IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISON

HCCC NO 543 OF 2013

BABS SECURITY LIMITED.....PLAINTIFF

Versus

GEOTHERMAL DEVELOPMENT LIMITED ……..…… DEFENDANT

RULING

[1] I am only to determine whether I should issue an injunction to restrain the Defendant from terminating the contract between the parties dated 30th September, 2013. The other prayers in the Plaintiff's Chamber Summons dated 10th December, 2013 were settled by consent of parties and the dispute was referred to arbitration. The application is expressed to be brought under Sections 6 and 7 of the Arbitration Act, rule 2 of the Arbitration Rules and the inherent powers of the court. It is supported by the affidavit of ISAAC MACHARIA WAMBUI sworn on 8th January, 2014.

[2] The application is based on the grounds set out in the application. The crucial one is that the Defendant has issued a notice of termination of the contract herein which is for provision of security. Unless the termination is stopped, the Plaintiff argues it will suffer irreparable damage as it has already invested over Kshs. 15,000,000 in the contract and will be forced to terminate employment of over 211 employees (security officers) it has hired for the contract. The later will invariably expose the Plaintiff to multiple labour and industrial claims. The contract contains an arbitration clause. The plaintiff even supplied a performance guarantee of Kshs. 3,011,040.

[3] The termination is purportedly based on general complaint on mobilization which the Plaintiff had already addressed in its letter dated 17th October, 2013 and at a meeting held on 24th October, 2013. But despite these efforts, the Defendant issued a termination notice for alleged breach of contract. Clause 16 is the arbitration agreement. The plaintiff declared a dispute on 4th December, 2013 and requested the defendant to appoint an arbitrator. The matter was eventually referred to arbitration. What the plaintiff now seeks is an interim measure of relief by way on an injunction to restrain the defendant from terminating the contract herein under section 7 of the Arbitration Act. The plaintiff cited the case of **NBI HCCC NO 105 OF 2013 ELIZABETH CHEBET ORCHRDSON v CHINA SICHUAN CORPORATION FOR TECNO-ECONOMIC CORPORATION & ANOTHER** where it was stated that the purpose of the interim measure of protection is to preserve the subject matter of the dispute pending arbitration. The Court, therefore, should be concerned with finding out whether there is an arbitration

agreement and if so, whether the subject matter of the arbitration is in danger of being wasted. See the case of **CMC HOLDINGS LIMITED & ANOTHER v JAGUAR LAND ROVER EXPORTS LIMITED [2013] eKLR.** The interim measure of protection is to prevent a party from prejudicing the final outcome of the lawsuit by arbitration action before judgment has been reached. Or in other words, ensures that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. See ***Black's Law Dictionary, 9th Edition.*** Existence of arbitration clause is prima facie proof of a prima facie case for purposes of the protection relief pending arbitration and that was stated by Ochieng J in **NBI HCCC NO 249 OF 2005 COMMUNICATIONS CARRIERS LIMITED & ANOTHER v TELCOM KENYA LIMITED.** The plaintiff submitted that the dispute has been referred to arbitration which cements establishment of a prima facie case as envisaged in the famous **GIELLA v CASSMAN BROWM CASE.**

[4] The reasons given for the purported termination of the contract are the subject matter of the dispute before the arbitral tribunal. According to the plaintiff none of the grounds cited justifies termination of the contract. If, therefore, interim measure of relief is not granted, the arbitration will be rendered nugatory. The plaintiff also submitted that the termination of the contract will occasion substantial and irreparable loss to the plaintiff unless interim relief is granted. It stated that allowing termination for breach of contract before a decision is reached by the arbitral tribunal will have serious ramifications on the prospects of the plaintiff being involved in any public procurement and it may be debarred on that ground under section 115(1) (c) of the Public Procurement and Disposal Act.

[5] When these things are placed on the scale of balance of convenience, the weight tilts in favour of granting the relief. The performance appraisal by the defendant attached to the affidavit of JULIUS KARURI shows the defendant was satisfied with the performance of the plaintiff. in any event the services are not provided to the satisfaction of the defendant, clause 24 of the contract provides a remedy of liquidated damages to the defendant. A performance guarantee has also been provided. Accordingly, the defendant is adequately secured. The defendant delayed the commencement of arbitral proceedings and so they should not reap from their own default. See the case of **NBI HCCC NO 11 OF 2011 DRAFT AND DEVELOP ENGINEERS LIMITED v NATIONAL WATER CONSERVATION & ANOTHER.**

The defendant opposed grant of interim relief

[6] The defendant opposed grant of any measure of relief herein. It filed Replying Affidavit sworn by JULIUS KARURI on 30th December, 2013 as well as written submissions. The Replying Affidavit details all the breaches which allegedly caused the issuance of the termination notice herein. The plaintiff submitted that after the award of tender for the provision of security to the plaintiff, the defendant noted some anomalies in the provision of services contracted. The defendant wrote to the plaintiff on these complaints on 16th October, 2013 and the plaintiff wrote back through its letter dated 17th October, 2013 detailing the measures they will take in order to address the complaints by the plaintiff. On 24th October, 2013, the defendant held a company meeting and noted that the plaintiff continued to willfully breach the contractual obligations. The Appraisal for the month of November, 2013 confirmed various shortcomings by the plaintiff. The on 29th November, 2013 the plaintiff issued a termination notice in accordance with the framework agreement herein for breach of the conditions and warranties of the agreement. a dispute was afterwards declared by the plaintiff.

