



1. Arbitration-Interim
Measures of protection

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
ENVIRONMENT AND LAND DIVISION
LAND CASE NO. 2 OF 2014

LAGOON DEVELOPMENT LTD.....PLAINTIFF

=VERSUS=

BEIJING INDUSTRIAL DESIGNING

& RESEARCHING INSTITUTE.....DEFENDANT

R U L I N G

Introduction

1. Before the court are two Applications. The Plaintiff's Application is dated 20th January, 2014 filed pursuant to the provisions of section 7(1) of the Arbitration Act, 1995, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 20 Rules (1) and (3), Order 40 Rules 1 and 2 of the Civil Procedure Rules and Article 159 of (2) (c) of the Constitution.
2. The Plaintiff's Application is seeking for the following orders:
 - a. **THAT an injunction be issued restraining the Defendant by itself agents, employees, servants, workers, hirelings and or any other person acting on its behalf from threatening or actually intimidating, harassing, abusing, vexing, harming, hurting and or causing any injury including any contact with the media, financial institution or other agencies with a view to intimidating/embarrassing the Plaintiff.**
 - b. **THAT the Defendant by itself, agents, employees, servants, workers hirelings and or any other person acting on its behalf be ordered to vacate the project site pursuant to clause 38:4:1 of the Contract pending the reference, hearing and determination of the dispute herein by arbitration under clause 45 of the Contract.**
 - c. **THAT an injunction be issued restraining the Defendant by itself, agents, employees, servants, workers, hirelings and or any other person or in any other way intermeddling, interfering with the project site or disrupting any form of works at the project site situate within LR No. 12889/265, Kilifi, pending the hearing and determination of the dispute herein by arbitration under clause 45 of the Contract.**
 - d. **THAT an injunction be issued restraining the Defendant by itself, agents, employees, servants, workers, hirelings and or any other person acting on its behalf from threatening or**

- actually collecting and or removing materials, goods temporary building, tools equipment, machinery at the project site or dismantling machinery, tools and equipment or demolishing any construction at the project site pending the reference, hearing and determination of the dispute herein by way of arbitration under clause 45 of the Contract.**
- e. **THAT the cost of this application be provided for.**

On the other hand, the Defendant's Application is seeking for the following orders:

- a. **The Plaintiff, whether by itself or agents be restrained from appointing handing over the site and construction or engaging another or any other persons or contractor to take over the constructions on the suit property or continuing with any further construction or development thereof by themselves or through their agents or employees howsoever as was already contracted with the defendant thereof pending the hearing and determination of the suit.**
- b. **That the Plaintiff, whether by itself or agents or employees or any persons howsoever be restrained from using the Material equipment's. machinery and plants belonging to the Defendant its agents, employees howsoever that are at the construction site pending the hearing and determination of the suit.**
- c. **That the OCS Malindi Police Station be ordered to ensure full compliance of the orders issued herein.**
- d. **That the costs of this application be provided for.**

The Plaintiff's Applicant case:

3. According to the affidavit of Ashton Towler, the Plaintiff's director, the Plaintiff and the Defendant entered into an Agreement and conditions of contract for Building and Civil Engineering Works published by the Joint Building Council, Kenya (199 Edition) executed on 5th March, 2012.

In the Agreement, the Defendant was engaged as a contractor of the Plaintiff's building construction in project known as Maudharini Development project Kilifi on L.R no. 12889/265 (the suit property).

4. It is the Plaintiff's director's deposition that the Agreement provided for arbitration as a dispute resolution mechanism in case of a dispute between the parties; that the parties to the agreement were to comply with the said provision and that this court has jurisdiction to grant interim measure of protection pending arbitration.
5. According to the Plaintiff, the Defendant was informed of the breaches it had committed on 7th January, 2014 but the Defendant ignored, neglected or disobeyed the same whereupon the Plaintiff terminated the contract thus entitling the Plaintiff to take possession and continued with the uncompleted works.
6. It is the Plaintiff's case that after termination of the contract, the Defendant and its agents began to illegally dismantle, demolish and interfere with machinery, tools, equipment and temporary structures on the suit property in disregard to the provisions of the Agreement. It is on that basis that the Plaintiff is seeking for interim measures of protection pending reference, hearing and determination of the dispute between the parties as provided for in the Contract.

