



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL DIVISION
CIVIL SUIT NO. 36 OF 2013

CIVICON LIMITED PLAINTIFF

V E R S U S

KIVUWATT LIMITED DEFENDANT

RULING

1. The Plaintiff Civicon Limited and the Defendant Kivuwatt Limited have a contractual relationship. The contract provides that where there is any dispute between the parties it would be resolved through arbitration.
2. The Plaintiff by a Notice of Motion dated 15th April 2013 sought an interim injunction to restrain the Defendant from calling for payment of the performance bond guarantee issued by the Plaintiffs bankers Citibank for the sum of US Dollars 1,283,925 and further the Plaintiff sought to restrain the Defendant from seizing or interfering with equipment, plant, machinery and assets which were in the possession of the Plaintiff by virtue of the contracts between the parties. An ex parte injunction was issued as prayed on 16th April 2013. Following the interpartes hearing of that Notice of Motion this Court by its Ruling dated 25th July 2013 dismissed the Plaintiff's application. On dismissing that application the Court ordered that this suit be stayed.
3. The contract between the parties provides that it shall be governed by the law of England and Wales and that any dispute arising from that contract it shall be subjected to arbitration of the International Chamber of Commerce (ICC).
4. The Plaintiff lodged a Notice of Appeal against the Ruling of 25th July 2013. What is now before court is a Notice of Motion dated 31st July 2013 where the Plaintiff seeks restraining orders against Kivuwatt Limited and Citibank. By that application the Plaintiff seeks interim injunction pending appeal in terms of the injunction issued on 16th April 2013. Further the Plaintiff has prayed that pending the hearing and determination of the Appeal there be an order for the maintenance of status quo in terms of the injunction order dated 16th April 2013.
5. The performance of the contract in question was to take place in Rwanda. The dispute between the parties as stated before was to be subjected to arbitration. The arbitration was to take place in Switzerland and the law which was applicable was that of England and Wales. Parties have already referred the dispute to Zurich under the rules of ICC. The Defendant has also filed a claim in a High Court of Justice Queens Bench Division Commercial Court in England. That action is

against the Plaintiff and Citibank. It seeks an order that the Court do find that the performance bond was varied and that the Court do find that Citibank covenanted to pay the Defendant upon a written demand being made by the defendant. It is that performance bond that the Plaintiff in this action seeks to have restraining orders issued by the Court to prevent the amount of that bond being paid to the Defendant by Citibank.

6. As stated before there was a Ruling dated 25th July 2013 by Muya, J the learned Judge held as follows.

“Even if the Court was to hold that it has residual jurisdiction, it must bear in mind the clear and unequivocal intentions of the parties. In the present case, there are allegations and counter allegations on or as to the breach of the contracts. It is not in dispute that the Plaintiff is holding onto equipment called Seperator which belongs to the Defendant which was to be transported to Rwanda. There are allegations that the Defendant has neglected and or failed to honour conditions of the agreement in terms of payment for work done. I am of the considered view that these are issues that are subject to arbitration proceedings. The Seperator machine is said to be pivotal to the project in Rwanda. The restraining orders prayed are not peripheral but go to the root of the contract agreement and I find to have no jurisdiction over that substantive issue.

Consequently the application by way of Notice of Motion dated 23rd April 2013 succeeds. The injunction granted to the Plaintiff in this suit dated 16th April 2013 is hereby set aside. An order for stay of proceedings in this suit is granted pending the arbitration proceedings. Costs to the Defendant. The application by the Plaintiff dated 15th April 2013 is dismissed with costs.”

It is that finding that the Plaintiff has filed a Notice of Appeal against.

7. In support of the application the Plaintiff argued that the orders that were sought were intended to prevent the Defendant from receiving US Dollar 1.2 million from Citibank and also to prevent the Defendant pending appeal from seizing equipment and machinery in the Plaintiffs possession. In the alternative, the Plaintiff sought for the maintenance of the status quo. It was submitted on behalf of the Plaintiff that the intention of the Plaintiff was to preserve the subject matter pending arbitration in Zurich. That the decision of the Court on the application will determine whether the resolution of the dispute in the arbitration would be worthwhile. Further that the Court should grant an injunction to ensure that the pending appeal is not rendered nugatory. The Plaintiffs learned Counsel submitted that this Court has jurisdiction to grant an injunction as sought by the Plaintiff. In that regard the learned Counsel relied on the case **ERINFORD PROPERTIES -VS- CHESHIRE COUNTRY COUNCIL [1974]ALL ER 448**. The Court held in that case that it was not inconsistent for a Court to grant an injunction pending appeal after dismissing a Motion for injunction. That such an order would be to ensure that the Court of Appeals decision is not rendered nugatory should the appeal Court reverse the Judges decision. The Plaintiff also relied on the case of **MADHUPAPER INTERNATIONAL LTD -VS- KERR [1985]KLR 840**. The Court in that case held-

