IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

COMM. CASE NO. E069 OF 2021

BETWEEN

VS HYDRO RWANDA LIMITED..... PLAINTIFF

AND

OMNIHYDRO LIMITED.....1ST DEFENDANT

BANK OF KIGALI PLC..... 2ND DEFENDANT

I & M BANK RWANDA LIMITED .....3RD DEFENDANT

SIDIAN BANK LIMITED .....4TH DEFENDANT

NCBA BANK LIMITED..... 5TH DEFENDANT

I & M BANK LIMITED..... 6TH DEFENDANT

RULING

Introduction

1. The application for consideration is the Plaintiff's Notice of Motion dated 3rd February 2021 made, inter alia, under **Section 7** of the ***Arbitration Act, 1995***. The Plaintiff seeks an interim measure of protection pending the hearing and determination of arbitral proceedings restraining the Defendants from processing and/or releasing the payment of the sum of USD 1,535,563.24 and Euros 930,460.90 or any part thereof as demanded by the 2nd and 3rd Respondent's swift messages calling on the Bond Nos 0222949, 0222950, 0222951, 0222952 and 0410/CAD/ME/APG/0396-2002.

2. The application is supported by the affidavit of Usgoda Arachchige Manjula Kositha Sanjeewa, the Plaintiff's Logistics Manager in charge of East Africa sworn on 3rd February 2021 and an undated supplementary affidavit. It is opposed by the 1st Defendant through the affidavit of its director Jacques Philippe Henri Marrier D'unienville sworn on 22nd February 2021. It is also opposed by the 4th Defendant through the affidavit of its Legal Officer, Stella Kendi, sworn on 19th February 2019 and by the 3rd and 6th Defendants through the affidavit of Jackson Maithya Kiyungu, its Manager-Trade Finance Department, sworn on 1st March 2021. There was no response from the 2nd and 5th Defendants. The application was canvassed by way of written submissions with the parties advancing their respective positions.

Background

3. The facts giving rise to the dispute set out in the plaint and depositions are not generally disputed. The Plaintiff, 1st, 2nd and 3rd Defendants are limited liability companies incorporated in Rwanda. The 2nd and 3rd Defendants have their offices in Kigali, Rwanda and are licensed to carry on banking business in that country.

4. The Plaintiff and the 1st Defendant entered into a contract dated 8th June 2017("the Contract") for the design, engineering, procurement, construction, commissioning and testing of *Mushishito Rukarara* Hydro power Project in Rwanda ("the Project"). Under the Contract, the Plaintiff, through the 2nd Defendant issued the 1st Defendant with Performance and Advance Payment Guarantees Nos 0222949, 0222950, 0222951, 0222952 all dated 4th September, 2020 and the 3rd Defendant issued the 1st Defendant with an Advance Payment Guarantee No. 0410/CAD/MF/APG/0396-2002 on 16th October, 2020.

5. The Plaintiff contends that despite performing its obligations under the terms of the Contract, the Project was delayed due to several unforeseen Force Majeure events more particularly; Catastrophic landslides in March and May 2018 and December, 2019 which necessitated redesigns of the project and; the Covid-19 pandemic in 2020. The 1st Defendant notified the Plaintiff that due to the delay it had decided to separate the remaining scope of works into two parts; some of the original scope of works to be completed by the Plaintiff and the remainder to be completed by the 1st Defendant and its new owners' engineers and advisors, Sivest (Pty) Limited("Sivest").

6. The Plaintiff states although it agreed with the 1st Defendant on the terms of engagement with Sivest in May 2020, the 1st Defendant continuously acted in bad faith in altering its position on issues agreed upon despite Sivest having taken over the agreed scope of works. It now claims that 1st Defendant and Sivest have effectively taken over the Project including control of the Project site, staff and equipment of the Plaintiff. Further, that the 1st Defendant acting in clear *mala fides* occasioned substantial delays in the execution of **Amendment 6** as agreed by the parties in August, 2020. The Plaintiff stated that on 26th November 2020, the 1st Defendant called the Bonds, while communicating to the Plaintiff a draft of **Amendment 6** containing terms materially and substantially different from those earlier agreed by the parties.

