



Multichoice Kenya Limited v Cementers Limited & another (Commercial Civil Suit E049 of 2022) [2023] KEHC 24543 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)

Neutral citation: [2023] KEHC 24543 (KLR)

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

COMMERCIAL CIVIL SUIT E049 OF 2022

MN MWANGI, J

JUNE 16, 2023

IN THE MATTER OF THE ARBITRATION ACT, 1995

-AND-

IN THE MATTER OF AN ARBITRATION

BETWEEN

MULTICHOICE KENYA LIMITED PLAINTIFF

AND

CEMENTERS LIMITED 1ST DEFENDANT

STEVEN OUNDO 2ND DEFENDANT

RULING

1. The plaintiff/applicant filed a Notice of Motion application dated 12th April, 2023 brought under the provisions of Articles 50 & 159(1) of *the Constitution* of Kenya 2010, Sections 7, 17(3) & (6) of the *Arbitration Act*, 1995, Rule 3 of the *Arbitration Rules*, 1997, Section 3A of the *Civil Procedure Act*, Order 37 Rule 14 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the law. The plaintiff seeks the following orders-
 - i. Spent;
 - ii. Spent;
 - iii. Spent;
 - iv. That pending the hearing and determination of the Originating Summons herein this Honourable Court do issue an injunction restraining the 1st defendant either by itself or through its employees, servants, agents, representatives or any other persons acting under



their instructions, from adducing and relying on the documents titled “Data Acquisition and Analysis Pertaining to Cementers Limited” or further documents and/or information filed in the impugned arbitration proceedings pursuant to the impugned ruling of the 2nd defendant in the matter of an Arbitration between *Multichoice Kenya Limited v Cementers Limited*;

- v. That pending the hearing and determination of the Originating Summons herein, this Honourable Court do issue an injunction restraining the 2nd defendant, either by himself or through his employees, servants, agents, representatives or any other person acting under his instructions, from issuing any rulings or order for directions in the matter of an Arbitration between *Multichoice Kenya Limited v Cementers Limited*, before him;
 - vi. That the costs of this application be awarded to the applicant; and
 - vii. Such other order(s) as the Court may deem fit.
2. The application has been brought on the grounds on the face of the Motion and is supported by an affidavit sworn on 12th April, 2023 by Nancy Matimu, the plaintiff’s Managing Director. In opposition thereto, the 1st defendant filed a replying affidavit sworn by Dipak Halal, the 1st defendant’s director on 24th April, 2023.
 3. On 26th April, 2023, the instant application was canvassed by way of oral submissions. Mr. Wambua, learned Counsel for the plaintiff submitted that the application herein seeks to stay arbitral proceedings between the applicant and the 1st defendant pending the hearing and determination of an appeal against the decision of the 2nd defendant, which the plaintiff disagrees with.
 4. Mr. Odhiambo, learned Counsel for the 1st defendant submitted that the impugned rulings were delivered on 17th January, 2022, whereas the Originating Summons was filed on 17th February, 2022 and served upon the 1st defendant on 16th December, 2022, approximately (ten) 10 months later. He stated that during the filing and service of the said Originating Summons, the plaintiff participated in the arbitral proceedings without disclosing about the existence of the said Originating Summons and that on 21st February, 2022 when they appeared before the Arbitrator, the plaintiff stated that it was ready to proceed further, and it applied and it was allowed to amend its pleadings. Mr. Odhiambo also stated that on 12th April, 2023, approximately two (2) months after dates for the hearing of the Arbitral proceedings were given, the 1st defendant was served with the instant application.
 5. He cited the provisions of Section 17(8) of the *Arbitration Act* and submitted that if the Court grants an order for stay of proceedings, it will delay the substance of Article 159 of *the Constitution*. In regard to the alternative prayer for an order of injunction, Counsel contended that the plaintiff has not demonstrated that it has a prima facie case with a probability of success under Section 17(6) of the *Arbitration Act*, since the Chartered Institute of Arbitration Rules which include admissibility and materiality of evidence were adopted by the Arbitrator. It was submitted by Mr. Odhiambo that the Arbitrator had powers to either admit or not admit the documents in issue in his rulings. Further, an Arbitrator can decide on questions of fraud and bad faith and as such, the issues raised in the Originating Summons can be determined later. He urged this Court to allow the arbitral proceedings to continue.
 6. In a rejoinder, Ms. Okimaru, learned Counsel appearing with Mr. Wambua for the plaintiff, stated that it was the Arbitrator’s finding that some documents could be adduced in evidence, therefore the issues raised in the Originating Summons which is an appeal against the two rulings by the Arbitrator should be ventilated before they are overtaken by events. She indicated that in the Arbitral proceedings, they are at the stage of hearing the claimant’s 2nd witness who had been made to stand down. The



