REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL &ADMIRALTY DIVISION

CIVIL CASE NO. 582 OF 2014

ITABUILD IMPORTS LIMITED.....PLAINTIFF

- VERSUS -

A.I.C KIJABE HOSPITAL..... DEFENDANT

R U L I N G

INTRODUCTION

1. The **Chamber Summons** application before the court is dated **9th December 2014** filed by the Plaintiff under Section 7 of the Arbitration Act, and other cited provisions of the law.
2. The application seeks to secure the following orders:-

a. ***That this matter be certified as urgent and service of the Defendant be dispensed with in the first instance.***
b. ***A temporary injunction do issue restraining the Defendant by itself, its agents and or assigns from continuing with works of whatsoever nature over New Paediatrics Wing Comprising Children's Wing, Hospital Link Corridor, Bethany Kids of Kijabe Hospital pending the determination of prayers c, d, e and f hereunder.***
c. ***A mandatory injunction restraining the Defendant by itself, its agents and or assigns from appointing a new contractor, allowing a new contractor to take over and or continue with works of whatsoever nature over New Paediatrics Wing Comprising Children's Wing, Hospital Link Corridor, Bethany Kids of Kijabe Hospital pending the determination of the proposed arbitration proceedings between the Plaintiff and the Defendant.***
d. ***A mandatory injunction compelling the Defendant by itself, its agents and or assigns to remove any other contractor besides the Plaintiff from New Paediatrics Wing Comprising Children's Wing, Hospital Link Corridor, Bethany Kids of Kijabe Hospital and put the Plaintiff in possession thereof pending the determination of the proposed arbitratal proceedings between the Plaintiff and the Defendant.***
e. ***A permanent restraining the Defendant by itself, its agents and or assigns to remove any other contractor besides the Plaintiff from New Paediatrics Wing Comprising Children's Wing, Hospital Link Corridor, Bethany Kids of Kijabe Hospital pending the hearing and determination of the proposed arbitral proceedings between the Plaintiff and the Defendant.***
f. ***The cost of this application.***

3. The application is premised on the several grounds set out therein and which we shall refer to herein, and is supported by affidavit of **Vittorio Veneziani** dated **9th December 2014** with

annextures thereto.

4. The application is opposed by the Respondent vide a Replying Affidavit of **Antony Christopher Sykes** dated **15th January 2015** together with annextures.
5. The brief history of the application is as follows. The Plaintiff/Applicant was prequalified by the Defendant for the construction of the proposed paediatric wing for Bethany Kids of the Defendant. As a consequence of this prequalification, the Plaintiff and the Defendant entered into a contract dated 13th September 2012 herein offer referred to as "**the Contract**". On 18th September 2014, the Defendant terminated the said contract, and also demanded that Imperial Bank Limited honour the terms of the Performance Bond. To protect its interests over the Performance Bond, the Plaintiff filed HCCC No. 407 of 2014, where parties are the Plaintiff and the Defendant herein, and the said bank. The HCCC No. 407 deals purely with the enforcement of the said bond and the same is still pending in court.

   Upon the termination of the said contract, the Defendant entered into two contracts with different contractors to proceed and conclude the remaining works under the contract. The Plaintiff is aggrieved by the said termination, and the appointment of the new contractors, and has cited Clause 45.1 of the Contract which contains an arbitration requirement and an elaborate process of dispute resolution. The Plaintiff then, pursuant to the said arbitration clause, proceeded to declare the existence of a dispute and referred the matter to arbitration. Parties have since agreed to the said arbitration and a sole arbitrator one QS Norman Mururu has since been appointed arbitrator and has accepted the appointment and fixed a preliminary meeting on 19th February 2015 at 2.30 p.m. in his office. Pending that arbitration the Plaintiff has filed this application seeking prayers (c) (d) and (e) of the application whose effect is to stop any further works going on at the site pending the outcome of the said arbitration.

6. On their part, the Defendant's case is that they having terminated the said contract, they are at liberty, under the said contract, to engage other contractors for the work, which according to them is pretty urgent, to proceed to completion without any further delay. The issue before this court is then whether this court can grant orders stopping the continuation of work at the site by other contractors who are strangers to the said contract.

