Power Parts (Kenya) Limited v Kenya Ports Authority (Commercial Case E070 of 2024) [2025] KEHC 4006 (KLR) (6 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4006 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL CASE E070 OF 2024

F WANGARI, J

MARCH 6, 2025

BETWEEN

POWER PARTS (KENYA) LIMITED ..... PLAINTIFF

AND

KENYA PORTS AUTHORITY ..... DEFENDANT

RULING

1. There are four applications filed in this matter so far and they are all preferred by the Plaintiff herein. For completeness of record, the applications are dated 5th December, 2024, 9th January, 2025, 30th January, 2025 and 27th February, 2025. Other than the application dated 5th December, 2024 (hereinafter "the first application"), the rest are seeking to cite certain individuals for being in contempt of the orders issued on 6th December, 2024.

2. The other applications after the one dated 5th December, 2024 all make reference to the first application and as such, it is the court's view that pronouncing itself on the first application would resolve the subsequent applications. Therefore, the ruling herein concerns itself with the first application. The same is brought under the provisions of sections 6 and 7 of the *Arbitration Act*, Rule 2 of the Arbitration Rules and all other enabling provisions of the law. It seeks the following orders: -

    a. Spent;

    b. Spent;

    c. Spent;

    d. The matter be referred to Arbitration as per clause 10 (b) of the contracts;

    e. Pending the hearing and determination of the Arbitration proceedings between the parties herein, the Honourable Court be pleased to grant interim protection measures in the nature of injunction staying the termination of the Applicant's contracts

Tender No. KPA/107/2023-24/TE dated 2nd February, 2024 and Contract Tender No. KPA/205/2023-24/TE dated 19th April, 2024 for the supply of spare parts for Kalmar Terminal Tractors and supply for spare parts for Kalmar Reachstackers; and

f. Costs of the application be provided for.

3. In summary, the grounds in support of the application are that the Plaintiff and the have been in contractual relationship since 2nd February, 2024 and 19th April, 2024 and which relationship was to last for the next three (30 years, that is up to 2nd February, 2027 and 19th April, 2027.

4. In a sudden turn of events, it is stated that the Defendant has proceeded to terminate the two contracts in issue without any justifiable cause or reason and also without complying with the dispute resolution clause in the contracts. It is the Plaintiff's contention that considering that the contract provides for arbitration, whenever a dispute arises, it is prudent to refer the matter to arbitration.

5. The Plaintiff further states that it has already procured the contract goods and has thus expended substantial sums in ensuring that the contract is honoured and which needs to be calculated and paid for by the Defendant. The Plaintiff avers that considering that the Defendant is determined in upholding the termination of the two contracts without referring the matter to the agreed dispute resolution mechanism or settling on the exit modalities if any, this court should intervene and restrain the Defendant from realizing its intentions until the matter goes for arbitration and the issues it has raised are resolved.

6. It is for the reasons above that they are seeking interim protection measures to restrain the Defendant or its agents from upholding the termination of the two (2) contracts dated 2nd February, 2024 and 19th April, 2024. The Applicant has expressed its desire to have the differences settled amicably to allow the parties proceed as earlier agreed or in the alternative, proper compensation be agreed upon.

7. The application is supported by the affidavit sworn on even date by Vishal Soni, its director. The affidavit contains extensive averments on how the contracts were entered into and the differences that arose during implementation of the project. It also sets out in detail what the parties agreed in terms of the contested issues such as duplicated items with different prices. This was undertaken with the Defendant's Contract Implementation Team (CIT).

8. There are annexures in support of the averments running to over three hundred and sixty (360) pages.

9. The application is opposed through a replying affidavit dated 17th December, 2024 sworn by Eveline I. Shigoli, the Defendant's General Manager, Supply Chain Management. The Defendant avers that the verifying affidavit to the plaint dated 5th December, 2024 as well as the supporting affidavit of Mr. Soni are incompetent, bad in law and fatally defective and thus out to be truck out from the court record for being filed without proper authority.

10. The Defendant contends that there is no resolution of the Plaintiff allowing the filing of the suit and swearing affidavits on behalf of the company. Still on the issue of authority, the Defendant avers that Mr. Soni perjured himself both in the verifying affidavit and the supporting affidavit since at law, the Plaintiff and Mr. Soni are two separate entities and therefore he cannot purport to act on behalf of the Plaintiff.

