



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 752 of 2012

FAST TRACK

CMC HOLDINGS LIMITED.....1ST PLAINTIFF

CMC MOTORS GROUP LIMITED.....2ND PLAINTIFF

VERSUS

JAGUAR LAND ROVER EXPORTS LIMITED.....DEFENDANT

AND

IN THE MATTER OF AN APPLICATION BY CMC HOLDINGS LIMITED AND CMC GROUP LIMITED

FOR ORDERS OF COMMITTAL FOR CONTEMPT OF COURT

AGAINST

JAGUAR LAND ROVER EXPORTS LIMITED.....DEFENDANT/1ST CONTEMNOR

SUSAN LESLEY PRESLEY.....2ND CONTEMNOR

NIGEL CLARKE.....3RD CONTEMNOR

RULING

1. The Applicant's Notice of Motion application dated and filed on 7th December 2012 was brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Order 5 Rule 17 of the Civil Procedure Rules, Article 22 of the Constitution. Section 7 (1) of the Arbitration (Amendment) Act No 11 of 2009 and all other enabling provisions of the law. Prayers No (i), (ii) and (iii) are spent and I will therefore not deal with the same. The application sought the following remaining orders;-

- i. THAT this Honourable Court be pleased to grant an interim injunction restraining the Respondent either by itself, its agents, assigns, representatives or otherwise howsoever from interfering with the exclusive distributorship agreement between the Applicants and the Respondent either in terms of the letter dated 26th November 2012 or in any way further publishing or acting in furtherance of the notices dated 3rd August 2012 which purported to terminate the Overseas Distributor Agreement dated 12th December 1985 and Importer Agreement dated 1st**

February 2009 pending reference and disposal of the disputes between the parties through arbitration.

ii. THAT leave be granted to the Applicants to effect service of process upon the Respondent through Courier service at the United Kingdom address through Abbey Road, Coventry, CV3 4LF, United Kingdom as shown in all correspondence from the Respondent.

iii. THAT the costs of this application be provided for.

2. The Applicants set out thirteen (13) grounds on which they relied on in support of their application. I will summarise the same as follows:-

a. **THAT** agreements provided that disputes between the parties would be referred to arbitration if they were not settled amicably. The Applicants were ready and willing to have the dispute referred to arbitration for full and final determination.

b. **THAT** a dispute on the purported termination of the distributorship agreement between the parties had arisen.

c. **THAT** the upon representations made by the Respondent, the Applicant undertook massive restructuring and re-organisation of the business in terms of hiring human resource to perform the contract and upgrading show rooms that met the standards set by the Respondent.

d. **THAT** it was fair and just that the orders sought be granted with the Applicants undertaking to provide any suitable undertaking and meet such terms as the court would impose for the grant of the interim orders.

3. The application was supported by the Affidavit of William Lay sworn on 7th December 2012.

4. On 4th January 2012, the Respondent filed a Notice of Preliminary Objection dated 31st December 2012 and set out several grounds which I will also summarise as follows:-

a. **THAT this court did not have jurisdiction to hear the matter as the entire suit before the court was misguided and liable to immediate termination by reason of such lack of jurisdiction.**

b. **THAT the Arbitration Act, 1995 had no relevance or application to the contract between the parties.**

c. **THAT the 1st Applicant had no contractual relationship with the Respondent and as such it was non-suited due to lack of *locus standi*.**

d. **THAT the contractual obligations between the parties excluded the Applicant from challenging the termination of the contract on the basis of appointment of a successor distributor, or the supply of any products following the service of a ruminant notice.**

e. **THAT the contractual agreement between the parties provided that the disputes between them were to be resolved by arbitration under English law and not Kenyan law and reserved exclusive jurisdiction to English courts.**

f. **THAT the Respondent is a foreign entity operating outside the jurisdiction of this court and the contracts underlying the suit and application were made outside the jurisdiction of this court.**

