



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 431 of 2012

COK FA-ST COMPANY LIMITED.....PLAINTIFF

VERSUS

JIANG NAN XIANG.....DEFENDANT

RULING

1. The defendant/applicant filed a Notice of Motion dated 17th September 2012 stated to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 46 Rules 3, 5(a) and 20 and Order 51 Rule 1 of the Civil Procedure Rules. The application seeks for the orders stated on the face of the application among them that, the honourable court be pleased to appoint an Arbitrator pursuant to the honourable court's order of 31st July, 2012 and Ruling of 10th August, 2012.
2. BY a Notice of Preliminary Objection 4th October, 2012 the Plaintiff raised the following preliminary objection to the Defendant's application of 17th September 2012 aforesaid:-
 - 1) **That under sections 6, 10 and 37 of the Arbitration Act 1995; the order of this court issued on 31st July, 2012; the Arbitration Agreement; Section 59 of the Civil Procedure Act and order 46 Rules 3 and 20 of the Civil Procedure Rules, this Honourable Court has no jurisdiction to determine any issue in dispute between the parties.**
 - 2) **That all proceedings before this court ought to be stayed pending the outcome of the Arbitration proceeding under the Arbitration rules.**
3. The Preliminary Objection was canvassed before me on 5th October, 2012. Mr. Wandago appeared for the Plaintiff while Mr. Abidha was present for the defendant.
4. Counsel for the plaintiff Mr. Wandago submitted that the effect of the order of 31st July, 2012 by Justice Ogolla referring the matter to arbitration was that the entire dispute between the parties was referred to arbitration. Therefore, any proceedings before the court had to comply with section 59 of the Civil Procedure Act and the Arbitration Act. It was further his submission that Section 59 of the Civil Procedure Act stated that all references to arbitration and all proceedings thereunder were to be governed as prescribed in the Arbitration rules. He submitted that Section 7 of the Arbitration Act reprimanded the court from interfering with matters governed by the Act. He further told the court that under Section 6 of the Arbitration Act, a court before which a matter is subject to an arbitration clause should stay the proceedings and refer the matter to arbitration. A court could not therefore refer a matter to arbitration then go on to sit in the arbitration. He added that the Arbitration agreement was in the articles of association and it required the appointment to be done by the Chartered Institute of Arbitrators. He relied on various authorities, among them, the case of **Corporate Insurance vs Loise Wachira, Nairobi Civil**

Appeal No. 151 of 1995 (unreported) where the Court of Appeal held that a party had no cause of action until an award was made. He submitted that section 37 (2) of the Arbitration Act dealt with provision of security but was only applicable after an award had been made. He referred the court to the case of **Narok County Council vs Trans Mara County Council [2000] 1. E.A 161** where it was held that the High Court should not deal with matters that are by statute granted to the Minister. In his view, the Court had no jurisdiction where the Arbitration Act was invoked.

5. The defendant opposed the plaintiff's preliminary objection. Counsel for the defendant Mr. Abidha submitted that all the prayers in their application dated 17th September 2012 were pursuant to the Court's jurisdiction under section 7 of the Arbitration Act and Order 46 rule 20 (1) of the Civil Procedure Rules, which gave the court powers to give remedies even when the arbitration proceedings are on-going. He stated that the prayers were interim measures of protection geared at preserving the substratum of the dispute. Such measures included provision of security. Mr. Abidha submitted further that Section 10 of the Arbitration Act must be read with Section 59 of the Civil Procedure Rules and that the court had jurisdiction to grant interim measures, notwithstanding Section 10 of the Arbitration Act. He indicated to the court that the plaintiff was transferring assets in a bid to defeat the arbitration and that the Notice of Preliminary Objection was a scheme by the Plaintiff to dispose of the assets and frustrate the defendant.

6. I have carefully considered the submissions by both counsels in relation to the Notice of Preliminary Objection filed on 5th October 2012.

7. On 31st July, 2012, my brother Justice Ogolla made a ruling referring the dispute in this matter to arbitration. By an application filed on 1st August 2012, the Plaintiff sought orders of interim measure of protection pursuant to Section 7 of the Arbitration Act. In a ruling delivered on 10th August 2012, I defined the scope of the dispute to be referred to arbitration; found that the Plaintiff did not merit the orders sought in the application and, pertinently, ordered that pending arbitration of the dispute, an injunction do issue restraining the Plaintiffs and each of them from entering the Defendant's factory, interfering with its manufacturing and other operations, locking or otherwise meddling with the affairs of the factory.

