



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO. 345 OF 2017**

**ISOLUX INGENIERA, S. A.....PLAINTIFF**

**VERSUS**

**KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**BANK OF AFRICA LIMITED.....2<sup>ND</sup> DEFENDANT**

**KCB BANK LIMITED.....3<sup>RD</sup> DEFENDANT**

**ECOBANK KENYA LIMITED.....4<sup>TH</sup> DEFENDANT**

**ECOBANK NIGERIA LIMITED.....5<sup>TH</sup> DEFENDANT**

**COMMERCIAL BANK OF AFRICA LTD.....6<sup>th</sup> DEFENDANT**

**RULING**

**The *ex tempore* decision**

1. On 13 December 2017, I heard the applications made by the Plaintiff and also by the 1<sup>st</sup> Defendant. The applications sought interim measures of protection pending arbitration. At the end of the arguments, I was satisfied that all the three applications as well as a preliminary objection which had been raised to the suit and to the Plaintiffs’ applications should be dismissed. I made an order accordingly. I dismissed all the applications *ex tempore*. I also dismissed the 1<sup>st</sup> Defendant’s preliminary objection. I did not however have time on that day to give my reasons.

2. This ruling now sets out the reasons why I dismissed the applications and the preliminary objection.

**Introduction**

3. I am dealing with three applications.

4. Two of the applications were made by the Plaintiff, a company incorporated in the Kingdom of Spain. The applications were majorly against the 1<sup>st</sup> Defendant, a state corporation duly registered in accordance

with the laws of Kenya. The third application is a cross-application by the 1<sup>st</sup> Defendant against the Plaintiff. For convenience, I will refer to the Plaintiff simply as “Isolux” and to the 1<sup>st</sup> Defendant simply as “Ketraco”.

5. The applications by Isolux appear unusual as they basically seek the very final orders that are also sought in the plaint. The applications are not intermediary even though so couched in the Chamber Summons. This is however not unexpected of applications for interim measures of protection pending arbitration.

6. The 2<sup>nd</sup> through 6<sup>th</sup> Defendants are innominate parties, impleaded purely for purposes of the efficacy of any order made in favour of Isolux. Indeed only the 2<sup>nd</sup> Defendant normally participated in these proceedings.

7. Mr. K. Ngeno represented Isolux while Mr. M. Mbaka urged Ketraco’s case. Mr. M. Munyu appeared for 2<sup>nd</sup> Defendant. I must quickly point out that I am grateful to counsel for their helpful submissions.

8. It is useful to recall that aside from the prayers of urgency and the ex parte reliefs, the main reliefs sought by Isolux in its application of 18<sup>th</sup> August, 2017 are as follows:-

**8.1 THAT an injunction be issued pending the reference to arbitration and the hearing of the arbitral proceedings restraining the 1<sup>st</sup> Defendant from releasing cumulative sums of Euros. 14,200,000.00 released to the 1<sup>st</sup> defendant by the 3<sup>rd</sup> and 6<sup>th</sup> Defendants on 17<sup>th</sup> August 2017 in pursuance of the calling of the Performance, Guarantees being held in the Defendant’s Account No. 1111251622 at Kenya Commercial Bank, Moi Avenue, be retained in the said account.**

**8.2 THAT the funds released to the 1<sup>st</sup> Defendant by the 3<sup>rd</sup> and 6<sup>th</sup> Defendant is pursuance of the calling of the Guarantee on 14<sup>th</sup> August, 2017 in the sum of Euros.14,200,000.00 and being held in the Defendant Account No. 1111251622 at Kenya Commercial Bank, Moi Avenue be paid back to the Plaintiff’s Account with the 3<sup>rd</sup> and 6<sup>th</sup> Defendants respectively to be held therein under the terms of the Guarantee, pending the hearing and determination of the Plaintiff’s Application dated 18<sup>th</sup> August 2017.**

**8.3 THAT an injunction be issued pending the reference to arbitration and the hearing of the arbitral proceedings restraining the 4<sup>th</sup> and 5<sup>th</sup> Defendants calling and/or enforcing of the calling of the Counter Guarantees issued by themselves in favour of the 3<sup>rd</sup> and 6<sup>th</sup> Defendant.**

**8.4 THAT IN THE ALTERNATIVE to paragraph 4 hereinabove, pending the preparation of a schedule demobilisations and taking of inventory and settling of final accounts between the 1<sup>st</sup> Defendant and the Plaintiff, status quo orders issue restraining the 1<sup>st</sup> Defendant from taking possession of the site, materials and drawing thereon from the Plaintiff/Applicant and/or assigning the Contract to other contractors or third parties.**

9. By its application of 24<sup>th</sup> August, 2017, Isolux then sought the following main reliefs:

**9.1 THAT pending the reference to arbitration and the hearing of the arbitral proceedings, this Court grants an interim measure of protection restraining the Defendant from assigning the Contract to any other Contractor or third parties.**

**9.2 THAT pending the reference to arbitration and the hearing of the arbitral proceedings, this Court grants an interim measure of protection restraining the Defendant from enforcing the calling of the Bank Guarantees in respect of the Contract.**

**9.3 THAT an injunction be issued pending the reference to arbitration and the hearing of the**

***arbitral proceedings restraining the Defendant either by itself, its servants or agents from dealing with, releasing or taking possession of the Plaintiff's material on site and the Drawing Works in respect of the Contract.***

***9.4 THAT an injunction be issued pending the reference to arbitration and the hearing of the arbitral proceedings restraining the 2<sup>nd</sup> to 6<sup>th</sup> Defendants from enforcing the calling of the guarantee by the 1<sup>st</sup> Defendant herein.***

10. The applications were supported by founding affidavits sworn by Lidia Ramirez and Jose Enrique Myro Borrero respectively.