“1. Where a Judge dismisses an application for interlocutory injunction, he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal and there is no inconsistency in doing so as the purpose of granting the injunction would be to prevent the decision of the Appellate Court from being nugatory should the appeal succeed.”

8. On the issue whether this Court has jurisdiction to entertain the present application the Plaintiff relied on the holding of the case **CMC HOLDINGS LTD & ANOTHER -VS- JAGUAR LAND ROVER EXPORTS LTD [2013]eKLR**. The Court in that case held-

“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 rule 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.”

9. In further submissions the Plaintiff's learned Counsel stated that the application is not affected by the order of stay of proceedings contained in the ruling of 25th July 2013. He so submitted because the learned Judge after delivering that Ruling made the following order after the Plaintiff's Counsel orally applied for temporary stay pending appeal-

“Status quo to be maintained pending hearing of the application within 10 days. Plaintiff's Counsel to file and serve within seven days. Hearing on 14th August 2013.”

10. The learned counsel for the Plaintiff submitted that by the learned

Judge granting an order of status quo this Court was then free to entertain the present application. Secondly, that if vacation of the stay was required the Court can allow such a prayer even though made orally for the stay to be vacated.

11. Plaintiff submitted that the performance bond since it was issued

pursuant to the contract between the Plaintiff and the Defendant that this Court may entertain the orders to restrain payment to be made to the Defendant under the performance bond.

12. The Defendant in response submitted that the Plaintiff was wrong to

amend its plaint after the ruling of 25th July 2013 and more particularly because such amendment was made without the leave of the Court. The Defendant sought for the striking out of the amended plaint.

13. The Plaintiff amended its plaint as stated by the Defendant after the

Ruling of 25th July 2013 was delivered. The Plaintiff in its amended plaint added Citibank as 2nd Defendant and elaborated on its claim against the Defendants. In particular the Plaintiff pleaded fraud against the defendant and on that basis stated that the Defendant was not entitled to receive the amount due on the performance bond.

14. Further the Defendant argued that the present application cannot

succeed because it was filed when the proceedings in this suit had been ordered to be stayed.

15. In response to the Plaintiffs authorities the Defendants learned

Counsel submitted that there was need to contextualize the cases to the present facts. In the case of Madhupaper learned defence Counsel said that the Court was dealing with an injunction pending appeal where the suit was still subsisting in the High Court. In this case he submitted that the High Court had already found that it had no jurisdiction and further that the parties had chosen the seat of their arbitration and the applicable law.

16. Defence further argued that since the Ruling of 25th July 2013 had

determined that this Court has no jurisdiction the Court should bear in mind the holding in the case of **OWNERS OF THE MOTOR VESSEL "LILIANS" -VS- CALTEX OIL (KENYA) LTD [1989]KLR 14**. The Court held in that case-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before Court."

17. It was argued by learned Counsel for the defence that the Court can

only intervene in cases of arbitration as provided under Section 10 of the Arbitration Act Cap 49. That Section provides as follows:-

"Except as provided in this Act, no Court shall intervene in matters governed by this Act."

18. In this regard it was submitted that Section 7 of the Cap 49 did not apply in this case. That Section is in the following terms-

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

Counsel stated that that Section only empowers the Court to give interim orders but that it does not allow the Court to revisit the issue such as here where the Plaintiff seeks injunction pending appeal. To support that injunction learned Counsel for the defence relied on the case **ANN MUMBI HINGA -VS- VICTORIA NJOKI GATHARA [2009]eKLR**. The Court in that case had this to say-

"A careful look at all the provisions cited in the heading in the application and invoked by the Appellant in the Superior Court clearly shows that all the provisions including the Civil Procedure Act and rules do not apply to arbitral proceedings because Section 10 of the Arbitration Act makes the Arbitration Act a complete code and rule 11 of the Arbitration Rules cannot override Section 10 of the Arbitration Act which states:-"

‘Except as provided in this Act no Court shall

intervene in matters governed by this Act.’

