Logitech & Jibril Group Limited v Kenya Ports Authority (Miscellaneous Cause E041 of 2023) [2024] KEHC 5505 (KLR) (14 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5505 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS CAUSE E041 OF 2023

DKN MAGARE, J

MAY 14, 2024

BETWEEN

LOGITECH & JIBRIL GROUP LIMITED .... PLAINTIFF

AND

KENYA PORTS AUTHORITY .... DEFENDANT

RULING

1. This matter has been pending long with court for a simple application. This may not be intentional. The matter was confused with Commercial 41 of 2023, Joselyne Nasambu Juma alias Joselyne Nasambu Sifuna Versus David Kinisu Sifuna and Nelson Muturi Dumbeyia, (Reported as *Juma v Sifuna & another (Civil Case E041 of 2023*) [2023] KEHC 25778 (KLR) (21 November 2023) (Ruling). The foregoing case was concluded in November 2023.
2. Soon thereafter, I read the first ruling in this matter. Someone without wisdom deemed to close this file instead of the HCCC 41 OF 2023 after I made my ruling in the chamber Summons after I made my ruling. The file was taken to the archives until the parties alerted me that the ruling was to be read.
3. The ruling has been ready since March 2024. I directed the matter to be reopened and the ruling be set for today. I also directed HCCC 41 of 2023 be closed to avoid confusion.
4. This a ruling is in respect of a Chamber Summons application dated 30.10.2023. It seeks the following orders:-
   a. Spent.
   b. An injunction be granted, to restrain the Defendants, its workers, agents, servants and or any other persons acting pursuant to its Tenders and or inviting Tenders for the supply of Portable water at the Port of Mombasa and Lamu being duties undertaken by the Plaintiff under Contracts Number KPA/054/2014-2015/ID dated 11th October 2015 and

Contract Number KPA/203/2020-21/GM dated 14th December 2021 respectively, pending the hearing and determination of the Arbitration between the parties.

c. An injunction be granted, to restrain the Defendants, its workers, agents, servants and or any other persons acting pursuant to its authority, from interfering with, dismantling, removing and or in any other manner whatsoever tampering with the Plaintiff's desalination plant, Machinery and other Fixtures, installed at the G-Section of the Defendant's premises at the Port of Mombasa, and used as a water Desalination Plant, pending the hearing and determination of the Arbitration, herein between the parties.

d. For purposes of interim measure of protection, an order be granted directing the Defendant not to disrupt and or in any other manner whatsoever interfere with and or stop the Plaintiff's activities of operation and supply of portable water at the Ports of Mombasa and Lamu, in terms of the contracts dated 13th August, 2021 and the contract dated 14th December 2021 respectively pending the hearing and determination of the Arbitration between the parties.

e. Prayers (b), (c) and (d) above be initially granted ex parte to last for a period of 14 (fourteen) days pending the hearing and determination of this Application inter parties."

5. The defendant raised a preliminary objection which I dismissed in limine. I was my decision then that a preliminary objection must be a pure point of law as succinctly posited in the locus classicus case of The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, made this pertinent observation where it was observed as follows: -

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop".

6. This paved way for this ruling. The Respondent filed a Replying Affidavit sworn on 28/11/2023 by Turasha Kinyanjui on 28th November 2023. Parties, filed submissions. I was frustrated by the Applicant's submissions. They are humongous repetitive and underlined unnecessary.

7. The question the by the Respondent is Whether the Plaintiff's Chamber Summons Application meets the threshold for the grant of an interim measure of protection as contemplated under Section 7 (1) of the *Arbitration Act*?

8. The Respondent filed composite submissions covering all the issues raised. They relied on the authorities of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR where the Court of Appeal, Nyarangi JA, as he was then, stated as hereunder.

> " 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 it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.