plaintiff's Counsel stated that the instant application is urgent since the parties herein appeared before the Arbitrator on 31st January, 2023 and took hearing dates.

7. Mr. Njogu, who also appeared for the plaintiff together with Mr. Kilonzo and Ms Okimaru stated that although Section 17(8) of the *Arbitration Act* provides that parties can commence and conclude arbitration proceedings during the pendency of the Originating Summons but the danger herein is that the proceedings would go on. He prayed for the said danger to be averted.

Analysis And Determination.

8. I have considered the instant application, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit filed by the 1st defendant and the oral submissions made by Counsel for the parties. The issue that arises for determination is whether the applicant has satisfied the conditions for grant of an order for an injunction.
9. In the affidavit filed by the plaintiff, it deposed that it has an ongoing dispute with the 1st defendant that is currently in arbitration before the 2nd defendant who is the sole Arbitrator. The plaintiff averred that on 22nd October, 2021, it filed a Notice of Motion application before the 2nd defendant seeking the expunging of the 1st defendant's bundle of documents titled "Data Acquisition and Analysis Pertaining to Cementers Limited" which was filed before the 2nd defendant, on the ground that the said documents which were not obtained from the plaintiff were the subject of ongoing Court proceedings being HCC No. 307 of 2018; *Cementers Limited v MultiChoice Kenya Limited & 13 others*, and HCC No. 359 of 2018; *MIH Africa Limited v Cementers Limited & 3 others* (formerly Constitution Petition No. 292 of 2018), in which the question of the veracity of the documents and legality of possession of the documents by the 1st defendant is a live issue.
10. The plaintiff further averred that it opposed the 1st defendant's application dated 22nd October, 2021 which sought to adduce further documents, where it claimed that they were in the same series as the documents sought to be expunged in the plaintiff's application dated 22nd October, 2021. It was stated by the plaintiff that on 17th January, 2022, the 2nd defendant dismissed the plaintiff's application and allowed the 1st defendant's application, thus allowing the 1st defendant to adduce the impugned information and documents.
11. The plaintiff stated that being aggrieved by the said ruling, it filed the Originating Summons herein seeking to overturn the Arbitrator's ruling of 17th January, 2022, which Summons are still pending before this Honourable Court. It stated that the hearing of the arbitral proceedings is set to proceed on 27th April, 2023 with the 1st defendant cross-examining the plaintiff's 2nd witness on the impugned documents. The plaintiff contended that should the arbitration proceedings resume and the impugned documents used in the hearing, the Originating Summons herein shall be rendered nugatory.
12. The plaintiff averred that the issues raised in the said Originating Summons directly affect the jurisdiction of the 2nd defendant in going beyond the scope of the reference to arbitration, and ignoring the binding decisions of the superior Courts on illegally obtained evidence, constitutional principles on the prohibition against use of illegally obtained evidence and the subsisting orders of this Court in related matters placed before the Arbitral Tribunal.
13. The plaintiff deposed that if the present application is not allowed, it will suffer irreparable loss and harm through the wanton breach of rules of natural justice and right to a fair hearing. It also deposed that its case will be heavily prejudiced as it will be faced with illegally obtained evidence thus discrediting the general direction of the proceedings. The plaintiff stated that it has a right to a fair trial, and that the principles of natural justice require that it be given an opportunity to prosecute its Originating



Summons, and that the defendants shall suffer no prejudice in the event the instant application is allowed.

