REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 394 OF 2013

LAVINGTON SECURITY LIMITED.....PLAINTIFF

VERSUS

ESSAR TELECOM KENYA LIMITED.....DEFENDANT

R U L I N G

1. The Plaintiff/Applicant herein filed a Notice of Motion under Certificate of Urgency dated 10th September 2013. The Application was brought under the provisions of **section 7 (1) and 2** of the *Arbitration Act, 2010* as well as **Order 40 Rule 2** and **Order 51 Rule 1** of the *Civil Procedure Rules*. **Sections 1A, 1B, 3A and 63 (e)** of the *Civil Procedure Act* also applied. The Application sought an order of injunction barring the Defendant, its servants and agents from terminating a contract entered into between the parties dated 6th July 2009. The Application was predicated on the following grounds:

> **"i) A dispute has arisen between the Plaintiff and the Defendant with regard to a contract dated 6th July, 2009 and the Plaintiff has referred the dispute to arbitration.**
>
> **ii) The Defendant has purported to issue a Notice to terminate the contract without regard to the contractual period and contrary to express provisions of the contract with regard to such Notices.**
>
> **iii) The Plaintiff will suffer irreparable loss and damages if the Defendant proceeds to effect the Notice to terminate and it is in the interest of Justice that the Honourable Court grants Interim reliefs pending reference and or hearing of the disputes by the Arbitrator".**

2. The Plaintiff's said Application was supported by the Affidavit of its Chief Manager, Operations of the Plaintiff Company, one **George Onyango** dated 10th September 2013. The deponent recounted how the Plaintiff had entered into a contract with the Defendant to provide guard services to the premises of the Defendant in various locations in Kenya. The Service Contract was dated 6th July 2009 (hereinafter "the Contract"). Under clause 20 of the Contract, the Plaintiff could vary the charges for guard services provided to the Defendant by using the following procedure:

> **"a) The Contractor shall give Thirty (30) day's notice of its intention to vary its Charges to the Client ("Notice of Variation of Charges") and such varied Charges**

shall, subject to paragraph (b) below have immediate effect thereafter.

b) Upon receipt of the Notice of Variation of Charges, the Client may within Fifteen (15) days from the date of receipt of the notice, give to the Contract thirty (30) day's notice in writing of its intention to terminate this Agreement ("Notice of Termination").

c) If a Notice of Termination is served upon the Contractor, the Charges for the period of the Notice of Termination shall be the rate payable before the Notice of Variation of Charges".

It is the Plaintiff's contention that it gave notice to the Defendant as to an increase in charges as per its letter dated 30th July 2013. The Defendant responded thereto by a letter dated 16th August 2013 in which it terminated the Contract but the Plaintiff details that this was outside the 15 day period envisaged under clause 20 b) of the Contract. The Plaintiff now wished to take the matter to arbitration, as per clause 19 of the Contract, but in the meantime sought Interim Orders from this Court that the termination of the Contract should be put on hold pending the hearing of the arbitral proceedings. In other words, the Plaintiff wished this Court to impose a mandatory injunction upon the Defendant to continue with the Contract until the determination made by an arbitrator.

