REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY AT MILIMANI

CIVIL CAUSE NO. 81 OF 2011

CHINA YOUNG TAI ENGINEERING CO LTD..... PLAINTIFF

Versus

L.G. MWACHARO t/a MWACHARO & ASSOCIATES....1ST DEFENDANT

RAVASAM DEVELOPMENT CO LTD….....2ND DEFENDANT

RULING

Injunction pending arbitral proceedings

[1] The application I am faced with is dated 16th July 2014 and is seeking for relief of interim measure of protection under section 7 of the Arbitration Act in the form of a temporary injunction to restrain the 2nd Defendant, its agents, employees, servants, assigns, successors and or any one claiming through or under it from advertising for sale, wasting, alienating, selling, or disposing of or otherwise interfering with land known as **Elysee Plaza L.R. NO 2/186** pending determination of the arbitral proceedings between the parties.

[2] The major grounds for the application is that the court issued temporary orders of injunction on 19th April 2013 and it would be a complete negation of those orders if the Defendants proceed to take possession of or sell the suit property. The suit property is already advertised for sale and any sale thereof will deny the Plaintiff an opportunity to recover on the award which may be issued in the arbitration. The Applicant has given the following set of information to support the fear it has expressed. First, the Applicant's claim in the arbitration is for a huge sum of Kshs. 546,206,546.73 with overwhelming chances of success. Second, the 2nd Defendant has admitted before the arbitral tribunal and in writing that it owes a sum of Kshs. 177,500,000. But in all these things, the 2nd Defendant admitted in its testimony that; its managing Director and Investors in the Project are all foreigners, i.e. Ghanaian and French nationals; it was incorporated solely as a special vehicle for the project herein alone; and it has no other assets within the country apart from the suit property. The attempts by the Managing Director of the 2nd Defendant to show he is a Kenyan in an affidavit under oath is not only dishonest but criminal in nature. He has misled the Registrar of Companies on that aspect.

[3] The Applicant has also cited Article 159(2) (c) of the Constitution on the principle of justice that courts, in the exercise of judicial authority should promote alternative forms of dispute resolution including arbitration. It also quoted order 40 rule 1(b) of the Civil Procedure Rules to support their request for an order of injunction on the fact that the 2nd Defendant may remove or dispose of its property

in circumstances affording probability that the 2nd Defendant will or may obstruct or delay execution of a decree which may be passed against the 2nd Defendant. And being guided by the decision of Kamau J in **Elizabeth Chebet Ochardson vs. China Sichun Corporation for Techno-Economic Corporation & Another,** the Applicant stated that the purpose of the relief under section 7 of the Arbitration Act is to ensure that the subject matter will be in the same state as it was at the commencement of or during the arbitral proceedings. Therefore, the court should be satisfied that the state of the subject matter will not be in the same state at the time the arbitral proceedings are concluded before it can issue the interim relief. Unless the relief is granted to preserve the suit premises, the probability of the Plaintiff making recovery on the award which may be given in its favour will be nil. There is *prima facie* case in the facts established by the Applicant on which an interim relief of protection should be given. So they pleaded with the court.

[4] Even if the court was in doubt, convenience would tilt in granting the injunction especially because there is pending litigation on the suit property and should be preserved. The Applicant was relying on the doctrine of *lis pendens* which was expounded in the case of **Carol Silcock vs. Kassim Sharrif Mohamed [2013] eKLR** and **Anne Njeri Mwangi vs. Co-operative Bank of Kenya Ltd [2013] Eklr** by Angote J and Havelock J respectively. The counter-claim by the Defendant has not been admitted and in any case it is for a much lesser sum, i.e. Kshs. 173,000,000 compared to the Applicant's claim of Kshs. 546,206,546.73.

The Respondents fired back

[5] The Respondents opposed the application for interim measure of protection sought by the Applicant. The Respondents filed a Replying Affidavit sworn by Eric Agbeko on 25th July 2014 and submissions. They argued that the 2ND Defendant was incorporated on 6th August 2008 to carry various objects including but not limited to construction. They have annexed the Memorandum and Articles of Association to prove this. Further, they urged the court to consider the JBC Agreement dated 28th April 2009 which set out the programme of work and completion date for the works. But, according to the Respondents the Applicant breached the said contract and abandoned the site. As a result thereof, the 2nd Defendant obtained a loan facility from Equatorial Commercial Bank in order to complete the project. Therefore, the conduct of the Applicant has just caused the Respondents great losses.