The Defendant's case:

7. In response to the Plaintiff's Application, the Defendant filed an Application dated 30th January, 2014 seeking for an order of injunction restraining the Plaintiff from appointing any other contractor to take over the constructions on the suit property or continuing with any further constructions or development pending the hearing and determination of the suit.
8. It is the Defendant's case that the Plaintiff purported to unilaterally and unlawfully terminate the contract and demanded that the Defendant vacate the premises and leave all materials, equipment, plants and machinery belonging to the Defendant.
9. The Defendant's director deponed in his Affidavit that the Contract provided for arbitration; that the Plaintiff has skipped that process and rushed to court and that the Plaintiff has appointed new

- contractors who are now using the Defendant's materials, plants, machines and equipment which are still at the site.
10. In addition to the Supporting Affidavit annexed on the Defendant's Application, the Defendant filed a Replying Affidavit sworn by the Defendant's Project Manager on 26th January 2014.
 11. In the said Replying Affidavit the Defendant representative has deponed that the Defendant has neither committed any of the acts of default stated in the contract nor issued with a proper 14 days notice.
 12. The Defendant admitted having received the Plaintiff's alleged default notice on 7th January, 2014 but denied that it was in default. It is the Defendant's case that the parties did not agree that the Plaintiff would continue using the Defendants' equipment, goods and materials.
 13. According to the Defendant, the Plaintiff owes it Kshs. 31,543.57 in respect of interim certificates of payments and interest in the said unpaid certificates in the sum of Kshs.6.038.607.76 which is due and payable by the Plaintiff; that it is the Plaintiff who is in breach of the contract by failing to settle the Defendant's interim certificates of payment and that the Plaintiff terminated the contract even before the lapse of 14 days.
 14. It is the Defendant's position that the Plaintiff proceeded to terminate the contract after being unable to settle its interim certificates of payment.

The Supplementary Affidavit:

15. The Plaintiff's director filed his Supplementary Affidavit on 31st March, 2014 and deponed that the Defendant did not respond to the breaches that were communicated to it; that the issues raised in the Defendant's Affidavit are issues which fall within the jurisdiction of the Arbitral tribunal and that the Defendant's allegations are ill-intended to expose the Plaintiff's project which is worthy more than Kshs. 500,000,000 to waste, loss and damage.

Submissions:

16. The parties' advocates filed their respective submissions. The Plaintiff's advocate submitted that the current dispute is for the arbitral tribunal envisaged under clause 45.1 and 45.2 of the Agreement.
17. The Plaintiff counsel further submitted that section 17 of the Arbitration Act frowns upon any intervention by the High Court and empowers the Arbitral tribunal to decide on its own jurisdiction. Counsel relied on case law to buttress his argument.
18. On the other hand, the Defendant's advocate submitted that the purpose of interim measure of protection is to preserve evidence, protect assets and to protect the subject matter from wastage or dissipation pending the outcome of the arbitration proceedings.
19. According to the Defendant's counsel, the Plaintiff is not seeking for interim measure of protection but rather to use the court process to continue with the construction project using the Defendant's materials, plant and goods. Consequently, it was submitted, the order that should issue is for the maintenance of the status quo or interim measure of protection pending arbitration as proposed in the Defendant's Application.

Analysis and findings

20. It is not in dispute that the Agreement between the Plaintiff and the Defendant at paragraph 45.0 provided that in case of a dispute between the parties, either during progress or after the completion or abandonment of the works, it should be referred to arbitration.
21. According to clause 45.2 of the Agreement, the matter to be referred to the arbitration tribunal may be "*on the construction of the contract or on any matter or thing of whatsoever nature arising there under*".
22. Although the parties are in agreement that the dispute should be referred to arbitration, the Plaintiff's position is that the interim measure of protection should include allowing it to continue with the works at the project site pending the hearing and determination of the dispute by way of arbitration.
23. On the other hand, the Defendant's position is that the interim measure of protection envisaged by

the Act is that the Plaintiff should be restrained from continuing with the works and from using the materials equipment, machinery and plants belonging to the Defendant pending the hearing and determination of the dispute.