5. On 5th February 2012, the Applicants filed another application dated 4th February 2013 on the ground that the Respondent had notified the Applicants that as far as they were concerned, the Agreement would stand terminated on 2nd February 2013 which in their view amounted to contempt of court as it was

contrary to the orders that were issued by this court on 7th December 2013. The Applicants therefore applied for leave to commence contempt of court proceedings against the Respondent. They sought the following reliefs:-

- a. A declaration that the letters dated 1st February 2013 and written by Susan Lesley Pearson were in contempt of the court.
 - b. An order of sequestration do issue that the properties of Jaguar Land Rover Exports Limited, of such value or nature as this Honourable Court, shall determine, be attached and sold for its contempt of this Honourable Court.
 - c. An order be made imposing such fine as this Honourable Court may deem appropriate on the said Susan Lesley Pearson and Nigel Clarke and/or they be committed to civil jail for such period as the Court may determine for contempt of this Honourable Court.
 - d. In the alternative, that the properties of the said Susan Lesley Pearson and Nigel Clarke be attached for the amount to be determined pending the purging of their contempt of this Honourable Court.
 - e. This Honourable Court be pleased to issue such other/further or consequential orders as it may deem just and expedient.
6. Mary Ngige who is the 1st Applicant's Group Director swore a Verifying Affidavit on 4th February 2013 in support of the said application. Joel Kibe, the Chairman of 1st Applicant Company swore a Supplementary Affidavit on 6th February 2013 stating that subsequent to the filing of the application for leave to commence contempt of court proceedings, the Respondent in further continuation of the contempt of court did on 5th February 2013 issue an email to its general customers in Kenya advising them that it had appointed a new distributor in Kenya. He annexed a copy of the email which was marked exhibit "JK- 1".
7. Joel Kibe contended that the communication was intended to steer the customers from dealing with the Applicant notwithstanding that the interim orders issued on 7th December 2013 were still in force.
8. Leave to commence contempt of court proceedings was issued by this court on 6th February 2013 whereupon on 8th February 2013 the Applicant's filed a substantive Notice of Motion dated 7th February 2013.
9. It is worthy of note that on 6th February 2013, the Applicant's filed a Notice of Withdrawal bearing the same date withdrawing the Chamber Summons application dated 4th February 2013 and filed on 5th February 2013.
10. In response thereto, Nigel Clarke, the 3rd Contemnor in the contempt of court proceedings swore a Replying Affidavit on 18th February 2013 on his own behalf and that of the 1st and 2nd Contemnors, namely Jaguar Land Rover Exports Limited and Susan Lesley Pearson.
11. In the said affidavit, he stated that the Respondent herein informed the Applicants that in compliance with the interim orders granted by the court, the Respondent would continue supplying them with vehicles to sell on their behalf but that the commercial transactions would not be a waiver of the termination notice issued on 3rd August 2012. He annexed letters dated 3rd August 2012 showing termination of the agreement, letter dated to Joel Kibe dated 26th November 2012 explaining that the Applicant's franchise application was unsuccessful and letters dated 1st February 2013 to the Applicant indicating that the six (6) month's termination would terminate on 2nd February 2013 and that any commercial relationship with the Applicants would not be deemed to be a waiver by the Respondent of its legal and contractual rights.

12. Due to the urgent nature of this matter, it was agreed that the substantive motion for the contempt of court proceedings and the Notice of Motion application filed on 7th December 2013 would be heard on the same date but with the former application being heard first. The Applicants, however, argued that the Notice of Motion for contempt of court should be heard first. They relied on the case of **Kalyaso Farmers Co-operative Society & 6 others vs County Council of Narok [2005] eKLR**, where Ojwang J (as he then was) held that such an application took precedence.