9. They stated that a court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. They buttressed their case with the decision of Samuel Kamau

Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where the Supreme Court held thus:

> "(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

10. It is their case that the *Arbitration Act* grants Courts jurisdiction to issue interim measures of protection to parties before or during arbitration. They referred to Section 7 (1) of the said *arbitration Act*. The said act is said to provide Act as doth: -

> "(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."

11. They stated that the limited jurisdiction donated to this Court by Section 7(1) of the 3 *Arbitration Act* can only be exercised if there exists an arbitration agreement between the parties. It was their case that neither the Renegotiated Contract for Supply of Portable Water at the Port of Mombasa dated 13th August 2021 nor the Contract for the Supply of Portable Water at the Port of Lamu dated 14th December 2021contain an Arbitration Clause.

12. They submitted that Clause 3.15.2 of the contract dated 13th August, 2021, on what consensus of the parties on the avenue of resolution of disputes and as such is not an Arbitration Clause as it does not clearly and exclusively provide for arbitration. They relied on Techno service Limited v Nokia Corporation & 3 others [2021] eKLR, where the Court held as doth:

> "55. The principal purpose of an arbitration clause is to provide a specialized tribunal to hear the dispute falling within the ambit of the matters governed by the agreement. Parties are at liberty to contract and to vest arbitrability determinations in the arbitrator, but only if the agreement contains clear language to that effect."

13. They stated that in the absence of evidence an arbitration agreement within the meaning of Section 7 (1) and 10 of the *Arbitration Act*, this Honourable Court lacks jurisdiction to hear and determine the suit herein.

14. They stated that the purpose of the said interim protection measures is to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued. They relied on the case of CMC Holdings Limited & another V Jaguar Land Rover Exports Limited [2013] eKLR where the Court held thus: I

> "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 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"

15. The Respondent submitted that they had demonstrated that the issue in dispute between the Applicant and the Respondent relate to the termination contracts between them and that in terminating the said contracts, the Respondent acted within its contractual rights. This of course is an argument, that I will dismiss off hand. The question whether a contract was properly terminated is within the jurisdiction of the Arbitrator. It is within the doctrine of kompetenz kompetez.

16. In the case of "Euromec *International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020*) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) Justice Mativo J, as he was then, stated as follows: -

> " any event, the question of whether there existed a dispute or not touched on the jurisdiction of the arbitrator. The arbitrator's jurisdiction could be challenged by attacking the agreement's validity or the tribunal's jurisdiction over the subject matters, among other challenges. Section 17 of the *Arbitration Act* provided for the doctrine of kompetenz-kompetenz, a jurisprudential doctrine whereby a legal body, such as an arbitral tribunal, could have competence, or jurisdiction to rule as to the extent of its own competence on an issue before it. The doctrine of kompetenz-kompetenz was enshrined in the UNCITRAL Model Law on International Commercial Arbitration and Arbitration Rules. Article 16(1) of the Model Law and article 23(1) of the Arbitration Rules both dictated that the arbitral tribunal was to have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

17. They stated that, the said contracts, cannot be preserved under Section 7 of the *Arbitration Act* since if the court were to grant the orders as sought, it would mean that the Court would be preventing one of the parties to the contracts from terminating the contracts. They relied on the case of Seven Twenty Investments Limited v Sandhoe Investment Kenya Limited [2013] eKLR where the Court held thus:

    27. The issue in dispute between the Plaintiff and the Defendant herein relate to the termination of an agreement between them. Such an agreement cannot be preserved under Section 7 of the *Arbitration Act* as it is not subject matter that is capable of being preserved it does not present a situation for this court to be satisfied that irreparable loss will result unless the relief was granted. If the court were to grant the orders as sought, it would mean that the court would be preventing one of the parties to the contract from terminating the contract.