THE APPLICANT'S CASE AND SUBMISSIONS

7. The Applicant's case as submitted by its counsel Mr. Joseph Munyithya is that in the dispute referred to arbitration, one of the issues for determination by the arbitrator is the legality of the alleged termination of the contract by the Defendant Mr. Vittorio Veneziani who deponed to the supporting affidavit, and who described himself as the Managing Director of the Plaintiff stated at paragraph 16 of the said affidavit that the Arbitrator will decided on whether the said termination was lawful. If the termination is found to have been unlawful, the Plaintiff will be seeking an order to continue with the works of the project. Mr. Muyithya submitted that the Defendants have at paragraph 21 of the replying affidavit disclosed that they have entered into new contracts with other contractors for the same construction works. However, as at now, there has been no valuation of the works which have so far been done. If this state of affair is allowed to continue, it will cause confusion at the site as it would be difficult to determine which works have been done by which contractor, and this confusion will lead to huge losses to the Plaintiff. This then necessitates an order for preservation of the site with the double advantage should the arbitrator reinstate the Plaintiff to the contract. The counsel further submitted that the role of this court, once the parties have submitted to arbitration, is to issue interim measures of protection under Section 7 of the Arbitration Act to preserve the said contract and the outstanding works at the construction site. The Applicant sited authorities to support the position of their case. One such authority was the **Infocard Holdings Limited** where the Court of Appeal prescribed what is to be considered in an application under Section 7 of the Arbitration Act as follows:-
    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 arbitrator so as to avoid encroaching on the tribunal's decision making power as intended by the parties?***

RESPONDENT'S CASE AND SUBMISSIONS

8. The Respondent through their counsel M/s Ann Mbugua submitted that the Defendant is an hospital for children with serious disabilities serving Kenya and surrounding countries, and that the construction works the subject matter of this suit are extremely urgent and are meant to ease congestion at the hospital. The counsel admtited that the Respondent terminated the said contract. The construction was to be completed by 21st December 2013. There were delays causing the Defendant to extend the period three times with the last extension ending on 19th September 2014. In the Replying Affidavit the deponent Mr. Antony Christopher Sykes who describes himself as the Construction Project Manager, at paragraph 10 and 11 therefore state the particulars of the said three extensions as follows:-
    a. ***1st extension granted to 4/1/2014***
    b. ***2nd extension granted to 5/5/2014***
    c. ***3rd extension granted from 5/5/2014 to 19/9/2014 vide letter dated 23rd June 2014.***
9. The deponent further at paragraph 11 with the aid of a declining labour supply graph demonstrates how the Plaintiff allegedly was not committed to complete the works in time by deliberately refusing to employ adequate labour on the project. In the same affidavit the deponent states that the Applicant after the expiration of the last extension did not apply for extension of time as stipulated in Clause 36.1 of the Contract; the Applicant also did not apply for extension of the Performance Bond but instead wrote to the bank pre-empting the forfeiture of the Performance Bond. When it became apparent that the Plaintiff would not complete the works by 19/9/2014 and it did not apply for extension, the Defendant terminated the said contract in accordance with Clause 38.1.2. of the contract.
10. The Defendant admitted entering into contracts with two companies being Ropa Engineering Company Limited for roofing completion; and Silver Terrazzo & Building Contractors Limited for Terazzo Works completion. It was submitted for the Defendant that the surrender of the site and the engagement of other service providers are expressly provided for in the contract, and that reinstatement of the Plaintiff to the contract would be totally against the terms of the contract. The Defendant submitted that the Arbitration Clause 45.5 of the contract is not at all tied to the process stipulated in Clause 38 of the contract, and that indeed the dispute herein is on termination of contract as opposed to value of the works, and that no prejudice would be suffered by the Plaintiff if no injunction is granted. M/s Mbugua further submitted that the parties will have a chance to present their case during the arbitration and the arbitrator is empowered to make award for damages to the deserving party. The Defendant submitted that the work is 80% completed, and the remaining 20% will be completed within 90 days, and that this court should not interfere with the process. M/s Mbugua relied on the case of **Giella – Vs – Cassman Brown and Company Limited** for her submissions that the Plaintiff had not established a *prima facie* case with a probability of success; has not demonstrated irreparable loss which cannot be adequately compensated by an award of damages; and that in any event the balance of convenience favours the Defendant, as any grant of the orders will clearly prejudice the young children suffering disability as they will continue to stay in congested space without being sure as to when the construction would complete. The Defendant in the replying affidavit has annexed pictures showing the said hospital, congested wards and the state of various works.
11. I have carefully considered the application and the opposing submissions of the parties. I am aware that most issues in this matter will be the subject of the said arbitration, and I will therefore not pronounce myself on the legality or otherwise of the said termination. I will restrict myself to the following issues:-
    a. ***What are the imports of Clauses 36.1, 38, and 45 of the contract to the matter at hand and the probable effect of compliance or non-compliance thereto by opposing parties.***
    b. ***What is the discernible intention of the Applicant from its conduct in the performance of its obligations under the contract, on termination of the contract, and its conduct soon after the said termination.***

c. ***Whether under Section 7 of the Arbitration Act this court can give the orders sought.***