11. In its cross-application dated 24 August 2017, Ketraco sought the following interim measures of protection:

***11.1 THAT the Plaintiff be ordered to provide the security costs of the present suit.***

***11.2 THAT the Plaintiff be ordered as a condition of referring this matter to Arbitration to provide security for costs in the intended arbitration.***

***11.3 THAT the Plaintiff be ordered to provide security for costs of this suit and the intended arbitration in the sum of Kshs.500,000,000.00***

***11.4 THAT the sum of Kshs.500,000,000.00 ordered as security for costs be invested in an interest earning account with the joint names of the Plaintiff's and the 1<sup>st</sup> Defendant's Advocates with a reputable banking institution in Kenya pending the hearing and determination of this suit and the intended arbitration.***

12. Isolux applications were opposed by Ketraco on various grounds including grounds stated in the Notice of Preliminary dated 22 August 2017. Ketraco also filed various opposing affidavits as did Isolux in response to Ketraco's application.

## **Background**

13. To understand the nature of the applications, it is essential to set out shortly the background and context in which the applications were made. The background is largely as presented by Isolux.

14. Isolux is a Spanish company headquartered in Madrid Spain and a subsidiary of Grupo Isolux Corsan S A ("the parent company"). Ketraco is a Kenyan corporate entity, wholly owned and controlled by the Government of Kenya. Isolux is an international engineering company. Ketraco, an acronym of the Kenya Electricity Transmission Company Limited, as the name suggests deals in planning designing building and maintaining electricity transmission lines and associated power substations.

15. On 20 December, 2011 the parties entered into an Engineering, Procurement and Construction (EPC) contract ("the contract") for the electricity transmission line between Loyangalani and Suswa electricity substations. The EPC works involved engineering, procurement, construction, testing and commission of approximately 428 km of a 400kv transmission-line connecting the national power grid to a wind power project located in the north-western part of Kenya and which was to be developed by Lake Turkana Wind Power Limited. A supplemental Agreement for the same EPC works was later entered into by Isolux and Ketraco on 21 July, 2014, itself perhaps an indication that the contract was not executed in time.

16. The contract contained detailed provisions. It ran some odd 76 pages excluding the schedules. Of relevance to the current proceedings, the contract provided for a contract price, part of which was to be paid in advance by Ketraco upon receipt of an invoice from Isolux as well as receipt of a performance security in the amount of 10% of the contract price and an advance payment guarantee from a bank approved by Ketraco. The contract also provided for interim payments.

17. The contract further provided for termination by Ketraco as well as by Isolux. Grounds for termination by either Isolux or Ketraco varied from failure to pay the undisputed amount in time to non-compliance with various contractual conditions and obligations. A common ground for termination was stated to be where Isolux or Ketraco or the parent company was “unable to, pay its debts or is liable to be moved up by a court of competent jurisdiction enters a composition or arrangement with its creditors or a moratorium is declared in respect of its indebtedness, or...goes into liquidation, or is subject to an administration order or if an administrator, administrative receiver or receiver is appointed over the whole or a substantial part of the property, assets or undertaking [of Isolux, Ketraco or the parent company as the case may be] or any equivalent or analogous event occurs.” : per clauses 15.2 and 16.2 of the contract.

18. It is perhaps also relevant to point out that both Isolux and Ketraco represented and warranted to each other, inter alia, that neither was in liquidation or subject to an administration order and no administrator, administrative receiver or receiver had been appointed over the whole or a substantial part of either Isolux’s or Ketraco’s property assets or undertaking and further that no equivalent or analogous event had occurred: per clause 24.2 of the contract.

19. Clause 20.2 of the contract contained an agreement to arbitrate (“the arbitration agreement”).

20. By the arbitration agreement, any dispute or difference arising out of or in connection with the contract was to be referred to and settled by arbitration under the Rules of conciliation and arbitration of the International Chamber of Commerce by three arbitrators. The seat of arbitration was agreed upon as London, England. It is common ground that the contract is governed by and construed in accordance with the Laws of Kenya.

21. The *lex arbitri* or law governing the arbitration as well as the arbitration agreement was however not agreed upon. I must however point out that the law of the juridical seat of the arbitration, and that is the law of England, is to be deemed as the *lex arbitri*. The autonomy and separability of the arbitration agreement would lead to this inference. The seat of arbitration is also likely to follow the court precedents set in **C v D [2007] EWHC 1541 (Comm)** and **XL Insurance Limited v Owens Corning [2001] 1 ALL ER 530** which both held that an agreement as to the seat of arbitration is analogous to choice of law of that seat as the proper law of the arbitration clause.