    28. Once such a party is prevented from exercising what it would be entitled to do under an agreement between itself and the other party, it would essentially mean the court would be re-writing the contract that had been entered between the parties. There would therefore be no dispute capable of being referred to the arbitral tribunal as the court would have stopped such termination any way. There would be no motivation for such a party who would be enjoying the contract to go to arbitration. 30. Termination of a contract cannot therefore be deemed to be the subject matter to be preserved under Section 7 of the *Arbitration Act*.

18. Respondent stated that orders for specific performance are final in nature and cannot be granted at an interlocutory stage. They placed reliance on Godfrey Otieno Onyango (Suing on Behalf of Ronald Onyango) & 2 others v Crispin Oduor Obudo & 8 others [2014] eKLR, where the Court held thus:

> " In prayer 5, the Plaintiffs seek an order of specific performance against the 1st and 2nd Defendants. An order of specific performance is final in nature and cannot be granted at this

interlocutory stage. There needs to be proof whether there were valid agreements in place between the parties herein. In any case the Plaintiffs have not produced sufficient evidence to demonstrate that the Defendants were bound to perform the agreements they intend to enforce. … 77. In my view the current matter is not a straight forward one and, in the circumstances, a mandatory order cannot issue. Further, prayer 7 as framed by the Plaintiff is tantamount to an order for specific performance which I have earlier declined.

19. They stated that prayers c and d in the Application herein, as framed by the Applicant, are tantamount to prayers for orders for specific performance. They urged me to dismiss the case.

20. The Respondents went a great length to submit on questions I had dealt with in my earlier. I need not regurgitate the herein.

21. The applicant on the other hand stated that on 1st April 2014, the defendant floated tender number KAP/098/2013.14/ID, for the supply of potable water to the port of Mombasa. Afterwards, under tender number KPA/054/2014-15/ID, when Ms Associated electrical and Hardware supplies Limited was awarded a 10 (ten) year contract 16th October 2015 for the supply aforesaid.

22. On 15th April 2016, Associated Electrical and Hardware supplies assigned the contract to Ms Logitech International Limited, which on 30th October 2020, changed its name to Logitech and Jibril Group limited, the plaintiff herein. The Plaintiff avers that in order to be able to supply the water as per the requirements of the defendant, it with the consent authority approval and knowledge of the defendant constructed and put up a water desalination plant on the defendant's land, which was land allocated to it by the defendant.

23. To them this was a private public partnership. The contract was to run for ten years. It took two years to constructive a massive desalination plant. It was reportedly renegotiated. The parties were using same contracts. The renegotiation is not in issue.

24. It was their case that on 28.9.2023 the contract was terminated with immediate effect. This means from 28.9.2023. the question then is whether there is a contract in situ. The Applicant stated that there were 3 reasons provided for termination of contract. The relevant clause reads as follows: -

" The employer may, without prejudice to any other remedy for breach of contract, by written notice of default sent to the contract, terminate this contract in whole or in part;

(a If the contractor fails to supply potable water to the required quality or quantity, or the other agreed services within agreed periods specified in the contract, or within any terms in any subsisting service levels agreement (SLA) between the employer and the contractor.

(b if the contractor fails to perform any other obligation(s) under the contract.

(c if the contractor, in the judgment of the employer or competent authority, that is, a court of law, has engaged incorrupt or fraudulent practices in bidding for renegotiation or in executing he contract."

25. It was the Applicant's case that none of the reasons provided above were the basis for termination. stated that there is a dispute that requires arbitration. They stated that the contract provided that stated that any of the parties can defect to and agreed nation forum and or Arbitration.

26. It is their case that arbitration has commenced by dint in Section 34 (3) of the *limitation of actions Act*. Section 34 of the Act provides as hereunder: -

(1) This Act and any other written law relating to the limitation of actions apply to arbitrations as they apply to actions. (2) Where a submission contains a term that no cause of action shall accrue in respect of a matter, the cause of action, for the purposes of this Act and of any other written law relating to the limitation of actions (whether in their application to arbitration or to other proceedings), accrues in respect of any such matter at the time when it would have accrued but for that term in the submission. (3) For the purposes of this Act and of any other written law relating to the limitation of actions, an arbitration is taken to be commenced when one party to the arbitration serves on the other party a notice requiring him to appoint anarbitrator or to concur in the appointment of an arbitrator or, where the submission provides that the reference shall be to a person named or designated in the submission, requiring him to submit the dispute to the person so named or designated.

