



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
MISC. APPLICATION NO. 115 OF 2015

STOIC COMPANY LIMITED.....APPLICANT

VERSUS

SCOPE TELEMATICS INTERNATIONAL

SALES LIMITED.....1ST RESPONDENT

COOPERATIVE BANK OF KENYA.....2ND RESPONDENT

R U L I N G

INTRODUCTION

1. The Application before the Court is the Applicant's Notice of Motion dated 26th February 2015 and filed on even date. It is expressed to be brought under Article 159 of the Constitution, Section 3A of the Civil Procedure Act, Order 51 Rule 1, Order 40 Rule 2 and Section 7 (1) of the Arbitration Act. It sought the following orders:-
 1. *Spent*
 2. *Spent*
 3. ***THAT pending reference of this dispute to arbitration and/or the conclusion of the negotiations between the executives from the Applicant and the 1st Respondent, an order of interim relief be granted to the Applicant to restrain the 1st Respondent from demanding payment on account of the contract for the supply of fleet management stocks known technically as Mhub846 and from demanding the release of the funds from the 2nd Respondent on account of the Letter of Credit dated 27th August 2014 in its favour.***
 4. ***THAT the costs of this application be provided for.***

THE APPLICANT'S CASE

2. The application is premised on the grounds stated therein and is supported by the Affidavit of PAUL MAHIAINI, the Managing Director of the Applicant and sworn on 26th February 2015.
3. The background to the application is that the Applicant entered into a Contract with the 1st Respondent for the supply of fleet management stocks known technically as Mhub846. The

- Applicant took out a letter of credit dated 27th August 2014 with the 2nd Respondent for the sum of Kshs. 4,200,000/- to guarantee payment of the price for the said products to the 1st Respondent. Subsequently, the 1st Respondent delivered the said products to the Applicant. However, the Applicant avers that the said products were far from what they expected in terms of functionality and quality. This forced the parties to vary the contract in so far as the specifications of the products were concerned vide the addendum dated 14th October 2014. Despite the addendum, the products delivered pursuant thereto also developed serious technical hitches which consequently elicited massive outcry from the end users.
4. It is the Applicant's assertion that it has been engaged in negotiations with the 1st Respondent as regards the dispute herein on the quality of the products in accordance with the agreement for the supply of fleet management stocks. According to the Applicant, the said Agreement provides for negotiations between the parties as is ongoing and in default of a settlement, the same provides for Arbitration.
 5. The Applicant's case is that there is a declared dispute between it and the 1st Respondent regarding the quality of the products. However, even before the dispute has been settled, the maturity date of the Letter of Credit dated 27th August 2014 has caught up with the parties and the 2nd Respondent has confirmed that it shall pay the 1st Respondent the sum stated in the said Letter of Credit as the price of the products delivered at the maturity date being 28th February 2015. Therefore, the applicant is apprehensive that unless this Court grants the orders sought for, the 2nd Respondent will proceed to pay on the said Letter of Credit occasioning it grave injustice and immense prejudice as well as rendering the on-going negotiations and the impending Arbitration nugatory.
 6. In view of the foregoing, the Applicant urged the Court that it was in the interest of justice to grant the prayers sought in its application

THE 1ST RESPONDENTS' CASE

7. In opposition to the application, the 1st Respondents filed the Grounds of Opposition and Notice of Preliminary Objection dated 20th **March 2015** on even date.
8. It is the 1st Respondents' case that there is no suit properly before this Court on which premise the application is based contrary to the terms of the Civil Procedure Act and the Arbitration Act. It is further its case that there has been no declaration of a dispute in accordance with the terms of the arbitration clauses in the agreement dated 12th June 2014 between the Applicant and itself. The 1st Respondent observed that the 2nd Respondent was not a party to the said arbitration clauses and therefore would not participate in the prospective arbitration.
9. It was also the 1st Respondent's case that the irrevocable Letter of Credit issued by the 2nd Respondent in its favour was separate from the issues in dispute between the Applicant and itself that were due for submission to arbitration. It was therefore its position that the said Letter of Credit could not be affected by the issue in dispute between itself and the Applicant.