3. In response to the Plaintiff's Application, the Defendant filed a Replying Affidavit sworn by its Head of Legal Affairs, **Rita Mwangi** dated 13th September 2013. The Defendant also filed a Notice of Preliminary Objection, again dated 13th September 2013, in which it maintained that the Application was firstly, incompetent and incurably defective and secondly, that this Court lacked the jurisdiction to hear the matter. That Preliminary Objection by the Defendant was dismissed by this Court on the 20th September, 2013. However, the said Replying Affidavit detailed the Contract between the parties and that the same was varied by a deed of variation dated 20th July 2011. The deponent noted that in accordance with paragraph 20 of the Contract, variation of the charges could only be effected upon negotiations between the parties. The letter received by the Defendant from the Plaintiff dated 31st July 2013 had been unilateral as to the increase in charges contrary to paragraph 20 of the Contract. Ms. Mwangi noted that upon receipt of the said letter, the Defendant had written an Email to the Plaintiff on 13th August 2013 informing it that the proposed charges were unacceptable. Thereafter, three days later, the Defendant wrote further to the Plaintiff a letter dated 16th August 2013 giving notice of termination of the Contract. The Defendant had written a further letter to the Plaintiff dated 28th of August 2013 informing it that the termination stood and that the handover was expected to be completed by 15th of September 2013. Shortly after that, the handover commenced and by the date of the Replying Affidavit, 13th September 2013 the Plaintiff had cooperated and completed handing over all the sites to which it had provided guards. The deponent thereafter attached copies of correspondence in relation to the Plaintiff's quality of the services provided which had been wanting and caused losses to the Defendant on several occasions. The Plaintiff had also failed to provide the Defendant with regular reports, particularly of security incidents, as required by the Contract. Two paragraphs of the said Replying Affidavit this Court considers pertinent and vital to the determination of the Application before it namely:

"21. THAT further, the security of the Defendant's installation is key to the operations of its network and any lapse thereof would result in the loss of equipment that is critical to the operation of the Defendant's said network and by extension result in the loss of connectivity to the Defendant's customers which will ultimately translate into erosion of the Defendant's customer base and ultimately to the colossal loss of revenue on the part of the Defendant.

22. THAT it is a common fact that the mobile telecommunications industry in Kenya is extremely competitive and the introduction of the mobile portability and dual SIM technology has raised the competitive nature of the business to a higher level as customers can freely migrate between networks and/or change SIM cards depending on the quality of services and/or costs of the services. Any lapse in security of the Defendant's sites could therefore lead to a massive permanent migration of the

Defendant's subscriber base to more dominant players in the market".

4. The Plaintiff filed a further Supporting Affidavit on 1st October 2013 sworn by the said George Onyango on even date therewith. The deponent took issue with the Replying Affidavit and declared that the Plaintiff had not, in fact, handed over the various installation sites to which it provided security services. This was shortly followed by a further Replying Affidavit again sworn by the said Rita Mwangi on 3rd October 2013. The deponent noted that the Contract was not exclusive as the Defendant already had in place contracts with other security service providers, including Apex Security Services Ltd. The deponent confirmed that the Plaintiff had withdrawn its guard services from the various sites and such withdrawal was conducted in a gradual manner so that by 12th September 2013, all sites had been handed over to the said Apex Security Services Ltd on behalf on the Defendant. The deponent took the precaution of annexing photographs of Apex Security guards at various sites as evidence of the handover. Ms. Mwangi further attached a copy of a letter from the Chartered Institute of Arbitrators (Kenya Branch) detailing that as this matter was currently in Court, the Institute would not interfere in the matter until further Court Order.

5. The Plaintiff's written submissions were filed herein on 1st October 2013. As regards its Notice of Motion dated 10th September 2013, Prayers Nos. 1 and 2 had already been spent and Prayer No. 3 had sought an interim injunction pending the reference of the dispute to arbitration or the hearing of the arbitral proceedings. The Plaintiff submitted that the genesis of the dispute arose from clause 20 of the Contract. It was noted that thereunder, the Plaintiff would give 30 days' notice of intention to vary its guard charges. Thereafter, the Defendant would have 15 days from the receipt of such notice, to give Plaintiff notice in writing of its intention to terminate the Contract. The Plaintiff had given such notice to increase its charges by letter dated 30th July 2013. Under clause 20 of the Contract, the Defendant was supposed to have replied on or before 13th August 2013. The Defendant had failed to respond within such time frame. The Plaintiff went on to note that the Defendant had purported to send a notice of termination dated 16th August 2013. It was the Plaintiff's clear submission that upon the expiry of the period stipulated in clause 20, the Defendant could not terminate the contract pursuant to clause 20 (b). It asked the Court to find that the notice to terminate was *prima facie* null and void. The Plaintiff had already declared a dispute and referred the matter to the Chartered Institute of Arbitrators (Kenya Branch) for the appointment of an arbitrator. Finally, the Plaintiff denied that the sites had been secured by the Defendant utilising the services of another security services company.

