REPUBLIC OF KENYA

High Court at Bungoma

Civil Suit 149 of 2012

BEDROCK SECURITY SERVICES LTD……. ……………..PLAINTIFF/RESPONDENT

VERSUS

NZOIA SUGAR COMPANY LTD……………… ……………DEFENDANT/APPLICANT

RULING

The Application

[1] By an application dated 3rd November, 2012, the court is invited to grant:-

a) A temporary injunction to restrain the Defendant/respondent or their agents or servants from terminating the Agreement for Provision for Security Services (hereafter the Agreement) between the parties herein made on 6th February, 2012; and

b) An order to protect the said Agreement; pending the determination of this suit and determination of the dispute herein by arbitration respectively.

[2] The application is supported by the affidavit of Eric Okeyo and the grounds set out in the face of the application.

Grounds for the application

[3] The significant grounds of the application are:-

a) The agreement herein contains an arbitration clause in the event of a dispute;

b) The Defendant has issued a notice to terminate the said agreement;

c) The Defendant in furtherance of the notice to terminate the agreement has called for bids for a tenders for provision of security services which will effectively determine the suit contract;

d) The actions of the Defendant are in total contravention fo the agreement;

e) The Defendant is a public body and should not put itself in a situation that may cause loss of public funds

[4] On 10.12.12, Mr. Otieno ably argued the application on behalf of the Applicant and cautioned the court that its jurisdiction at this stage is limited and cannot delve into the merits of the case. His argument found grounding in the judgment of Ransley J in the case of **MUGOYA CONSTRUCTION 7**

ENGINEERING LTD V NSSF BOARD OF TRUSTEESNBI HCCC NO 58 OF 2005 (unreported). According to him all what the court needed to satisfy itself on, is that:-

a) There is an arbitration clause in the agreement; and

b) There is a dispute.

A single is dispute is enough to for the court to issue the orders sought. He referred the court to paragraph 6 of the supporting affidavit to demonstrate the existence of a dispute. The dispute is found in the Plaintiff's response to the complaints made by the Defendant.

[5] The complaints and responses by the Defendant and the Plaintiff respectively were:-

1st complaint – That the plaintiff does not have enough man power on the ground to discharge the contract.

Plaintiff's response-The contract was not for provision of any number of security personnel. This constitutes a dispute.

2nd complaint –That the plaintiff has not trained guards properly.

Plaintiff's response- That the parties had not worked on a training programme.

3rd complaint - The plaintiff's employees were not sufficiently motivated to work because of poor terms of service.

Plaintiff's response- The plaintiff paid its personnel in accordance with the law. There has never been any labour dispute of poor pay by the plaintiff.

4th complaint – That the overall performance was poor.

Plaintiff's response- The plaintiff has provided evidence that it had performed well, arrested people and handed them to police. Indeed it is the defendant who was facilitating release of those people arrested by the security detail of the plaintiff. This fact has not been controverted by the defendant.

5th complaint – Failure to install alarm transmitters.

Plaintiff's response-The plaintiff was that the time was in the process of obtaining certain licences abroad and the defendant had allowed time for plaintiff to install the alarm. Parties worked together to install the alarms.

Finally; there was a critical dispute on the engagement of regular police by the defendant, a matter the plaintiff expressly advised against -as clauses14 and 15 of contract prohibits that kind of engagement. These clauses were violated by defendant.

[6] In the plaintiff's view there were enough disputes to warrant referral to arbitration. In the termination notice which culminated that suit.

[7] The plaintiff was of the opinion that the notice of termination issued by the defendant was properly issued under clause 24 of the contract. The contract allowed termination:-

a) for breach of contract listing particulars of breach or

b) under the proviso that allows termination without reason.

According to Mr. Otieno, the defendant terminated the contract under (a) and gave reasons. They must then agree to stand the scrutiny of the reasons they offered for termination.

[8] All the above are matters should be determined by the arbitrator, and they had invited the defendant to have the matter arbitrated upon but they declined. Clause 25 of the contract is clear that all disputes shall be referred to arbitration (i.e. any dispute).

[8] The High court has jurisdiction under Order 40 rule 2 of the Civil Procedure Rules (hereafter CPR), to issue an injunction to stop a breach of contract. The subject contract is not terminated as it is in force until January 2013. Under the Order the principles enunciated in the case of Giella vs. Casman Brown applies. The plaintiff has established a prima facie case with probability of success. Paragraph 18, 19 and 20 of affidavit in support show that damages are not an appropriate remedy. The defendant is a state corporation. Breaching the contract means waste of public reasons.