22. In pursuance of the contractual provisions, Isolux Limited caused to be issued to Ketraco performance guarantees by the 2<sup>nd</sup> and 6<sup>th</sup> Defendants on diverse dates.

23. Matters came to a head on 20 July, 2017.

24. Isolux wrote to Ketraco and informed Ketraco of the commencement of insolvency proceedings of the parent company as well as several of its subsidiaries including Isolux. Three weeks or so later on 14 August, 2017, Ketraco invoked the provisions of clause 15.2 (h) and terminated the contract with immediate effect. Ketraco’s letter of 14 August 2017 read, partly, as follows:

“...

**This is to advise that the filing of bankruptcy petition (copy attached) in Madrid by Isolux Ingeniera, S A is an event of breach of the terms of the said EPC contract provisions under clause 15.2 (h). Accordingly, the employer hereby gives you Notice terminating the contract in accordance with the said clause 15.2 (h) with immediate effect.**

**In order to ensure the protection of property and or for the safety of the works as provided in the EPC contract, urgently arrange for proper hand-over of the site and works and deliver any required Goods, all contractor’s documents and other design documents made by or for ISOLUX, to KETRACO.”** [emphasis in original]

25. Isolux did not arrange for a proper hand-over of the site and works to Ketraco. Isolux did not also

deliver any required goods and contractors documents or any documents to Ketraco as demanded. Instead, by its letter of 16 August, 2017 Isolux denied being in breach of the terms of the contract and reiterated its commitment to the contract.

26. Isolux wrote two letters on 16 August 2017 to Ketraco. The letters were similar in content save that the first acknowledged Ketraco's right to terminate the contract where Isolux was placed under an administration order or if an administrator, administrative receiver or receiver was appointed over the whole or a substantive part of the property of Isolux. The second of the two letters did not have this acknowledgment. I return to these letters later in the ruling.

27. As it were, Ketraco simply stood by its notice of termination and again on 17 August 2017 urged Isolux to "*urgently arrange for the hand-over of the site and works as directed under the said Notice.*" In the meantime as well, Ketraco called in the performance guarantees and securities from the 2<sup>nd</sup> through 6<sup>th</sup> Defendants.

28. The response from Isolux was to cling to its letter(s) of 16 August 2017 presume a dispute (there was no declaration of one) and move to court for an interim measures of protection pending arbitration.

### *Court proceedings*

29. A dispute was later declared in the statement of claim filed in court. Isolux also asserted its intention to refer the dispute to arbitration pursuant to clause 20.2 of the contract.

30. In court, Isolux contended that Ketraco had no right to terminate the contract as Ketraco had been informed way back on 20 July, 2017 of insolvency proceedings of Isolux Corsan S A, the parent company of the Isolux. According to Isolux, Ketraco had acquiesced to the event of insolvency and had thus waived its right to terminate the contract under clause 15.2 (h) of the contract. Additionally, Isolux contended that the declaration of insolvency did not impede the continuation of business activity of Isolux and that Isolux could still perform the contract.

31. Then, Isolux turned on Ketraco and accused it of having failed to fulfil its obligations under the contracts. Ketraco was particularly accused of substantial breach in failing to provide possession of and accesses to all areas of site to enable Isolux perform its part of the bargain.

32. The first application for relief pending arbitration was initially heard on 18 August 2017 ex parte and under urgency. Orders were issued to restrain the enforcement of the performance guarantees and securities against the 2<sup>nd</sup> through 6<sup>th</sup> Defendants. On both 23 August 2017 and 29 August, 2017 when the parties appeared inter partes, the court was informed that save for the 2<sup>nd</sup> Defendant's performance guarantees, the other guarantees involving the other 4 defendants had been honoured and the counter guarantees called in. This must have prompted the second of Isolux's applications. The latter application sought to freeze the monies paid to Ketraco by the 3<sup>rd</sup> and 6<sup>th</sup> Defendants and also to restrain the 4<sup>th</sup> and 5<sup>th</sup> Defendant from calling in their counter guarantees.

### **The parties' positions and arguments**

#### *Isolux submits*

33. According to Mr. Ngeno only two facets of the applications before the court were critical. First was whether there was an arbitration agreement between the parties and secondly, was whether the subject matter of arbitration was under threat. Mr. Ngeno answered both questions in the affirmative.

34. It was Mr. Ngeno's submissions that the contest was all about the termination of the contract and absent the interim measures of protection now sought by Isolux, the contest would be over. It was Mr. Ngeno's submissions that prior to the purported termination of the contract, Isolux had been fully performing the contract and that Ketraco was now engaging Isolux's sub-contractors and thus stood to

suffer no hardships. Instead, it was Isolux who would be prejudiced and put to hardship through a multiplicity of suits/claims by contractors if no interim measure of protection was granted.

35. Mr. Ngeno further submitted that the termination was not justified as according to Spanish law, administration and insolvency did not bar the bankrupt from undertaking its burden. Counsel argued for the interim measures to be allowed for a short period of 45 days only.

36. On the preliminary objection, counsel submitted that it could not be determined *in limine* as there was need for opinion evidence to be led by an expert on the insolvency laws of Spain.

