



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO 274 OF 2013**

**TALEWA ROAD CONTRACTORS LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Amended Notice of Motion application dated 1<sup>st</sup> July 2013 was filed on 2<sup>nd</sup> July 2013. Its initial Notice of Motion application was dated 27<sup>th</sup> June 2013 and filed on 28<sup>th</sup> June 2013. Its prayers were anchored under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010 and Sections 7 and 22 of the Arbitration Act, 1995 and all other enabling provisions of the law.

2. The same was basically seeking orders for an injunction or interim measures of protection to restrain the Defendant from assigning to any person whatsoever or howsoever, the Contract Agreement dated 12<sup>th</sup> January 2012 for the periodic maintenance of the Mombasa- Miritini Road or the confiscation, selling, disposing of, removal, utilisation or interference with the plant, machinery, equipment, motor vehicles and other items situated at the site. (A109) pending the hearing and determination of the intended arbitration.

**PLAINTIFF'S CASE**

3. The grounds on the face of the amended and initial Notice of Motion applications, the undated Supporting Affidavit by John Kihonge Wainaina and his Supplementary Affidavit sworn on 1<sup>st</sup> July 2013 and filed on 2<sup>nd</sup> July 2013 alluded to the fact that Clause 67 of the said Contract provided for dispute resolution in the event of any dispute arising out of the execution or termination of the contract. In the Amended Notice of Motion application, the Plaintiff averred that the Supporting Affidavit was sworn on 27<sup>th</sup> June 2013.

4. In the said Supplementary Affidavit, the deponent stated that the mechanism for resolution of disputes was elaborate and would take a considerable amount of time hence the need to be granted a preservative order to maintain the *status quo* pending the exhaustion of the dispute resolution mechanism. He said that the Plaintiff stood to suffer irreparable damage and substantial financial loss if the said status was not maintained.

5. In his Further Supplementary Affidavit sworn on 25<sup>th</sup> September 2012 but shown to have been filed on 20<sup>th</sup> September 2013, the said John Kihonge Wainaina averred that the Defendant was the one that occasioned delays in the Plaintiff's execution of works on the site. He reiterated that the Plaintiff had received conflicting instructions and that it had severally raised the issue of removal of impediments and that it compensated the Defendant by paying liquidated damages. He contended that it was therefore not open to the Defendant to purport to terminate the contract as that would amount to unjust enrichment.

6. It was the Plaintiff's contention that it was common for contractors to seek finance from third parties but that the Defendant despite being aware of the far-reaching implications if it terminated the contract, it nonetheless deliberately terminated the said contract to inflict it financial loss.

7. In its written submissions dated 25<sup>th</sup> September 2013 and filed on 26<sup>th</sup> September 2013, the Plaintiff it argued that it had established a *prima facie* case why it should be granted an injunction and an interlocutory mandatory injunction under the provisions it had brought its application. It relied on the cases of **Giella vs Cassman Brown & Company Limited [1973] EA 358** and **Showind Industries Limited vs Guardian Bank Limited & Another (2002) 1EA 284** in this regard.

8. It was its case that the court could exercise its discretion to grant the orders under Section 3A of the Civil Procedure Act with a view to meeting the necessary ends of justice and to prevent abuse of the court process. It contended that it was never issued with any notice for termination and that it had diligently carried out the works. It therefore urged the court to grant it the orders it had sought.

#### **DEFENDANT'S CASE**

9. Dominic Kumina Kirira, the Defendant's Senior Engineer (Maintenance) swore a Replying Affidavit on 17<sup>th</sup> July 2013. The same was filed on even date. The Defendant admitted that said Contract provided for the use of the FIDIC (*Federation Internationale Des Ingenieurs- Conseils*) Conditions of Contract.

10. The Defendant alluded to several issues in its Replying Affidavit relating to the execution of the Contract. It referred to issues regarding impediments on the site, excavation and cleaning of potholes by the Plaintiff without laying the mix design specifications, the Plaintiff's assertions of issuance of conflicting instructions, issuance of a fourteen (14) days compliance notice, delays in the completion of the works, non-compliance with the completion time, request for extension of time, breach of Contract, termination of the Contract, securing of all the Plaintiff's plants and materials among others.