24. In the case of **Safaricom Limited -Vs- Ocean View Beach Hotel Limited & 2 Others (2010) e KLR**, the Court of Appeal held that the principles enunciated in the famous case of **Giella -Vs- Cassman Brown (1973) EA 358** should not be the basis while granting the interim measures of protection pursuant to the provisions of section 7 of the Arbitration Act.

25. While interpreting what the interim measures of protection entails, the court stated as follows:

“By determining the matters on the basis of the Giella principles, the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. 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.”

26. The interim measures of protection by whatever description ought to be granted in light of the peculiar circumstances of each case. According to the Blacks' Law Dictionary, 8th edition, the term “Interim Measure of protection” has been defined as follows:

“An Intentional tribunal order to prevent a litigant from prejudicing the final outcome of a law suit by arbitrating action before judgment has been reached. This measure is comparable to a temporary injunction in national law.”

27. The Defendant's counsel has asked me to be persuaded by the Ruling of my sister Kamau J in the case of **CMC Holdings Ltd. & Another -Vs- Jaquar Land Rover Exports Ltd. (2013) eKLR** in which she 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. The court must be satisfied 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.”

28. In the case of **Seven Twenty Investments Limited -Vs- Sandhoe Investment Kenya Limited, (2013) e KLR**, Kamau J held as follows:

“Perusal of section 7 of the Arbitration Act clearly shows that the issue of whether or not there is a dispute or whether or not there would be losses by either side would not be a factor for a court to take into consideration when deciding whether or not it should grant an order of 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 reference.”

29. I am persuaded by those decisions considering that the same are in consonant with the decision of the Court of Appeal in the *Safaricom* case (*supra*) and the definition of what interim measure of protection entails. The interim measure of protection is only meant to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings.

30. Clause 38.4 of the Agreement provides that in the event of the contract being terminated, the Defendant shall forthwith vacate the site thereby relinquishing possession thereof and the responsibility and care of the site and the works shall henceforth pass to the Plaintiff.

31. Clause 38.5 further provides that upon termination of the contract, the Plaintiff may employ and

- pay other persons to carry out and complete the works and use all temporary buildings, equipment, goods and materials placed on site.
32. One of the disputes that is supposed to be determined by the arbitrator is whether indeed the Plaintiff lawfully terminated the Agreement. In view of the fact that it is only the arbitrator who can make that determination, the Plaintiff cannot invoke the provisions of clause 38.5 as alleged.
33. The invocation of clause 38.5 presupposes that the Defendant has admitted that the Plaintiff lawfully terminated the Agreement, which is not the case.
34. In the circumstances, I will agree with the Defendant's submissions that the interim measure of protection of the subject matter herein is to maintain the status quo pending the outcome of the arbitration proceedings.
35. The continued construction of the subject matter by a different contractor has the effect of changing its nature to the extent that the arbitration proceedings may be compromised.
36. I say so because one of the complaints raised in the Plaintiff's notice is the quality of plaster works. How will that issue be resolved by the arbitrator if the works on the subject matter are allowed to go on by another contractor? How will the arbitrator confirm the acceptability or otherwise of the external plaster works if another contractor takes over the project at this stage?
37. The most appropriate way of preserving evidence and maintain a status quo pending arbitration is by way granting the orders as proposed in the Defendant's Application. Construction works should stop pending determination of the dispute by an arbitrator.
38. In the circumstances, and for the reasons I have given above, I dismiss the Plaintiff's Application dated 20th January, 2014 and allow the Defendant's Application dated 30th January, 2014 in the following terms:

(a) The Plaintiff, whether by itself or agents be and is hereby restrained from appointing handing over the site and construction or engaging another or any other persons or contractor to take over the constructions on the suit property or continuing with any further construction or development thereof by itself or through its agents or employees howsoever as was already contracted with the Defendant thereof pending the hearing and determination of the dispute by way of arbitration.

(b) That the Plaintiff, whether by itself or agents or employees or any persons howsoever be and is hereby restrained from using the material, equipment, machinery and plants belonging to the Defendant its agents, employees howsoever that are at the construction site pending the hearing and determination of the dispute by way of arbitration.

(c) Each party to bear its own costs.

DATED AND DELIVERED IN MALINDI THIS 30TH DAY OF MAY, 2014.

O. A. Angote

Judge