11. To this end, it is the Defendant's contention that upon the verifying affidavit as well as the supporting affidavit being struck out, both the plaint and the chamber summons application would remain unsupported by any evidence and thus should be struck out in limine or the same be dismissed with costs.

12. Substantively responding to the application, the Defendant confirms entering into the two contracts alluded to by the Plaintiff and the terms of three (3) years are largely not in dispute. Making reference to clause 10 of the General Conditions of Contract, the Defendant states the contracts contained mandatory requirements for the parties to make every effort to resolve any disputes or disagreements arising between them under the contract by direct negotiation in the first instance and later by arbitration upon exhausting all avenues for conducting the negotiations.

13. Accordingly, it is the Defendant's position that the negotiation process and negotiations being held between the parties has not been completed by the parties under CIT with the events constituting the matters in issue in the suit unfolding as recent as the month of November. The Defendant reiterates that the Plaintiff jumped the gun and completely ignored the dispute resolution mechanism provided under the terms of the contracts.

14. The Defendant confirms that the goods subject of the two (2) contracts are fundamental for the proper functioning of the Port of Mombasa. However, it is its position that it is of paramount importance that the supply of the goods is undertaken pursuant to an untainted contract devoid of underlying fraud in the execution and implementation of the contract.

15. Accordingly, making reference to the provisions of section 62 of the Public Procurement and Assets Disposal Act (PPADA), it is the Defendant's position that this provision required that the Plaintiff being a tenderer in a public tendering process to make a declaration not to engage in corruption or fraudulent practice and a further declaration that the person or his or her sub-contractors are not debarred from participating in procurement proceedings.

16. The Defendant states that the Plaintiff has failed to disclose to the court that the Defendant terminated the contracts by reason of its (Plaintiff) own conduct of causing misrepresentations in some of the standard parts and items included under the contracts. It has enumerated the Plaintiff's particulars of fraud and misrepresentation.

17. The Defendant further points out to a report dated 9th October, 2024 emanating at a meeting held by it by the CIT. It was to establish whether the Defendant was realizing value for its money on the supplies as required by law and to provide an opinion on whether the contracts should be allowed to continue or be terminated based on the comparative price overstatement.

18. The Defendant states that a tabulation of the price differences in the two contracts by CIT made an observation that it could not perform effective price analysis due to price duplication in the contracts and that the same created challenges in implementing the contracts. The Defendant opines that according to CIT, due to the challenges in implementing the contracts, the Defendant's management was to either recall the contracts for review or terminate the same and initiate fresh tendering process.

19. The Defendant states that by a further report dated 22nd October, 2024, CIT issued various recommendations to solve the challenges facing the implementation of the contracts among them that on the issue of duplicate items with different prices, CIT noted that the Plaintiff had conceded to having the contract reviewed taking the line item with the lowest price.

20. It is the Defendant's position that granting of the orders sought by the Plaintiff will prejudice the outcome of the intended arbitration because the Plaintiff is likely to resume performing his obligations under the said contracts in the same fraudulent manner while arbitration proceedings are underway. Further, that such an order will negate the outcome of the arbitration proceedings because the question of whether the performance of the contract ought to be resumed will be one of the key issues for the Arbitrator to determine.

21. The Defendant concludes that the balance of convenience tilts in its favour. According to it, it will be greatly prejudiced if the orders sought are granted because it will be compelled to condone and promote the fraudulent conduct of the Plaintiff and the expense of the Defendant and the public. It is the Defendant's contention that the Chamber Summons dated 5th December, 2024 be dismissed with costs to the Defendant.

22. The Plaintiff filed a supplementary affidavit dated 17th January, 2025 wherein it responded to each of the issues raised in the replying affidavit such as the issue of lack of resolution and clause 10 of the General Conditions of the Contract capping the time for parties to discuss their differences mutually within thirty (30) days.

23. The Defendant on its part filed a further affidavit dated 3rd February, 2025 which was in response to the Plaintiff's supplementary affidavit dated 17th January, 2025. In the said affidavit, the Defendant reiterates the issue of fraud and maintains that it was orchestrated by the Plaintiff. In conclusion, the Defendant avers that the subject matter of the suit is a commercial transaction and as such, the Plaintiff, the Plaintiff cannot suffer irreparable harm which cannot be compensated by an award of damages in the suit or in the arbitration.

24. Any loss that may be suffered which is denied is capable of being quantified in money terms in the unlikely event that the Plaintiff succeeds in the suit or arbitration. The Defendant thus maintains that the Chamber Summons dated 5th December, 2024 ought to be dismissed with costs.