13. During the hearing on 25th February 2013, Mr Munyu, counsel for the Applicants informed the court that he had received information from the Applicants that the Respondent had closed down their Vista and Workshop systems which was in contempt of the court orders of 7th December 2012. The court directed the parties to visit the premises accompanied by the Deputy Registrar of the High Court of Kenya to verify the authenticity of the complaint. Dominica Nyambu, a Deputy Registrar of the High Court of Kenya subsequently submitted a report indicating that at the time of the site visit, the Vista system was working but that the Workshop System was not accessible to the Applicants.

14. As was agreed by the parties, I will therefore deal with the application for contempt of court proceedings first. The same was being prosecuted on behalf of the Applicants by Mr Munyu and by Mr Njogu, on behalf of the Contemnors.

15. Mr Munyu submitted that it would be futile to proceed with the Notice of Motion dated 7th December 2012 if the Respondent continued disobeying the orders issued by this court. He stated that the Respondent issued unsolicited letters to the Applicants and the general public on 1st and 5th February 2013 in which the Respondent averred that as far as it was concerned, the Agreements would stand terminated on 2nd February 2013 and that RMA was the Respondent's duly appointed distributor in Kenya. It was the Applicant's case that the said letters were intended to sway the Kenyan customers and the general public from dealing with the Applicants and were not mere opinions as has been stated in the Replying Affidavit of Nigel Clarke.

16. The Applicants submitted that the Contemnors who were duly served were blatantly contemptuous of the dignity of this court. The court therefore needed to be protected because if that was not done, the continuous disregard of the court orders issued by the court would erode its dignity. It was the Applicants' case that so long as the said order remained in force, the Respondent was under a duty to obey it. It relied on the case of **WC No 7 of 2010 In the matter of Cementers Limited** where Kimondo J found that the contemnors were parading false facts when they published an advertisement whose net effect was to cast "doubts on the existence of the petition for winding up and were thus denigrating the process or proceedings and undermining the judicial process and integrity of the court."

17. The specific order the Respondent is said to have disobeyed read as follows:-

“ THAT interim injunction be and is hereby granted restraining the Respondent either by itself, its agents, assigns, representatives or otherwise howsoever from interfering with the exclusive distributorship agreement between the Applicants and the Respondent either in terms of the letter dated 26th November 2012 or in any way further publishing or acting in furtherance of the notices dated 3rd August 2012 which purported to terminate the Overseas Distributor Agreement dated 12th December 1985 and Importer Agreement dated 1st February 2009 pending the hearing inter partes.”

18. In his submissions, Mr Munyu pointed out that an advocate had a duty to report disobedience to the court and relied on **HCCC No 173 of 2011 Fleur Investment Limited vs The PS Ministry of Roads & others** in which Majanja J stated as follows:-

“ I would hold that it is the duty of an officer of the court to bring to the court's attention any instances of disobedience of its orders. In such case a case the court will deal with the matter, giving it the seriousness and urgency it deserves and suspending all other matters in order to preserve its dignity and authority...”

19. The Applicants also relied on the case of **Hadkinson vs Hadkinson [1952] 2 ALL ER 567** in which Romer J held as follows:-

“ It is plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void...”

20. This was the same position held in **Wildlife Lodges Limited vs County Council of Narok & Another [2005] eKLR** also cited by the Applicants.

21. On the other hand, the Respondent argued that the contemnors were not personally served with the order which they were expected to comply with. It submitted that the order was served in Birmingham and not Coventry, United Kingdom where the Defendant was headquartered. The order was never served on Nigel Clarke or Susan Pearson Lesley and consequently, no order as sought by the Applicants could issue.

22. The Respondent relied on the case of **Kariuki & 2 others vs Minister of Gender, Sports, Culture & Social Services and 2 others [2004] I KLR** where Lenaola J held:-

“ In England, as general rule, no order of court requiring a person to do or restrain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing any act in question. The copy of the order must be endorsed with a notice informing the person on whom the order is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it...Service on the alleged contemnor did not constitute personal service and even if the alleged contemnor had knowledge of the order, he would not be liable for contempt.”

