



**Ruwatex Africa Limited v T.Y.P.S.A Consulting; Cabinet Secretary
Ministry of Finance & 3 others (Interested Parties) (Civil Case 888 of 2021)
[2023] KEHC 20842 (KLR) (Commercial and Tax) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20842 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 888 OF 2021
JWW MONG'ARE, J
JULY 24, 2023**

BETWEEN

RUWATEX AFRICA LIMITED PLAINTIFF

AND

T.Y.P.S.A CONSULTING DEFENDANT

AND

CABINET SECRETARY MINISTRY OF FINANCE INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

PRECISION CAPITAL LIMITED INTERESTED PARTY

KENYA TRADE INVESTMENT CENTRE LTD INTERESTED PARTY

RULING

1. On November 7, 2021 the Applicant obtained interim orders staying the proceedings in this matter. The said interim orders were confirmed on October 14, 2022 and an order referring the suit to arbitration and staying the proceedings in this suit was granted. Since then, it is alleged that the Plaintiff has taken no steps to comply with the said order. On December 8, 2022, the Defendant Applicant filed the current application by vide a certificate of urgency seeking the following orders;
 1. Spent
 2. Spent
 3. That the interim order of protection issued by this court on November 1, 2021 and further confirmed and/or maintained on October 14, 2022 be discharged and or set aside.



4. That in the alternative to prayer 3 above, the interim order of protection issued by this Court on November 1, 2021 and further confirmed and/or maintained on October 14, 2022 be varied to extent that the said order be conditional on both the Plaintiff and the third Interested Party herein commencing arbitration proceedings within strict timelines to be imposed by the court.
 5. That in the event of failure by both the Plaintiff and the third Interested Party to commence arbitration proceedings with the timelines set by the court as per prayer 4 of the Application herein, the interim order of protection issued on November 1, 2021 and further confirmed and/ or maintained on October 14, 2022 be discharged.
 6. That the costs of the Application herein be awarded to the Defendant.
 7. That any other or further and consequential orders and/ or directions be given.
2. The Application is supported by the grounds set therein and a supporting affidavit sworn by Joaquin Bardba Zalvide, the Managing Director-Africa, of the Defendant. The application is opposed and the 3rd and 4th Interested Parties filed their responses. There was no response by the Plaintiff or the 1st and 2nd interested parties and did not attend court for submissions on the application.
 3. The Defendant/Applicant has moved the court to set aside the interim orders of injunction affirmed on October 14, 2022 by the court to allow arbitration are being abused by the Plaintiff and the 3rd & 4th interested parties who have failed to get the arbitration process moving as per the courts direction.
 4. The Applicant further argues that the inaction by the Plaintiff has denied the Defendant its rightful claim to payment by the 1st Interested Party of its dues on the consultancy contract amounting to Kshs 1,100,000,000/- for work done. Under the said contract, it was the obligation of the Plaintiff to procure the payment of the consultancy fees above and the order for stay is being used by the Plaintiff to frustrate the agreement between itself and the Defendant Applicant.
 5. The Applicant argues that when the orders of injunction were issued, no arbitration process had been commenced, hence the same were issued in a vacuum and should be vacated or varied. Further, the entry into the scene by the 3rd and 4th Defendant who purport to have a contract with the Defendants, accordingly, only work to further delay the realization of the payments due to the Defendant under the agreement between the Defendants and the Plaintiffs. The two interested parties attempt at having the matter referred to a single arbitrator has been frustrated by the Plaintiff who have failed and or refused to participate in the same.
 6. The Applicant therefore urges the court to vacate the orders of October 14, 2022 under Order 40 rule 7 of the *Civil procedure*. In the alternative, if the court does not vacate the Injunction order, to direct timelines within which the Arbitration proceedings should be commenced and give directions on the fate of noncompliance with said court orders.
 7. The Plaintiff/Respondent filed grounds of opposition dated January 13, 2023 which they sought to rely on entirely. The Plaintiff did not file a Replying affidavit.
 8. The 3rd Interested Party opposed the application and submitted that it had made attempts to refer the dispute the Defendant and itself to arbitration. The 3rd Interested Party argued that there was nothing pending before the court as the orders of October 14, 2022 disposed of the issues and parties were asked to resolve the matter through arbitration. The 3rd Interested Party maintained that the court therefore lacked jurisdiction to review its own orders as sought by the Applicant as by virtue of the said orders



it was functus officio. The 3rd Interested Party urged the court to let the injunction stay pending the arbitration proceedings as an order vacating or varying the same would greatly prejudice them.