37. In support of his arguments, Mr. Ngeno referred to the cases of **Safaricom Ltd v Ocean View Beach Hotel Ltd and 2 Other [2010]eKLR** and **Babs Security Limited v Geothermal Development Co. Ltd [2014]eKLR**.

*Ketraco responds*

38. In response, Mr. Mbaka was of the view that the applications by Isolux were not merited.

39. Mr. Mbaka pointed out that it was not in dispute that Ketraco could terminate the contract if Isolux was insolvent or faced insolvency proceedings. Mr. Mbaka contended that Isolux acknowledged this fact by its letter of 16 August 2017. In consequence, Mr. Mbaka contended that there was indeed nothing in dispute and thus there would be no need for arbitration.

40. Secondly, counsel pointed out that there was “nothing to be protected” as the guarantees had been called in and further the contract had also been terminated and fully impaired. According to Mr. Mbaka to maintain the status quo meant that Ketraco would be exposed with no performance guarantee(s) in place.

41. On Ketraco’s application for security for costs, Mr. Mbaka pointed out that Isolux was admittedly insolvent and it was necessary to order for security for costs which may be incurred in the intended arbitration. This, according to Mr. Mbaka, was with a view to cushioning Ketraco.

42. Mr. Mbaka finally lamented that since the termination, Isolux had done nothing to show that it was keen in pursuing any arbitration. In counsel’s view, the court’s jurisdiction was thus put to question. Counsel urged the court to allow the preliminary objection as an insolvent seems to have taken action without any permission or authorization by the bankruptcy administrator.

*The 2<sup>nd</sup> Defendant adds its voice*

43. Mr. Munyu who appeared for the 2<sup>nd</sup> Defendant maintained a neutral stance. Counsel pointed out that the 2<sup>nd</sup> Defendant would abide with any court order.

*The rejoinder*

44. In a brief rejoinder, Mr. Ngeno submitted that the court’s jurisdiction was founded under s.7 of the Arbitration Act. On the preliminary objection, counsel maintained, while referring to the case of **D. P. Bachhetta v Government of the U.S.A [2014]eKLR** that the objection was not well founded *in limine* as it involved an interpretation and construction of foreign law which entailed fact and not pure points of law. Finally, on the issue of security for costs, counsel submitted that the question as to whether or not security for costs ought to be awarded was one for the arbitral tribunal once constituted.

**Discussion and Determination**

*Issue(s)*

45. Three issues emerge for determination. First, has this court the jurisdiction to entertain the suit/applications? Secondly, is the suit competently before the court or is the preliminary objection well founded? Thirdly, is either party entitled to the interim measure(s) of protection sought?

46. On the jurisdiction issue, Mr. Mbaka appeared to be of view that in the absence of any move to constitute an arbitral tribunal the court had no jurisdiction to entertain the applications by Isolux. Mr. Mbaka also alluded to the fact that the parties had settled for the seat of arbitration in London, England and thus effectively questioned the powers of the national courts of Kenya to grant the orders sought.

47. Section 7 (1) of the Arbitration Act 1995 (“the Act”) is relatively clear. It reads thus:

**“1. It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitratl proceedings, an interim measure of protection and for the High Court to grant that measure.”**

48. It is clear that unless the parties agree otherwise, any party to an arbitration agreement may move the court for interim measures of protection under s. 7 (1) of the Act prior to the arbitral tribunal being constituted. The rationale is relatively easy to understand.

49. Firstly, the court has the mandate unless the parties agree otherwise to support and assist the arbitral process. Interim measures of protection are often tailored to support the arbitral process and to ensure the process is not undertaken in vain. Secondly, courts have coercive powers not just over the parties to the arbitral agreement but also third parties, against whom an arbitral tribunal may have no jurisdiction. Often interim measures of protection are coercive and fetch upon third parties as in this case where the guarantor banks are to be deemed third parties to the arbitration agreement. Thirdly, most interim measures of protection are sought under urgency. The road to the formation of an arbitral tribunal at times is long and windy. It may take weeks, even months to constitute an arbitral tribunal and by which time the purpose of a well deserved interim measure of protection could have been defeated. The national court must thus be in a position to intervene prior to the formation of the arbitral tribunal.

50. The second limb of the jurisdictional issue relates to the more difficult territorial question.

51. Admittedly the juridical seat of arbitration under the arbitration agreement between Isolux and Ketraco is London. Which national court then, is competent to grant interim measures of protection in an arbitration where the underlying contract is being performed in Kenya.

52. Again, I would first take refuge in the main purpose of interim measures of protection. They are intended to support arbitration and ensure the process is successful and not a nullity. I would also rely on the principle of party autonomy.

53. In my judgment, in the absence of any agreement by the parties to the arbitration to the contrary, I see no reason why the national courts of Kenya should not in full recognition of the doctrine of comity support arbitration scheduled to take place in London, England. This is more so where the law of the seat of arbitration as well as the rules of the relevant arbitral institution do not prohibit the national courts of any other country from granting the interim measures of protection.