11. In its written submissions dated 18<sup>th</sup> October 2013 and filed on 23<sup>rd</sup> October 2013, the Defendant contended that this suit ought to have been filed at the High Court of Kenya at Mombasa as was provided for in Section 15 of the Civil Procedure Act as it was the place where the contract was to be performed.

12. It also raised issue with the way the Plaintiff had presented its case as Rule 2 of the Arbitration Rules, 1997 provided that any application under Sections 6 and 7 of the Arbitration Act, 1995 was to be brought by way of a chamber summons application and not by way of Notice of Motion application.

13. It reiterated the facts it had raised in its Replying Affidavit and referred the court to the case of **CMC Holdings Limited & Another vs Jaguar Land Rover Exports Limited (2013) eKLR** wherein this court held that it could not grant orders that would have the effect of preventing the Respondent therein from exercising its rights under the contract.

14. It also placed reliance to the case of **Channel Tunnel Group Limited vs Balfour Beatty Construction Limited (1993) AC 334** where the court held that in making an interim orders of protection, the court had to be reluctant to make a decision that would risk prejudicing the outcome of the arbitration.

15. It submitted that the Plaintiff had not met the conditions that had been set out in the case of **Giella vs Cassman Brown Company Limited** (Supra) and urged the court to dismiss the Plaintiff's application

herein.

## **LEGAL ANALYSIS**

16. The court noted the Defendant's submissions that this matter ought to have been heard at the High Court of Kenya at Mombasa as evidenced in Section 15 (c) of the Civil Procedure Act as the performance was in Miritini, Mombasa.

17. Whilst the court agrees that this would have been the ideal situation, it is necessary to look at the explanation of what the place where the cause of action arises. The place where the cause of action, wholly or in part arises is explained in Explanation 3 of Section 15 of the Civil Procedure Act which stipulates as follows:-

**“In the suit arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely-**

- i. The place where the contract was made;**
- ii. The place where the contract was to be performed or performance thereof completed;**
- iii. The place where in performance of the contract any money paid to which the suit relates was expressly or impliedly payable.”**

xviii. The Defendant did not place before the court anything to suggest that the contract was not made in Nairobi or that the payments were not to be made in Nairobi. It was incumbent upon the Defendant to demonstrate this fact, which this court finds that it did not do.

xix. The Defendant was also economical with its submissions on this issue as Section 15 (a) of the Civil Procedure Rules, 2010 provides as follows:-

**“Subject to limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction, the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business or personally works for gain.”**

20. A perusal of the Amended Plaintiff shows that both the Plaintiff and the Defendant were body corporates with registered offices in Nairobi. This court is therefore properly seized of this matter and shall proceed to determine the matter on its merits.

21. As regards the competence of the Plaintiff's Notice of Motion application, the court wholly agrees with the Defendant that the Plaintiff's prayers ought to have been brought by way of a Chamber Summons application. However, as this court is enjoined by Article 159(2) (d) of the Constitution of Kenya, 2010 to administer justice without undue regard to the procedural technicalities, it therefore deemed it to be in the interests of justice to disregard that technicality as it does not affect the substance of the application and proceed to determine the same on the merits of this case.

22. Although in its Amended Motion, the Plaintiff alluded to the fact that the Supporting Affidavit John Kihonge Wainaina was sworn on 27<sup>th</sup> June 2013, the court notes that the court copy was not dated. The Defendant did not raise the issue of the Supporting Affidavit not having been dated leading this court to make an assumption that its copy may have been dated. However, the court's copy is the one that forms the court record and must fully comply with the mandatory provisions of the law.

23. Section 5 of the Oaths & Statutory Declarations Act Cap 15 (Laws of Kenya) is set out in mandatory terms. The same provides as follows:-

**“Every Commissioner for Oaths before whom any oath or affidavit is taken or made under the Act shall (emphasis court) state truly in the Jurat or attestation at what place and date (emphasis court) the oath is taken or made.”**

24. It must be understood, that whereas Article 159 (2) (d) of the Constitution of Kenya, 2010 comes to

the aid of litigants to cure procedural technicalities, it cannot cure substantive issues. This was a conclusion that was arrived in the case of **Raila Odinga vs IEBC & Others (20130 eKLR)** where the Supreme Court held that Article 159 (2) (d) of the Constitution of Kenya, 2010 simply meant that a court shall not pay undue regard to procedural technicalities at the expense of substantive justice but that the same was not intended to oust the obligations by litigants to comply with procedural imperatives.