In the light of the above, the Superior Court did not have jurisdiction to intervene in any manner not specifically provided for in the Arbitration Act. This includes entertaining the application the subject matter of this appeal and all the other applications purporting to stay the award or the judgment/decreed arising from the award. In this regard we note that because of the number of the applications filed in the High Court outside the provisions of the Arbitration Act the award has not yet been enforced for a period close to 10 years now. The provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/decreed where Arbitration Rules 1997 apply the Civil Procedure Rules where appropriate. In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act. It is clear to us that no application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration.”

19. I have considered the parties affidavits evidence and learned Counsels submissions.

20. The parties choose in their contracts for their dispute to be resolved through arbitration and also choose the applicable law as that of England and Wales. In view of that does this Court has jurisdiction to entertain an injunction pending appeal? The Defendants argued that Section 7 of Cap 49 limited the Court to only entertain an original injunction application and not a subsequent injunction application pending appeal. I must admit that I do not see such limitation in that Section. That Section as reproduced above clothes this Court with power to grant interim measure of protection. That Section does not restrict the orders obtained under it. In my view the Court would have power to give interim measure of protection pending appeal.

21. The limitation that I however do see in respect of this case is that the parties choose the applicable law that would govern their contractual relationship. In that regard I find that I am in agreement with the finding in the ruling of 25th July 2013. I am in agreement because Section 10 Cap 49 forbids this Court on acting on any other law but that which is under Cap 49. To then require this court to apply the law chosen by the parties would contravene that Section. It's worth also noting that the parties contract was entered and was to be performed in Rwanda. It is for that reason that I find that the Plaintiff's application cannot succeed.

22. In regard to the performance bond I am in agreement with the Defendants argument that it is not subject of the arbitration process. That being so, there cannot be injunction issued pending arbitration.

23. In respect of equipment held by the Plaintiff and in particular a machine called Seperator the Plaintiff alleges that it has a lien over it. The Seperator belongs to the Defendant. The Plaintiff alleges that the Defendant owes it money and therefore holds the Seperator claiming that it has a lien over it. It is imperative to note that the alleged money which the Plaintiff alleges it is owed is the subject of the arbitration in Zurich. In the arbitration proceedings however I did not see the Plaintiff's claim to have a lien over the Seperator. Rather, it is the Defendant who has pleaded for the release of the Seperator but in the documents before Court I could not find the Plaintiff's response to that specific claim.

24. The Plaintiff amended its plaint in this case after the Ruling of 25th July 2013. The Ruling that was delivered on that day was on the basis of the original plaint. The Appeal that has been filed against that ruling would also be on the basis of the original plaint. It follows that the injunction pending appeal as sought before me can only also be on the basis of the original plaint. I would however add that the Plaintiff did not need to seek leave before amending the plaint because the pleadings had not closed. The only thing that makes the plaint to be incompetent is that it was

filed after the court made an order for the proceedings in this case to be stayed. But for the purpose of the application before me that amended plaint is not for consideration.

25.The Defendant's argument that the Plaintiff's application is incompetent in view of the stay of proceedings issued on 25th July 2013 is in my view correct. The Court on that date ordered that these proceedings in this file be stayed. For any party therefore to seek to move the Court whether by amending the pleadings or by seeking injunctive orders as in this case the stay needed to be vacated. It could not be vacated by implication as suggested by the Plaintiff. The fact that the Judge after delivering the ruling of 25th July 2013 granted temporary status quo did not vacate the stay. The Plaintiff has failed by its application before Court for having not sought that stay to be vacated. The Court cannot therefore entertain the prayers sought. The Plaintiff's learned Counsel could not seek to vacate the stay orally when the application was argued before Court because the Defendant would not have had sufficient notice of that oral application to be able to reply. That prayer is therefore rejected.

26.In the end, the Plaintiff's application dated 31st July 2013 is dismissed with Cost to the Defendant. Any interim orders of injunction or maintenance of status quo are hereby vacated.

Dated and delivered at Mombasa this 28th day of August, 2013.

MARY KASANGO

JUDGE