14. The 1st defendant in its replying affidavit deposed that even after the rulings were delivered by the Arbitrator on 17th January, 2021, the plaintiff continued participating in the arbitration, and did not inform the Tribunal that it had filed an application challenging the said rulings. The 1st defendant averred that when parties appeared before the Arbitrator on 28th February 2022, the plaintiff intimated to the Tribunal that it would be ready to proceed with the hearing after 16th June, 2022, when its second witness who is based outside the country would be available to take the stand. The 1st defendant further averred that when the parties herein appeared before the Tribunal on 31st January, 2023 to agree on hearing dates, the plaintiff did not refuse to take dates on account of its Originating Summons and parties agreed on ten (10) diverse dates for the resumption of the hearing of the arbitral proceedings.
15. It was stated by the 1st defendant that the instant application is only calculated to delay the arbitration that has been pending for four (4) years before the Tribunal, since it was filed approximately one (1) year after the Arbitrator delivered his rulings. The 1st defendant stated that staying the arbitral proceedings herein will negate the enjoyment of the right to have justice dispensed without any delay as guaranteed under Article 159(2)(b) of *the Constitution* of Kenya, 2010. The 1st defendant further stated that the instant application is an afterthought, as an application for stay or injunction ought to have accompanied the Originating Summons when it was filed a year ago.
16. The 1st defendant deposed that the parties herein adopted the Chartered Institute of Arbitration Rules, 2012 (Kenyan Edition), which give the Arbitrator powers to decide any question of law arising in the arbitration. It deposed that since admissibility, relevance and materiality of evidence are issues of law, the Arbitrator was empowered to decide on the same under the said rules. It further deposed that the said rules give the Arbitrator powers to decide any question of bad faith, dishonesty or fraud arising from the dispute. It averred that the evidence sought to be introduced by the 1st defendant is largely to show that the fraud committed by the plaintiff and its agents is in the manipulation of evidence to fix the 1st defendant in the construction dispute and as such, the Tribunal was well within its powers to admit evidence it deems necessary in the determination of questions before it.
17. It was the 1st defendant's case that the impugned documents were not obtained illegally since on 1st August, 2018, the Court in HCCOMM 307 of 2018; *Cementers Limited v Multichoice Kenya Limited & 13 others* granted the 1st defendant an order permitting it entry into the plaintiff's premises to search for, identify, inspect, preserve, reproduce, and remove all evidence pertaining to a construction dispute between the parties herein. Further, that on 10th August 2018, Hon. Lady Justice Nzioka in the same case issued an order allowing parties access and perusal of the materials for purposes of returning any material that fell outside the scope of the construction dispute between the parties herein.
18. The 1st defendant asserted that the plaintiff neither appealed nor sought to review the order of 1st August, 2018 and that it did not challenge the execution of the Anton Pillar Order but on 17th January 2019, it applied to have the dispute between itself and the 1st defendant wholly referred to arbitration based on the arbitration agreement between them. The 1st defendant averred that this culminated in a ruling dated 22nd May, 2019, where Hon. Lady Justice Nzioka stayed the suit between the parties herein, pending referral of the said dispute to arbitration. It stated that the dispute pending in HCCOMM 307 of 2018 is only between the 1st defendant and 13 other defendants.
19. It was stated by the 1st defendant that the plaintiff is not, and has never been a party to HCCOMM 359 of 2018; *East Africa Limited v Cementers Limited & 3 others* and that there is no issue in the said suit that can affect the jurisdiction of the Arbitrator regarding the dispute between the plaintiff and



the 1st defendant herein. It further stated that privilege cannot protect either a client or an Advocate from any communication made in furtherance of any illegal purpose. The 1st defendant averred that the documents obtained through the Anton Pillar Orders, are evidence of communication relating to the falsification of evidence placing blame on the 1st defendant in the construction dispute. It contended that for the said reason, there is no proprietary information about Multichoice or MIH that was collected and which has been adduced before the Arbitral Tribunal.