25. For the reason that the said Supporting Affidavit did not comply with the statutory and mandatory provisions of the law, the court hereby expunges and strikes out the said Supporting Affidavit of John Kihonge Wainaina. The Plaintiff's Notice of Motion application stands automatically dismissed as it has no limb to stand on. The effect of this striking out of the said Supporting Affidavit is that all the exhibits attached to the said Notice of Motion application are also hereby struck out.

26. The court will therefore only address itself to the Amended Notice of Motion application supported by the Supplementary Affidavit of John Kihonge Wainaina and the annexures thereto to establish whether or not the Plaintiff was entitled to the orders it sought.

27. The Plaintiff's application was saved by the fact that the said Amended Notice of Motion was supported by a duly sworn Supplementary Affidavit. Had the Plaintiff had not sworn another Affidavit and opted to rely on its undated Affidavit in support of its Notice of Motion, its application would have failed right at the outset.

28. The purpose of an injunction or 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 therefore 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.

29. According to the Black's Law Dictionary 9<sup>th</sup> Edition, an interim measure of protection is defined as follows:-

**“An international tribunal's order to prevent a litigant from prejudicing the final outcome of a lawsuit by arbitrary action before a judgment has been reached. This measure is comparable to a temporary injunction in national law.”**

30. In the same dictionary, injunction has been defined as:-

**“A court order commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate and complete remedy at law and that an irreparable injury will result unless the relief is granted.”**

31. A court must be convinced that such an injunctive order is essential and that it esteems that the act being restrained is contrary to equity and good conscience. It is a remedial writ which a court issues for purposes of enforcing its equitable jurisdiction.

32. Section 7(1) of the Arbitration Act states as follows:-

**“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.”**

33. 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.

34. 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. It therefore follows that the subject matter and the dispute or difference being referred to the arbitral tribunal are separate and distinct entities.

35. In the case of CMC Holdings Ltd & Another vs Jaguar Land Rover Exports Limited (Supra), this very 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.”**

36. This was an argument that was also considered in the case of Donwood Company Limited vs Kenya Pipeline Company Limited[2005] eKLR which was upheld 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...”**

37. From the understanding of this court, the Plaintiff was seeking an injunction to restrain the Defendant from acting further on its notice of termination of the Contract of 12<sup>th</sup> January 2012 and to restrain the Defendant from confiscation, selling, disposing of, removal, utilization or interference with the plant, machinery, equipment, motor vehicles and other items situated at the site. The court will therefore address the two (2) issues separately.

38. It did appear from the Plaintiff's own admission that the said contract was terminated. Just as this court held in the case of CMC Holdings Ltd & Another vs Jaguar Land Rover Exports Limited (Supra), the contract is not of the nature that this court can grant an interim measure of protection or restrain the Defendant from exercising its rights under the said Contract. The contentions that were raised in the Affidavits mainly touched on the legitimacy or otherwise of the termination of the said Contract. Commenting on the merits of the same would be delving into the realm of the arbitral proceedings when this court lacks power or jurisdiction to do so.

39. Restraining the Defendant from assigning the Contract to other parties would amount to this court re-writing the contract something a court would also not have jurisdiction or power to do as was rightly pointed out Paragraph 14 hereinabove. In that case of CMC & Another vs Jaguar Land Rover Exports Limited(Supra), this court stated as follows:-

**“Granting the orders as sought by the Applicants would amount to the court interfering in issues that would rightly be before the arbitral tribunal or English Courts and for which this court would not have jurisdiction to deal with. The role of this court is supportive. It cannot purport to assist a party beyond what it is mandated to do under the law.”**

40. This very court also dealt with the issue of injunction or interim measures of protection in respect of a contract in the case of Seven Twenty Investments Limited vs Sanhoe Investments Kenya Limited (2013) eKLR. It held as follows:-

**“Any injunction on the facts on the case as they stand now would definitely be interference by a court which would have no business making preliminary findings on the rights of the parties headed to an arbitration process. In other words, the granting the orders being sought by the Plaintiff would amount to this court preventing the Defendant from exercising its**

**rights under the contract. The question of whether or not the Defendant was entitled to terminate the contract as it purported to do or whether there is a dispute capable of being arbitrated upon should rightly be resolved by the arbitrator. For the reason that the court found that it cannot interfere with the contracts of the parties, it does not find the Plaintiff's application to have satisfied the threshold of when a court can grant an interim measure of protection or injunction as contemplated under Section 7 of the Arbitration Act.**

