



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 208 OF 2015

EURO WATER SERVICES LIMITED.....PLAINTIFF

- VERSUS -

PETER GATUNE.....DEFENDANT

RULING

1. The Notice of Motion dated 28th April 2015 was brought pursuant to Section 6 (1) and (2) of the Arbitration Act and Section 3A of the Civil Procedure Act.
2. It is an application seeking orders to refer the dispute to arbitration in accordance with Section 6 (d) of the contract between the plaintiff and the defendant.
3. The second relief that is sought by the plaintiff is that its Drilling Rig together with its accessories, which were being held by the Defendant, be released to the plaintiff, pending arbitration.
4. On 26th May 2015 the parties agreed that the dispute be referred to arbitration. Mr. Collins Namachanja was appointed as the arbitrator.
5. It was further agreed that the arbitrator would have 60 days to determine the issues. That meant that if the arbitration process commenced immediately, it should have been concluded by the end of July 2015. Bearing that fact in mind, I asked the learned Deputy Registrar, Ms Sandra Ogot, to ascertain the status of the arbitration process. The reason why I deemed it necessary to ascertain whether or not the arbitration had been concluded, is that the application before me was of an interlocutory nature. Therefore, if the arbitration had been concluded, it is probable that the interlocutory application would have been overtaken by events.
6. Ms Ogot was informed that, as at 12th August 2015, the process of arbitration had not yet started. Because of that information, the application dated 28th April 2015 remained interlocutory.
7. In determining the issue before me, I must remain alive to the fact that the Arbitrator is the person duly mandated to make a determination on the substantive questions concerning the question whether or not the parties discharged their respective obligations under the contract.
8. It is common ground between the parties, that they signed an Agreement dated 19th September 2012.
9. Pursuant to the said Agreement, the plaintiff, who was a contractor, was supposed to drill one borehole in Kitengela. That task was being undertaken on behalf of the defendant, who was client.
10. The contractor's case was that it moved onto the site, where it drilled a borehole which was approximately 80 metres deep.
11. It was the contractor's further case that the borehole was yielding an output which exceeded the output which the client desired.
12. However, the client insisted that the contractor had to drill a much deeper borehole, as it had been originally anticipated that the borehole would be upto 260 metres in depth.

13. In those circumstances, even though the contractor felt that further drilling would be counter-productive, it nonetheless drilled until the depth of 130 metres.
14. According to the contractor, it was impossible to drill beyond the depth of 130 metres. The contractor's case was that the client appreciated that it was not possible for the contractor to drill any deeper. Therefore, in the understanding of the contractor, there was a mutual understanding that the work be stopped.
15. The contractor cased and flushed the borehole, and thereafter took steps to remove its equipment from the site.
16. However, the client stopped the contractor from removing the equipment.
17. It was the client's case that there was no proof that the desired yield of 20 cubic metres per day had been exceeded.
18. Secondly, the client was adamant that the contractor was under a contractual obligation to drill until it achieved the desired depth of 260 metres.
19. The reason why the client insists that the contractor had to drill until reaching the desired depth is because the contractor first said that the depth of 80 metres could not be surpassed. Therefore, it appears that when the contractor was able to reach 130 metres, the client found himself unable to believe the contractor's contention concerning the depth upto which the borehole could be drilled.
20. As to which of the parties is right concerning the possible depth, is an issue to be determined by the arbitrator.
21. But whilst the arbitration was still pending, should the client be allowed to continue detaining the contractor's rig?
22. The client said that he did not authorize the contractor to stop the drilling. Indeed, the client said that the contractor never sought his consent to stop the drilling.
23. To my mind, the presence or otherwise of authority from the client, to stop further drilling would be relevant in determining who was in breach of the contract.
24. In **BLUE LIMITED Vs JARIBU CREDIT TRADERS LIMITED HCCC NO. 157 OF 2008**, Kimaru J. ordered the defendant to deliver to the plaintiff the files relating to the debtors' book, within 14 days of the order. That was an interim order, which was deemed fair and just, pending the arbitration process. In arriving at that decision the learned Judge noted that;

“...the defendant had already handed over the debtors book and files containing the list of the debtors in part performance of the agreement, and since there is evidence that the defendant repossessed the said debtors book, it is only fair and just that pending the hearing and determination of the dispute between the plaintiff and the defendant, by arbitration, that the plaintiff and the defendant be placed in the position that they were prior to the defendant repossessing the debtors books and files thereto”.