12. It is noted that under the said contract which is found at page 14 of the Applicant's Bundle an Architect is appointed as an officer of the employer for purposes of communications between the Employer, the Contractor, the Quantity Surveyor and other Project Officers. This appointment is contained in Clause 2 of the said contract. This office is relevant to these proceedings in relation to communications which took place between the Employer and the Contractor before and soon after the contract was terminated.
13. Now, the main issue here is whether the said termination was justified. As I have said, this is the issue to be determined conclusively by the Arbitrator. The duty of this court here is simply to "peep" into the act, so to speak, and to consider, in a very broad manner, whether the actions of the Defendant in terminating the contract were justifiable. In the replying affidavit Mr. Antony Christopher Sykes, he depones at paragraph 11 thereof that the Plaintiff's contract was extended on three different occasions ending with extension to 9th September 2014. The contract, whose sum was Kshs.173,586,294.43 was expected to complete on 21st December 2013. It is clear that the Plaintiff did not meet this deadline hence the said extensions. By their letter dated 23rd June 2014, the Defendant extended the contract to 19th September 2014. However, on 18th September 2014, the Defendant duly terminated the said contract, citing, among other reasons, failure by the Plaintiff to apply for extension under Clause 36.1 of the Contract. Indeed, in the said letter of termination found at page 49 of the Defendant's bundle, at paragraph 2 thereof, the Defendant is pleading with the Plaintiff to apply for extension of the contract.

Clause 36.1 states:-

> ***"Upon it becoming reasonably apparent that the progress of the works is delayed, the Contractor shall forthwith give written notice of the cause of the delay to the Architect with supporting details showing the extent of delay caused or likely to be caused. Thereafter the Architect shall evaluate the information supplied by the Contractor and if in his opinion the completion of the works is likely to be or has been delayed beyond the date for practical completion stated in the appendix to those conditions or beyond any extended time previously fixed under this Clause"***

14. The Architect may extend or not extend period. The important thing to consider is whether the Plaintiff applied for any such extension. There is no evidence on record that the Plaintiff made such a request for extension and that the same was denied. This brings to question the intention of the Plaintiff. How did it intend to continue with the contract without seeking to extend the same? The question to ask is whether there was a deliberate intention by the Plaintiff to default so that the Defendant would take the punitive action of terminating the contract. This question is important since the Plaintiff wants the court to stop any further works at the site pending the arbitrators finding on the legality of the termination. If under the contract, the Plaintiff did not apply for extension, then what became of the contract? The contract was terminated by effluxiion of time and the Defendant merely recognised the same officially under Clause 38.1.2 of the Contract.
15. Clause 38.4 of the contract stipulates the procedure to be followed after termination of contract.

> ***38.4 In the event of the contract being terminated as aforesaid and so long as it has not been reinstated and continued, the following shall be the respective rights and duties of the employer and the contactor***
>
> ***1. The carrying out of the works by the contractor shall cease forthwith and the contractor shall vacate the site thereby relinquishing possession thereof and the responsibility and care of the site and the works shall henceforth pass to the employer.***
>
> ***2. So soon as it is practicable the Architect shall arrange a joint inspection with the contractor and the Quantity surveyor for the purposes of taking a record of the work done, materials and goods delivered on site, the contractors equipment and temporary building***

3. The Quantity Surveyor shall within a reasonable time after the inspection prepare a final account for that part of the works carried out by the contractor by the date of termination of the contract.

38. ***The employer may employ and pay other persons to carry out and complete the works and to rectify any defects and he or they may enter upon the works and use all temporary buildings, equipment, goods and materials intended for, delivered to and placed on or adjacent to the works and may purchase all materials and goods necessary for carrying out and completion of the works.***

38. ***The Contactor shall, if so required by the employer within fourteen days of the date of termination, assign the employer without payment of any agreement for the supply of the materials or goods . . .***

38. ***The contractor shall as and when require in writing by the Architect so to do (but not before) remove from the works any temporary buildings ,equipment, goods and materials belonging to and hired by him. If within thirty days after such requirement has been made the contractor has not complied therewith, then the employer may (but without being responsible for any loss or damage) remove and sell any such property of the contractor holding the proceeds less all costs incurred to the credit of the Contractor.***

Annexed hereto and marked ACS-3 is a copy of the signed contract.

