



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO 407 OF 2014

ITALBUILD IMPORTS LIMITED PLAINTIFF

VERSUS

A.I.C KIJABE HOSPITAL.....1ST DEFENDANT

IMPERIAL BANK LIMITED.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff filed its Notice of Motion application dated 19th September 2014 and filed on 22nd September 2014. The court certified the matter as urgent and granted an order restraining the 2nd Defendant, by way of injunction, from honouring the demand by the Plaintiff dated 17th September 2014 or any other demand pending the inter partes hearing of the said application on 25th September 2014.
 2. On 25th September 2014, the 1st Defendant filed a Notice of Motion application of even date seeking the lifting of the aforesaid orders. The court directed that both applications would be heard together as they were related. On 27th November 2014, the Plaintiff filed another Notice of Motion dated the same date seeking leave to amend the Plaintiff and restraining orders against the 1st Defendant from interfering with the project herein pending hearing and determination of the arbitration.
 3. In view of the fact that the Plaintiff's latter application had been filed late in the day and after the court had given directions on the hearing and determination of its Chambers Summons and 1st Defendant's Notice of Motion application dated 19th and 25th September 2014 respectively, the court directed that that the two (2) said applications would be heard first for the sake of good order.
- I. PLAINTIFF'S CHAMBER SUMMONS APPLICATION DATED 19TH SEPTEMBER 2014 AND FILED ON 22ND SEPTEMBER 2014**
4. The Plaintiff's Chamber Summons application dated 19th September 2014 and filed on 22nd September 2014 was brought under the provisions of Section 7 Arbitration Act Rules 8 and 10 of

the Civil Procedure Rules (sic) and Sections 1A and 1B of the Civil Procedure Act. Prayer Nos (a), (b), (c) and (d) were spent. It sought the remaining following orders:-

- a. **Spent.**
- b. **Spent.**
- c. **Spent.**
- d. **Spent.**
- e. **THAT the 2nd defendant/respondent be restrained by way of injunction from honouring the demand by the 1st defendant/respondent dated 17th September 2014 or any other demand whatsoever pending the hearing and determination of the proposed arbitration proceedings between the plaintiff/applicant and the defendants/ respondents.**
- f. **THAT an injunction do issue prohibiting the 1st defendant/respondent from making any further demands for the payment of the performance Bond Ref. No. LG NO 929/SEP/12 from the 2nd defendant/respondent pending the determination of the proposed arbitration proceedings between the plaintiff/applicant and the defendants/respondents.**
- g. **The costs of this suit.**

THE PLAINTIFFS' CASE

5. On 19th September 2014, Vittorio Veneziani, the Plaintiff's Managing Director swore a Supporting Affidavit on behalf of the Plaintiff herein. The Plaintiff's written submissions were dated 23rd October 2014 and filed on 25th October 2014.
6. The Plaintiff's case was that it entered into a contract with the 1st Defendant dated 13th September 2012 (hereinafter referred to as "the Contract") after it was prequalified by the 1st Defendant for the construction of the paediatric wing of Bethany Kids at the hospital. The Plaintiff obtained a Performance Bond Ref. No. LG NO 929/SEP/12 (hereinafter referred to as 'the Performance Bond') dated 18th September 2012 which expired on 21st September 2014.
7. The Plaintiff contended that it faced several challenges and breach of contractual obligations by the 1st Defendant which led to the works not being completed within the contractual period. The 1st Defendant then terminated the contract on 18th September 2014 and called upon the 2nd Defendant to honour its contractual obligation to pay the sum of Kshs 17,358,629.45 contained in the said Performance Bond.
8. It pointed out that Clause 45 of the Contract provided that any dispute that arose therein, the matter would be referred to arbitration. It therefore sought that temporary orders for interim relief be granted in the interests of justice as it would suffer extensively and its rights under the Contract prejudiced if the conservatory orders were not granted pending the hearing and determination of the arbitration proceedings.

