



Polyphase Systems Limited v Sterling & Wilson Solar Ltd & 2 others (Civil Suit E361 of 2023) [2024] KEHC 8729 (KLR) (Commercial and Tax) (22 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8729 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E361 OF 2023**

A MABEYA, J

JULY 22, 2024

BETWEEN

POLYPHASE SYSTEMS LIMITED PLAINTIFF

AND

STERLING & WILSON SOLAR LTD 1ST DEFENDANT

I&M BANK LIMITED 2ND DEFENDANT

ABSA KENYA LTD (FORMERLY BARCLAYS BANK OF KENYA LTD) 3RD DEFENDANT

RULING

1. Before Court for determination is the Chamber Summons application dated 14/8/2023 brought under section 10 of the *Judicature Act* Cap 8 Laws of Kenya, Rule 3(1) & (2) of the *High Court (Practice and Procedure Rules)* Section 6 and 7 of the *Arbitration Act* 1995, Rule 2 of the *Arbitration Rules* 1997 and the Inherent Jurisdiction of the court.
2. The applicant sought orders for interim measure of protection by freezing the funds held in the 1st respondents bank account number 2040207514 held in the 3rd respondent's bank amounting to Kshs.33,000,000/- against the applicant's performance guarantee issued under reference PBG 0771TGU193170001.
3. The summons was supported by the grounds on its face and the supporting affidavit of Kritan Saroop Saggar sworn on 14/8/2023. The applicant's case was that the 1st respondent had executed a contract for the provision of electro mechanical and ramming works for a 40MW AC Malindi Photovoltaic Solar Project. That the project was completed and tested and had started generating power.



4. That in accordance to the contract, the applicant issued a performance guarantee for a period of 24 months which expired on 30/6/2023. That the parties have a dispute that is before the Singapore International Arbitration Centre for non-payment for works done under the contract.
5. It was averred that despite the ongoing arbitral proceedings, the 1st respondent had called up the performance bond and guarantee despite its expiry on 30/6/2023. That the respondent was in breach of the terms of the contract between the parties as well as ignoring the rules of the ongoing arbitration. That the 2nd and 3rd respondent had ignored the applicant's concerns concerning the expiry of the guarantee. That in the premises, the applicant would suffer great prejudice and irreparable loss if the 1st respondent was not restrained from calling up the performance guarantee which had since expired.
6. The 1st respondent opposed the application vide a replying affidavit of Abhishek Shrivatsava sworn on 8/8/2023 and grounds of opposition of even date. It confirmed that the parties had a contract for electro mechanical works for the supply, installation and testing and commissioning the works at the site. That the terms of the contract dictated that the applicant would carry out the works as per the 1st respondent's requirements.
7. That however, the applicant caused some delays and a dispute ensued. That the applicant filed HCCC E196 OF 2021 where it made an application for an injunction to halt the 1st respondent from calling up the performance guarantee. That in the premises, the issue of calling up the guarantee was *res judicata*.
8. The 1st respondent contended that, 4 days before the expiry of the performance guarantee, it wrote to the 3rd respondent calling up the guarantee and therefore the Court could not grant any negative order. The 1st respondent termed the application as an abuse of the court process.
9. In addition, the 1st respondent raised a preliminary objection dated 28/8/2023. The preliminary objection was founded on the grounds that the court had no jurisdiction to hear and determine the application since the issues raised herein were subject to the arbitral proceedings pending before the Singapore Arbitration Center.
10. The applicant filed grounds of opposition to the objection dated 19/9/2023. It contended that the Court had the jurisdiction to hear and determine the application and that the preliminary objection did not meet the threshold laid out in the case of *Mukisa buiskits Manufacturing Co Ltd v West End Distributors* [1969] E.A 696.
11. I have considered the rival arguments as well as the submissions on record. There are two issues for determination. The first issue is whether the preliminary objection dated 28/8/2023 is sustainable and if not, whether the applicant has made out a case for the grant of the interim order of protection.
12. The preliminary objection was raised by the 1st respondent on the grounds that the court lacked jurisdiction to hear and determine the application as the matter was *res judicata*.
13. In *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696, a preliminary objection was defined as consisting a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. It is argued on the basis that the facts pleaded are true.
14. It is trite that the issue of jurisdiction need to be determined at the earliest. See *Owners of the Motor Vessel 'Lillian'(S) versus Caltex Oil (Kenya) Ltd* [1989] KLR1.
15. The 1st respondent's contention was that the issue raised in the application had already been raised and determined in HCCC E196 of 2021. That it was subject to the issues raised in the arbitral proceedings at the Singapore International Arbitration Center.



16. Having considered the pleadings before Court, it is not in dispute that the parties entered into a binding contract for the provision of electro mechanical and ramming works for a 40MW AC Malindi Photovoltaic Solar Project. The contract contained an arbitral clause which required the parties to resolve their disputes through arbitration. The parties have confirmed that the arbitral proceedings are ongoing.
17. In the present case, due to the existence of the arbitration proceedings the court's jurisdiction is limited. Section 10 of the arbitration Act ousts the Courts interference in matters arbitration unless as provided in the Act. The application before Court was anchored on section 6 and 7 of the Arbitration Act.
18. On the application, section 7 of the Arbitration Act provides: -
 - “(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.”
19. In this regard, by virtue of section 7 aforesaid, this Court has the requisite jurisdiction to handle an application for interim orders of protection made before or during arbitral proceedings. The Court finds that the preliminary objection on the ground that the matters are pending in the ongoing arbitration is not sustainable.
20. The other ground for objection was that the same issue had been litigated upon and determined in HCCOM No. E196 of 2021. I have seen the ruling made on 4/8/2021 by Mativo J (as he then was). At paragraphs 127 up to 134, the Judge dealt with the prayer whether to grant an interim measure of protection by freezing the funds sought to be frozen in the present application but declined.
21. The matter having been dealt with and determined, it is obvious that it is res judicata and this Court has no jurisdiction to re-open it by dint of section 7 of the Civil Procedure Act.
22. Accordingly, I find no merit in the application and I hereby strike it out with costs.
It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2024.

A. MABEYA, FCI Arb

JUDGE

