



**Tajiri Daima Limited v Sia Madesta Construction Limited & another (Civil Case E583 of 2023)
[2024] KEHC 11179 (KLR) (Commercial and Tax) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11179 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E583 OF 2023
JWW MONG'ARE, J
SEPTEMBER 19, 2024**

BETWEEN

TAJIRI DAIMA LIMITED PLAINTIFF

AND

SIA MADESTA CONSTRUCTION LIMITED 1ST DEFENDANT

MICHAEL OWANO T/A OWANO & ADVOCATES 2ND DEFENDANT

RULING

1. For determination is the Plaintiff's Notice of Motion application dated 27/11/2023 filed pursuant to section 7 of the *Arbitration Act* 1995, Order 51 rule 1 of the Civil Procedure Rules and section 3A of the *Civil Procedure Act*.
2. The Plaintiff prayed for a grant of interim injunction to restrain the 2nd Defendant and/or its agents from refunding a sum of 72,000 euros held in escrow to the 1st Defendant or its agents.
3. The grounds of the application were that the Plaintiff and 1st Respondent entered into an agreement for the supply of 10,000 metric tons of used rails to be divided in *portions of 1500* metric tons to be shipped from the port of Mombasa to the 1st Respondent's port of destination. A condition precedent to the agreement was that the Respondent was to deposit 72,000 Euros, 10% of the purchase amount, into the escrow account of the 2nd Respondent to secure the transaction as the Respondent is not registered in Kenya and does not have any assets in Kenya.
4. The Plaintiff averred that after execution of the agreement, a dispute arose between the parties which led the 1st Respondent to terminate the contract and demand a return of the amount in escrow. That the escrow agreement and the sale contract contain arbitration clauses however an arbitration tribunal has not been formed yet.



5. The Plaintiff is apprehensive that the 2nd Respondent being the escrow agent shall proceed to refund the Respondent the escrow amount which would cause it to lose their only security as the Respondent had no presence in Kenya.
6. In opposition to the instant application, the 1st Defendant filed a replying affidavit sworn on 8/12/2023 sworn by OLEG KRAVETS, its director.
7. He averred that despite the 1st Defendant paying a deposit of 72,000 Euros to secure 5000 metric tonnes of scrap metal, the Plaintiff did not ship the metric tonnes as agreed; that it was discovered that the 1st Defendant was a forgery that did not engage in the business of scrap metal as represented in the agreement.
8. Mr. Kravets asserted that the discovery led the 1st Defendant to ask for a refund from the 2nd Defendant as it was evident that the Plaintiff would not meet their obligations as per the agreement however the 2nd Defendant has not taken actions towards the said refund.
9. The 1st Defendant prayed for an order to strike out the application as the same is vexatious and bad in law. The 2nd Defendant also opposed the instant application vide a replying affidavit sworn on 1/3/2024 by Michael Owano.
10. Mr. Owano contended that his firm was appointed as escrow agents vide an escrow agreement dated 29/9/2023 in a sale and purchase transaction between the Plaintiff as the seller and the 1st Defendant as the buyer; that funds to the tune of 72,000 Euros was deposited into the escrow account by the 1st Defendant in furtherance to the agreement.
11. That the 1st Defendant terminated the contract with the Plaintiff and requested a refund on account of allegations of fraud by the Plaintiff and the 2nd Defendant requested for consent from both parties to access the funds in escrow and to refund the 1st Defendant as per clause 2.2.2 of the escrow agreement.
12. Mr. Owano asserted that the 1st Defendant executed the consent however the Plaintiff refused to do so therefore he could not process the refund to the 1st Respondent and that he has later on served with a court order stopping any refund to the 1st Defendant which he is obliged to adhere to.
13. In response to the 1st Defendant's replying affidavit, the Plaintiff filed a further affidavit sworn on 30/1/2024 by Johnson Wafula, its general manager.
14. He averred that the Plaintiff never presented itself to the 1st Defendant as a duly licensed scrap metal dealer but rather it informed it that they were using the license of a sister company to transact until their pending license is approved. Further that the 1st Defendant has not denied the fact that they do not have a registered office in Kenya, East Africa or the rest of the continent as such if the court were to lift the orders stopping the refund, the Plaintiff would suffer irreparably if it succeeds in the intended arbitration.

Analysis and Determination:

15. The parties canvassed their respective arguments through written submissions; the Plaintiff's submissions are dated 30/1/2024 while the 1st Defendant's submissions are dated 28/1/2024. The court has carefully considered the same together with the pleadings filed in this matter.
16. This being an application for an interim injunction, the principles to be considered are as set out in the celebrated case of *Giella v Cassman Brown* [1973] EA 358. These principles are that: (i) the applicant must prove a prima facie case with a probability of success (ii) the applicant must illustrate that he will



suffer irreparable loss and damage if the injunction is not granted (iii) If the court is in doubt, it will determine the matter on a balance of convenience.

17. The court will consider the first limb on whether the Plaintiff has illustrated that they have a prima facie case with a probability of success.
18. In the case of Mrao Ltd V First American Bank Of Kenya Ltd & 2 Others Civil Appeal No 39 OF 2002 a prima facie case was described to be:-

“... in civil cases it is a case in 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 to call for an explanation or rebuttal from the latter.”
19. It is not in dispute that the Plaintiff and the 1st Defendant entered into a sales and purchase agreement for the sale of used rails to the tune of 10,000 metric tonnes to be shipped at intervals of 1,500 metric tons per trip. The parties also entered into an escrow account management agreement whereby the 2nd Defendant was appointed to receive an amount equivalent to 10% of the first 1,500 metric tonnes.
20. A dispute arose between the parties regarding the sale agreement and the 1st Defendant terminated the contract. This led the 1st Defendant to seek to have the funds it had deposited in escrow refunded to it by the 2nd Defendant. The Plaintiff is apprehensive that the money held in escrow would be released to the 1st Defendant before the dispute between the parties is resolved through arbitration.
21. Under clause 22.1 of the sale agreement, any dispute between the parties arising thereto ought to be solved in through negotiation and if that failed, through arbitration. It is quite clear from the agreement by and between the parties that this court will therefore not consider the issues raised regarding the dispute between the parties as it has been divested of jurisdiction by virtue of the said agreement.
22. The Plaintiff submitted that the 1st Defendant is not a company resident in Kenya and with no known assets in our jurisdiction. Therefore, it follows that if it is successful in the arbitration, it may be unable to recover any amount from the 1st Defendant and the only funds capable of attachment are the ones held in escrow.
23. I note that the 1st Defendant is indeed a company registered in Latvia, and has not controverted the assertions by the Plaintiff's that it has no assets nor any presence in Kenya. It is foreseeable therefore that the Plaintiff risks being unable to execute the arbitral award against the 1st Defendant in the event that it is successful in the arbitration. The arbitration proceedings risk being rendered moot and an academic exercise should the monies held in the escrow account be released to the 1st Defendant before the same is finalised.
24. This consideration in my view shows that the Plaintiff has a prima facie and would suffer irreparable injury if the interim injunction is not granted. I therefore find that the instant application is merited and that it is in the interest of justice to grant an interim injunction pending determination of the dispute before an arbitral tribunal.
25. Each shall party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2024.

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J.W.W. MONG'ARE



JUDGE

In the Presence of:-

Mr. Bosire for the Applicant.

N/A for the Respondent.

Amos - Court Assistant