[6] The Respondents formulated several issues which they think should be determined by the court. These issues are:-

1) Was there a valid contract between the parties?

2) Was there a breach of the said contract by the Plaintiff?

3) Was the contract terminated by the 2bd Defendant? and

4) Is the 2nd Defendant entitled to damages?

[7] But without much ado, I should state here that these issues form the substratum of the arbitral proceedings, and the arbitral tribunal is the right forum where the issues should be raised and determined. This court, therefore, cannot determine the issues formulated by the Respondents without usurping the jurisdiction and power of the arbitral tribunal. For that reason, I will only use the submissions by the Respondents in so far as they are relevant to the request for interim measure of protection sought by the Applicant. I note that the 2nd Respondent argued that, despite the breach by the Applicant, it overpaid the Applicant by Kshs. 173, 471,715.89 which sum constitutes the counter-claim it has filed against the Applicant. It also argued that the Applicant has not come to court with clean hands in view of the breach and the unpleasant conduct of the Applicant in abandoning the site. Background facts of the case on these allegations were provided in its submissions. To them the relief should be refused.

THE DETERMINATION

[8] I have considered all the affidavits filed in support of and opposition to the application dated 16th July 2014. I have also considered the submissions of the parties which have been filed and form part of the record. Although the application dated 16th July 2014 is for a temporary injunction, it is attended to by two powerful and quite distinct arguments which have been put forth by the Applicant. The two arguments are measured on two distinct legal yardsticks. The first argument is that the injunction sought is aimed at acting as an interim measure of protection of the suit property under section 7 of the Arbitration Act pending the determination of the arbitral proceedings herein. The yardstick thereto is found in the proposition of the law on section 7 of the Arbitration Act; courts have spilt enough judicial ink on this subject and I need not re-invent the wheel. On the applicable threshold thereof, I am content to cite the decision by Kamau J in the case of **Elizabeth Chebet Ochardson vs. Cina Sichun Corporation for Techno-Economic Corporation & Another,** that the purpose of the relief under section 7 of the Arbitration Act is to ensure that the subject matter will be in the same state as it was at the commencement of or during the arbitral proceedings. Therefore, the court should be satisfied that the state of the subject matter will not be in the same state at the time the arbitral proceedings are concluded for an interim relief to issue. I will come back to this.

[9] The second argument is on order 40 rule 1(b) of the Civil Procedure Rules that the injunction herein is being sought on the premise that the 2nd Defendant may remove or dispose of its property in circumstances affording a probability that the 2nd Defendant will or may obstruct or delay execution of a decree which may be passed against the 2nd Defendant. The test thereof is the one formulated for Mareva injunctions; and the purpose of such injunction under order 40 Rule 1(b) of the Civil Procedure Rules is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him. But an injunction in order 40 rule 1(b) of the Civil Procedure Rules is not to be used: 1) to pressure a defendant; or 2) as a type of asset stripping (forfeiture); or 3) as a conferment of some proprietary rights on the plaintiff upon the assets of the Defendant.

[10] I resume the first request for interim measure of protection and the applicable test. Has the Applicant satisfied the court that the subject matter of the suit will not be in the same state at the time the arbitral proceedings are concluded unless an injunction is granted? There is one important thing here; what is the state of the subject matter which should be preserved? The record shows there is a dispute on the completion of the contract between the parties, and that is one of the issues before the arbitral tribunal. The claim before the arbitral tribunal is for the contract sum and counter-claim of some overpayment by the Applicant and 2nd Respondent respectively. The 2nd Respondent claims valuation of work done has been done already. The Applicant is not asking preservation of the suit property so that valuation of work done could be done. They are also not claiming any proprietary interest on the suit property save for entitlement or consideration under the contract consisting in their claim now before the arbitral tribunal. There is also no clarity from the Applicant that the interim measure of protection is necessary, in the context of their claim, to preserve the subject matter of the arbitral proceedings. Given the nature of the claim by the Applicant, courts should be slow to prevent the proprietor of the suit property from selling the property unless there is utmost good ground to do so; that such sale will affect the subject matter of the arbitral proceeding in a manner that it will not be the same again by the time the arbitral proceedings are concluded. But before I render my final pronouncement on this matter, let me consider the other requests and arguments made by the parties so that I can have an informed overall impression of all the matters in issue. Perhaps, the grounds cited under order 40 of the CPR offer some plausible considerations.