54. Additionally, in the instant case, s. 2 of the Act stipulates that the Act applies to both domestic and international arbitration unless expressly provided otherwise. Section 7 (1) of the Act as already alluded, allows this court to issue interim measures of protection before or during arbitral proceedings. It is not limited to arbitrations in Kenya only. It is also not limited to domestic arbitration. The section extends to international arbitration, the kind Isolux and Ketraco are about to be engaged in.

55. I conclude by stating that in the case of interim measures of protection there exists a regime of concurrent jurisdiction whereby either the arbitral tribunal once constituted or the national courts of the juridical seat of arbitration or the national courts of where the underlying contract was being performed, may as appropriate and depending on the urgency, entertain and grant an interim measure of protection

pending arbitration.

56. In the absence of any law of the seat of arbitration or rule of the ICC prohibiting the Kenya courts from exercising such jurisdiction and in the absence of any agreement to the contrary by the parties, this court has both the substantive and territorial jurisdiction to deal with and determine the applications for interim measures of protection. This is further in view of the urgency of the applications by Isolux.

57. It leads me to the preliminary issue raised as to the competence of the suit and applications by Isolux.

58. It was Ketraco's contention that Isolux is operating under a declaration of voluntary insolvency and therefore was obliged to obtain permission from either the court or the administrator prior to filing the instant suit. Isolux response is that it has continued to retain both its decisional and administrative faculties and thus required no leave of the court or of the administrator.

59. It is common cause that on 12 July 2017 the Commercial court of Madrid Spain announced and declared the voluntary bankruptcy of the parent company and its subsidiaries including Isolux. A sole insolvency administrator was also appointed for purposes of the voluntary bankruptcy. Creditors were invited to join the insolvency proceedings. The declaration and announcement was later gazetted in Spain on 18 July 2017. An English translation of the gazette notice was availed by Ketraco without any contest by Isolux. A reading of the declaration and gazette notice reveals that Isolux like its parent company was to retain the management and control of its assets and decisions subject to any intervention through authorization and conformity of the administrators.

60. While Ketraco contends that permission of the administrator is necessary, Isolux contends it is not. While Ketraco also contends that leave of the court to commence the proceedings is necessary, Isolux contends it is not. Mr. Ngeno, for Isolux, added that the preliminary objection was not well founded as there was need to first determine a factual issue as to the exact position of the Spanish law in these regard.

61. I must point out that my clear reading of the declaration of voluntary insolvency and the attached conditions cannot lead me to summarily dispose of the instant cause. The nature of the proceedings which were commenced on the same date as the gazette notice in Spain, that is to say the 18 July 2017, dictated that Isolux moves with urgency. I see no reason why in these respect the intervention of the Insolvency Administrators by their "*authorization and conformity*" may not be read to include ratification of the action even prior to hearing the expert opinion on Spanish law.

62. Further, it is true that with regard to arbitration proceedings, s.38 of the Arbitration Act limits action to be taken by parties to arbitration agreements where such parties become bankrupts and trustees in bankruptcy are appointed. Section 38 of the Act provides that in the event of insolvency, the trustee in bankruptcy is the one to act instead of the insolvent party to the arbitration agreement. However, s. 38 is also limited to domestic arbitration and or if the insolvent is a Kenyan. The instant arbitration agreement does not fall under s.38 of the Act. It is an international arbitration. Isolux as well is not a Kenyan entity.

63. I do not find that the preliminary objection was merited in the circumstances of this case.

64. I will now consider the three applications for interim measures of protection.

65. Arbitration law preaches and grants party autonomy. Courts are discouraged from intervening but will do so in specific cases. One such case is where a court is allowed to grant an interim measure of protection under s. 7 of the Act. An interim measure of protection is some form of emergency relief. It is a tool intended to preserve and ensure the usefulness of arbitration. As, legal commentator, Stephen M. Ferguson says in his article "**Interim Measures of Protection in International Commercial Arbitration: Problems, proposed solutions and anticipated results**" [2003] 12 Current Intr'l Trade Law Journal 99:

*"An interim measure [of protection] is any temporary measure by which at any time prior to the issuance of the award by which the dispute is finally decided the court or tribunal orders a party*

*to comply with”.*

66. Without a closure as to category and with the aid of Article 17 (2) of the UNCITRAL Model Law on international commercial arbitration, I may index the types of interim measures of protection as follows.

67. First, there are those measures aimed at maintaining the status quo or clarifying the parties contractual position or relationship pending the finalization of arbitral proceedings. Secondly, are those measures aimed at facilitating the conduct of arbitration such as preservation of evidence and inspection of sites or goods. Thirdly, are measures aimed at facilitating the enforcement of arbitral awards such as the freezing of assets of a party or of removal of assets from within a jurisdiction. Fourth, are measures to ensure that a party is not cost-proof, such as an order for security for costs.

68. The categories may however not be closed and may take any form: see **Futureway Limited v National Oil Corporation of Kenya [2017]eKLR** . The court simply needs to be satisfied that there is need in the circumstances of each case to protect the parties’ rights and preserve the status quo until the arbitration is over. The onus is on the party applying for an interim measure. Neither party is to go home feeling the other party is award-proof or cost-proof. The aim, in my judgment, is to achieve the ideals of justice.