[7] In the face of the breaches outlined in the Replying Affidavit, an injunction should not be granted. Also the plaintiff has not met the thresholds in the case of **GIELLA v CASSMAN BROWN** on injunctions. The plaintiff did not provide services of high standards as provided in the agreement and so poor performance as provided in the agreement is a ground for summary termination. The said agreement was voluntary and no allegation of coercion or fraud in entering the contract. Its terms thus bind all the parties including the one on summary termination without

ant notice. The termination notice was, therefore, justified. The plaintiff has not made any attempt to ameliorate the shortcomings. The plaintiff has not demonstrated that any of its rights have been infringed to warrant an injunction. Accordingly, no prima faciee case which has been established in the standard of prima facie case defined in the case of **MRAO LTD v FIRST AMERICAN BANK LIMITED & 2 OTHERS CA 39 OF 2002.**

[8] The defendant took the view that the plaintiff has not shown that damages will not be an adequate remedy to its grievances. In fact, the defendant stated that the plaintiff will not suffer any irreparable damage because if it is successful, it will be adequately compensated in damages. Even if the balance of convenience was to be called upon, in the circumstances of the case, it militates against the grant of an injunction. An injunction will not preserve the subject matter because the contract will continue and will not be at the same state at the time the arbitral reference is concluded. Further, the defendant deals with resources of national strategic security importance and is very sensitive. The relationship here is based on mutual trust and thee trust goes way when breach is recorded. The plaintiff did not come to court with clean hands and should not be given any relief. See the case of **TITUS GICHARU MWANGI v MARY NYAMBURA MURIMA & ANOTHER [2014] eKLR.** The application should be dismissed with costs to the defendant.

THE DETERMINATION

[9] I will not reinvent the wheel. The threshold of law for the grant of a temporary injunction were set out in the case of **GIELLA v CASSMAN BROWN** but have''…***always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before''***. See the case of **SULEIMAN v AMBOSELI RESORT LTD (2004) eKLR 589 Ojwang Ag. J (as he then was).** In applying the traditional grounds set out in the **GIELLA CASE I** should be guided by the fundamental principle of law; that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong". I recast the traditionally accepted principles in the following questions:

i) Has the Applicant established a prima facie case?

ii) Does the applicant stand to suffer irreparable harm if an injunction is not granted? And

iii) On which side does the balance of convenience lie?

[10] 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 the interim relief under section 7 of the Arbitration Act, existence of an enforceable arbitration agreement constitutes prima facie case in the context of GIELLA v 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. The protection envisaged under the section is to ensure that the subject matter of the arbitral proceedings is not in any danger of being wasted or dissipated before the final decision by the arbitral tribunal is made on the matter. But the ultimate decision will depend on the peculiar circumstances of each case and matters such as; the nature of the contract to be preserved; the nature of and the potentiality of dissipation of the subject of the arbitral proceedings; and any other relevant factor attending the case will guide the decision of the Court in determining whether or not an order for interim protection should be made.

[11] From the outset, there is an enforceable arbitral agreement in place and, thus, there is prima facie case in the sense of the **GIELLA v CASSMAN BROWN CASE.** But will the plaintiff suffer irreparable damage unless the interim measure of relief is made? I am concerned with two important factors here. The first one is the alleged investment of over Kshs. 15,000,000. The second is the feared multiple labour and or industrial actions from the 211 employees engaged

pursuant to the contract herein. The Defendant is an enormous enterprise which will be able to pay damages in the circumstances of the contract. In saying this I am aware the fact that a party can pay damages should not be the sole basis of refusing an injunction lest the relief of injunction should become a preserve for mighty and wealth. The fear of and arguments around possible multiplicity of suits by the 211 employees of the Plaintiff, may sounds attractive. But a court of law should be careful not to draw any connotation of employees' rights out of the circumstances of a case such as this, for, that approach will unfairly constrict the right of the Defendant to terminate a contract for breach simply because the Plaintiff employed some people to carry out works provided in the contract. With absolute respect, the contract in question is not an employment contract among the said employees, the Plaintiff and the Defendant. It is not even among those contracts which enjoy exemption from privity of contract. Except, in the interest of justice, and the fact that the dispute has already been referred to arbitration, I am inclined to grant an interim measure of relief by way of a temporary order of stay of the termination notice for a limited period of ninety days. But I will require the Plaintiff to provide within seven (7) days of today, an undertaking as to damages should it be ultimately found that the interim relief ought not to have been issued in the first place or was issued on insufficient ground. Parties should, however, strive to assist and serve the arbitral tribunal in accordance with the overriding objective for it to complete its work expeditiously and file the final award. This order should be served on the arbitral tribunal. I will not make an order for costs in light of the circumstances of this case.

Dated, signed and delivered in court at Nairobi this 27th day of October, 2014

F. GIKONYO

JUDGE