7. The 1st Defendant does not deny that it called in the Bonds. It takes the position that it called in the Bonds as a result of breaches of the Contract by the Plaintiff and not on the basis of the alleged delays, force majeure, or **Amendment 6**. It states that **Amendment 6** was in fact a draft document whose terms were being negotiated expressly "subject to contract" and "without prejudice", and further that there was no agreement on fundamental terms of the draft amendment. It pointed out that the allegations by the Plaintiff relating to alleged delays, force majeure, are governed by the dispute resolution mechanism set out in **Clauses 20.2, 20.3** and **20.4** of the Contract which provides that where any dispute that cannot be settled amicably under **Clause 20.2** or where there is no final and binding decision from an expert under **clause 20.3** shall (if a party wishes to pursue the dispute) be referred to final determination by arbitration in accordance with **clause 20.4**. That the arbitration agreement is governed by English law and provides for the juridical seat of arbitration as London, England and the arbitration rules being those of the LCIA-MIAC Arbitration Centre. Therefore, the Kenyan court does not have jurisdiction to determine any issue arising from the Contract.

The Application and submissions

8. The Plaintiff's case is that **Clause 12** of the subject Bonds provides that a dispute between the parties ought to be determined through Arbitration and that the 1st 2nd and 3rd Defendants all carry out business outside of the jurisdiction of this Court and have no known assets within this Court's Jurisdiction and as such the Plaintiff is apprehensive that if the orders sought are not granted, the intended arbitral proceedings shall be rendered nugatory.

9. The Plaintiff maintains that the call for the Bonds shall irredeemably affect its business as the amount in issue is colossal and taking into account the economic effect the Covid-19 pandemic has had on businesses and livelihood of its employees. The Plaintiff states that pursuant to the 1st Defendant requesting the 2nd and 3rd Defendants to honor the afore-stated call of the subject bonds issued by the Plaintiff to the tune of USD. 1,535,563.24 and Euros 930, 460.90, the 2nd and 3rd Defendants have by the SWIFT message dated 28th January, 2021 requested the 4th, 5th and 6th Defendants to process the subject payments.

10. The Plaintiff states that **Section 7** of the ***Arbitration Act*** stipulates that it is not incompatible with an arbitration agreement for a party to request from the Court, before or during arbitral proceedings an interim measure of protection and for the High Court to grant the same and the court ought to consider; the existence of the arbitration agreement; whether the subject matter of the arbitration is under threat; in the special circumstances, which is the appropriate measure of protection after an assessment of the merits of the application and; for what period must the measure be given especially if requested before commencement of the arbitration?

11. The Plaintiff avers that the call on the Bonds by the 1st Defendant is non-compliant, erroneous and null and void for reasons that the amounts called under the Advance Payment Guarantee are over and above the value claimable under the terms of the bonds and the same contravenes **Article 17(e)** of the ***ICC Uniform Rules for Demand Guarantees*** **("URDG")** which stipulates, inter alia, that a demand for an amount greater than that available under the guarantee will be non-compliant and should not be honoured.

12. The Plaintiff submits that it has satisfied the conditions for grant of the orders sought and the Court has wide and unfettered discretion to grant the orders sought in order to preserve the subject of the intended arbitral proceedings. The Plaintiff adds that the Defendants do not stand to suffer any prejudice if the orders sought herein are granted and that it undertakes to expeditiously initiate and prosecute the intended arbitral proceedings. It urges the court to grant the prayers sought and that it is willing to abide by any conditions set by the Court for the grant of the Orders sought herein.