23. This was the same holding in **Philip Kipsigei Ruto vs David Tore Pirade & Another [2012] eKLR** and **Dickson Mbugua & 3 others vs Stuart Henderson & 3 others HCCC No 1938 of 2001** by Sitati J and Onyango-Otieno J (as he then was) respectively also relied on by the Respondent. It therefore submitted that in the absence of personal service and a penal notice as mandated by Section 5 of the Judicature Act and Order 52 of the Rules of the Supreme Court under whose provisions the Applicants had brought the contempt of court proceedings, the orders as sought by the Applicants could not issue.

24. I have looked at all the case law provided by the parties and the submissions by the parties and take judicial notice that the 2nd and 3rd Contemnors were aware of the proceedings herein as they alluded to the same in their letters to the Applicants and their customers.

25. The Respondent's letter dated 1st February 2013 states in part:-

“As you are aware the parties await the judgment of the Kenyan Court or soon after the hearing listed for 6th February 2013 in relation to the injunction sought by CMC. We therefore write to inform you that any trade, business or supply or other commercial relations that occur between JLREL and CMC on or after the expiry of the Agreement on 2nd February 2013 is as a result solely of its obligations to comply with the restrictions and Court order currently in place, and is in no way pursuant to the Agreement or other arrangement between the parties. For the avoidance of doubt, JLREL holds the Agreement terminated after 2nd February 2013 and any commercial relationship with CMC following that date shall not be deemed to amount to a waiver by JLREL or of its legal or contractual rights.”

26. In the email of 5th February 2013 to the Applicant and customers, Nigel Clarke wrote as follows:-

“ A result of such a review, the decision was taken to appoint a new partner, RMA. ...However, you may be aware that a delay in implementing our plans has been brought about by a court action taken by CMC Motors. Although we cannot comment on the current proceedings, we are working

to ensure that our customers are supported to the fullest extent possible. Jaguar Land Rover will be sending you regular communications to keep you informed of the situation. Thank you for your continued patience and understanding.”

27. I wholly concur with Mr Munyu’s submissions that as an officer of this court, he is under a duty to inform the court whenever its dignity is being undermined. However, the court must also be satisfied that its dignity is being undermined.

28. I have carefully considered the two pieces of communication and note that the effect of the communication was in the first case, the Respondent stating that it would not be waiving its legal and contractual rights even if it continued to do business with the Applicants. In the second instance, it was merely informing its customers the progress of the case. That in my view cannot amount to publishing or acting in furtherance of the notices to terminate dated 3rd August 2012 contrary to the order of 7th December 2012.

29. Against that backdrop, I am convinced that the Applicants have not proven beyond reasonable doubt that the Respondents were in contempt of the court orders issued on 7th December 2012. It is therefore not necessary for me to address myself to the question whether there was proper service upon the 2nd and 3rd Contemnors. Suffice it to say that whereas I took judicial notice that they were both aware of the court proceedings, there is nothing to suggest that the Applicants served any Penal Notice on the Respondent herein as mandated by the law.

30. In respect of the Vista and Working system failures, I find that there was no sufficient proof placed before me to blame to the Respondent. The nature of contempt of court proceedings is criminal where the burden of proof is beyond reasonable doubt rather than on a balance of probability. It was not possible to establish in the little time that the court had and in the absence of experts to establish indeed that the Respondent had interfered with the systems as was alleged by the Applicants.

31. For those reasons, I find that the Applicants’ Notice of Motion application dated 7th February 2013 is not merited and the same is hereby dismissed with costs to the Respondents and 2nd & 3rd Contemnors.

32. Turning to the Notice of Motion application dated 7th December 2012, it will be important for me to consider whether I was clothed with jurisdiction to determine this matter. In its Notice of preliminary objection, the Respondent submitted that the Arbitration Act, 1995 (which ought to read as Arbitration (Amendment) Act, 2009) was not applicable herein and that this court did not have jurisdiction to deal with the matter as the applicable law governing the contracts between the parties was the English and not Kenyan law.

