



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 296 OF 2013

INSIGHT MANAGEMENT CONSULTANTS LIMITED.....
PLAINTIFF

VERSUS

JAMBO BISCUITS LIMITED.....
DEFENDANT

RULINGS

1. By Chamber Summons application dated and filed on 10th July 2013, the Plaintiff sought the following orders:-
 - i. Spent
 - ii. Spent
 - iii. **An injunction do issue restraining the Defendant whether by itself or by his servants, agents, employees, advocates or otherwise howsoever, from removing any of its assets, including monies deposited in his accounts and held in all and any bank operating in Kenya, from the jurisdiction of this court or disposing, interfering with, charging or otherwise dealing with them in any way whatsoever, pending full hearing and determination of the dispute between the parties by arbitration.**
 - iv. **In the alternative, the Defendant do furnish security and place at the disposal of the court a sum of money as may be sufficient to satisfy an arbitral award within 3 days of the order of this court and in default warrants of attachment do issue in respect of its assets and its bank accounts be frozen.**
 - v. **Any further relief that the court deems fit in the interest of justice.**
 - vi. **The costs of the application be the Plaintiff's in any event.**
2. The grounds upon which the Plaintiff relied in support of its application were generally as follows:-
 - i. **The Plaintiff provided to the Defendant human resource as had been set out in an agreement between the parties dated 2nd June 2012 and that as at 18th June 2013, the Defendant owed the Plaintiff a sum of kshs. 4,537,358/=.**
 - ii. **The Defendant issued the Plaintiff cheques which were dishonoured upon presentation to the bank leading to the Plaintiff filing CMCC No 3776 of 2013, which dispute had in accordance with Article 15 of the said Agreement been referred to arbitration.**
 - iii. **Following a notice issued in the press, under the Transfer of Business Act, the Defendant**

- was to transfer its assets to another entity know as Kilimanjaro Foods Limited.**
- iv. **The Plaintiff had filed the application herein as it did not have any knowledge of the Defendant's assets. It was apprehensive that if the Defendant disposed of its assets, the Plaintiff would only have a "paper award" in any subsequent arbitral proceedings.**
 3. The Plaintiff's application was supported by the affidavit of Gerald Ndiritu who was a director of the Plaintiff. The same set out in *extenso* the grounds of the application.
 4. It was the Plaintiff's case that it was entitled at common law or in equity to trace and recover from the Defendant in so far as they remained in possession of such monies or assets as would be sufficient to meet the amount demanded together with costs thereon and that the Defendant was liable to the Plaintiff to deliver up all the properties in its possession and/or ownership that would be sufficient to meet the Defendant's obligations under the agreement pending arbitration.
 5. On 19th July 2013 the Defendant filed a Replying Affidavit which was sworn on its behalf by Nitin Dawda, its Managing Director. She stated that the Plaintiff's misapprehension was misplaced as the Notice of Transfer of Business was clear that the Defendant was only transferring part of its assets and stock. She stated that the Defendant was also apprehensive that it would be unable to recover its costs which it put at about kshs. 6,000,000/=. The Defendant was similarly concerned about a paper judgment and indicated that it would also seek a provision for costs against the Plaintiff.
 6. To that end, the Defendant filed its Chamber Summons application dated 17th July 2013 on the same date. It sought the following order:-
 - i. **Spent**
 - ii. **The Honourable Court be pleased to set aside and or discharge and or vary the *ex parte* temporary injunction Orders issued by Honourable Mr. Justice Havelock on 12th July 2013 together with all consequential order(s) upon such term(s) and or condition(s) as it may deem fit and just.**
 - iii. **The Plaintiff/Respondent do furnish and place at the disposal of the court a sum of money as may be sufficient to satisfy an arbitral award within 3 days of the Order of this court and in default warrants of attachment do issue in respect of its assets and its bank accounts to be frozen.**
 - iv. **The Honourable Court be pleased to make and or grant such other and or further Order(s) as it may in the interests of justice deem expedient and or necessary.**
 - v. **That the costs of this Application be provide (sic) for.**
 7. In an Affidavit sworn by Nitin Dawda on 17th July 2013 and filed on the same date, the Defendant reiterated the facts in its said Replying Affidavit and requested therein that Havelock J who issued the initial interim orders herein on 12th July 2013 disqualify himself. The said learned judge did recuse himself from hearing this matter on 18th July 2013.
 8. The matter was subsequently referred to this court for determination. When the matter came before this court on 19th July 2013, both the Plaintiff's and Defendant's counsel informed the court that they wished to have the applications heard together as the same were related. They both filed their respective submissions on 30th July 2013 and orally highlighted the same when the matter came up in court on 8th August 2013.
 9. Mr. Ogunde, counsel for the Plaintiff submitted that the Defendant's demand for security for costs had no basis. He, however, argued that the Plaintiff could pray for the same as the Defendant had advertised in the press that it was disposing of its assets. He contended that a prayer for security of costs was not a tit for tat affair but that there had to be actual threat or actual disposal of the assets. He averred that the Defendant had not furnished the court with any evidence to show that the Plaintiff was disposing off its assets to warrant its prayer that the Plaintiff should provide security for costs.
 10. Mr. Ogunde also submitted that the court could order the Defendant to pay security and that if it could not give security, the court could instead grant the injunction.
 11. To support its case for interim measures of protection, the Plaintiff referred this court to the cases of **CMC Holdings Ltd, & Another Vs Jagua Land Rover Export Limited (2013) eKLR, and**

HCCC No 302 of 2011 Roaring Success Limited Vs Airtel networks Limited & Another
(unreported).