6. In turn, the Defendant filed its written submissions on 4th October 2013. They commenced by summarising various clauses in the Contract including those relating to Termination and Variation of Charges. It pointed to the Plaintiff's letter dated 30th July 2013 in which it had sought to increase the security charges. The Defendant pointed out that it had replied to that letter on 16th August 2013 with the issuance of a notice to terminate the Contract. It submitted that the 16th August 2013 was within 15 days of the **receipt** of the Plaintiff's said letter of 30th July 2013 and, accordingly, the Defendant had complied with the provisions of the Contract. The Defendant maintained that the Contract was lawfully terminated under clause 13 and consequently this Court need not address its mind to the same. The Defendant further submitted that the Plaintiff bore the burden of proof to show that the Defendant's termination notice was issued outside the 15 day provided in clause 20 of the Contract. It maintained that the Plaintiff could only do so successfully by proving that its said letter of 30th July 2013 was delivered by hand at the Defendant's offices in Westlands earlier than 1st August 2013. This had not been done. The Plaintiff had merely shown to this Court a stamped copy of a letter indicating that it was received at an office belonging to the Defendant. The receipt stamp did not indicate to which office the letter had been delivered. As a result, the Plaintiff had failed to discharge the burden of proof placed upon it under **section 107** of the *Evidence Act*. As a result, the Plaintiff had not made out a *prima facie* case of breach as to be entitled to injunctive relief.

7. The Defendant went on to say that the Plaintiff was effectively seeking a mandatory injunction in the hope that it would achieve the following:

> **"a) Cause a breach of the contract between the Defendant and the third party who has taken over the provision of security services to the Plaintiff;**

b) Remove the said third party who has already taken over all the Defendants sites;

c) Cause the said third party to terminate employment contracts that they have entered into with the security guards who have been assigned to guard the Defendant's sites;

d) Remove the security guards employed by the said third party from their work stations;

e) Force the Defendant to enter into a new contract with the Plaintiff against their will;

f) Return the Plaintiff back to the Defendants sites, against the wishes of the said Defendants and without a valid contract to the effect;

g) Force the Defendants to accept and receive security services provided by the Plaintiff against their interest and in spite of their protestations".

The Defendant then went on to ask the question as to whether this Court could issue such a mandatory injunction disguised as an interlocutory application. It saw the issues for this Court to determine as:

"a) Can a court of law issue an injunction to restrain the doing of what has already been done?

b) Do the circumstances of this case as summarized above justify the grant of a mandatory injunction having regard to the principles governing the grant and mandatory injunctions?

c) Has the Plaintiff satisfied all the conditions governing the grant of an interlocutory injunction as set out in the case of GIELLA VS CASSMAN BROWN?

d) Whether the Plaintiff has complied with the preconditions set in the agreement before seeking to refer the matter to arbitration.

e) Can there be parallel proceedings respecting the same subject matter both before a court of law as well as before an arbitrator?"

8. Turning to the law, the Defendant drew the attention of the Court to **Order 40 rule 2** which provision is detailed as follows:

"40 (2). (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time at the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit".