41. In the **Cetelem vs Roust Holdings (2005) 4 All ER 52**, 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 a contractual right of the parties...”**

42. In the **NCC International AB vs Alliance Concrete Singapore Pte Ltd (2008) 5 LRC 187** the court held that the granting of an interim measure of protection or injunction pending the determination of an arbitral reference was a discretionary measure that should be exercised cautiously so as not to usurp the role of the arbitral tribunal and that it could decline to grant such orders where an arbitration tribunal had concurrent jurisdiction to make such orders. The court should therefore come in under very exceptional circumstances.

43. Perusal of the **Cetelem vs Roust Holdings case** (Supra) shows that the gist of the granting of an order of interim measure of protection or injunction was for purposes of preserving assets and evidence the court said were **“...not confined to tangible assets but could for example, include choses in action.”** It is for the same reason that the court granted an injunction to preserve a site in **Don woods Company Limited vs Kenya Pipeline Company Limited** (Supra).

44. The contract between the Plaintiff and the Defendant cannot be referred or deemed to be an asset, tangible or otherwise. It does not fall within the confines envisaged by Section 7 of the Arbitration Act. There is indeed nothing to be conserved in the said contract.

45. The disputes in respect of the Contract between the Plaintiff and the Defendant had a complete code on dispute resolution. The issues that emerged from the parties' affidavits and pleadings are completely outside the jurisdiction and scope of this court. If the court even for one moment purported to consider the arguments relating to the said Contract, it would be clearly out of order and in contravention of Section 10 of the Arbitration Act, 1995 which provides that:-

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

46. Indeed, the role of the court under the Arbitration Act Cap 49 (laws of Kenya) is merely complementary. It was never intended that the court could intervene in the dispute between the parties who had chosen arbitration as their mode of resolution of the dispute.

47. Any injunction on the facts on the case as they stand now would definitely be interference by a court which would have no business making preliminary findings on the rights of the parties headed to an arbitration process, a process the parties have voluntarily opted as a mode of resolution of their dispute. In other words, the granting the orders being sought by the Plaintiff would amount to this court preventing the Defendant from exercising its rights under the contract. The question of whether or not the Defendant was entitled to terminate the contract as it purported to do should thus be resolved by the arbitrator.

48. For the reason that the court found that it cannot interfere with the contracts of the parties, it does not find the Plaintiff's prayer in respect of the aforesaid contract to have satisfied the threshold of when a court can grant an interim measure of protection or injunction as contemplated under Section 7 of the Arbitration Act.

49. Having said so, the confiscation, selling, disposing of, removal, utilisation or interference with the plant, machinery, equipment, motor vehicles and other items situate at the site are of the nature that can

be preserved under Section 7 of the Arbitration Act as they were items that were capable of being dissipated if not preserved.

50. It is evident from the pleadings, affidavits and written submissions by the respective parties, that there was in fact a dispute between them emanating from the aforesaid Contract which they agreed, could be referred to arbitration.

51. The court is therefore in agreement with the Plaintiff that it would be just, equitable, proper and fair to grant an injunction as an interim measure of protection pending the referral of the dispute to the arbitral tribunal for its determination in line with the provisions of Clause 67 of the FIDIC Contract, a clause this court took judicial notice of, as a copy of the said Contract and attached as annexure had already expunged from the court record.

52. The injunction herein was granted on a balance of convenience as granting it on the grounds that the Plaintiff has established a *prima facie* case with a probability of success could be misinterpreted to mean that the court has considered the merits or demerits of the dispute between it and the Defendant and which this court found it has no power or jurisdiction to do.

### **DISPOSITION**

53. Accordingly, the upshot of this court's ruling is that the Amended Plaintiff's Notice of Motion application dated 1<sup>st</sup> July 2013 and filed on 2<sup>nd</sup> July 2013 was successful in part and the same is hereby allowed in terms of Prayer (3) therein. As the prayer for interim orders during the hearing and determination of the application herein is now spent, the injunction has been granted pending the hearing and determination of the Intended Arbitration. Costs will be in the cause.

54. It is so ordered.

**DATED and DELIVERED at NAIROBI this 24th day of, September, 2014**

**J. KAMAU**

**JUDGE**