THE 2ND RESPONDENT'S CASE

10. The 2nd Respondent opposed the application vide the Replying affidavit of LILY KIUNJURI dated and filed on 20th **March 2015** as well as the Grounds of Opposition dated 20th **March 2015** and filed on even date.
11. The deponent, described as the Trade Sales Manager, confirmed that on 19th July, 2014, the Applicant applied to the 2nd Respondent Bank for a letter of credit for Kshs. 4,200,000/= in favour of the 1st Respondent on account of importation of 500 units of Mhub 846 units. The 2nd Respondent approved the request by the Applicant for the letter of credit of Kshs. 4.2 Million for 12 months and subsequently, on 27th August, 2014 issued it with the said Letter of Credit.
12. The deponent further confirmed that in compliance with the terms and conditions of the Letter of Credit, the 1st Respondent forwarded all the requisite documents to its bank, Allied Irish Bank

(AIB Bank) for onward transmission to the 2nd Respondent. The 2nd Respondent through its swift message of 21st October, 2014 indicated that the negotiating bank, AIB Bank, Dublin IE would be authorized to claim reimbursement on maturity provided documents negotiated were in order and strict compliance with the terms and conditions of the Letter of Credit. On 19th December, 2014 the 2nd Respondent duly acknowledged receipt of the requisite documents. However, it noted the following discrepancies; Airway Bill did not indicate the flight date; and tax invoice was presented instead of commercial invoice.

13. In view of the above, the 2nd Respondent informed the advising Bank, AIB Bank that it was holding the documents at its counters at the advising Bank's risk and disposal. It however stated that it would seek the Applicant's waiver of the alleged discrepancies. The Applicant through a letter dated 19th December, 2014 to the 2nd Respondent clearly accepted the said discrepancies. The Applicant confirmed that the Letter of Credit made it liable for the payment of the drawing irrespective of any discrepancy which may be noted. The Applicant accordingly authorized the Bank to debit its USD Call Deposit account and pay. In view of the foregoing, the 2nd Respondent authorized the negotiating bank to claim the sums arising from the Letter of Credit as the documents were in strict compliance thereto. It further advised the Applicant that the drawing of the amounts under the Letter of Credit would fall due on 28th February, 2015 and that the Bank would debit the account on maturity.
14. It is therefore the 2nd Respondent's case that it was under a duty to pay the sums under the Letter of Credit on maturity of the same as the 1st Respondent had strictly presented the requisite documents. Its position is that in law, it would only be prevented from honoring its obligation under the Letter of Credit in clear cases of fraud by the beneficiary in respect of the documents presented to them. According to the 2nd Respondent, it has not been notified of any fraud in respect to the documents furnished on it in respect to the Letter of Credit.
15. In view of the foregoing, it was the 2nd Respondent's case that the orders sought herein were misconceived and it urged the Court to dismiss the application with costs to it.

ANALYSIS

16. The application was prosecuted by way of written submissions. The 2nd Respondent filed its written submissions dated 9th April 2015 on 10th April 2015 while the 1st Respondent filed its written submissions dated 17th April 2015 on even date. The Applicant filed its written submissions and List of Authorities dated 27th April 2015 on even date.
17. I have considered the application, the affidavits in support and opposition thereto, the Grounds of Opposition as well as the written submissions by Counsel in support and in opposition to the application.
18. The 1st Respondent raised a preliminary issue as to whether the current application was properly before this Honourable Court. Its submission was that the application as filed was fatally and incurably defective for having been so filed without being premised upon a suit. It referred to the procedure for making an application for an interim measure of protection as provided for under Rule 2 of the Arbitration Rules, 1997 which provides that:

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

19. From the foregoing, it was the 1st Respondent's submissions that the summons application for an interim measure of protection under Section 7 of the Arbitration Act, 1995 could only be made in the context of a suit. Therefore, according to the 1st Respondent a Notice of Motion application, as in this case, was not a manner of commencing a suit.
20. The Applicant did not quite address the issue as to whether or not the application was proper without a suit to be anchored on. It was however its submission that Article 159 of the Constitution conferred upon this Court judicial authority to promote the principle of justice and most importantly to promote alternative forms of dispute resolution.
21. It is not in dispute that section 7 of the Arbitration Act confers upon this Court the power to grant

an interim measure of protection before or during arbitral proceedings upon request by a party to an arbitration agreement. The 1st Respondent's contention is that such an application shall be anchored on a suit as provided for under Rule 2 of the Arbitration Rules, 1997 as stated above in this ruling. I have perused the said Rule 2 of the Arbitration rules and the basic interpretation therein is that applications under Section 6 and 7 of the Act shall be made by summons in the suit. This means such an application must be anchored on a suit which is not the case in the current application.