12. The Plaintiff submitted that *prima facie*, its case was strong as there was evidence that the Defendant issued the Plaintiff cheques that were dishonoured upon presentation of the same for payment.
13. Mr Kibanya, counsel for the Defendant submitted that the court could not evaluate or determine the strength of the parties cases as that was within the domain of the arbitral proceedings.
14. He stated that the Defendant was also apprehensive that should it succeed, it would not be able to recover its award. However, the Defendant did admit that none of the parties had satisfied the court that they had sufficient assets. The Defendant had proposed that each party gives the other a bank guarantee. This was because the order for injunction was a draconian measure that could stop the Defendant from selling its assets when no one could be sure that the Plaintiff would succeed in its claim.
15. In response to Mr Kibanya's submission, Mr Ogunde told the court that it could not be invited to make orders on speculation and that there had to be a threatened or actual disposition of assets as the Plaintiff had shown.
16. Each party therefore asked that the court dismisses the others application
17. The court has carefully considered the pleadings, the case law, the oral and written submissions and wish to state right out at outset that the court can only intervene in matters governed by the Arbitration (Amendment) Act, 2009 only as provided for under Section 10 of the said Act. The same provides as follows:-

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

The effect of the provision is that the court can only grant orders only as envisaged in the said Act.

18. The Plaintiff sought injunctive orders to restrain the Defendant from removing any of its assets including monies pending the hearing and determination of the dispute between the parties which dispute was currently before an arbitral tribunal. The court must ask itself whether its intervention will be for purposes of preservation the subject matter of the arbitral proceedings or evidence or for preventing wastage of assets. As this court held in the case of **CMC Holdings Ltd & Another vs. Jagua Land Rover Exports Ltd (Supra)** the court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time of conclusion of the arbitral proceedings before it can grant an order for injunction or interim measure of protection.
19. In this particular case, the Plaintiff has not furnished this court with evidence that the assets in issue are the subject matter of the arbitral proceedings that they are to be wasted or that the injunction sought which appears to this court as being a *Mareva* Injunction should be granted. The order seeks to restrain the Defendants from removing, dissipating, or disposing of the assets from the jurisdiction of Kenya which order can be granted where a judgment debtor appears to want to frustrate a potential judgment. The Plaintiff has also not provided this court with evidence to show that he purpose of the Transfer of the Defendant's assets was to defeat a potential arbitral award. Indeed there must be some nexus own between the order sought and the action being taken by a judgment – debtor.
20. The position of the court is fortified by the fact that from the Notice of transfer assets, it refers to transfer of “part of the assets” and “part of the stock”. Debts and liability prior to the transfer are to be paid by the Transferor, who in this case is the Defendant.
21. The court is not satisfied that the Plaintiff has been able to justify why this court should grant it the order sought as it has also not been to demonstrate that it will not be able to recover the arbitral award, if the same was entered in its favour bearing in mind that the sum in dispute is Kshs. 4,537,358/=.
22. Turning to the question of security for costs, the court agrees with both parties submissions that their respective apprehension are speculative. The court has not heard the benefit of listening to the case as this has been within the domain of the arbitral tribunal. As was rightly pointed out by Mr Kibanya, the court would not be able to evaluate and weight the merits and demerits of the parties' cases. It is for that reason that the court finds it difficult to grant the parties the order for security of costs. The legislators had the wisdom to give the arbitral tribunal power to order a

claimant to provide security for costs or order any party to provide security in respect of any claim or any amount in dispute under the said Arbitration Act.

23. Section 18 of the said Act provides as follows:-

1. **unless the parties otherwise agree, an arbitral tribunal may, on the application of a party –**
 - a. **Order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure or**
 - b. **Order any party to provide security in respect of any claim or any amount in dispute; or**
 - c. **Order a claimant to provide security for costs.**
2. **The arbitral tribunal or a party with the approval of the arbitral tribunal, may seek assistance from the High Court in the exercise of any power conferred on the arbitral tribunal under subsection (1).**

24. After a careful analysis of the facts of the case herein, the court is of the view that both parties have not been successful in their respective applications. As was seen above, this court can only intervene in arbitral matters within the confines of Section 10 of the said Act, beyond that its hands are tied.

25. In the premises foregoing, the Plaintiff's Chamber Summon application filed on 10th July 2013 and the Defendant's Chamber Summon application dated and filed on 17th July 2013 are not merited and consequently the same are hereby dismissed. Each party will bear its own costs.

26. It is so ordered.

DATED and DELIVERED at NAIROBI this 20th day of September 2013

J. KAMAU

JUDGE