25. Directions were taken to have the application canvassed by way of written submissions. Both parties duly complied. The Plaintiff's submissions are dated 20th January, 2025 while those of the Defendant are dated 31st January, 2025.

26. I commend the parties for putting in extra effort in ensuring that the court has sufficient material to guide it in arriving at a just decision either way. The industry demonstrated in the well – reasoned and detailed submissions complete with decided cases from this court and other superior courts is something to be emulated by parties appearing before this court and other superior courts.

Analysis and Determination

27. I have carefully considered the application, the responses, the rival submissions, the authorities cited as well as the law and I discern only one (1) issue for determination which is whether the Plaintiff has made out a case for grant of interim protection measure of injunction and refer the matter to arbitration. Corollary to this is issue of costs.

28. The application is brought under the provisions of sections 6 and 7 of the *Arbitration Act* as well as Rule 2 of the Arbitration Rules. Section 6 addresses itself to stay of proceedings and having considered the prayers being sought especially prayer (e) of the application, the most relevant provision in the resolution of the issue at hand is section 7 thereof. It provides as follows: -

> " 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.
>
> 2. Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application."

29. I do not find section 7 (2) above applicable since the subject matter of the application is yet to be referred to any arbitral tribunal and therefore no expression of any of the issues herein have been ruled upon by any other dispute resolution mechanism.

30. Section 7 (1) has been interpreted to empower court to grant interim orders for purposes of preserving the subject matter and or maintaining the status quo so as to ensure tranquility before the hearing and determination of the dispute. The primary objective of the court when intervening under Section 7 is to ensure that the subject matter of the arbitration proceedings is not jeopardized before an award is issued, thereby rendering the entire proceedings nugatory.

31. In Infocard Holdings Limited vs AG & 2 Others [2014] eKLR, the court held that section 7 does not give courts the power to look into the merits of the agreement and the dispute generally lest it interferes with the jurisdiction of the arbitral tribunal. Similarly, in CMC Holdings Limited v Jaguar Land Rover Exports Limited [2013] eKLR the court held that: -

> "...In practice, 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 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..."

32. From the two contracts in issue, it is not in contest that parties expressly agreed to make every effort to resolve amicably by direct negotiation any disagreement or dispute arising between them under or in connection with the contract. In the event parties failed to resolve the dispute or differences within thirty (30) days, either party was to give notice of its intention to commence arbitration. No arbitration would commence unless notice of intention was issued.

33. Therefore, I have no hesitation in finding that parties herein expressly agreed on a dispute resolution forum and in this case, arbitration. This is evident from a holistic reading of clause 10 of the contracts. In Alison Jean Louis vs Rama Homes Limited [2020] eKLR, it was held as follows: -

> "...where parties mutually agree and contract their own forum of choice and process of dispute resolution by virtue of Article 159 COK 2020, the court downs its tools and allows parties to pursue alternative dispute resolution mechanism, in this case, arbitration..."

34. Does it mean that where parties have expressly agreed to refer their disputes to arbitration the court will allow applications such as the present one as a matter of course? No. A party must tender evidence that a dispute has arisen to set in motion invocation of reference to arbitration. In the present case, parties are in agreement that there are issues that have arisen in terms of the performance of the contracts.

35. Indeed, the Defendant has proceeded to terminate the two contracts citing amongst other grounds that the Plaintiff has engaged in fraud. In a view of resolving the issue, the Plaintiff issued notice in terms of clause 10 (b) of the contracts.

36. Having issued termination notices to the two (2) contracts, can it be said that the Plaintiff jumped gun by resorting to court? I do not think so. This is a commercial transaction where the Plaintiff has averred that it has expended substantial sums in acquiring the products to be used in fulfilling its terms of the

contract. This averment has not been controverted at all and as such, it would be onerous to expect the Plaintiff to negotiate with the Defendant while out of work and with no offer of being put back to the position it was prior to the termination of the contracts.

37. I therefore do not find the Plaintiff's actions in moving the court for interim protection measure was premature. The Defendant does not at all appear to give the Plaintiff a chance to rectify that which the Defendant deems it wrong. Both parties expressly agreed to first make every effort to resolve any dispute or disagreement amicably by direct negotiation and if no resolution would be arrived at within thirty (30) days, either party was at liberty to give notice of intention to commence arbitration.