22. The 1st Respondent relied on the case of **Aisha C. Ryu vs. Viri Goswami [2008] eKLR** where Rawal J. (as she then was) upheld an objection that an Originating Summons was incompetent and incurably defective on account that there was no suit on which it was premised. Notably, the said decision which is persuasive to this Court was made before the promulgation of the present Constitution which introduced Article 159 providing for substantive Justice and promotion of alternative forms of dispute resolution. This was also prior to the introduction of the overriding objective principle under the Civil Procedure Act. This Court is of the view that the matter before it is one where the foregoing provisions should be invoked for the ends of justice to be met. This Court is alive to the fact that Article 159 of the Constitution should not be a panacea for the breach of procedural requirements anchored in law. However, in invoking the said Article 159, the Court will look at the circumstances of each case with the end in mind being to do substantive justice to the parties.
23. In the present application, it is not in dispute that the Applicant and the 1st Respondent entered into the Channel Agreement dated 12th June 2014 for the supply of M-hub, a fleet management device commonly known as tracking devices. It is also not in dispute that the said Channel Agreement contains a dispute resolution mechanism which provides for negotiations and in the absence of a settlement the matter is to be referred to arbitration. According to the Applicant a dispute has arisen between it and the 1st Respondent as to the quality of the tracking devices. The 1st Respondent has not controverted the fact that there is a dispute. The Applicant therefore made the present application seeking orders of interim relief to stop payment of the said Letter of credit pending negotiations and any subsequent arbitration.
24. On account of the foregoing, it is plain that the applicant is entitled to seek interim relief pending arbitration before this Court under section 7 of the Arbitration Act. The fact that the said Application was not anchored on a suit does not render the same fatal such as to deny the Applicant the right to seek for an interim relief. At this juncture, the Court refers to the case of **Joseph Kibowen Chemjor Vs William C. Kisera [2013]** in which Munyao J. stated as follows:-

“...There are times when all that a person wants is an order of court where the rights of the parties are not going to be determined. There is no “action” being enforced or being tried. In many such instances, it is the discretion of the court being sought or a procedural issue sought to be endorsed. The court in such a case is not being asked to determine any rights of the parties. Now, the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no “action”. In such instances, I think it is permissible for such person to file a miscellaneous application because the court is not asked to determine any issues between the parties. This is common and permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. This for instance can cover applications for leave to institute suit out of time or for leave to commence judicial review proceedings...”

In the present matter, the Applicant had no action against the Respondents in this forum. The dispute, if any, between the Applicant and the 1st Respondent was to be referred to Arbitration and therefore this Court had no jurisdiction to determine the same. Indeed, all the Applicant wants is an interim relief pending the commencement of arbitration proceedings. In the circumstances, this Court does not see the purpose which a suit, in terms of a Plaint or any other means of instituting a suit would have served in this matter. There is also no prejudice occasioned to the Respondents by virtue of the present application not being anchored on a suit. It is for the foregoing reasons that this Court dismisses the objection raised by the Respondents to the effect that the current application is defective.

25. Therefore, that leaves the Court with the substantive issue of whether or not to grant the Applicant the orders of interim relief pending arbitration.
26. It was the Respondents' contention that the seat of Arbitration being the Republic of Ireland, this Court had no jurisdiction to grant the orders sought. I beg to differ with the Respondents' position. The arbitration agreement does not oust the jurisdiction of this Court in granting interim relief as sought herein pursuant to section 7 of the Arbitration Act. The said section is clear to the effect that it is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure. It therefore means that this Court has wide powers to grant such orders. Further, section 2 of the Arbitration Act confers upon this Court the jurisdiction to deal with matters arising from both domestic and international arbitration. Besides, under Article 48 and 50 of the Constitution, this Court is enjoined to ensure that every person has a right to access justice and to fair hearing. In that case this Court has the jurisdiction to determine the present application. See; **CMC Holdings Limited & Another Vs. Jaguar Land Rover Exports Limited [2013] eKLR**. In any case, it would be unconscionable for the Respondent to expect the Applicant to travel all the way to Ireland just to procure an interim relief pending arbitration.
27. Turning to the substance of this application, it is the Applicant's submission that they seek interim relief to suspend the payment of the Letter of Credit pending the resolution of the dispute herein as to whether the products supplied by the 1st Respondent met the specifications agreed on so as to entitle them to receive payment by means of the said letter of credit.
28. The 2nd Respondent's case is that the 1st Respondent having strictly complied with the terms of the Letter of Credit, it is under obligation to pay notwithstanding any dispute between the Applicant and the 1st Respondent pursuant to the underlying contract. It was also its case that it was not privy to the channel agreement and therefore it would not be bound by the arbitration agreement therein. The foregoing was essentially the 1st Respondent's case. The Respondents referred the Court to several common law authorities as well as legal texts to the effect that a Letter of Credit was irrevocable and a Bank was obligated to pay so long as there was strict compliance with the terms of the said Letter of Credit. In addition the Letter of Credit was not dependent on other contracts. See; **Article 4 of the ICC Uniform Customs and Practice for Documentary Credits (UCP 600), Power Curber International Ltd Vs. National Bank of Kuwait (1981) 3 All ER 607 (CA), Hamzeh Malas & Sons vs. British Imex Industries Ltd [1958] 1 All ER 264** among others.
29. In the present application it is not in dispute that the 1st Respondent was in compliance with the terms and conditions of the Letter of Credit having forwarded all the requisite documents.
30. However as pointed out by the Respondents, there are circumstances under which the Bank is enjoined to refuse payment under the Letter of Credit as follows:-
- I. ***The documents presented by the Seller are fraudulent and the Bank is notified of the said fraud;***
 - II. ***Allowing encashment of the Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned. See; R D Harbottle (Mercantile) Ltd and Another Vs. National Westminster Bank Ltd and Others [1977] 2 All ER 870.***
31. It therefore means that the Courts can interfere with the irrevocable nature of the Letter of Credit. The Respondents' case is that there is no evidence of fraud that would call for the intervention of this Court in issuing interim orders of relief. Indeed, from the proceedings on record there is no evidence of fraud and understandably so, as this Court has no jurisdiction to determine any dispute between the parties which is to be referred to arbitration. I therefore agree with the Applicant's submission that it will be for the arbitral tribunal to determine whether there are any exceptional cases including fraud arising from the dispute between the parties to warrant interference with the Letter of Credit.
32. The other consideration for interference is whether encashment of the Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned. This Court's view is that the Letter of Credit was an integral part of the Channel agreement. Without it the 1st Respondent would not have proceeded to supply the products to the Applicant. Therefore the Respondents'