THE 1ST DEFENDANT'S CASE

9. In response to the said application, on 25th September 2014, Anthony Christopher Sykes, the 1st Defendant's Construction Project Manager swore a Replying Affidavit on behalf of the 1st Defendant herein. It was filed on the same date. He also swore a Supplementary Affidavit on 30th October 2014. It was filed on even date. The 1st Defendant's written submissions were dated 30th October 2014 and filed on 31st October 2014.
10. The 1st Defendant's case was that the Plaintiff was required to complete the works on 21st December 2013. It said that the Plaintiff sought extension of completion of works on 4th January 2014, 5th May 2014 and 23rd June 2014 but it subsequently failed to seek an extension in terms of Clauses 36.1 or to agree to the 1st Defendant engaging sub-contractors as had been stipulated under Clauses 26, 27 and 30 of the said Contract.
11. It said that during the said Contract, the Plaintiff failed to avail samples for approval in a timely manner and as at 18th September 2014, it had not submitted many items as it was required to do yet, together with the other consultants in the project, it had timeously met all its contractual

obligations. It averred that the many delays were detrimental/prejudicial to it and the sick children requiring treatment.

12. It was the 1st Defendant's contention that the said Performance Bond was between itself and the 2nd Defendant and was distinct from the Contract. It therefore averred that as a result, the Plaintiff had no right to stop payment of the same as it was irrevocable and payable on demand.
13. It was categorical that the said Performance Bond was its security to enable it quickly engage another contractor to resume and complete the work on site. It therefore urged the court not to allow the Plaintiff's application.

THE 2ND DEFENDANT'S CASE

14. On 15th October 2014, Mary Wanjiru, the 2nd Defendant's Legal Officer swore a Replying Affidavit dated the same date. The 2nd Defendant's written submissions were dated 24th November 2014 and filed on 25th November 2014.
15. The 2nd Defendant contended that the Performance Bond was to cover damages sustained by the 1st Defendant in the event the Plaintiff defaulted in its obligations under the Contract and had been validated to 21st September 2014.
16. It was its averment that the Performance Bond was distinct from the Contract and that it was not required to know and it did not know of the specific details of the dealings between the Plaintiff and the Defendant in the performance of their respective obligations under the Contract.
17. It said that on 15th September 2014, it received a letter from the Plaintiff warning it from honouring the Performance Bond. On 17th September 2014, it received a letter from the 1st Defendant which was seeking forfeiture of the said Performance Bond on the ground that the Plaintiff had defaulted in the performance of its obligations.
18. In view of the two (2) opposing positions by the Plaintiff and the 1st Defendant, it contended that it was necessary that the issue of whether there had been default be determined to justify the demand for forfeiture.

LEGAL ANALYSIS

19. Notably, the court found it fit to address the issues of its jurisdiction in this matter as it goes to the very root of its ability to grant the orders sought herein. The jurisdiction of this court was aptly demonstrated in the case of **Mugoya Construction & Engineering Limited vs The National Social Security Fund Board of Trustees & Another [2005] eKLR** where it was held as follows:-

“...the jurisdiction to grant injunctive relief was to preserve the subject matter of the suit pending determination of the issues between the parties...”

20. The fact that suit that both the 1st and 2nd Defendants filed their respective defences would not ordinarily have caused the jurisdiction of this court to be invoked for it to determine the dispute between the Plaintiff and the 1st Defendant. Notably, the reliefs that the Plaintiff had sought in its Plaint were clear that no defences could be filed herein as there was no dispute that had been placed before this court for determination.
21. It was the considered opinion of this court that the said defences were superfluous and had had no effect on the orders that this court could grant under the provisions of Section 7 (1) of the Arbitration Act in view of the reliefs that had been sought. The said reliefs were as follows:-
 - a. **An injunction restraining the 2nd Defendant from honouring the demand by the 1st Defendant dated 17/9/2014 or any other demand whatsoever pending the determination of the proposed arbitration between the plaintiff and the defendant (emphasis court).**
 - b. **An injunction prohibiting the 1st defendant from making any further demands for the payment of the performance Bond Ref. L.G. 929/SEP/12 from the 2nd Defendant**

pending the hearing and determination of the proposed arbitration proceedings between the plaintiff and the defendants (emphasis court).

c. **The costs of this suit.**

22. In that regard, the circumstances herein were very distinct to those in the case of **Corporate Insurance Co Ltd vs Wachira [1995-1998] 1 EA 20 (CAK)**, Gicheru, Kwach and Shah JJA (as they then were) where it was held as follows:-

“...The arbitration Clause was in the nature of a Scott v Avery clause which provides that disputes shall be referred to arbitration and that the award of arbitration to be a condition precedent to the enforcement of any rights under the contract. A Scott v Avery clause can provide a defence to a claim but the party relying on it cannot circumvent the statutory requirement to apply for stay of proceedings. If the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading. By filing a defence, the appellant had lost its right to rely on the clause (Kenindia Assurance v Mutuli [1993] LLR 2833(CAK) applied.”