69. The Act prescribes no standards applicable to applications for interim measure of protection but case law has essentially settled the standards. Unlike arbitral tribunals which will consider imminent harm and the likelihood of success on the merits of the dispute, a court faced with an application for interim measures must avoid venturing into the merits of the dispute for the obvious reason that this is not its remit. It is the remit of the arbitral tribunal. The court must thus be careful not to pre-empt the ultimate award, even as it considers an application for interim measures of protection.

70. The court however has a loose discretion to ensure that the aim and purpose of an interim measure of protection is achieved. In this regard the principles set out in the case of **Safaricom Limited v OceanView Beach Hotel Ltd & 2 Others [2010]eKLR** still remain undimmed. The court (per Nyamu JA) stated thus;

**“... 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”.***

71. The discretion the court is seized with would also mean that the circumstances of the case ought to be taken into consideration as well as the conduct of the parties. A party, who does not move with urgency, will not obtain the court’s assistance. Likewise, a party who seeks the court’s assistance but does not do so in good faith is likely not to succeed. In the end, it all depends on the full circumstances of the case: see **Richard Boro Ndungu v KPMG East Africa Association & 2 others [2017]eKLR**.

72. What then of the instant case?

73. Foremost, there should not exist any doubt that the parties (Ketraco and Isolux) clearly and unmistakably intended that their disputes be resolved by an arbitral tribunal. Clause 20.2 of the contract is exhaustive. It is valid and enforceable. It is on the basis of the arbitration agreement that either Ketraco

or Isolux could move to seek an interim measure of protection from the court or the arbitral tribunal.

74. I will first consider the application for security for costs by Ketraco.

75. What is the urgency in this application? I must confess that I have seen none, yet, in my view, urgency should be a counting factor to invite the court's attention and intervention in a situation where parties have settled for an alternative dispute resolution mode.

76. The parties to the arbitration agreement have also settled for the very detailed arbitration process under the auspices of the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("the ICC Rules"). The designated juridical seat is London, England.

77. Article 30 of the ICC Rules has an elaborate procedure to deal with costs and fees as well as deposit or security for arbitrators fees. The costs and fees are set on the basis of the subject matter of the claim. The International Court of Arbitration domiciled at the ICC fixes all the administrative costs and fees payable to the arbitrators. It is pegged on the sums in dispute or claimed. Article 31 of ICC Rules, as may be relevant, provides as follows"

**"1. The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the court in accordance with the scale in force at the time of the commencement of the arbitral proceedings, as well as the fees and expenses of any experts appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.**

**2. The court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case. Decision on costs other than fixed by the court may be taken by the Arbitral Tribunal at any time during the proceedings.**

**3. The Final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties".** [emphasis mine]

78. It is common ground that the arbitration agreement provides for an ICC arbitration to be governed by the ICC Rules. Article 23 of the ICC Rules also provides for conservatory and interim measures to be granted by the tribunal at the request of a party once the arbitration file has been transmitted to the constituted arbitral tribunal. Such interim measures include security for costs. It is however appreciated that the power of the arbitral tribunal under Article 23 does not prejudice any party's right to apply to any judicial authority for interim or conservatory measures before the formation of the arbitral tribunal.

79. No doubt therefore in exceptional circumstances, either party ought to be able to be heard on and granted an interim measure as to security for costs by a judicial authority or the arbitral tribunal.

80. In the instant case, the more appropriate forum for such a measure, in my judgement, would however be the ICC constituted arbitral tribunal. Foremost the parties (Isolux and Ketraco) agreed to be guided and chaperoned by such an arbitral tribunal which also has powers to grant interim measures of protection once constituted. Secondly, the arbitral tribunal in conjunction with the ICC court would be in better stead than this court to have an estimate of and fix the arbitration costs which include arbitration fees, administrative expenses and reasonable legal fees: see Article 25 (1) of the ICC Rules. Thirdly, orders for security for costs always lead to the proceedings or intended proceedings being stayed until provision of or full payment of such security. I do not hold the view that the primary supportive function of the court is currently necessary to impose what I may term hardship on an already, admittedly, financially struggling Isolux before it even commences the arbitral process. Ketraco in my view stands to suffer little or no prejudice. The application for security for costs can be revived before the arbitral tribunal once its constituted.

81. I must finally add that I was not entirely persuaded by the affidavit evidence that Isolux was intent in

becoming cost-proof: Ketraco only relies on the fact of Isolux's voluntary insolvency proceedings and no more. This alone should not suggest or lead to the conclusion that Isolux is intent in defeating any order on costs as may ultimately be made by the arbitral tribunal.

82. I conclude that the ICC Rules are rather self-sufficient and capable of covering the aspect of security for cost. As there is currently no urgency in the application for security for costs, it would be more appropriate if Ketraco bid its time and made the application before the arbitral tribunal once constituted.

83. Ketraco's application for security for costs for the above reasons stands dismissed.

84. I now turn to consider the applications by Isolux.

85. The applications by Isolux seek to maintain a status quo ante pending the arbitration and final award so as to prevent Ketraco from bringing about a change of circumstances which the arbitral tribunal cannot adequately remedy. Isolux contends that Ketraco could not possibly terminate the contract. Ketraco, on the other hand, contends that it could and that the contract expressly gave it a right which it has since exercised. I must, out of deference to the arbitral process, proceed on the basis that Isolux has an arguable claim which Ketraco has met with an arguable defence.