20. It was stated by the 1st defendant that in order to use the evidence seized in the arbitration, it did not need to seek any authorization from the Court because in the words of Hon. Lady Justice Nzioka in her ruling delivered on 22nd May, 2019, the Anton Pillar Order was granted to seize evidence relevant for use in arbitration. It further stated that the plaintiff has not demonstrated any prejudice or the loss it stands to suffer in the event that the instant application is disallowed. It also stated that the balance of convenience tilts in favour of the 1st defendant.
21. Although Mr. Wambua, one of the Advocates for the plaintiff submitted that the instant application seeks to stay the arbitral proceedings between the plaintiff and the 1st defendant, the order granted in regard to that prayer is spent as the order was meant to last during the hearing and determination of the application herein. The instant application bears no prayer for stay of proceedings pending the hearing and determination of Arbitral proceedings. This Court is now left to determine whether the plaintiff has made out a case to warrant being granted an order of temporary injunction.
22. An order for an interlocutory injunction is a discretionary remedy that is granted on the basis of evidence and sound legal principles. The onus is on the applicant to satisfy the Court that it should be granted an injunction. The conditions for interlocutory injunctions were laid down by the Court in the case of *Giella v Cassman Brown & Company Limited* [1973] E A 358, where the Court expressed itself as follows-

“Firstly, 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.”
23. On the issue of whether a prima facie case with a probability of success has been established by the plaintiff, I am bound by the Court of Appeal decision in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, where the Court considered what constitutes a prima facie case as follows-

“So, what is a *prima facie* case” I would say that 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 as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”
24. This Court notes that there are ongoing Arbitral proceedings between the plaintiff and the 1st defendant herein. It is also noted that vide rulings delivered on 17th January, 2022, the sole Arbitrator who is the 2nd defendant herein, allowed the 1st defendant to cross-examine the plaintiff’s second witness while relying on a bundle of documents titled “Data Acquisition and Analysis Pertaining to Cementers Limited”. The plaintiff being aggrieved by the said decisions filed an Originating Summons seeking to



- overturn the rulings of 17th January, 2022. The plaintiff thereafter filed the instant application seeking orders of temporary injunction to restrain the 1st defendant from adducing evidence and/or relying on the said documents; and to restrain the 2nd defendant from issuing any rulings or order for directions in the Arbitral proceedings pending the hearing and determination of the Originating Summons.
25. This Court has to determine whether the plaintiff's appeal against the decision of the sole Arbitrator has a probability of success. The plaintiff contended that in allowing the 1st defendant to rely on the bundle of documents titled "Data Acquisition and Analysis Pertaining to Cementers Limited", the Arbitrator determined a matter that goes beyond the scope of the reference to arbitration, disregarded the orders of the High Court in HCC No. 359 of 2018; *MIH Africa Limited v Cementers Limited & 3 others* (formerly Constitution Petition No. 292 of 2018), in which the question of the veracity of the documents and legality of possession of the documents by the 1st defendant is a live issue. It is also contended that the Arbitrator ignored the binding decisions of the superior Courts on illegally obtained evidence and that he ignored the constitutional principles on prohibition of use of illegally obtained evidence.
 26. The 1st defendant on the other hand stated that pursuant to the adoption of the Chartered Institute of Arbitration Rules, 2012 (Kenyan Edition) by the parties to the arbitration, the Arbitrator had the power to decide any question of law arising in the arbitration. It is this Court's finding that since admissibility, relevance, and materiality of evidence are issues of law, the Arbitrator was empowered to decide on the same under the said rules. For this reason, the Arbitrator did not go beyond the scope of the reference to arbitration in allowing the 1st defendant to rely on the bundle of documents titled "Data Acquisition and Analysis Pertaining to Cementers Limited".
 27. On the issue that the impugned documents were obtained illegally, the 1st defendant averred that they were not obtained illegally since vide a ruling delivered on 1st August, 2018, the Court in HCCOMM 307 of 2018; *Cementers Limited v Multichoice Kenya Limited & 13 others* granted the 1st defendant an order permitting it entry into the plaintiff's premises to search for, identify, inspect, preserve, reproduce, and remove all evidence pertaining to a construction dispute between the parties herein. In addition, on 10th August 2018, Hon. Lady Justice Nzioka in the same suit issued an order allowing parties access and perusal of the materials for purposes of returning any material that fell outside the scope of the construction dispute between the parties herein.
 28. The decisions by Hon. Lady Justice Nzioka have never been varied and/or set aside by a Court of competent jurisdiction. On 17th January, 2019, the plaintiff applied to have the dispute between itself and the 1st defendant wholly referred to arbitration based on the arbitration agreement between them. The 1st defendant contended that vide a ruling dated 22nd May, 2019, Hon. Lady Justice Nzioka allowed the plaintiff's request by staying the suit between the parties herein, pending referral of the said dispute to arbitration. The Court further held that the Anton Pillar Order was granted to seize evidence relevant for use in arbitration. The 1st defendant argued that in order to use the evidence seized in the arbitration, it did not need to seek any authorization from the Court.
 29. It is notable that the plaintiff has not challenged, rebutted and/or controverted the averments by the 1st defendant contained in its replying affidavit in opposition to the instant application. Further, it is not disputed that the plaintiff is not, and has never been a party to HCCOMM 359 of 2018; *East Africa Limited v Cementers Limited & 3 others*, therefore there is no issue in the said suit that can affect the jurisdiction of the Arbitrator regarding the dispute between the plaintiff and the 1st defendant herein.
 30. In light of the foregoing analysis, I hold that the documents that were seized pursuant to a Court order were not obtained illegally. I further hold that in allowing the 1st defendant to rely on the