23. As matters stand now, this court has no the jurisdiction to hear and determine the dispute between the Plaintiff and the 1st Defendant as no dispute had been placed before it for determination. The suit was merely to back up the Plaintiff’s application seeking interim measures of protection pending the hearing and determination of the dispute herein in an arbitral proceeding.

24. A perusal of the pleadings reveals as the Plaintiff stated that the dispute between the parties related to whether or not there was default on its part, whether or not the 1st Defendant could forfeit the Performance Bond. The Plaintiff contended that it had not defaulted in its obligations under the Contract while the 1st Defendant was adamant that the Plaintiff had breached its contractual obligations and that it was entitled to forfeit the Performance Bond.

25. Under Clause 26 of the said Contract, the contract could not be assigned without consent of the Plaintiff or the 1st Defendant and that such party would not be relieved of obligations for the part of the Contract that had already been performed or the part not assigned. It stipulates as follows:-

26.1 Neither the Employer nor the Contractor shall, without the consent of the other assign this contract, Provided that the approval of the assignment shall not relieve either party of his obligations for the part of the contract already performed or the part not assigned.

26.2 It shall be a condition of any assignment that for the employment of any assigns shall terminate immediately upon the termination (for whatever reason) of the Contractor’s employment under the contract.

26. On the other hand, Clause 33 of the said Contract provided as follows:-

33.1 The Contractor shall permit the carrying out of work not forming part of this contract but described in the contract bills, by the Employer or by other persons employed or otherwise engaged by him.

33.2 Where the work is not described in the contract bills, the Employer may arrange the carrying out of such work only with the consent of the Contractor, which consent shall not be unreasonably withheld.

33.3 Every person employed or otherwise engaged by the Employer under this clause shall be deemed to be a person for whom the Employer is responsible and not a sub-contractor.

27. To understand what the genesis of the invocation of the two (2) clauses by both the Plaintiff and the 1st Defendant was, the court had a look at the Architect’s letter dated 16th September 2014 that

was annexed to the 1st Defendant's Replying Affidavit, Exhibit marked "GKK 1." The same read as follows:-

"Reference is made to the meeting of 15th September 2014 where your firm signified that some works could be awarded to others, for purposes of attaining project completion and the expected quality standards.

The Employer is prepared to consider this arrangement for the following trades, as provided for under Clauses 26, 27, and 30 of the Contract...

This process would entail identifying suitable subcontractors and suppliers to perform the outstanding obligations under your ambit. On this understanding we accordingly request for your timely consent to make the necessary appointments, bearing in mind the prevailing circumstances."

28. The Plaintiff's response to the said letter was dated 17th September 2014 and was also annexed to the 1st Defendant's Replying Affidavit and marked Exhibit "GKK -2". It stated in part:-

"...Kindly note that our proposal was not that you identify adequate suppliers and/or subcontractors under our ambit, but that the Employer takes over the relevant works and procures others to execute them directly without our involvement or responsibility. In this sense, we accept that the Employer can procure contractors or suppliers of his choice.

In the circumstances, the new contractors will come into the project under clause 33, "Work by other persons Engaged by the employer."

29. Evidently, it was not a disputed fact that the Plaintiff had delayed in completing the works. Indeed, in its letter dated 18th September 2014 annexed to the 1st Defendant's Replying Affidavit Exhibit marked "GKK-3", the Architect requested the Plaintiff to seek Extension of the Time for completion of the said works. What appeared to have been in dispute was which of the provisions, Clause 26 or Clause 33 of the said Contract was applicable as far as the engaging of sub-contractors was concerned.

30. This is what led to the 1st Defendant writing to the 2nd Defendant. In its letter dated 17th September 2014 to the 2nd Defendant, the 1st Defendant stated as follows:-

"...Regrettably, the Contractor Itabuild Imports Limited, after two ex-gratia extensions of time, has not fulfilled his obligations in having failed to perform in accordance with the contract in many respects. The original contract completion date of 21st December 2013 is almost nine months behind us and handover of the Works still remains several months away. There has been no appreciable material progress at site during the past calendar month.