[9] There is an additional but distinct power under section 7 of the Arbitration Act and rules that enables the court to issue interim measure of protection either before or during arbitration. This is not an injunction and is not subject to criteria for grant of injunction. So, if prayer 2 fails they should get prayer 3.

Mr. Otieno submitted that there is need to protect the plaintiff, particularly because the defendant has started the process of procurement of a replacement. Unless interim orders are issue an award to a third party will be made thus frustrate the contract. This will expose the defendant to a loss of public funds. This is a public interest matter.

[10] Mr Otieno urges that the case of **SAFARICCOM LTD** is distinguished as it related to a situation where a party opted to terminate the contract by giving notice without assigning any reasons. In this case the defendant gave reasons and so must substantiate the reasons for termination. The breach alleged by defendant should be taken to arbitration and not this court. The court should not take over the arbitrators place by making enquiries as requested by the defendant.

[11] Under Order 40 rule 2 of the CPR, a party is allowed to ask for injunction to restrain breach of contract. There must be a suit in order to make an application for injunction. The Law is that you must pray for injunction in the suit to provide a foot for an application for temporary injunction. The plaintiff is only seekin to preserve the suit subject.

[12] It is a misplaced argument by the Defendant that there will be undue hardship that can will occur if an injunction is issued. See cases No. 5 in defendant's supplementary list and No. 9 of the main defendant's list of authorities.

[13] On specific performance, Mr. Otieno argued that the law has now changed with the Constitution, 2010 putting new labour relations laws in place. The employment laws allows an employer to take back an employee who has been terminated wrongfully.

The Respondent's case

[14] Mr. Simiyu opposed the application. He relied on the replying affidavit and judicial decisions he filed in court.

[15] Mr. Simiyu told the court that the principles of granting a temporary injunction was enunciated in **GIELLA VS. CASMAN** Brown apply in this case. In the instant case, there is no prima facie case that has been established for the reasons below:-

a) The suit contract is terminable on notice thus an injunction is not the appropriate remedy. See the case of **SAFARICOM LTD V OCEAN VIEW BEACH HOTEL & OTHERS NBI HCCC NO 394 OF 2009**.

b) The contract was lawfully terminated by a Notice given on 20.7.12 stating reasons for breach. On expiry of the notice, and the Plaintiff had not remedied the breach, a final notice was issued on 8.10.12. As at that time, there was no dispute that had been declared by plaintiff. The declaration of a dispute was just an afterthought.

c) The proceedings before the court are incompetent and an abuse of court process because the suit is seeking permanent injunction in prayer 1 of the plaint yet Section 7 of the Arbitration Act envisage only interim remedy pending arbitration. The plaintiff is seeking a permanent remedy which is parallel to the process of arbitration and that will be detrimental to defendant's case. On this reason alone this suit cannot succeed.

d) The plaintiff cannot impose itself on the defendant and neither can the court force parties into a union especially when there is an exit clause. See the decision by Ransley J. in Mugoya case.

[16] The applicant has come to equity with dirty hands. It is trite law that a party with soiled hands cannot get equitable remedy. he referred the court to the letters written to the plaintiff on the breach herein.

[17] The Application is disguised as seeking an injunction but in real sense it is seeking specific performance of the contract by the Defendant. Grant of orders will result into undue hardship on the defendant as it would compromise its security systems. The Defendant is not ready to be provided with security by a party they are not happy with. The Defendant is a state corporation with an element of public interest, it will therefore be sad for it to be tied to a party it has lost confidence in.

[18] Damages would be adequate if the court finds prima facie case has been established because the contract is for a fixed term, terminable by notice. It is certain what the plaintiff is entitled to from the contract. It can only be Kshs. 25 million – which the defendant can pay if arbitration succeeds. See cases No. 4 and 5 in the defendant's list of authorities that damages is an adequate remedy in such cases on contract.

[19] Finally, balance of probability lies in favour of the defendant. It is about security of assets of one of the biggest state corporation in the country. It will be untenable and dangerous to force the union between the parties herein. The result will be disastrous. See case No. 3 of the defendant's supplementary list of authorities i.e. **NJENGA VS. NJENGA [1991] 401**. This is not an appropriate case for an injunction and the court should dismiss the application. Arbitration can continue without an injunction and arbitrator can compel payment of damages.