33. Mr Karori argued the Applicants’ case while Mr Njogu represented the Respondent.

34. The dispute resolution clause contained in the Agreement dated 12th December 1985 between Land Rover Exports Limited and CMC Motors Group Limited (previously known as Cooper Motor Corporation (Kenya) Limited) which change of name is acknowledged in the Respondent’s letter dated 3rd August 2012 marked “WL 3” in the Applicant’s Supporting Affidavit sworn by William Lay on 7th December 2012 stipulates as follows:-

a. This Agreement shall be governed by and construed in all respects in accordance with the Law of England.

b. The English Court (to whose jurisdiction the Company and the Distributor hereby submit) shall be competent to entertain and adjudicate upon any matter arising out of or in connection with this Agreement.

c. In the event that any dispute or difference arises between the parties which cannot be settled by the amicably then the Company shall such dispute or reference be referred to arbitration...Any

such arbitration shall be conducted under the Rules of Conciliation and Arbitration of the United Nations Commission in International Trade Law and shall be held in London.

iv. Nothing in this clause shall prevent the Company from applying to the appropriate court in the Territory for any injunction or other like remedy to restrain the Distributor from committing or continuing to commit any breach of this Agreement and for consequential relief.

35. Notably, by a letter dated 23rd March 2012, the Applicants were informed that Land Rover Exports Limited transferred all its rights, obligations and liabilities under the 1985 agreement to Jaguar Land Rover Exports Limited, the Respondent herein. Schedule 1 of the said agreement refers to the territory as “Kenya.”

36. Article 26 in the Importer Agreement dated 1st February 2009 between Jaguar Cars Exports Limited and CMC Motors Group Limited showed the dispute resolution mechanisms was to operate as shown hereunder:-

“This Agreement shall be governed by and construed in accordance with English law. The parties irrevocably submit to the exclusive jurisdiction of the English Courts. All disputes or claims arising out, emanating from, or in connection with this Agreement including any question regarding its existence, validity or termination, or the legal relationship established by this Agreement shall be referred to and finally resolved by arbitration under the Rules of London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause. The language of arbitration proceedings shall be English and the arbitration shall take place in London.”

37. William Lay explained how the 2nd Applicant made improvements in the show rooms which the Respondent confirmed were to its satisfaction. On page 72 of the Applicants’ application, Nigel Clarke emailed William Lay on 2nd August 2012 stating as follows:-

“ Yes a really good facility. However, it is important to understand that JLR have been considering its position in Kenya due to the strategic importance of the market to which William Lay responded on the same date that:-

“ Am pleased to hear that you found it “super” in terms of potential to meet JLR requirements.”

38. On 3rd August 2012, the Respondent wrote to the 2nd Applicant giving it six (6) months notice of termination of the agreements. The Agreements were to be terminated on 2nd February 2013. It was a result of these two (2) letters that the Applicants came to court seeking interim orders to restrain the Respondent from acting in furtherance of the said notices.

39. In its response through a Replying Affidavit sworn by Nigel Clarke on 27th December 2012, the Respondent stated that the 1st Applicant was not a party to the proceedings herein as it was neither a signatory nor an active party to the contracts. It argued that there was nowhere that the 1st Respondent appeared in the two (2) agreements as a party therein. It was the Respondent’s contention that the 2nd Applicant’s performance as a JLR dealer had been substandard and was amongst the worst in the region. The Respondent contended that the 2nd Applicant’s business plan was intended for competitive evaluation of bidders to carry on the Respondent’s franchise business in the region.

40. The Respondent therefore argued that this court has no place to re-write the contract between the parties which specifically provided for the termination of the contracts, non-exclusivity of the Jaguar Agreement, the choice of law as English law and the exclusive jurisdiction of the English Courts.

