



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

CIVIL CASE NO. 394 OF 2013

LAVINGTON SECURITY LIMITED PLAINTIFF

VERSUS

ESSAR TELECOM KENYA LIMITED DEFENDANT

RULING

1. The Plaintiff/Applicant herein filed a Notice of Motion under Certificate of Urgency dated 10th September 2013. The same was brought under the provisions of **section 7 (1) and 2** of the *Arbitration Act, 2010* as well as **Order 40 Rule 2** and **Order 51 Rule 1** of the *Civil Procedure Rules*. **Sections 1A, 1B, 3A and 63 (e)** of the *Civil Procedure Act* also applied. The Application sought an order of injunction barring the Defendant, its servants and agents from terminating a contract entered into between the parties dated 6th July 2009. The Application was predicated on the following grounds:

“i) A dispute has arisen between the Plaintiff and the Defendant with regard to a contract dated 6th July, 2009 and the Plaintiff has referred the dispute to arbitration.

ii) The Defendant has purported to issue a Notice to terminate the contract without regard to the contractual period and contrary to express provisions of the contract with regard to such Notices.

iii) The Plaintiff will suffer irreparable loss and damages if the Defendant proceeds to effect the Notice to terminate and it is in the interest of Justice that the Honourable Court grants Interim reliefs pending reference and or hearing of the disputes by the Arbitrator”.

2. The Plaintiff’s said Application was supported by the Affidavit of the Chief Manager Operations of the Plaintiff Company, one **George Onyango** dated 10th September 2013. The deponent recounted how the Plaintiff had entered into a contract with the Defendant to provide guard services to the premises of the Defendant in various locations in Kenya. The Service Contract was dated 6th July 2009 (hereinafter “the Contract”). Under clause 20 of the Contract, the Plaintiff could vary the charges for guard services provided to the Defendant by using the following procedure:

“a) The Contractor shall give Thirty (30) day’s notice of its intention to vary its Charges to the Client (“Notice of Variation of Charges”) and such varied

Charges shall, subject to paragraph (b) below have immediate effect thereafter.

b) Upon receipt of the Notice of Variation of Charges, the Client may within Fifteen (15) days from the date of receipt of the notice, give to the Contract thirty (30) day's notice in writing of its intention to terminate this Agreement ("Notice of Termination").

c) If a Notice of Termination is served upon the Contractor, the Charges for the period of the Notice of Termination shall be the rate payable before the Notice of Variation of Charges".

It is the Plaintiff's contentions that it gave notice to the Defendant as to an increase in charges vide its letter dated 30th July 2013. The Defendant responded thereto by letter dated 16th August 2013 terminating the Contract but the Plaintiff details that this was outside the 15 day period envisaged under clause 20 b) of the Contract. The Plaintiff now wished to take the matter to arbitration as per clause 19 of the Contract but in the meantime sought Interim Orders from this Court that the termination of the Contract should be put on hold pending the hearing of the arbitral proceedings. In other words, the Plaintiff wished this Court to impose a mandatory injunction upon the Defendant to continue with the Contract until the determination made by an arbitrator.