COURT RENDERS ITSELF

[20] The counsels have ably argued their respective perspectives putting forward the issues which the court should determine. Quite a number of issues arise out of the arguments of the parties. Some are substantive going to the root of the dispute herein, and I should not concern myself with such issues. Those issues which I believe are determinable within the application include:-

a) Is the plaintiff's case one of specific performance although styled as one seeking for an injunction?

b) Has the applicant met the threshold for the grant of a temporary injunction?

c) Is the plaintiff's case a parallel of would-be arbitration proceedings?

d) Is this case an abuse of the process of the court?

A matter of specific performance?

[21] Although the plaintiff's case is styled as one seeking for an injunction, it's tenor and purport is one of specific performance. The permanent injunction sought is in the nature of a mandatory injunction. The legal meaning assigned to the relief of a Mandatory Injunction in the Black's Law Dictionary, 7th Edition

is:-

''An injunction that orders an affirmative act or mandates a specified course of conduct''.

Specific performance refers to:-

''A court-ordered remedy that requires precise fulfilment of a legal or contractual obligation when monetary damages are inappropriate or inadequate…''

[22] A critical interface of these two remedies reveals that both are equitable remedies and when a mandatory injunction is sought in respect of a contract such as the one in question, once it is granted produces an effect in the nature of fulfilment of a contractual obligation which in simple terms is specific performance in the law of contract. That is a matter for plenary hearing by arbitral tribunal where arbitration clause is put to full effect. I am therefore persuaded to agree with Mr. Simiyu that going by the argument of Mr. Otieno that a dispute has been declared in terms of the Arbitration Act, the suit as framed will be a parallel to arbitration jurisdiction. However, Mr. Simiyu has argued that there is no dispute that has been declared. That aspect of this case is therefore in issue and in the circumstances I am not foreclosed to determine the second issue of the feasibility for a temporary injunction being granted by this court. On that basis I will proceed on the other issue.

Grant of a temporary injunction

[23] The application seeks for a temporary injunction. I wish to dwell on the prayer for a temporary injunction rather than for the protection order in prayer 3 of the application. The tenor of, the style adopted by the application, and the arguments of the applicant, clearly show that the prayer for an order to protect the subject contract is in the alternative. It is also a saddle on the prayer for a temporary injunction in the hope that it will provide an easy relief. In my view therefore, this is the kind of practice that should be discouraged as parties are expected to be sure of the remedy they need from court instead of engaging in a bet for chance. Accordingly, the major issue that should completely determine the application is whether the applicant has satisfied the threshold for the grant of a temporary injunction.

The threshold

[22] The applicable principles for the grant of temporary injunctions were so well settled in **GIELLA V CASMAN BROWN** that they cannotbe called upon to justify themselves. They are:-

a) An applicant must show a prima facie case with a probability of success;

b) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and

c) when the court is in doubt, it will decide the application on the balance of convenience.

[23] Has the applicant established a prima facie case with a probability of success? This should not be confused with establishing a prima facie case for breach of contract against the defendant. On this, I am guided by the wise words of LAW, J.A in the case of **IBRAHIM V SHEIKH BROS. INVET. LTD [1973] E.A 118**that:-

''All that the plaintiff has established, in my view, is a prima facie case of breach of contract against the defendant. He has not established any prospects of irreparable harm being suffered by him if the status quo is not preserved. Any loss he may have suffered, or may suffer in future, is susceptible of pecuniary compensation''.

[23] I am persuaded to agree with the argument made by the defendant that the contract is for an ascertainable amount which can be compensated by an award of monetary sum. There is nothing or any covenant that makes the subject contract so unique as to be incapable of compensation in monetary terms.

The contract is for a definite consideration and any breach is capable of pecuniary compensation. For such contracts, an injunction is not the appropriate remedy. In my view therefore, the Applicant ***has not established any prospects of irreparable harm being suffered by him if the status quo is not preserved.*** In the premises, I decline to issue a temporary injunction in favour of the applicant. As a result, the application dated 7th December, 2012 is dismissed with costs to the Respondent.

Dated, signed and delivered in open court at Bungoma this 30th day of January 2013.

GIKONYO
JUDGE
10.12.2012

30/1/2013
Before: Gikonyo, Judge
Alusa: Court Assistant

M/s Wakoli for Wekesa for Defendant/Respondent

Makali for Otieno for Plaintiff/Applicant

Court: Ruling delivered in open court.

GIKONYO
JUDGE
30/1/2013