The contractor being in default we therefore duly demand forfeiture of the bond and ask that you honour this amount..."

31. There was no indication by the 1st Defendant to show that the Architect had invoked the relevant Clauses of the said Contract with a view to the Plaintiff rectifying the defect, complying with the Architect's instructions, suspending the Works or whatever else the Plaintiff would have been required to do. The 1st Defendant did not also furnish the court with evidence of its termination of the said Contract under Clause 38.0 thereof.

32. For the foregoing reasons, the court wholly concurred with the Plaintiff that the determination of which party was in default and whether the same was done in accordance with the Clauses in the said Contract were all within the jurisdiction of the arbitrator. Indeed, the circumstances under

- which a dispute could be referred to arbitration was well set out in Clause 45.0 of the said Contract. The court not therefore delve into the merits of the said dispute and/or difference between the Plaintiff and the 1st Defendant.
33. The question of the amount of the Performance Bond that was to be payable as was contended by both the Plaintiff and the 2nd Defendant was also a pertinent issue. The court observed their arguments that there was a maximum amount and it was payable for damages sustained by the 1st Defendant as a result of the Plaintiff's default hence the need to have the same being assessed before the same could be paid out to the 1st Defendant by the 2nd Defendant.
34. The court noted the very able and detailed submissions that had been made by all parties regarding the circumstances under which Performance Bonds were payable but it could not make a determination of the same for the reason that that was within the jurisdiction of the arbitrator.
35. The length of the submissions that was devoted to the issue of payment of the Performance Bond and the 2nd Defendant's submissions that it was awaiting determination of the dispute to protect its reputation depending on how it treated its obligations under the said Performance Bond was sufficient evidence that that was indeed a weighty issue that would require to be determined by the arbitrator. The court was therefore hesitant to delve into the merits of the parties' submissions in reject of the Performance Bond.
36. Suffice it to state that the court agreed with the Plaintiff's submissions that the Performance Bond was an integral part of the said Contract. Whereas it was a distinct contract as had been contended by the 1st Defendant, it was not entirely independent of or separable from the original Contract. It did not exist for its own sake. It was to protect the 1st Defendant from certain acts and/or omissions by the Plaintiff that would prejudice its interests under the said original Contract. Indeed, the forfeiture of the said Performance Bond depended wholly on whether or not the Plaintiff was to be found to have been in default of the said Contract.
37. In other words, the Performance Bond remained in a dormant state. Life was breathed into it upon the happening or occurrence of certain events in the original Contract. The circumstances under which the 1st Defendant could recall the said Performance Bond and the quantification of the amount payable were again within the purview of the arbitrator, which this court stated hereinabove it not want to delve into.
38. In this regard, the court adopted the holding in the case of **Mea Limited vs Echuka Farm Limited & 2 Others [2007] eKLR** in which it was stated as follows:-

“I am content to say that it convinces me to hold that the performance bond and the obligation thereunder are inseparable from the obligations of the parties under the contract...”

39. The only concern by this court was to establish whether or not the Plaintiff had demonstrated a good case for being granted an interim relief pending the hearing and determination of the dispute by the arbitral tribunal that was to be appointed pursuant to Clause 45 of the said Contract.
40. Notably, neither the Plaintiff nor the Plaintiff furnished the court with a full citation of the said Clause 45 of the said Contract. However, part of the said Clause could be found Agreement and Conditions of Contract for Building Works that was annexed to the Plaintiff's Supporting Affidavit Exhibit marked “VV 5”. As the existence of the said Clause was not denied by the 1st Defendant and having taken judicial notice of the drafting of the said Clause, the court found that there was indeed a valid arbitration clause which bound the parties.
41. The court cannot re-write contracts that have been entered into by the parties and they must therefore be bound by the terms therein. The intervention by the court is limited in matters where there is an arbitration clause as can be seen in the provisions of Section 10 of the Arbitration Act which provide as follows:-

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

42. For this reason, the court was in agreement with the Plaintiff that it could seek orders for interim relief to enable the dispute between it and the 1st Defendant be referred to arbitration pursuant to

Section 7(1) of the Arbitration Act Cap 49 (Laws of Kenya). The same stipulates as follows:-

“It is not incompatible with an arbitration agreement for a party to request from the High Court before or after doing arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