16. Clearly, the rights, duties and obligations of the Employer and the Contractor are well set out in the Contract. There appears to be no provision for the Contractor to remain in possession of the site pending resolution of the arbitration process, as claimed in Paragraph 9 of this application. In her submissions M/s Mbugua gave the chronology of events and actions taken leading to and superseding the termination of the contract as follows:-

a. ***On 15th September 2014, the plaintiff approached the Imperial Bank to pre-empt forfeiture of the Performance Bond (See annexture ACS-4 to the Replying Affidavit)***

b. ***The termination notice in accordance with Clause 38.2 was issued on 18th September 2014 and the defendant called for forfeiture of the bond.***

c. ***The carrying out of the Works by the Plaintiff according to Clause 38.4.1 ceased from 19th September onwards.***

d. ***Responsibility for the care of the site according to Clause 38.4.1 was taken by the Employer immediately and posted hospital security on the site from 19th September 2014***

e. ***The joint inspection and record exercise according to Clause 38.4.2 was completed on 8th October 2014 (See annexture ACS-6 to the Replying Affidavit.***

f. ***In invoking the rights of the Employer to employ and pay other persons to carry out and complete the Works as stated in Clause 38.5 and 38.6 the Employer requested assignment of subcontractors and suppliers (See annexture ACS-7 Kijabe Hospital letter dated 29th September 2014).***

g. ***In accordance with Clause 38.7 the Architect requested removal of temporary buildings, equipment, goods and materials (See annexture ACS-8 Archenteron letter IIL/046 dated 22nd October 2014)***

h. ***In accordance with Clause 38.7 the Contractor complied with this request (See annexture ACS-9)***

17. From the foregoing, it is clear that under Clause 38.4.1, the contractor shall cease to carry out any works of construction upon termination and the contractor shall vacate the site thereby relinquishing possession thereof and the site responsibly shall henceforth pass to the Employer.
18. It is also clear that under Clause 38.4.2. the Architect shall arrange a joint inspection with the Contractor and the Quantity Surveyor for the purposes of taking a record of the works done, materials and goods delivered on site, the contractor's equipment and temporary buildings. Annextures ACS 8 – 10 of Mr. Antony Christopher Sykes' affidavit found at page 73 of the Defendant's Bundle show communications between the Architect and the Plaintiff. In one such communication, annexture ACS - 9, the Plaintiff is informed of the items to be removed from the site, to which the Plaintiff through its agent Mr. Clapperton Pamba agrees. The question to ask then is why would the Plaintiff accept to remove construction items from the site if the Plaintiff still intended to have the possession of the site? The impression I get is that the Plaintiff had in mind already given up the site. The current application appears to me to be merely an afterthought.
19. Under Clause 38.5 of the contract, the Defendant is entitled to engage other persons to carry out and complete the works pursuant to such termination. This the Defendant did vide two contracts with Silver Terrazzo and Building Contractors Limited for the Terrazzo works, and M/s Ropa Engineering Company Limited for the roofing works. Details of those contracts are found at pages 80 – 84 of the Defendant's bundle.
20. As for the Arbitration Clause it is agreed that Clause 45 of the said contract demands that all disputes be referred to arbitration. The Arbitration Clause does not, however, state that during the arbitral process construction works will have to cease. The Arbitration Clause does not address the issues raised in Termination Clause 38. This shows that these clauses take effect independently. The Arbitration Clause is not interpreted to mean that once an arbitration process has been initiated then the construction should stop, or a third party given the contract should be stopped from carrying on with the contract. To the contrary, the Termination Clause 38 elaborately deals with the effect of termination on the continuity of the contract, and adequately states that the Defendant is at liberty to engage third parties to proceed with the contract. In my view, the aftermath of the termination are clearly stipulated in Clause 38. Those aftermaths are very clear on the status of the contract and third parties. What, perhaps, this court should consider is the interim measure of Protection, if any, that can be granted under Section 7 of the Arbitration Act pending the arbitration process allowed under Clause 45 of the Contract. Section 7 of the Arbitration Act allows the court to issue interim measures of protection to the suit property pending arbitration. The existence of an Arbitration Clause in a contract, and the fact that in this case the arbitration process is almost underway, are in themselves *prima facie* evidence that the Applicant could have a case to be protected in much the same way as the principles established under **Giella – Vs – Cassman Brown & Company Limited Case**. However, that alone is not enough. The court must look into the nature of the subject matter to be protected in relation to the totality of the agreement or contract allowing the arbitration process. The court in exercising jurisdiction under Section 7 must satisfy itself that the subject matter to be protected is one which will dissipate if not protected, and also one which once lost, would not be recovered. That is to say, the Applicant must show a possibility of irreparable loss which cannot be compensated for by way of damages. The court must also consider the inconvenience to be suffered by either of the parties in considering whether or not to grant the interim measures of protection.
21. Applying my mind to above caution, it is my considered view that in the case at hand, as I have demonstrated above, the Plaintiff upon receiving the Notice of Termination, behaved and conducted itself with an exuberant acquiescence, giving the impression that it was not going to claim the possession of the construction site, or attempt to come back to the site. Secondly, as I have demonstrated above, under Clause 38, and upon the termination being served, the contractor was expected to, and it indeed left the site possession to the Defendant, who, upon resuming that possession, went ahead to enter into contract with other parties for the completion of the works. It is clear that under the contract itself, especially under Clause 38, interim measures of protection under Section 7 of the Arbitration Act would not apply, for if it were to apply it would have the effect of annulling the provisions of the Termination clauses 38.4.1, 38.5, 38.6 and 38.7. Such an action would completely negate the intention of the parties as expressly stated, and would amount to the court re-writing the contract for the parties. Thirdly, it is clear to me that the said clauses on