[11] Has the Applicant shown that the 2nd Defendant may remove or dispose of its property in circumstances affording probability that the 2nd Defendant will or may obstruct or delay execution of a decree which may be passed against the 2nd Defendant? As I stated earlier, the test here is the one formulated for Mareva injunctions; and the purpose of such injunction under order 40 rule 1(b) of the Civil Procedure Rules is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him. This seems to be the major reason why the Applicant believes it is entitled to relief. It has stated that the court issued temporary orders of injunction on 19th April 2013 and it would be a complete

negation of those orders if the Defendants proceed to take possession of or sells the suit property. They argued also that the suit property is already advertised for sale and any sale thereof will deny the Plaintiff an opportunity to recover on the award which may be issued in the arbitration. The Applicant has given the following set of information to support the fear it has expressed. First, the Applicant's claim in the arbitration is for a huge sum of Kshs. 546,206,546.73 with overwhelming chances of success. Second, the Applicant claimed that the 2nd Defendant has admitted before the arbitral tribunal and in writing that it owes the Applicant a sum of Kshs. 177,500,000. Further, the Applicant claims that the 2nd Defendant admitted in its testimony that; Its Managing Director and Investors in the Project are all foreigners, i.e. Ghanaian and French nationals; the attempts by the Managing Director of the 2nd Defendant to show he is a Kenyan in an affidavit under oath is not only dishonest but criminal in nature; the said MD of the 2nd Defendant misled the Registrar of Companies on that aspect; the 2nd Defendant was incorporated as a special vehicle for the sole object of the project herein; and the 2nd Defendant has no other assets within the country apart from the suit property.

[12] The fact that the MD for the 2nd Defendant is a foreigner *per se* does not translate into an intention by the 2nd Defendant to remove or dispose of or an act of removing or disposing of assets from the jurisdiction of the court. The parties to the contract herein are the Applicant and the 2nd Respondent who entered into the contract in question in their capacity as described in the contract and nothing shows that the capacity of the 2nd Defendant has changed since the entry of the contract. The 2nd Defendant remains a legal person up to the time of this ruling as no evidence to the contrary has been presented to the court although there have been disputes on the directorship and shareholding of the 2nd Defendant. But Mabeya J in his ruling dated 19th April 2012 ruled that those issues should be determined in **HCCC NO 450 of 2011**. The allegations that the MD for the 2nd Defendant has committed criminal acts by giving false information to the Registrar of Companies is a serious matter which ought to have been laid before the relevant state organs for appropriate action rather than casually use it as a basis for an injunction. Similarly, this application is not one for raising or piercing of the corporate veil. I have also looked at the Memorandum and Articles of Association of the 2nd Defendant and it was incorporated for many other objects apart from construction. In addition, the 2nd Defendant is the registered proprietor of the suit property. When I place these facts on the legal scale, I do not think there is any justification that the sale of the suit property by the 2nd Defendant, is an act of removing or disposing of its property in circumstances affording probability that the 2nd Defendant intends to or may obstruct or delay execution of a decree which may be passed against the 2nd Defendant. In the absence of evidence that the 2nd Defendant action of selling the suit property is aimed at dissipating its assets in order to defeat execution of any award which may come out of the arbitral proceedings, an injunction cannot issue lest the court should be assisting the Applicant; 1) to pressure a defendant; or 2) to carry out a type of asset stripping (forfeiture); or 3) as a conferment of some proprietary rights on the plaintiff upon the assets of the Defendant. A court of law should never do such things; its duty is to administer justice in accordance with the law and the facts of the case. However, and purely in the interest of justice, the admission by the 2nd Defendant that it does not have any other assets within the local limits of court appeals to the best interest of justice. Accordingly, I am inclined to temporarily restrain only the sale of the suit property for 60 days only to enable the parties as well as the arbitral tribunal to conclude the arbitral proceedings herein. Meanwhile, as the court should act fairly in the interest of all the parties especially in the circumstances of this case, I order the Applicant to provide an undertaking as to damages within 7 days of today to take care of any loss which may be occasioned on the Respondent on any misadventure that the temporary measure of protection granted ought not to have been granted in the first place. These orders will automatically lapse on the due dates. It is so ordered. In the premises, the application dated 16th July 2014 succeeds to the limited extent I have specifically stated. For that reason, I will not award any costs to any party. Each party shall bear own costs.

Dated, signed and delivered in court at Nairobi this 26th day of January 2015

F. GIKONYO

JUDGE