25. In my understanding, the interim order was intended to safeguard the subject matter of the dispute. I say so because the defendant had agreed to sell to the plaintiff, the debtors books and the various codes held by various employers, as those codes were necessary for the deduction of payments from the remuneration of the defendant's customers.
26. It would therefore follow that unless the plaintiff was in possession of the debtors books and files during the duration of the arbitration, the defendant could easily have continued to utilize the said material to obtain payments from customers. If that happened, the plaintiff could ultimately be unable to benefit from the debtors books and files, even if the plaintiff was successful in the arbitration.
27. I therefore understand that one of the considerations, when determining the interlocutory application, pending arbitration, is the need to provide an interim measure of protection of the subject matter.
28. It is noteworthy that in the case of **BLUE LIMITED Vs JARIBU CREDIT TRADERS LIMITED Hccc No. 157 of 2008**, the Court provided the necessary protection by ordering the defendant to hand over to the plaintiff, the debtors books and files. It is arguable that the Court could simply have told the defendant to refrain from using the debtors books and files to collect payments from customers. Such an order may have provided some measure of protection to the subject matter.
29. However, the learned Judge went further, by requiring the defendant to hand over to the plaintiff,

- the debtors books and files.
30. To my mind, that interim measure of protection was granted as it offered the most effective protection.
31. In the case of **BABS SECURITY LIMITED Vs GEOTHERMAL DEVELOPMENT LIMITED**, Hccc No. 543 of 2013, Gikonyo J. expressed himself thus;

“A consensus seems to have emerged from the string of judicial authorities cited and which the Court is familiar with, that, if an injunction is sought as an interim relief under section 7 of the Arbitration Act, existence of an enforceable arbitration agreement constitutes a prima facie case in the context of GIELLA Vs CASSMAN BROWN CASE. But, of course, that is not enough to grant interim relief by way of a temporary injunction as the Court will be obligated to consider all the other factors before it comes to a decision that the Applicant deserves an injunction as a measure of protection of the subject of the arbitral proceedings”.

32. In that case, the Applicant had sought an interlocutory injunction. The said injunction was intended to stop the defendant from terminating the contract between the parties.
33. After giving due consideration to all the circumstances prevailing, the Court granted an injunction to stop the defendant from terminating the contract. The injunction was to remain in force for 90 days, but the plaintiff was also required to give an undertaking, within 7 days, to compensate the defendant if, ultimately, the Court came to the conclusion that the interim relief ought not to have been granted.
34. The contract in question was for the provision of security guards by the plaintiff, to safeguard the defendant's premises and assets.
35. One of the factors which led to the grant of the interim relief was that if the contract was terminated, the over 200 security guards who had been hired by the plaintiff, to provide guard services to the defendant would be laid off, leading to the possibility of a multiplicity of suits by the guards, against the plaintiff.
36. In the case of **WOTTA HAUS LIMITED Vs PRISCILLA IGIRIA, HCCC NO. 58 OF 2014**, the plaintiff was to drill a borehole at the defendant's home. However, the plaintiff did not complete the task.
37. The failure to complete the work was attributed, by the plaintiff, to a breakdown in the equipment needed to do the work. Therefore, the plaintiff needed to remove the equipment from the site, so that it could be repaired.
38. But the defendant objected to the removal of the equipment before the work was completed.
39. Waweru J. held that the defendant had failed to demonstrate any claim, in law, to warrant the continued detention of the plaintiff's equipment. The learned Judge expressed the opinion that the defendant's actions were totally unreasonable and unacceptable, as they amounted to a desire to punish the plaintiff.
40. For those reasons, the Court rejected the defendant's view, which would have perpetuated an illegality committed by the defendants upon the plaintiff.
41. On the basis of those 3 authorities, the plaintiff asked the court to order the defendant to release the rig pending the arbitration.
42. In answer to the application, the defendant submitted that it should be rejected because the plaintiff had invoked section 6 of the Arbitration Act, instead of section 7.
43. The defendant submitted that the contract in this case, allowed a party to refer a dispute to arbitration without having to seek leave of the court.
44. Whereas the parties have now referred the substantive dispute to arbitration, that does not negate the plaintiff's assertion that the defendant had all along failed to co-operate with the plaintiff, to have the dispute referred to arbitration.
45. The defendant invited the court to bear in mind the following definition of the phrase;

“interim measure of protection”, as given in the BLACK'S LAW DICTIONARY, 9th Edition;

“An international tribunal's order to prevent a litigant from prejudicing the final outcome of a lawsuit by arbitrary action before a judgement has been reached. This

measure is comparable to a temporary injunction in national law”.