(4) Any such notice as is referred to in subsection (3) of this section may be served in the manner prescribed for the service of a civil summons, as well as in any other manner provided in the submission.

(5) Where the court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration shall cease to have effect with respect to the dispute referred, the court may further order that the period between the commencement of the arbitration and the date of the order of the court be excluded in computing the period of limitation prescribed for the bringing of an action or commencement of arbitration proceedings with respect to the dispute referred.

(6) In relation to an arbitration under a written law, subsections (3) and (4) of this section have effect as if the references to the submission were replaced by references to such provisions of the written law as relate to the arbitration.

27. It is their case that the disruption of business for supply of water will result in a total waste of resources and will make then suffer irreparable damage. This was due to: -

a. The machinery installed thereat is tailor made to source sea water from the dep areas of the shoreline for desalination.

b. Such machines can only be used at the shoreline and particularly where they have been installed at the defendant's premises.

c. There is no other consumer who will contract for such huge volumes of water as the consumed by the defendant on a daily basis.

d. Therefore, an abrupt and unplanned disruption will be to the detriment of the plaintiff.

28. It is this case that the applicant intends to float tenders and as such it is necessary to preserve the subject matter. The evidence of floating was however not given.

Analysis

29. What is not in doubt is that trough the defendant alleged otherwise there is a contract in situ with clause related to arbitration. There is a sequential step until arbitration. It is thus dishonest to state that there is no arbitration clause.

30. The question on whether all disputes herein will be dealt by the arbitrator is beyond the remit of the court herein on the basis of the doctrine of competence- competence. This settles this question of jurisdiction of the court. In the case of *Euromec International Limited v Shandong Taikai Power*

Engineering Company Limited (Civil Case E527 of 2020)) [supra], Mativo Jas he was then, stated as doth:-

> "In Kenya, court intrusion in arbitration proceedings is limited only to circumstances expressly permitted by the *Arbitration Act*. In this respect, section 10 of the Act provides that except as provided in the Act, no court shall intervene in matters governed by the Act. In dictatorial terms, the section limits the jurisdiction of the court to only such matters as are provided for by the Act. The section exemplifies the recognition of the policy of party's autonomy" which underlie the arbitration generally and in particular the Act.

37. Section 10 enunciates the necessity to curb the court's role in arbitration so as to give effect to that policy. The principle of party autonomy is recognized as a critical precept for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense. The Act was enacted with the key purpose of increasing party autonomy and minimizing court intervention."

31. The parties have the autonomy to decide in the arbitration the scope and powers of the arbitrator. It is not for this court to deal with the validity or otherwise of the termination. It is also not the duty of the court to reverse what has been done. The court issues order that preserve evidence and the subject matter.

32. Therefore, the only issues that arise from this claim are: -

    a. Whether the court ought to stop advertisement for other tenders.

    b. Whether the court ought to issue any orders related to the contract.

33. The question of other tenders has not been shown to be in the offing. It is a question in Vacuo. The Respondent indicated the use water supplied by Mombasa water and sanitation company effect.

34. This is a contract for suppling of very personal products. It cannot be forced on the parties. Can the court force the Respondent to consume water from the applicant the nature of the contract does not allow this court to intervene?

35. The aspect of new contracts has not been admitted. My understanding is that tenders must be dealt with on a tender by tender basis. This court cannot issue a blanket order stopping tenders that do not appear to be in the horizon. The nature of the order, appears as submitted by the Respondent to be in the nature of a mandatory injunction. It has no motivation for parties to arbitrate.

36. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in East African Industries vs. Trufoods [1972] EA 420 and Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court restated the law as follows:

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the Respondent, if it is granted."

37. The Court of Appeal in the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR further opined that:

> " …these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially… if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."

38. In the locus classicus case of Kamau Mucuha vs. The Ripples Ltd. Civil Application No. Nai. 186 of 1992 [1990-1994] EA 388; [1993] KLR 35 the Court of Appeal expressed itself as hereunder:

> …A court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the Court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted and that is a higher standard than is required for prohibitory injunction."

39. There is a prima facie case for grant of injunction. This is because the case is arguable. However not before this court. In the case of Mrao Ltd v First American Bank of Kenya Ltd& 2 others [2003] eKLR, the Court of Appeal noted that: -

> " 4. A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

40. The test for an injunction was well settled in the locus classic case of Giella = vs = Cassman Brown & Co. Ltd (1973) EA, 358, 360, sets out principles for grant of injunction. The court, stated as follows, though the wisdom of Spry VP, as then he was, as follows: -

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

41. The Supreme court was succinct in the case of Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Petition 12 of 2016) [2019] KESC 11 (KLR) (6 December 2019) (Judgment), where they held as follows: -

(52) We note in the above context that, the *Arbitration Act*, was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the Court process. The Act was also formulated in line with internationally accepted principles and specifically the Model Law. With regard to the reason why some provisions of the Act speak to the finality of High Court decisions, the Hansard of the National Assembly during the debate on the *Arbitration Act* indicates that, "the time limits and the finality of the High Court decision on some procedural matters [was] to ensure that neither party frustrates the arbitration process [thus] giving arbitration advantage over the usual judicial process." It was also reiterated that the limitation of the extent of the Courts' interference was to ensure an, "expeditious and efficient way of handling commercial disputes."

(53) Similarly, the Model Law also advocates for "limiting and clearly defining Court involvement" in arbitration. This reasoning is informed by the fact that "parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the? nullity and expediency of the arbitral process." Thus, arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Indeed, our Constitution in Article 159(2)(c) acknowledges the place of arbitration in dispute settlement and urges all Courts to promote it. However, the arbitration process is not absolutely immune from the Court process, hence the present conundrum.

(54) The Model Law indeed advises that all instances of courts intervention must be provided for in legislation. That is the explanation that the Model Law accords to Article 5 which is in pari materia with Section 10 of the Act. The said Section 10 provides, "Except as provided in this Act, no Court shall intervene in matters governed by this Act." On the other hand, Article 5 provides, "In matters governed by this Law, no court shall intervene except where so provided in this Law."

(55) In illuminating the meaning of Article 5, the explanatory notes of the Model Law provide that, beyond the instances specifically provided for in the law, no Court shall interfere in matters governed by it. That further, the main purpose of Article 5 is to ensure predictability and certainty of the arbitral process. That understanding is also discerned in the Court of Appeal decision of Singapore in the case of L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal [2012] SGCA 57 where the Court stated that:

> "The effect of art 5 of the Model Law is to confine the power of the Court to intervene in an arbitration to those instances which are provided for in the Model

Law and to 'exclude any general or residual powers' arising from sources other than the Model Law....The raison d'être of art 5 of the Model Law is not to promote hostility towards judicial intervention but to 'satisfy the need for certainty as to when court action is permissible'."

42. Interference includes avoiding issuing orders that change the status quo and affect or severely limit the arbitrator/s jurisdiction or remit. have perused the contract and not that the issue of damages regarding supply is quantifiable. The matters this court is request to rule on vis-à-vis restoring the tender and negating the termination, will be far reaching. While problematizing, contextualizing and conceptualizing the entire amalgam and gamut that is the law on arbitration, it is not foreseen, anticipated and even advisable that the court, can issue orders changing that which has already happened.