86. The interim reliefs sought by Isolux are by way of injunction which effectively will lead to a status quo ante. Isolux will expect to be back where the parties were prior to the letter by Ketraco of 14<sup>th</sup> August 2017 which purportedly terminated the contract. Isolux will expect to be back on site. Isolux (perhaps, Ketraco as well) will expect all the performance guarantees, which have been called in and honoured, reinstated. Isolux will expect Ketraco not to access any monies off such performance guarantees and securities and where already accessed such monies to be refunded. All the other defendants will be expected to unwind the clock as well and issue new guarantees.

87. I already pointed out that the guiding principles were as laid out in the case of **Safaricom Ltd v OceanView Beach Hotel Ltd & 2 Others [2010]eKLR**. I did not hear any party to level a criticism of this case and I would be glad to follow it with the rider as pointed out in both **Futureway Ltd v National Oil Corporation of Kenya [2017]eKLR** and **Richard Boro Ndungu v KPMG East Africa Association & 2 Others [2017]eKLR** that the discretion is with court and it depends on the circumstances of each case.

88. There is also no doubt that interim measures of protection may include protecting contractual rights and thus making orders for the continued subsistence of the performance of contractual relationships : see **Richard Boro Ndungu v KPMG East Africa Association & 2 Others (supra)**, **Submiller Africa BV & another v East Africa Breweries Ltd [2009] EWHC 2140** and **Cetelem SA v Roust Holdings [2005] 2 Lloyd's Rep 494**.

89. As I read through the submissions of counsel for Isolux and later listened to the oral arguments by Mr. Ngeno, it struck me that the decision in **Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 Others (supra)** could have been misunderstood. Mr. Ngeno seemed to simply suggest that the court was empowered to adopt a holding role by ordering the maintenance of status quo pending arbitration once it was shown that there was in place a valid and enforceable arbitration agreement. This approach was exacerbated when Mr. Ngeno pointed to Clause 20.2 of the contract (the arbitration agreement) and then to the fact that there was a purported termination by Ketraco as well as calling in of performance guarantees. To Mr. Ngeno, the subject matter of the arbitration was the contract and nothing more or less.

90. Foremost, it would be important to point out that **Safaricom Ltd v OceanView Beach Ltd & 2 Others (supra)** does not stand for the simple proposition that the mere presence of an arbitration agreement – valid and enforceable - is enough to lead the court to order a status quo. An applicant needs to do more. The court too needs to do more. An applicant must show that he stands to be prejudiced beyond redemption as the entire subject matter of the arbitration would be put to way beyond restitution or reparation. The court must then after “an assessment of the merits of the application” determine whether in the circumstances it would be appropriate to order a measure of protection.

91. In considering the merits of the application for an interim measure of protection, the court must however be careful not to encroach on the substantive decision-making power of the arbitrators (appointed or to be appointed) by venturing into the merits of the dispute. The unfortunate reality, however, is that the encroachment may not be avoided where the court is urged to maintain a particular state of affairs. Where the arbitral tribunal, as in this case, is being asked or is likely to be asked to maintain and order specific performance of a contract, the court may find it necessary to consider whether the state of affairs is likely in the event to be ordered by the arbitrators award in order to consider whether it is just to order relief in the shape of an injunction : see **Coppee-Lavalin NV v Ken-REN Chemicals & Fertilizers Ltd (In liquidation in Kenya) [1994] 2 All E R 449**. The situation is even more complicated where the interim measure of protection takes the shape of an order that a party performs a contract, the very obligation the existence of which the arbitrators are called upon to decide.

92. In **Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] A C 334**, in an application for interim measures of protection which sought to suspend the suspension of a contract the court expressed its reluctance to pre-empt the arbitral award. As it would have amounted to pre-judging the merits of the case the court declined to issue the interim measures of protection which were mandatory in nature and sought the performance of the contract.

93. I found most of the foreign decisions informative and also relevant in pursuit of concept of internationalization of arbitration.

94. Against the foregoing background, I now turn to further consider the merits of the applications by Isolux.

95. There is no doubt that there is a valid and enforceable arbitration agreement. Ketraco has however expressed doubts as to the commitment by Isolux to this agreement to arbitrate. Ketraco points to the fact that Isolux is yet to declare a dispute and commence the process of constituting an arbitral tribunal under Clause 20.2 of the contract. In this regard, Isolux has stated that it will be proceeding to arbitration and that it simply hesitated as the parties were negotiating an amicable settlement. I have no reason to doubt the explanation advanced by Isolux. The court records also bear testimony to the various attempts at settling the dispute which thus far have proved fruitless.