argument that the Letter of Credit was not part of the said agreement and cannot be a subject matter of the dispute does not appeal to this Court. See **Italbuild Imports Ltd Vs AIC Kijabe [2015] eKLR** where Kamau J. quoted the case of **Mea Limited vs Echuka Farm Limited & 2 others [2007] eKLR** in holding that a performance Bond was not entirely separable from the main contract as it was an integral part of the said contract.

33. At the moment, the quality and functionality of the products supplied are in question. Therefore, the presumption being that the Applicant has not yet realised the purpose and benefits of the said products, it would not be just and fair that the 1st Respondent receive payment while the Applicant is yet to benefit from the said products. It would be appropriate for the 2nd Respondent to “hold on” to the said Letter of Credit pending the resolution of the disputes as to the functionality of the products. Having found that the Letter of Credit was an integral part of the performance of the contract, this in essence makes it a ‘subject matter’ of the dispute between the Applicant and the 1st Respondent.

34. In the case of **Safaricom Limited -Vs- Ocean View Beach Hotel Limited & 2 Others (2010) eKLR**, as relied on by the Applicant, the Court of Appeal held as follows with regard to interim relief under section 7 of the Arbitration Act:

“...It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names... whatever their description, however, they are intended in principle to operate as “holding” orders, pending the outcome of the arbitral proceedings.”

35. The interim measures of protection, whatever the description, ought to be granted taking into consideration the unique circumstances of each case. In the present application, this Court has already determined that it would be appropriate for the 2nd Respondent to “hold on” the payment of the said Letter of Credit to the 1st Respondent pending the resolution of the dispute between the Applicant and the 1st Respondent.

36. In light of the foregoing, this Court finds that the Applicant is entitled to an interim relief under section 7 of the Arbitration Act pending arbitration proceedings.

DISPOSITION

37. In the circumstances foregoing, the upshot of this court’s ruling is that the Applicant’s Notice of Motion dated 26th February 2015 and filed on even date is merited and the same is therefore allowed in the following terms:-

1. ***THAT pending reference of this dispute to arbitration and/or the conclusion of the negotiations between the executives from the Applicant and the 1st Respondent, an order of interim relief be granted to the Applicant to restrain the 1st Respondent from demanding payment on account of the contract for the supply of fleet management stocks known technically as Mhub846 and from demanding the release of the funds from the 2nd Respondent on account of the Letter of Credit dated 27th August 2014 in its favour.***
2. ***The costs of this application shall abide the outcome of the intended arbitration proceedings.***

It is so ordered.

READ, DELIVERED AND DATED AT NAIROBI

THIS 31ST DAY OF JULY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Njuguna holding brief for Kago for the Applicant

M/s Ibrahim for the 1st Respondent

Abitha holding brief for the 2nd Respondent

Teresia – Court Clerk