3. In response to the Plaintiff's Application, the Defendant filed a Replying Affidavit sworn by its Head of Legal **Rita Mwangi** dated 13th September 2013. The Defendant also filed a Notice of Preliminary Objection, again dated 13th September 2013, in which it maintained that the Application was firstly, incompetent and incurably defective and secondly, that this Court lacked the jurisdiction to hear the matter. It is the Defendant's Preliminary Objection that this Court has been asked to determine at this stage of the proceedings.
4. Before Court on 16th September 2013, Mrs. Arwa on behalf of the Defendant submitted that there was no prayer to support the Notice of Motion dated 10th September 2013. Prayers Nos. 1 and 2 were already spent having been heard before the Court *ex parte*. Prayer No. 3 seeks an interim injunction pending the reference of the dispute to arbitration or the hearing of the arbitral proceedings. Such interim injunction involved the Court ordering the Defendant not to terminate the Contract. Counsel noted that the Application was brought under the provisions of **Order 40 Rule 2** of the *Civil Procedure Rules, 2010*. The Application was seeking final Orders which could not be granted by the Court at the interlocutory stage. There was no prayer in the Application seeking interim orders pending the hearing of the suit. Counsel maintained that **Order 40 Rule 2** only referred to proceedings before Court and not to arbitration proceedings. She urged the Court to find on this ground alone that the Application was incurably defective. As to the Court's jurisdiction to hear the matter, counsel noted that the suit, as well as the Application, was premised on the Contract. It was the Defendant's contention that there was no valid contract as the same had not been executed in the manner in which a corporate body is expected to execute such a contract. The Contract had not been sealed with the Common Seal of the Defendant Company. Counsel maintained that the fact that the parties had acted upon the Contract did not mean to say that it was a valid contract. Finally, counsel suggested that there was no contract to be continued as the Contract had expired on 15th September 2013 by reason of the notice served by the Defendant on the Plaintiff.
5. In his turn, Mr. Bundotich, for the Plaintiff, sought to make it clear that the Preliminary Objection was aimed towards striking out the Application and not the suit. Referring to the **Mukisa Biscuits** case, he maintained that a Preliminary Objection should only deal with matters of law and not fact. He accused counsel for the Defendant of straying into the arena of facts, particularly by saying that the Contract was not properly executed. By paragraph 14 (a) of the Replying Affidavit, the Defendant had admitted that it was bound by the Contract. Again by clause 19.6 of the Contract as read with section 7 of the Arbitration Act, the parties had agreed that the High Court had jurisdiction. As regards the first point of the Preliminary Objection, Mr. Bundotich conceded that prayers Nos. 3 and 4 were for the consideration of the Court. He felt that prayer No. 3 was compatible with **section 7 (1)** of the *Arbitration Act*. It was also compatible with clause 19.6 of the

Contract. He noted that the Notice of Motion could not stand on its own. It had to be backed up by an original pleading which was the Plaintiff in this matter. He submitted that **Order 40 Rule 2** not only referred to proceedings in the High Court but also to arbitral proceedings as contemplated by **section 7** of the *Arbitration Act*.

6. First of all, I do not accept the Defendant's contention that the Contract is no contract owing to lack of proper execution thereof by the Defendant. Quite apart from the Defendant clearly acting upon the Contract, it is clearly signed by the Defendant's duly authorised representative and witnessed by an advocate. The Contract is not a Deed requiring execution under seal. As this was the ground upon which counsel for the Defendant based her contention that this Court had no jurisdiction, I have no hesitation in rejecting her point in that regard. The next point to consider was the position of the Application under the provisions of **Order 40 Rule 2** and, more particularly, section 7 of the *Arbitration Act*. **Order 40 Rule 2** reads as follows:

“40 2. (1) In any suit for restraining the

defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time at the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit”.

Further, **section 7 (1)** of the *Arbitration Act* reads:

“7 (1) 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”.

7. Quite clearly from the above, a Plaintiff or Claimant seeking a measure of interim protection from the Court prior to or even during arbitration proceedings, there must be some provision to give the Court jurisdiction and to enable an interim measure to be put in place. I believe that the Plaintiff herein has come before this Court quite properly by using the provisions of **Order 40 Rule 2** as read with **section 7 (1)** of the *Arbitration Act*. Nowhere in **Order 40 rule 2** does it say that the Rule applies to Court proceedings alone. It refers to contracts and other injuries but is silent on the proceedings to which an Order for interim protection could apply. As regards the provisions of **section 7 (1)** of the *Arbitration Act*, the same reads quite clearly, that there is no incompatibility with any arbitration agreement for a party to seek an interim measure of protection from the Court. As pointed out by Counsel for the Plaintiff, clause 19.6 of the Contract is quite clear as regards jurisdiction it reads:

“Nothing in this Section 19 shall preclude either Party from seeking any interim relief from any competent court having jurisdiction pending the institution of any arbitration proceedings in the terms of this Section.”

To my mind, nothing can be clearer in that the arbitration agreement itself gives jurisdiction to this Court.

8. The outcome to all the above is that I dismiss the Defendant's Preliminary Objection with costs to

the Plaintiff. Parties may now take a date for the hearing of the substantial Application.

DATED and delivered at Nairobi this 20th day of September, 2013.

J.B.HAVELOCK

JUDGE