41. The Respondent also submitted that the 2nd Applicant issued a Notice for arbitration on 10th December 2012 which was after it had filed the suit herein.

42. In its Grounds of Opposition filed and dated 4th January 2013, the Respondent stated that the 2nd Applicant was guilty of laches as the termination of the contracts were not only carried out in accordance with the contract but in respect of which the consequential action of appointing new distributors had already been carried out in accordance with the contract.

43. The Respondent also objected to the Applicants' application because it was intended to controvert and subvert the established law of contract allowing freedom to contract and determine the manner in which such contractual relations are to be terminated.

44. I must point out that this was a very lengthy application that took almost one and half (1½) days to conclude and I must commend Messrs Karori, Munyu and Njogu for all the effort they put in. Although a lot of evidence has been adduced as to what transpired between the parties leading to the dispute herein, this is not the proper forum to determine the authenticity, veracity or the correctness of the same.

45. I will therefore address myself only to the issues of whether this court has jurisdiction to hear this application and whether this court can grant the orders sought by the Applicant herein.

46. The Respondent has argued that the Kenyan court has no jurisdiction to determine this matter in the Land Rover Agreement because jurisdiction was exclusively reserved for the English courts and because it was only the Respondent who could commence arbitral proceedings. It had not elected to go for arbitration. In the Jaguar Agreement, the Respondent conceded that parties could proceed to arbitration.

47. I would agree with the Applicants that the Constitution of Kenya, 2010 has conferred on the High Court of Kenya unlimited original jurisdiction to determine civil and criminal disputes. Every person has a right to access justice and to fair hearing under Articles 48 and 50 respectively of the Constitution.

48. Article 48 of the Constitution of Kenya, 2010 provides as follows:-

“ The State shall ensure justice to all..”

49. Article 50 of the Constitution of Kenya stipulates as follows:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

50. Section 2 of the Arbitration (Amendment) Act, 2009 also confers this court with jurisdiction to hear matters arising out of domestic and international arbitrations when it provides as shown hereunder:-

“ Except as otherwise provided in a particular case, the provisions of this Act shall apply to domestic and international arbitrations.”

51. Under Section 3 of the Arbitration (Amendment) Act, 2009, an arbitration is international if :-

“ the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states.”

52. It is therefore not correct as the Respondent's counsel submitted that the Kenyan Arbitration legislation was made with the sole object of dealing with Kenyan matters.

53. The Land Rover Agreement which was to be governed by UNCITRAL law under which the Rules of Conciliation and Arbitration were formulated provided that the parties submitted themselves to the English Courts which were competent to adjudicate the dispute between the parties. Indeed, the clause permitted the Respondent to seek injunctive orders in Kenya which proceedings the Applicants would be parties to. From its wording, it is clear that the clause did not exclude the jurisdiction of this court to adjudicate over matters that it had jurisdiction over. It must, however, be borne in mind that intervention

by the Kenyan court in matters where parties have chosen arbitration as a mode of dispute resolution mechanism must be only within the parameters by the law.

54. By virtue of Article 1 (5) of the Constitution of Kenya, 2010 which provides that the general rules of International Law shall form the law of Kenya, the Land Rover Agreement conferred jurisdiction on this court to hear this matter. No contract can therefore oust the jurisdiction of the Kenyan court. Indeed, it would be a great miscarriage and travesty of justice if the Applicants were shut out from Kenyan courts due to wording in their contracts.

55. The circumstances are, however, different from the Jaguar Agreement that exclusively limited the jurisdiction of the disputes between the parties to English Courts. The 2nd Applicant and the Respondent irrevocably submitted themselves to English law. Be that as it may, the jurisdiction of this court would still be conferred by the Constitution of Kenya, 2010 and the Arbitration (Amendment) Act, 2009 as has been stated hereinabove.