46. The defendant went on to submit that the plaintiff should have demonstrated that it was entitled to an injunctive relief.
47. If that is the defendant’s understanding then I would not hesitate to state that it is not reflective of the composite picture as envisaged by section 7 of the Arbitration Act. That section does not envisage only injunctive reliefs. This is what section 7 (1) of the Arbitration Act provides;

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

48. The nature and scope of the interim measure of protection which the High Court can grant is not limited by law.
49. Even the definition given in **BLACK’S LAW DICTIONARY** appears to acknowledge that the real question to be considered by the court is whether or not the rejection of the request for protection could cause prejudice to the final outcome of the lawsuit.
50. The defendant concedes that fact, in his submissions. However, he then submitted that the conditions for the award of the protective measures do not exist in this case.
51. As far as the defendant was concerned, if the plaintiff were to continue to use the rig, that would defeat the arbitration.
52. I must say that I failed to understand how the use of the rig, during the arbitral proceedings could defeat the purpose of arbitration.
53. The defendant does not challenge the plaintiff’s contention that the detention of the rig has resulted in the plaintiff suffering ***“tremendous monetary losses, since it does not operate and has been sued for non performance of other contracts”.***
54. Assuming that the defendant was to succeed in the arbitral proceedings, it is conceivable that the plaintiff may either be compelled to drill the borehole to a greater depth or the plaintiff may be compelled to compensate the defendant for breach of contract.
55. Another possible solution might be achieved through the defendant engaging another contractor to complete the job, and thereafter seek compensation from the plaintiff.
56. If the plaintiff was using the rig to work elsewhere, it might be able to compensate the defendant, if so ordered. Or if the plaintiff was ordered to complete the task, the financial muscle of the plaintiff would determine its ability or otherwise to do the needful.
57. To my mind, therefore, the continued detention of the rig is not beneficial to any of the parties. If anything, it raises a serious sense of prejudice against both parties. I say so because the financial losses being experienced by the plaintiff may make it impossible for the plaintiff to either complete the job or to compensate the defendant.
58. Conversely, if the defendant was unsuccessful in the arbitration, he would also face a possible sizeable bill, as compensation to the plaintiff. The continued detention of the plaintiff’s rig, in those circumstances could only aggravate the situation.
59. In the case of **SEVEN TWENTY INVESTMENTS LIMITED Vs SANDHOE INVESTMENT KENYA LIMITED** Hccc No. 359 of 2013, Lady Justice Kamau held that the plaintiff had not;

“satisfied the threshold to empower this court to grant an interim measure of protection or injunction as contemplated under section 7 of the Arbitration Act”.

60. The learned Judge held the view that;

“...the Plaintiff’s application is hinged on the continued usage of the aircrafts and not their preservation”.

Whilst I do appreciate the reasoning of my learned sister, above, I regrettably find myself unable to concur with it. My view is that Section 7 of the Arbitration Act does not make reference to the need to preserve the subject matter of the arbitration. The word used is *“protection”*.

61. Whilst protection may normally be provided through preservation, it need not be limited only to preservation. As already stated earlier in this Ruling, the power of the court to make orders which offer protection, is unlimited.
62. In the case of **SEVEN TWENTY INVESTMENTS LIMITED Vs SANDHOE INVESTMENT LIMITED** Hccc No. 359 of 2013, the Court said the following, concerning section 10 of the Arbitration Act;

“In view of the fact that the court cannot intervene in a dispute where parties have opted to proceed for determination of the same through arbitration, it cannot make any orders that would interfere with the rights of the parties. In the CETELEM Vs ROUST HOLDINGS [2005] 4 ALL ER 52 case, the court held that;

‘There was, however, nothing in the subsection to limit the power of the court to the making of orders which did not involve a preliminary determination of the rights of the parties...’

63. With that in mind, I have consciously restrained myself from making any orders which would involve the determination of the rights of the parties. I have left that role and function to the arbitrator.
64. Nonetheless, I have come to the conclusion that the continued detention of the rig did not help either party. Instead, the said detention was prejudicial to both parties. Therefore, I find that justice demands that the rig be released to the plaintiff pending the arbitration. In the circumstances, I now order the defendant to release to the plaintiff the Drilling Rig, Drilling pipes and the accessories which the defendant was holding.
65. However, as a pre-condition for the said release, the plaintiff must, within the next 7 days, provide to the defendant, an undertaking in writing, to commit itself to settle such compensation as the plaintiff may ultimately be held liable for, to the defendant upon the determination of the arbitration.
66. As this is an interlocutory order, I order that the costs of the application shall abide the determination of the dispute by the arbitrator. If the plaintiff succeeds in the arbitration, it shall also be awarded the costs of the application. However, if the defendant is successful in the arbitration, the costs of this application will also be awarded to him.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of September 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Kassam for the Plaintiff

Otieno for Omulama for the Defendant

Collins Odhiambo – Court clerk.