13. The 1st Defendant's case is that the terms of the Bonds are clear in so far as the payments to it, were to be made on-demand, without investigation or inquiry, proof or condition, or any right to set off or counterclaim, and the Plaintiff, the 1st, 2nd and 3rd Defendants are fully aware of these terms and law pertaining to on-demand bonds. It also rejects the Plaintiff's contention that its call on the bonds exceeded the financial thresholds contrary to **Article 17(e)** of the ***URDG***.

14. The 1st Defendant reiterates that the basis of the call on the Bonds was related to breaches of the Contract by the Plaintiff and not to the unrelated issues raised by the Plaintiff on the alleged delays, force majeure, or **Amendment 6**. It submits that each Bond is a contract distinct

from the Project Contract. It further submits that the 2nd and 3rd Defendants are expected to honour its demands without reference to the Plaintiff as it is not a party to the respective Bonds.

15. The 1st Defendant further contends that dispute clauses in the Bonds relate to *"the parties hereto"* and not to the Plaintiff which is not a party. It adds that the Bonds do not mention the 4th, 5th and or 6th Defendants, who are unrelated, for all purposes pertaining the 1st Defendant to the Bonds, and have been introduced by the Plaintiff for the sole purpose of these proceedings in Kenya.

16. The 1st Defendant further avers that the Plaintiff has mischaracterized the case against it and the basis of the action it seeks to avert. It submits that when the Plaintiff negotiated, and concluded the Contract with the 1st Defendant, it understood, the commercial safeguard of performance and advance payment Bonds designed to cater to contingencies of non-performance and to preserve the integrity of infrastructure contracts.

17. The 3rd and 6th Defendants' case is that they are not privy to the Contract. That the 3rd Defendant states that it only provided an Advance Payment Guarantee No. 0410/CAD/ME/APG/0396-2020 dated 16th October 2020. It contends that its obligation to make payments under the Bond would arise on receipt of demand made in accordance with provisions of the Bond, without any further proof or condition and without any right of set-off or counterclaim, and the bank shall not be required or permitted to make any other investigations or enquiry.

18. The 3rd Defendant admits the 1st Defendant called up the Guarantee. It further states that it was not aware of, and neither was it a party to the disputes between the Plaintiff and the 1st Defendant and that even if it was aware of the said disputes, it cannot be a ground for issuing an injunction to stop the said payments. It further submits that it is not a party to the said disputes which the Plaintiff wants referred to arbitration between and in the circumstances, an injunction cannot be issued against it.

19. The 3rd and 6th Defendant submit that the Guarantee was subject to ***URDG*** which delineates uniform rules for operation of Performance Guarantees. It states that under **Article 5** of ***URDG***, the Performance Guarantee is irrevocable and it is neither concerned with nor bound by the contractual relationship between the Plaintiff and the 1st Defendant, nor with the performance thereof. It further submits that it cannot rely on a dispute between the Plaintiff and the 1st Defendant's claims or defences arising therefrom in respect of its obligations under the Guarantees. The 3rd Defendant further submits that under ***URDG***, it has neither duty nor obligation to ascertain performance of the underlying contract nor can it rely on any allegations of breach of contract or non-performance to withhold payment where a complying demand is presented.

20. The 3rd and 6th Defendants submit that that it is long established that when a performance guarantee is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the Guarantee are satisfied. Therefore, any dispute between the Plaintiff and the 1st Defendant must be settled between themselves and it must honour the Performance Guarantees. It urged the court to dismiss the Plaintiff's application with costs to it.

21. The 4th Defendant avers that the Plaintiff sought three Advance Payment Guarantees and two Performance Bonds from it in January 2020. It subsequently approached its correspondent banks, the 5th and 6th Defendants herein, to issue the guarantees to the 1st Defendant in the Plaintiff's favor in Rwanda. The 4th Defendant contends that it is obligated in law to honor the guarantees once called up and stands guided by the Court's directions in this matter.

Analysis and Determination

22. I have gone considered the pleadings, submissions and depositions and even though the Plaintiff has raised a technical ground regarding the 1st Defendant's deposition, I propose to deal with the substance of the application as the facts in issue necessary for determination are not in dispute. Further, a substantial part of the matter I propose to resolve are in substance, matters of law.