56. Having found that this court has jurisdiction to hear this matter, I wish to point out that the validity of the arbitration clause is not something that this court can determine because that is a matter for an arbitral tribunal to decide. The mode of appointment of the arbitral tribunal is also not something that this court should concern itself with.

57. It is evident from Section 30 of the English Arbitration Act, 1996 which is the substantive law that the parties herein chose to govern their disputes, that the arbitrator has the competence to rule on its jurisdiction. The said section provides as follows:-

“ (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its jurisdiction, that is, as to –

a. Whether there is a valid arbitration agreement,

b. Whether the tribunal is properly constituted, and

c. What matters have been submitted to arbitration in accordance with the arbitration agreement.”

58. Under Section 31 of the English Arbitration Act, 1996, a party can raise an objection that the tribunal lacks substantive jurisdiction. I say this because there were arguments and counter-arguments between the parties as to whether the Applicants could issue a Notice of Arbitration when the clause in the Land Rover Agreement provided that it was only the Respondent who could do so.

59. I have considered all the case law submitted by the parties in respect of the validity of the arbitration clause and its unilateral nature in the Land Rover Agreement but cannot determine whether the arbitration clause was valid, whether the tribunal will be properly constituted if the Applicants issue the Notice to Arbitration or what matters will be submitted to arbitration in accordance with the arbitration agreement as that is under the mandate of an arbitral tribunal. It is for that reason that I will not consider the authorities submitted by the parties on this point as that will clearly exceed my mandate as a court.

60. However, having found that this court has jurisdiction over the two (2) agreements only as far as arbitration is concerned, the next issue to consider is whether this court can grant an interim injunction in favour of the Applicants pending reference and disposal of the dispute between the parties through arbitration. In seeking the said orders, the Applicant has relied on Section 7 of the Arbitration (Amendment) Act, 2009 which provides as follows:-

“It is not incompatible with an arbitration clause for a party to request from the High Court or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”

61. The Applicants have sought for the following order:-

“THAT this Honourable Court be pleased to grant an interim injunction restraining the Respondent either by itself, its agents, assigns, representatives or otherwise howsoever from interfering with the exclusive distributorship agreement between the Applicants and the Respondent either in terms of the letter dated 26th November 2012 or in any way further publishing or acting in furtherance of the notices dated 3rd August 2012 which purported to terminate the Overseas Distributor Agreement dated 12th December 1985 and Importer Agreement dated 1st February 2009 pending reference and disposal of the disputes between the parties through arbitration.”

62. In practise, parties to international arbitrations normally seek interim measures of protection. They provide a party to the arbitration an immediate and temporary injunction if an award subsequently is to be effective. 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.

63. I have carefully analysed the circumstances of this case and find that a contract is not something that would be wasted if it was not conserved. The intention of the grant of an interim measure of protection is to ensure that the subject matter remains as it is until the conclusion of the reference. The agreements herein are not of the nature that can be preserved as the Applicants intend to act on the same until the determination of the reference and they will therefore not remain static or in the same state they are in today. There was a competitive bid that the Applicants did not succeed in. The granting the orders being sought by the Applicants would amount to preventing the Respondent from exercising its rights under the contract. As was rightly pointed out by Mr Njogu, this court cannot re-write what the parties had agreed upon in their contracts. The issue of whether or not the Respondent was entitled to terminate the contracts as it did should rightly be resolved as stipulated in the dispute resolution clauses in the two (2) agreements and cannot form part or the basis of an interim measure of protection. Granting the orders as sought by the Applicants would amount to this 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.

64. Accordingly, I do not find the prayers sought by the Applicants to fall within the category of interim measures of protection that this court can grant. The upshot of my ruling therefore is that the Applicant's Notice of Motion application dated 7th December 2012 is not merited and the same is hereby dismissed with costs to the Respondent.

65. Orders accordingly.

DATED and DELIVERED at NAIROBI this 19th day of March 2013

J. KAMAU
JUDGE