38. Since parties expressly consented on their dispute resolution forum, it is not this court's position to re-write what parties consciously agreed. However, as decreed by section 7 of the *Arbitration Act*, any party who feels that the subject matter of arbitration is under threat, it will not hesitate to issue the protection measure sought.

39. The subject matter of the arbitration in the present case is the performance of the two (2) contracts. Though I refrain from expressing myself on the other pending applications, I note that there are allegations that the Defendant has in fact proceeded to advertise tenders for some of the items forming subject of the present two (2) contracts. If this is the position that currently obtains, there is an obvious risk that the subject matter would dissipate in the event that no protection order is issued. This will defeat the very reason for reference to arbitration.

40. Having found as above, which is the appropriate measure of protection? In Safaricom Limited v Ocean View Beach Hotel Ltd & 2 Others (supra), Nyamu JA observed as follows: -

> " ...Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions..."

41. In the present application, the Plaintiff sought for protection measure in the form of an injunction. As was held in Safaricom Limited (above), when considering applications for grant of interim protection measures in the form of injunction, the court is not bound to determine it on the basis of Giella v Cassman Brown's principles. The Court of Appeal (Nyamu, JA) noted as follows: -

> " ...By determining the matters on the basis of the [GIELLA] principles the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names. In the case of Kenya, the *Arbitration Act* is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as "interim measures of protection" under section 7 of the *Arbitration Act*. On the other hand, in the English version of the ICC Rules for example, they are known as "interim conservatory measures". Whatever their description however, they are intended in principle to operate as "holding" orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation... An interim measure of protection such as that sought in the matter before us is supposed to be issued by the court under section 7 in support of

the arbitral process not because it satisfies the civil procedure requirements for the grant of injunctions as the High Court purported to do in this matter...”

42. Therefore, the Plaintiff's submissions based on the principles of Giella v Cassman Brown are misplaced as this is an injunction not in the sense of the civil procedure requirements but under section 7 of the *Arbitration Act*. Based on the special circumstances of the case, an interim protection measure in the nature of injunction is appropriate as it would restrain the Defendant from terminating the two subject contracts pending arbitration.

43. Before concluding this issue, prayer (d) of the application seeks that the matter be referred to arbitration. Having found that the interim measure of protection in the nature of injunction is appropriate, common sense demands that there must be a natural flow of events after issuing such an order. In the present case, I find that prayer (d) in the application is merited and is hereby allowed.

44. The last consideration is for what period must be given. Arbitration is a time bound dispute resolution mechanism and which was designed to save on time. This being the case and since parties did not submit on the timelines, I shall exercise my discretion by fixing timelines for the parties to appoint an arbitrator for the formal commencement of the arbitral proceedings and in particular, taking into account that the Defendant is a parastatal that relies on taxpayers' money. Accordingly, I find merit in the Plaintiff's application.

45. The Defendant has averred substantially and also made lengthy submissions on the issue of fraud. Issues of fraud cannot be resolved through rival affidavit evidence. It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. The Court of Appeal in Vijay Marjario v Nansingh, Madhusingh Darbar & Another [2000] eKLR held that: -

> “ ...It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleadings. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts...”

46. This being the case, I hold the view that the issue of fraud is a matter within the province of the arbitrator and I thus refrain from expressing myself on this issue.

47. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -

> “ The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”

48. Any departure from this trite position can only be for good reasons which the Supreme Court in Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion,

courts must not only look at the outcome of the suit but also the circumstances of each case. In Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR the court noted as follows: -

> "The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Costs follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

49. Considering the purpose for grant of interim protection measures, that is, they are issued not intending a litigation, I direct that each party shall bear own costs.

50. Having found as above, the following orders flow therefrom: -

    a. The application dated 5th December, 2024 has merits and the same is allowed in terms of prayers (d) and (e);

    b. The parties are directed to comply with clause 10 (2) (i) of the contracts in terms of appointment of arbitrator and in default of the same within thirty (30) days herein, reference be had to clause 10 (2) (i), (a) to (d) in the order listed;

    c. In respect to the pending applications and considering the orders in (a) above, I direct that pending the conclusion of the arbitration proceedings, the contracts be performed in terms of clause 10 (7) of the contracts; and

    d. Each party to bear own costs.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 6TH DAY OF MARCH, 2025.

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F. WANGARI

JUDGE

In the presence of:

Mr. Siminyu Advocate for the Plaintiff/Applicant

Mr. Amakobe Advocate for the Defendant/Respondent

Ms. Salwa, Court Assistant

F. WANGARI J.