43. The Plaintiff placed reliance on the case of Seven Twenty Investments Limited vs Sandhoe Investment Kenya Limited [2013] eKLR where this very court held as follows:-

“Perusal of Section 7 of the Arbitration Act clearly shows that the issue of whether or not there was a dispute or whether or not there would be losses by either side would not be a factor for a court when deciding whether or not it should grant the said interim measure of protection or injunction to safeguard the subject matter of the arbitral proceedings. All that a court would be interested in is whether or not there was a valid arbitration agreement and if indeed the subject matter of the arbitral proceedings was in danger of being wasted or dissipated so as to preserve the same pending the hearing and determination of the arbitral process.”

44. The injunction or interim measure must be of urgent nature to preserve the subject matter of the dispute so that the proceedings before the arbitral tribunal are not rendered nugatory. In this regard, the court found the case of Lease Company Limited and Vital Bio Energy (Kenya) Limited vs Agricultural Development Corporation [2014]eKLR that was relied upon by the Plaintiff to have been relevant in the circumstances of its case. It was held as follows:-

“Indeed, I am bound by the decision of the Court of Appeal in the Safaricom case. Where the court finds that an arbitral agreement between the parties exist, and there is a dispute that should be determined by an arbitrator, the court is obligated to grant an interim order of preservation to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings.”

45. In the case of CMC Holdings Ltd & Another vs Jaguar Land Rover Exports Limited [2013] eKLR that was also referred to by the Plaintiff, this court also held as follows:-

“The measures are intended to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.”

46. Having considered the pleadings, the affidavit evidence, written submissions and the case law, the court came to the conclusion that it was satisfied that the Plaintiff had demonstrated that there was a valid arbitration agreement in accordance with Section 4 of the Arbitration Act. The said arbitration agreement had not been declared inoperative, null and void or incapable of being performed and that there was indeed a dispute or difference between it and the 1st Defendant that was capable of referral to arbitration.

47. The 1st Defendant persuaded the court that there was urgency in the matter in view of the sick children who are served by the hospital. Unfortunately, the court has a duty to uphold the rule of law, which in this case was to grant the interim relief pending the hearing and determination of the dispute by the arbitral tribunal as had been sought by the Plaintiff and to give effect to the parties' intentions that any difference or dispute arising out of the said Contract was to be referred to a forum they had each consented to.

48. The 1st Defendant's Notice of Motion application dated and filed on 28th September 2014 was brought pursuant to the provisions of Sections 1A and 1B of the Civil Procedure Act and all enabling provisions of the law. It had sought the following prayers:-

- a. **THAT the interim order granted by this Honourable Court on 22nd day of September restraining the 2nd Defendant, Imperial Bank Limited, from honouring the demand made by the 1st Defendant, A.I.C KIJABE HOSPITAL be lifted forthwith.**
- b. **THAT the 2nd Defendant herein, Imperial Bank Limited, be ordered to Honour (sic) its obligations under the guarantee and as requested by the 1st Defendant herein, AIC Kijabe Hospital, in their letter dated 17th September 2014.**
- c. **THAT costs of this Application be borne by the Plaintiff.**

49. The court noted the contents of the Supporting and Further Affidavits of Anthony Christopher Sykes that were sworn on 25th September 2014 and 7th October 2014 and filed on 25th September 2014 and 8th October 2014 respectively, the Replying Affidavit by Vitorrio Veneziani that was sworn on behalf of the Plaintiff, the annexures thereto, and the written submissions by all the parties and case law in respect of the said application.

50. However, in view of the finding of the court that the Plaintiff's application was successful, the court did not find it necessary to analyse and/or consider the 1st Defendant's application as the same was not successful.

DISPOSITION

51. For the foregoing reasons, the upshot of this court's ruling was that:-

- a. **The Plaintiff's Notice of Motion application dated 19th September 2014 was merited and the same is hereby allowed in terms of Prayer Nos (d), (e) and (f) therein together with costs to be borne by the 1st Defendant.**
- b. **The 1st Defendant's Notice of Motion application dated and filed on 25th September 2014 was not merited and the same is hereby dismissed with costs to the Plaintiff and the 2nd Defendant.**

52. It is so ordered.

DATED and DELIVERED at NAIROBI this 27th day of February, 2015

J. KAMAU

JUDGE