43. Last aspect of the orders sought relate to the desalination plant. On a prima facie basis, removal or destruction of the plant, will wipe the evidence of existence of the plant into oblivion. If finally, the contract is re-instated by the arbitrator, there will be nowhere to turn to. The act of allowing the destruction of the plant, will forever change the status quo in a more profound way.

44. There is equally a prima facie case for preserving the plant until the arbitrator rules otherwise. The Respondent is unlikely to suffer any prejudice. The balance of convenience tilts in favour of the Applicant to maintain the Plant.

45. I do not find any reason to interfere with tenders. There are several remedies and processes for challenging in a more profound way, tenders flouted contrary to the existing law. The in any case, when specific tenders are floated, the provisions of Public Procurement and Disposal Act will come into play.

46. Any tender that is released must be challenged appropriately as the specific tender. Those tenders are not part of the agreement between parties. It will be against public policy to confine a public resource to one party. The other tenderers also have a right, nay a duty to ensure that public tenders are shared appropriately. Extending a tender ad infinitum has an effect on the management of public resources.

47. The tender in this case relates to different financial years. If the Applicant is unable to stop its floating for any reason, they can compete favourably with other tenderers. Being unable to win an open tender is not a loss. It is a gamble a business should and must make. It cannot be that the court will know in advance which needs the defendant has.

48. As I indicated in the case of *Taireni Association of Mijikenda v Cabinet Secretary Ministry of Finance & National Treasury & 3 others (Constitutional Petition 2 of 2023*) [2023] KEHC 27039 (KLR) (19 December 2023) (Ruling), concessions sometimes are means of keeping the resources away from the public. In that case, I posited as hereunder; -

> " The next question is the nature of the port. Operation of ports, roads, airways, and pipelines are evidence of existence of a state. A state that cannot run the four strategic component misses the elements of statehood and has no right to operate. Even banana republics remain states because they can control these components. If these are surrendered, a country becomes a colony. The Montevideo convention on Rights, Responsibilities and Duties of state, article 1 thereof, provide for what constitutes a state. These include a defined territory, population, government and capacity to enter into relations with other states.
>
> The Court addressing the issue of surrender sale/lease concession, of ports to foreign/ local political interests affects the sovereignty of Kenya to act as one state with territorial integrity. This has a more profound effect, when the court notes that in the last 4 weeks,

the disputes in the Commercial division, in Mombasa have been handling cargo related to military equipment transport to neighbouring countries. I am not wrong to note that the issues raised are not idle."

49. I am unable to stop floating of unknown tenders. There has to be a process that each individual tender is challenged. In any case, the subject tender was terminated on 28/9/2023 or thereabouts. Having been terminated, the parties must challenge the termination through Arbitration. If successful they can then re-start supplying. The termination was under a contract requiring arbitration.

50. The contract having been terminated, the court can only concerve the remaining subject matter, that is the plant. This is to avoid it going to waste as the parties duel before the arbitrator

51. The business part can be dealt with by the arbitrator.

52. Therefore, only prayer (c) was proved. The rest of the of the prayers are not allowed. Parties will have to deal with those issue and when.

53. In the circumstance only prayer (c) was proved. Costs shall be in the arbitration.

Determination

54. In the circumstance I make the following orders: -

    a. Prayers a b and d of the application dated 30th October,2023 are hereby dismissed.

    b. An injunction be granted, to restrain the Defendants, its workers, agents, servants and or any other persons acting pursuant to its authority, from interfering with, dismantling, removing and or in any other manner whatsoever tampering with the Plaintiff's desalination plant, Machinery and other Fixtures, installed at the G-Section of the Defendant's premises at the Port of Mombasa, and used as a water Desalination Plant, pending the hearing and determination of the Arbitration, herein between the parties.

    c. Costs in the arbitration.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 14TH DAY OF MAY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Ms Charo for Respondent

No appearance for Applicant

Court Assistant - Brian