016 through presentation of a Plaint. In other words RPM presented a suit. The Defendants, taking the position that the dispute was subject to an Arbitration Agreement, sought a stay of the proceedings and a referral order. Eventually by the consent of 23rd November 2016, this matter was referred to Arbitration.

22. A question to be asked is whether the suit ceased to subsist because of the referral order. The referral order was comprised in the following short consent:-

“by consent, this matter be referred to Arbitration in accordance with the Arbitration Agreement between the Parties.”

The consent does not say that the suit was thereby marked as settled or withdrawn.

23. What the consent seems to have done was simply to refer the matter to Arbitration. RPM itself has filed an Application dated 8th February 2011 under the Provisions of section 7 of the Act. That very filing is an affirmation by RPM that these proceedings are the suit contemplated by Rule 2.

24. Does the Defendant require to have a Counter-claim?. The wording of section 7 does not preclude a Defendant from seeking a measure of protection. The section provides that a party to an Arbitration Agreement can request for such an order. What is crucial is for such party to demonstrate that the subject matter of the Arbitral proceedings in danger of being wasted or dissipated or otherwise under threat. An analogy can be drawn from the provisions of order 40 Rule 3(a) of the Civil Procedure Rules where even a Defendant can seek for a temporary injunction where property in a dispute is in danger of being wasted, damaged or alienated.

25. In determining an Application brought under Section 7 of the Act, the Court must first be satisfied that there is a valid Arbitration Agreement between the Parties (see Hon. Angote J in **Fresco Bushlands (K) Ltd vs Agricultural Development Corporation (2014) eKLR.** In the matter before the Court, there is a convergence by the Parties that there is a valid Arbitration Agreement and the Parties have in fact consensually submitted themselves to Arbitration. No difficulty arises on that point.

26. The object of section 7 is to protect the subject matter of Arbitration that is under threat of waste or dissipation or such like threat. The merits or otherwise of the dispute is a matter for the Arbitral Tribunal and the role of the Court is merely supportive or complementary. For this reason, the Court will always be cautious not to overstep this supportive role by delving into issues that would properly be before the Arbitral Tribunal (see Kamau J in **CMC Holdings Limited & Another vs Jaguar Land Rover Exports Limited (2013) eKLR.**).

27. At the core of the Cooperation Agreement entered between RPM and VFK is the grant of small scale loans. Clause 3 of the Agreement

defines and delineates the roles and responsibilities of the Parties to the Agreement. RPM is given the role of all field work which includes loan recovery efforts.

28. No doubt RPM makes a valid point when it asserts that the role of loan recovering belongs to it. The concern of VFK is that the arrears of Kshs. 198 million has not been recovered and that RPM has indicated, in writing, that it would stop loan collection. RPM on the other hand argues that, it cannot continue with its obligations without receiving payments due to it under the Agreement.

29. Whether or not, and by whom, there has been breach of the Cooperation Agreement is a matter that will be determined by the Arbitrator to whom the dispute or differences herein have been referred. But what would be the fate of the subject matter if the loan recovery is left unattended?. In support of the summons before Court, the Chief Executive Officer of VFK depones that the subject matter of the Agreement is loan disbursements and collection. This is not refuted by the RPM. He also depones that VFK will suffer irreparable injury if loan collection is not undertaken. Again RPM does not deny this. It would seem therefore that the subject matter of the Arbitration is under threat if loan collection is not undertaken.

30. In a letter dated 22nd July 2016, RPM's lawyers wrote to the lawyers of VFK about the strain in the relationship between the two. After complaining that commission of about Kshs. 4,062,560.07 remained unpaid, RPM explains that it is with the commission that it meets its costs including; rent salaries etc. RPM then asserts:-

“For your client to fail to pay the said commission, same can be construed to imply that your client is asking our client to stop the loan collection exercise. Our client has obliged to stop the loan collection and will do the same from 1st August 2016. In any case, the same is expensive, since our client incurs a daily cost of at least Kshs. 20,000/= for the collection exercise. However, our client will go to Court shortly to seek orders of specific performance on the same. But before the same is done, it is our client's decision to close down your client's Kisii Office on or before the 29th of July 2016 to avoid further escalation of costs.”

31. VFK's position is that nothing is due from it to RPM. What is clear however is that RPM was unwilling to continue with loan recovery from 1st August 2016. What RPM was unable to point out is any term of the Agreement which would entitle it to stop or suspend its obligations (if commission is not duly paid) without first terminating the contract. If loans are not recovered, then the subject matter is under threat and as RPM is unwilling to continue with loan recovery, then VFK Limited will have a forceful argument that it should employ alternative avenues of collecting the loans.