96. Through its counsel, Mr. M. Mbaka, Ketraco also pointed out that that there was nothing to arbitrate. Specifically, Mr. Mbaka pointed out to Clause 15.2 (h) of the contract which, according to counsel, allowed Ketraco to determine the contract the moment insolvency proceedings were commenced. It is however this action that Isolux seeks to challenge. Additionally, Isolux also alleges waiver of the right to terminate on the part of Ketraco. In my judgement, Isolux's claim is potentially justiciable in so far as it alleges that Ketraco had no right to terminate the contract. It will be for the arbitrators to determine the arbitrability of the dispute. It will also be for the arbitrators to determine whether Ketraco's act in terminating the contract is so unanswerable that there is nothing to arbitrate.

97. Isolux however treads on willowy grounds if not thinner ice in so far as the status quo is sought to be maintained. There has to be a balance of both parties' rights and the respective hardships as may be occasioned if interim measures of protection are granted or denied, as the case may be. Neither party is to be laden with a heavier burden.

98. The current state of affairs is that the contract stands terminated, the performance guarantees have all also been called in and some honoured. Isolux is also insolvent and is under an administration order.

99. To grant an order maintaining the status quo ante would mean rewinding the clock. It would mean that the contract would have to be performed by both Isolux and Ketraco. On the face it, this should not be a problem. Ketraco would however have to deal not only with Isolux but also the insolvency administrator appointed by the Commercial Court in Madrid, Spain on 12 July 2017. The contract may require decisions to be made and obligations performed. Isolux may perform most, if not, all but subject to authorization by the insolvency administrator. Some decisions may also require the authorization of the insolvency administrator. This certainly may not be the same position anticipated by the parties as they

executed the contract. I do not view it that the parties could have anticipated a situation where a third party would have a say in either party's administration and decisional faculties in the performance of the contract.

100. Additionally, to grant an order of status quo ante may mean having to redo all the performance guarantees which have been called in and honoured. It is any person's guess as to whether the insolvency administrator will approve of such action. It is also any person's guess as to whether a bank would be willing to issue a guarantee to cover a party undergoing an insolvency process.

101. On the other hand, termination of the contract does not automatically also result in the loss of all rights under the contract and appurtenant thereto. One such obvious right is the right to damages. I did not hear any submissions to by Isolux that damages would not be adequate or that it would not be just to confine Isolux to a remedy in damages rather than specific performance. Neither was it suggested that calculations of such damages would be problematic. Indeed, both parties are clear that site measurements be undertaken.

102. There is also the factor tabled by Ketraco that the delay in performing the contract is already causing it millions of shillings daily. The amount was placed at Kshs. 33 million daily. By all standard, this is not a modest amount. According to Ketraco a continued performance by Isolux with all its insolvency problems would simply worsen the situation. Likewise, a complete stoppage to the works would only aggravate the losses and problems. In the circumstances of this case, I would agree that an order to maintain the status quo would lead to irreparable prejudice upon Ketraco.

103. In the totality of the affidavit evidence and the circumstances of this case, I would not find it appropriate to maintain the status quo ante 14 August 2017. It would not be a forward looking interim measure of protection. It would be unnecessarily burdensome to Ketraco. In view of Isolux's insolvency it would lead to unpredictable uncertainties. On the other hand the subject matter of the arbitration would not be entirely lost or defeated. Isolux could still safely prove its remedial rights under the contract including the right to damages.

### **Full and frank disclosure**

104. Finally, I feel constrained to also make it clear that I did not particularly find Isolux to have been fully candid with the court as it sought the ex-parte orders on 18 August 2017. The non-disclosure of the letter of 16 August 2017 in which Isolux appreciated the right of Ketraco to terminate the contract in the event of any insolvency proceedings, was in my view intentional and deliberate. While I have no doubt that the effect of this letter will most likely form a point of contest before the arbitrator, I must point out that times without number the court has relayed the message that a party applying for an ex-parte relief must show utmost good faith and disclose its case carefully and fairly. He does so by identifying the crucial points for and against the application. He has to disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the ex-parte relief.

105. Even though Mr. Ngeno insisted that the letter in question had been withdrawn and retracted it is clear from the record that it formed the subject of subsequent correspondence between the parties. In my view, a litigant who approaches a court *ex parte* is not entitled to omit any reference to a fact or attitude of his opponent which is relevant to the point in issue merely because he is not prepared to accept the correctness of it. It is also not an excuse for a litigant to say that information left out was not important and worse still if such information would form a ground for the defence.

106. If the duty of full and frank disclosure is not observed the court may ordinarily discharge any ex-parte relief even if after full enquiry the view is taken that the order was just and convenient and would probably have been made even if there had been full disclosure.

107. I deliberately did not however make the rule as to full and frank disclosure an instrument of injustice by disposing of the applications by Isolux on the basis of want of full and frank disclosure. Rather, the applications by Isolux fail for the reasons I have stated in the proceeding paragraphs.

## **Summary**

108. I dismissed the three applications ex tempore on 13 December 2017. Having considered all the above matters as well as the fact of non disclosure at the ex parte stage, I return the same verdict. The applications by Isolux dated 18 August 2017 and 24 August 2017 are dismissed. The same applies to the application dated 24 August 2017 as well as the preliminary objection dated 22 August 2017 by Ketraco. Each party shall however bear its own costs.

**Signed, delivered and dated at Nairobi this 19<sup>th</sup> day of December 2017**

**J.L. ONGUTO**

**Judge**