said documents, the 2nd defendant did not deal with matters outside the scope of the reference to arbitration. It is my finding that the plaintiff has not demonstrated that it has a *prima facie* appeal by way of the Originating Summons, with high chances of success.

31. The plaintiff contended that in the event that the application herein is not allowed, it will suffer irreparable loss and harm through the wanton breach of rules of natural justice and right to a fair hearing. It also contended that its case will be heavily prejudiced as it will be faced with illegally obtained evidence thus discrediting the general direction of the proceedings.
32. The application herein has been brought pursuant to the provisions of Section 17(6) of the [Arbitration Act](#), 1995 which provides that -

“Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.”
33. Section 17(8) of the [Arbitration Act](#), 1995 provides the following-

“While an application under subsection (6) is pending before the High Court the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided and such award shall be void if the application is successful.”
34. Based on the foregoing provisions, the plaintiff has not demonstrated that it stands to suffer irreparable loss and harm in the event the instant application is not allowed since under the provisions of Section 17(8) of the [Arbitration Act](#), 1995, the sole Arbitrator’s award shall not take effect until the Originating Summons herein is decided. Further, in the event the plaintiff is successful in the said Summons, the Arbitrator’s award shall be varied and/or set aside.
35. It is worth noting that the impugned rulings were delivered on 17th January, 2022, whereas the Originating Summons was filed on 17th February, 2022 and served upon the 1st defendant on 16th December, 2022. Service was done approximately 10 months after the filing of the Originating Summons. It is not disputed that the plaintiff continued participating in the arbitral proceedings after delivery of the rulings in issue without informing the 2nd respondent that it had filed Originating Summons to challenge his decisions to allow the 1st defendant to rely on the bundle of documents titled “Data Acquisition and Analysis Pertaining to Cementers Limited”.
36. All along, the plaintiff indicated to the 2nd respondent that it has always been ready to proceed with the hearing of the dispute before him, and when the plaintiff appeared before him on 31st January, 2023, ten (10) diverse dates for the resumption of the hearing of the Arbitral proceedings were agreed on. Moreover, the 1st defendant was served with the instant application on 12th April, 2023, approximately two (2) months after dates for hearing of the Arbitral proceedings were given.
37. In the said circumstances, this Court finds that the plaintiff is guilty of laches. Consequently, the balance of convenience tilts in favour of the 1st defendant. To this end, I am guided by the decision in the case of *Showind Industries v Guardian Bank Limited & another* [2002] 1 EA 284 cited with authority by the Court in [Peter Kairu Gitu v KCB Bank Kenya Limited & another](#) [2021] eKLR. In the former case, Ringera J., (as he was then was) stated thus-

“.....an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant’s case is very strong and straight forward. Moreover, as the remedy is an



equitable one, it may be denied where the Applicant's conduct does not meet the approval of Court of equity or his equity has been defeated by laches"

38. In order for a Court to issue an interlocutory injunction, an applicant has to meet all the three conditions set out in the case of *Giella v Cassman Brown & Company Limited (supra)*. See [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) [2014] eKLR. The plaintiff has however failed to meet the said conditions.

39. I find that the application dated 12th April, 2023 is devoid of merit. I dismiss it with costs to the 1st defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JUNE, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Njogu with Ms Okimaru for the plaintiff/applicant

Mr. Odhiambo h/b for Mr. Nderitu SC for the 1st defendant

Ms B. Wokabi – Court Assistant