termination were meant to divest the contractor of any immediate interest in the continuation of the works at the site. Considering, the wording of the said contract, it becomes clear that the result of the arbitral process would be limited to awarding damages where appropriate as opposed to reinstatement of the contract because such reinstatement would be against the express provisions of the Contract.

22. It is my considered view that the conduct of the Applicant for failure to extend the period of contract, its conduct upon the receipt of the letter of termination, and the wording of the Termination Clause 38 of the Contract convincingly militate against the issuance of any interim measures of protection under Section 7 of the Arbitration Act. In addition, the Applicant's claim is a money claim being based on contract. If the arbitrator finds that the Applicant's contract was illegally terminated, damages would be an adequate compensation. In any event I believe that the grant of the prayers sought herein would cause a lot of inconvenience to the Defendant. It has been clearly demonstrated by the Defendant that the Defendant is an hospital for children with special disabilities. Currently, the hospital suffers acute congestation. The continuing works are expected to conclude to provide the much needed relief to decongest the hospital. Termination of those works, without knowing when the same would resume would amount to such an inconvenience which this court would be keen to avoid.

23. Finally, the Applicant submitted strongly that there has been no valuation of the works upto and including the time when the contractor handed over the site to the Defendant. However, the contract does not make any references to valuation of works. In my view, Clause 38.4.2 dealt with this aspect and it involves a joint inspection of the site with all the parties concerned to assess and take record of the work done, materials and goods delivered on site, the contractor's equipment, and temporary buildings. I understand the above clause especially the phrase "***for the purpose of taking a record of the work done, materials and goods delivered on site, the contractor's equipment, and temporary buildings***" to have clearly addressed the Applicant's concern on the issue. I have also referred to communications in the annextures to the replying affidavit of Antony Christopher Sykes which clearly addressed the same. In the event that Clauses 38.4.2 and 38.4.3 have not been complied with, then the same shall be doe within 30 days from today.

24. Pursuant to the foregoing, I make the following orders:-

i. ***The Plaintiff's/Applicant's Chamber Summons application dated 9th December 2014 is dismissed for lack of merit.***

ii. ***The Defendant/Respondent is herewith directed to comply with Clauses 38.4.2 and 38.4.3 of the said Contract, if it has not already done so, within 30 days from the date hereof.***

iii. ***The costs herewith shall be for the Defendant/Respondent.***

Orders accordingly.

READ, DELIVERED DATED AND AT NAIROBI THIS 30TH DAY OF JANUARY 2015

(Signed)

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Jin for the Plaintiff/Applicant

M/s Amin Mbugua for the Defendant/Respondent

Teresia – Court Clerk