8. In the application of 17th September 2012 which the Plaintiff has now objected to, the Defendant seeks orders of this court for appointment of an arbitrator; fixing of the time within which the award should be made; and, provision of security by way of the Plaintiff depositing a sum of Kshs. 40 Million in a joint account in the names of the advocates for the parties. The Defendant in the application of 17th September 2012 stated that he was moving the court for the said orders because the Plaintiffs had ignored, refused or neglected requests by the Defendant to participate in the appointment of an arbitrator from a list of arbitrators suggested by the Defendant. The Defendant claimed that the directors of the Plaintiff were taking advantage of the delay in appointment of an arbitrator to siphon off, waste and transfer the assets of the Respondent in an attempt to defeat the arbitration.

9. On the outset, I need to clarify that the referral of the dispute in this matter to arbitration was made by the court on its own motion. Court-sanctioned arbitration finds jurisdiction in Section 59 of the Civil Procedure Act and Order 46 Rule 20(1) of the Civil Procedure Rules, 2010. Order 46 Rule 20(2) allows the court to make any directions as may be necessary to facilitate alternative dispute resolution. In addition, it is explicitly clear from Section 7 of the Arbitration Act that it is not incompatible with arbitral proceedings for a party to seek interim measures of protection pending arbitration. While therefore Section 10 of the Arbitration Act precludes the court from intervening in matters to which the Act applies, that section allows the court to intervene to the extent provided in the Act. I therefore find an application for interim measures of protection under Section 7 of the Act to be part of the permissible jurisdiction accorded to this court in the exception to Section 10 of the Act aforesaid.

10. Looking at the application dated 17th September 2012, prayers 2 and 3 requesting this court to appoint an arbitrator is necessitated by the Defendant's frustration with the non-co-operation of the Plaintiff in the appointment of an arbitrator. This to me is not an interim measure of protection under Section 7 of the Arbitration Act. However, this Court, being a court of equity, must ensure that justice is done to both

parties and should not allow the present impasse to persist unabated. Counsel for the Plaintiff Mr. Wandago submitted that the appointment of the arbitrator should be done in accordance with the arbitration agreement provided for in the articles of association and which requires the appointment to be done by the Chartered Institute of Arbitrators. I therefore direct that as the parties have failed to mutually agree on appointment of an arbitrator, the Chairman for the time being of the Chartered Institute of Arbitrators Kenya Chapter do appoint a single arbitrator to arbitrate the dispute in this matter within 21 days from today. The arbitrator once appointed will deal with the issue of timelines in respect of the proceedings and eventual award.

11. With regard to prayer 4 of the application dated 17th September 2012, I find the request for deposit of Kshs. 40 Million in a joint account in the names of the advocates for the parties to be an interim measure of protection, and over which this court is seized of jurisdiction under Section 7 of the Arbitration Act. In that regard, I did observe in my ruling of 10th August 2012 that I had noted from the statement of account annexed to the affidavit of the Defendant that a sum of Kshs. 32,282,378.27 was owed by the Plaintiff to the Defendant on account of goods supplied and not paid for. In addition, a sum of Kshs. 12,980,738.40 was claimed by the Defendant on accounts of goods manufactured in the Plaintiff's logo but which the Plaintiff had failed to collect. These claims had not been controverted to by the Defendant and were, *prima facie*, due and owing to the Defendant. As an interim measure of protection pending the arbitral process, I find merit in directing that the Plaintiff do provide security for the sum of Kshs. 40 Million. This provision does not, in my view, contravene Section 37(2) of the Arbitration Act as that section does not preclude provision of security in other instances besides the enforcement and recognition stage of an award. However, as it may be onerous to ask the Plaintiff to provide a cash deposit for the said sum of money, I direct that the Plaintiff do deposit with the court title to land valued in the region of the said sum of money or in the alternative, do provide an irrevocable bank guarantee in favour of the court, both to subsist until conclusion of the arbitral proceedings. Such security should be furnished within 21 days from today.

12. Further, to obviate dissipation of the assets of the company, and as an interim measure of protection, I reiterate and confirm the injunction orders granted in my ruling of 10th August 2012 in the terms set out in paragraph 24 of the ruling, to persist until hearing and award of the arbitral proceedings.

13. For these reasons, the Defendant's Notice of Motion application dated 17th September 2012 and the Plaintiff's Notice of Preliminary Objection filed on 4th October 2012 are compromised in the above terms.

14. Costs shall be on the cause.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED THIS 11th DAY OF OCTOBER 2012

**J.M MUTAVA
JUDGE**