32. VFK states that this alternative arrangement be protected by Court. This Court takes the view that the orders sought by RPM are merited as it protects the subject matter from implosion as the Parties herein resolve their differences through Arbitration.

Plaintiff's chamber summons of 8th February 2017

33. The Plaintiff's chamber summons of 8th February 2017 is the easier to deal with. In it, RPM seeks the following orders:-

(i) That this Honourable Court be pleased to grant an injunction against the Defendants/Respondents, their servants and or agents or otherwise howsoever be restrained from interfering with the Plaintiffs' obligations generally in the Co-operation agreement including group formation, loan appraisal, loan monitoring, loan collection, and/or recovery including listing the defaulters with CRB, until the suit herein is heard and finalized by the Arbitrator as per the consent made in this Honourable Court on the 23rd of November 2016;

(ii) In the alternative, this Honourable Court be pleased to grant an injunction against the Defendants/Respondents' from interfering with the Plaintiffs obligations in the Co-operation agreement as spelled out in Article 3 of the said Agreement on loan promotion, group formation, loan appraisal, loan monitoring, loan collection or recovery by whatever means until the Defendants pay the Plaintiffs the outstanding commission and interest of Kshs. 5,531,060.07/= immediately and continue paying the said commission and interest until the outstanding amount is fully paid in terms of loan arrears;

(iii) That this Honourable Court do grant a mandatory injunction against the Defendants from withholding payments due to the Plaintiffs, same being:-

a. the unpaid interest income between January 2015 to August 2015 of Kshs. 2,970,564/= (Invoice No. RPM 041)

b. unpaid interest income for the month of April 2016 at Kshs. 297,255.70/= (Invoice No. RPM 043)

c. unpaid interest income for the month of May 2016 at Kshs. 130,501.40/= (invoice No. RPM 044)

d. payment of 20% of Kshs. 3,321,398/= as commission agreed for the month of June 2016 whereby Kshs. 664,259/= is payable to the Plaintiff (invoice No. RPM 045).

(iv) That a mandatory injunction be issued against the Defendant from withholding Kshs. 1,468,500/= payable to the Plaintiff as commission of 3% under invoice No. RPM 100 for groups mobilized as per the Agreement in the month of August and duly entered into the Defendants information system;

(v) Those costs of this Application be awarded to the Plaintiffs.

34. This Court has already set out the object of a measure of protection envisaged by section 7 of the Arbitration Act. The Court has also sounded out the caution to be exercised by it in dealing with a plea brought under these provisions.

35. At the heart of the dispute or differences between the two is the issue of commission and interest allegedly due to RPM from VFK. RPM, in addition, seeks specific performance of the contract. These are the issues that shall be on the table of the Arbitral Tribunal for its resolution.

36. In the summons before Court, a substantial prayer is that the Court orders VFK to pay RPM some outstanding commission and interest. But how will this Court do that without appearing to be advantaging RPM in a matter that is squarely before the Arbitration for resolution. If this Court were to make those orders, then it will be straying into a field which is the exclusive mandate of the Arbitrator. The Court will be going beyond its section 7 remit which is merely to grant interim measures of protection, where merited.

37. That the said, prayer (6) of the Summons deserves some further consideration. In it, RPM seeks the intervention of Court to restrain the Defendants from interfering with the RPM's obligations in the Cooperation Agreement. Those obligations are cited to include; group formation, loan appraisal, loan monitoring, loan collection and or recovery including listing of defaulters with Credit Revenue Bureaus. This is what RPM, with the concurrence of VFK, signed up to do. To protect RPM from interference of these responsibilities would be consistent with protecting the subject matter. However, of these obligations, RPM on 22nd August 2016, on their own volition, stated that it would not continue loan collection and/or recovery from 1st August 2016. By doing so, it surrendered this obligation. For this reason, any order of protection that Court will grant will not extend to loan recovery or collection and activities associated with it. In any event, in granting the motion of 8th December 2016, the Court has endorsed the new arrangement for loan collection put in place by VFK.

38. Ultimately, the Court makes the following orders;-

38.1) The notice of motion of 8th December 2016 is hereby allowed

38.2) The chamber summons of 8th February 2017 is allowed only in terms of prayer 6. However, the protection does not extend to the obligation to collect or recovery of loans and the activities connected thereto.

38.3) Each Party shall bear its own costs in respect to the two Applications.

Dated, delivered and signed in open Court at Nairobi this 20th day of December 2017.

F.TUIYOTT

JUDGE

PRESENT:

Kimondo h/b Nyabuyi for Plaintiff

Mugisha h/b for Nyaanga for Defendant

Alex - Court Clerk