9. The 4th Interested Party also filed grounds of opposition and a Replying Affidavit. The 4th Interested Party urged the court to maintain the status quo as there were no sufficient grounds adduced by the Applicant to warrant setting aside or varying the injunctive orders. The 4th Interested Party submitted that they had considerable interest in the outcome of the suit and deserved an opportunity to argue their case and the same would be defeated if the injunction was lifted as the same would jeopardize their claims within the contested agreement between the Plaintiff and the Defendant. The 4th Interested Party stated that they had initiated arbitral proceedings and the same were ongoing and should be allowed to proceed to their logical conclusion with the status quo being maintained.

Analysis and Determination: -

10. I have considered the pleadings and the documents filed in support of the respective positions taken by either side. I note that there is in place an order of injunction issued by this court on November 1, 2021 and confirmed by the same court on October 14, 2022 and the said order further directing the parties to resolve the disputes before an arbitrator in line with the terms and conditions set out in the consultancy agreement between the Plaintiff and the Defendant. I further note by orders of this court the 3rd and 4th Interested Parties were allowed to be enjoined in the suit and the same have maintained that they have a stake in the consultancy agreement between the Plaintiff and the Defendants and have separate agreements with the Defendants as facilitators. The issue therefore that this court has to determine is “whether it has jurisdiction to interfere or vary with order of this court issued on November 1, 2021 and confirmed by the court on October 14, 2022”. Arising from the orders of this court directing the parties to submit themselves to arbitration, it has been argued that this court is bereft of jurisdiction to review or vary the said orders as sought by the Defendant herein. In my view, this is not the position as the court has a duty to ensure that which it ordered has been complied with, in order to avoid a situation like the one prevailing in the present suit.

11. Section 7 of the [Arbitration Act](#) 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.”

Secondly, and in so far as the jurisdiction of the court is concerned, this court is clothed with original and inherent jurisdiction in civil and criminal matters under the [constitution](#) of Kenya in article 165(3) therefore which states as follows;” (3) Subject to clause (5), the High Court shall have-- (a) unlimited original jurisdiction in criminal and civil matters;”.

12. In any event, courts have held that the [Arbitration Act](#) and the presence of an arbitration clause in an agreement does not oust the jurisdiction of the court per se, but stays the matter pending the conclusion of the arbitration process. This position was reiterated by the Court of Appeal in the case of [Tononoka Steels Limited V Eastern and Southern Africa trade And Development Bank](#) [1999] eKLR, the Court of Appeal held that an agreement cannot oust the jurisdiction of the courts. Instead, the least the court can do is to stay the process pending the arbitral process.



13. To my mind and guided by the law and the decisions emanating from the courts I find that this court has jurisdiction to vary or review the orders issued by it when moved by an application such as the one presently before it. In the premises therefore, and noting that the 3rd and 4th Interested Parties have initiated arbitral proceedings in compliance with orders of this court, the court hereby directs that the Plaintiff, on whose application these orders were granted, to forthwith and within 90 days from the date herein initiate the arbitral proceedings on its part. The matter will then be mention for further directions on November 1, 2023. Costs of this application shall be met by the Plaintiff herein. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF JULY 2023

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

Ms. Onyango holding brief for Dr. Fred Ojiambo S.C for the Applicant/Defendant.

Mr. Kegode holding brief for Mr. Agimba for the Plaintiff/Respondent.

Ms. Kanini for 1st & 2nd Interested Party.

Mr. Esilaba holding brief for Mr. Angaya for the 3rd Interested Party.

Mr. Makau holding brief for Ms. Okonu the 4th Interested Party.

Sylvia- Court Assistant