The Defendant maintained that the above provision made it clear that an interlocutory prohibitory injunction could only be applied for before the threatened injury or breach is committed. To this end, the Defendant referred the Court to the authority of **East African Foundry Works (K) Ltd v Kenya Commercial Bank Ltd (2002) 2 EA 371**. The Defendant then emphasised that the grant of a mandatory

injunction at the interlocutory stage would have the following consequences:

> **"(a) Such orders would be onerous on the Defendants, the third party and the security guards employed by the said third-party and posted on the Defendant's sites.**
>
> **(b) Such orders would visit untold sufferings on innocent third parties.**
>
> **(c) Such orders would automatically determine the dispute between the Plaintiff and the Defendant. This is because the moment this court compels the Defendant to have the Plaintiff back and even to grant them a fresh contract, that will be the end of the matter."**

To emphasise its position in that regard, the Defendant went on to refer this Court to the authorities of **Kenya Breweries Ltd v Okeyo (2002) 1 EA 109, Showind Industries Ltd v Guardian Bank Ltd & Anor. (2002) EA 284** and **Mwangi v Braeburn Ltd (2004) 2 EA 196**. As regards to whether the Plaintiff has satisfied the principles for the granting of an interlocutory injunction, the Defendant referred this Court to **Giella v Cassman Brown (1973) 483** as well as the Court of Appeal authority of **Kenya Commercial Finance Company Ltd v Afraha Education Society (2001) 1 EA 83**.

9. Turning to whether the Plaintiff had complied with the terms of the Contract particularly as regards the reference to the dispute to an arbitrator, the Defendant maintained that it had not complied with the provisions of clauses 19 and 20 thereof. The Plaintiff had not issued a notice of dispute to the Defendant and it had failed to attempt to resolve the dispute through good faith negotiations. Then, it had failed to address the dispute through the contact persons as detailed in the Contract. That was a 15 day process and if the contact persons failed to resolve the dispute, then it was to go before the Chief Executive Officers of the parties. Again if no negotiations were successful at this level, the matter could be referred to the Chartered Institute of Arbitrators (Kenya Branch) for the appointment of an arbitrator. The Defendant referred the Court to the finding in the case of **Epco Builders Ltd v Geomaps Africa Ltd HCCC No. 547 of 2007** as per **Lesiit J.** who found:

> **"The Applicant also failed to comply with preconditions set in the Agreement between the parties, of either serving a notice in writing to the Respondent notifying it of the nature of the dispute or difference. Further no attempt has been made to settle the dispute or difference if any. I find that in the circumstances the Applicant is not entitled to the prayers sought."**

Finally, the Defendant referred this Court on the point as to whether there could be parallel proceedings between the court and an arbitral tribunal, to the authority of the Court of Appeal in **Niazsons (K) Ltd v China Road and Bridge Corporation (2001) EA**.

10. The classic case as regards the granting of mandatory injunctions at the interlocutory stage is the **Kenya Breweries** case cited above in which the Court of Appeal adopted the finding in **Locabail International Finance Ltd v Agroexport & Ors (1986) 1 All ER 901**. The Court held as follows:

> **"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided once and for all, or where the injunction was directed at a simple and summary act which could be remedied or where the defendant had attempted to steal a march on the plaintiff."**

A similar position was adopted by **Ringera J.** in the **Showind Industries** case (supra) in which the learned Judge held:

"An interlocutory mandatory injunction would be granted sparingly and only in exceptional circumstances such as where the applicant's case was very strong and straightforward. Moreover, being an equitable remedy, any application would be denied where it was inequitable to grant it, for

example, where the applicant's conduct did not meet the court's approval or his equity had been defeated by laches."

11. I also take the point made by the Defendant that the Plaintiff itself has not abided by the terms of the Contract between the parties. I have perused the Contract more particularly clause 19 – Arbitration. The same reads as follows:

> **"19.1 In the event of any dispute or difference arising between the Parties in relation to or arising out of this Agreement, including the interpretation, rectification, termination or cancellation of this Agreement, the Parties shall forthwith, upon receipt of a notice in writing from the Party claiming such dispute or difference attempt to resolve the dispute or difference through good faith negotiations. The Parties shall first address the issues in dispute through the respective Contact Persons. If the Contact Persons are unable to settle the dispute within fifteen (15) Business Days, the matter will be referred to the respective Chief Executive Officers. In the event the Chief Executive Officers fail to reach a settlement on the disputed issues within a period of fifteen (15) Business Days after escalation, a Party may refer the dispute or difference to arbitration under the provisions of the Arbitration Act, 1995, pursuant to the provisions of clause 19.8.3 upon issuing the notice not later than ten (10) days prior to such reference.**
>
> **19.2 The arbitration shall be undertaken by a single arbitrator to be agreed upon between the Parties or, failing such agreement within seven (7) Business Days the dispute being referred to arbitration, an arbitrator shall be appointed by the Chairman for the time being of the Charted Institute of Arbitrators, Kenya Branch upon the written request of either Party.**
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> **19.3 The appointment of the arbitrator shall be final and binding on the Parties and**
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> **19.3.1 The arbitration shall take place in Nairobi, Republic of Kenya.**
>
> **19.3.2 The language of the arbitration proceedings shall be English.**
>
> **19.3.3 The decision of the arbitrator shall be final and binding on the parties; and**
>
> **19.3.4 The decision may be made an order of a court of competent jurisdiction.**
>
> **19.4 The parties undertake that all arbitral proceedings conducted shall be kept strictly confidential as well as all Confidential Information disclosed therein which shall be used solely for those proceedings.**
>
> **19.5 The provision of this Section 19 will continue to be binding on the Parties notwithstanding any termination or cancellation of this Agreement.**
>
> **19.6 Nothing in this Section 19 shall preclude either Party from seeking any interim relief from any competent court having jurisdiction pending the institution of any arbitration proceedings in the terms of this Section".**

There is no evidence before this Court that the Plaintiff herein made any attempt whatsoever to resolve the dispute between the parties by negotiation as contemplated in the above clause 19. The Plaintiff merely rushed off to Court to seek interlocutory relief in order to try to maintain the Contract between the parties. The persuasive Ruling of **Lesiit J.** in the **Epco Builders** case (supra) applies to this case.

12. I have perused the correspondence attached to the Affidavit in support of the Plaintiff's application before Court. In accordance with clause 20 of the Contract I find that the Plaintiff did indeed send a letter to the Defendant dated 30th July 2013 proposing a variation in the charges that it would demand for the

supply of security services at the Defendant's various sites throughout Kenya. Clause 20 (b) notes that upon receipt of the Notice of Variation of Charges, the Defendant may within 15 days from the date of receipt of the notice give to the Plaintiff 30 days' notice in writing of its intention to terminate the Contract. On the copy of the said letter of the Plaintiff dated 30th July 2013 is an acknowledgement stamp by the Defendant Company dated 31st July 2013. The Replying Affidavit of the said Rita Mwangi details that the Plaintiff's said letter should have complied with the provisions of clause 16 of the Contract relating to Notices, which detailed the physical and postal addresses of the parties. The deponent maintained that the Plaintiff's letter was not served upon the Defendant at Essar House Africa, Brookside Grove, Muguga Green Lane, Westlands. Even if it had been, in my opinion the Defendant had responded sufficiently to the Plaintiff's Notice of Variation of Charges as per its Email dated 13th August 2013 to satisfy the provisions of clause 20 of the Contract. Such was shortly followed up by the termination letter dated 16th August 2013. I find that such was in accordance with clause 13 of the Contract. In the Court's view, there was nothing untoward or any breach of the Contract by the Defendant in the action that it took. In the circumstances, I do not find that the Plaintiff has satisfied even the first hurdle of the **Giella v Cassman Brown** (supra) principles in that it has not satisfied this Court that it has a *Prima facie* case with even a possibility of success.

13. The conclusion to all the above is that I dismiss the Plaintiff's Application dated 10th September 2013 with costs to the Defendant. In this Court's opinion, should the Plaintiff wish to take this dispute further, then it would do well to abide by the provisions of clause 19 of the Contract as regards an attempt to resolve such dispute or difference through good faith negotiations.

DATED and delivered at Nairobi this 24th day of March, 2014.

J.B.HAVELOCK

JUDGE