23. The issue for determination is whether the Plaintiff has made out a case for the grant of an interim measure of protection under **Section 7** of the ***Arbitration Act, 1995***. It provides as follows:

> **7. Interim measures by court**
>
> (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.

24. The leading case in which the Court of Appeal outlined the principles governing the grant of interim measures of protection is ***Safaricom Limited v Ocean View Beach Hotel Limited & 2 others*** **Civil Application No. NAI 327 of 2009 [2010] eKLR** (see also ***Scope Telematics International Sales Ltd v Stoic Company Ltd and Another*** **NRB CA Civil Appeal No. 285 of 2015 [2017] eKLR**) where Nyamu JA., observed as follows;

> By determining the matters on the basis of the [GIELLA] principles the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different

names. In the case of Kenya, the Arbitration Act is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as "interim measures of protection" under section 7 of the Arbitration Act. On the other hand, in the English version of the ICC Rules for example, they are known as "interim conservatory measures". Whatever their description however, they are intended in principle to operate as "holding" orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation.

Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-

1. The existence of an arbitration agreement.

2. Whether the subject matter of arbitration is under threat.

3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.

4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties. [Emphasis mine]

25. From the facts I have outlined, this case revolves around the 1st Defendant's decision to call on the Performance and Advance Payment Bonds, respectively issued by the 2nd, 3rd and 4th Defendants Banks to the 1st Defendant at the request of the Plaintiff. In as much as the Plaintiff stated that there is a dispute between the parties herein which dispute ought to be determined through arbitration as stipulated under the terms of the subject Bonds, I agree with the 1st Defendant that the Bonds are distinct contracts to the Contract in respect of the Project and, as a matter of fact, are expected to be honored by the 2nd and 3rd Defendants without reference to the Plaintiff as the parties to the Bonds are the 1st, 2nd and 3rd Defendants.

26. The nature of payment guarantees, performance bonds and like documentary credit documents has been the subject to several decisions which the parties have quoted in their submissions at length. These decisions include ***Sinohydro Corporation Limited v GC Retail Limited and Another*** **[2016] eKLR**, ***Saj Ceramics v HMS Bergabau AG and Another*** **[2018] eKLR**, ***Transfrica Assurance Co., Ltd v Cimbria (EA) Ltd*** **[2002] 2 EA 627** and ***Kenindia Assurance Co., Ltd v First National Finance Bank Limited*** **[2008] eKLR**. The common thread in these decisions is that a Performance Bond or Guarantee is a contract independent of the primary contract. This principle was clearly explained by Lord Denning MR in ***Edward Owen Engineering Limited v Barclays Bank International Limited*** **[1978] 1 All ER 976** which has been relied on in the cases I have cited as follows;

A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course we are very familiar. It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honor the credit.

It is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller. The issuing bank agrees to pay upon presentation of documents, not goods. This rule is necessary to preserve the efficiency of the letter of credit as an instrument for the financing of trade. [Emphasis mine]

27. The Bonds contain similar terms. They are made between the 1st Defendant and the respective banks. **Clause 12** therein provides as follows:

12. The parties hereto irrevocably agree to settle any dispute which may arise under or in connection with this bond and for such purposes be resolved through arbitration and the arbitrator's decision be final. This shall be governed by and construed in accordance with the law of England and the arbitrator to sit either in NAIROBI or KIGALI for ease of access

28. In its application and the suit, the Plaintiff has invoked **Clause 12** of the respective Bond documents as a basis of its application yet it is not a party thereto. Since the Plaintiff is not a party to the arbitration agreement it now seeks to rely on, it has not established the first condition for the grant of an interim measure of protection laid down in ***Safaricom Limited v Ocean View Beach Hotel Limited & 2 others*** **(Supra).**

29. The jurisdiction to grant interim orders of protection rests on an arbitration agreement between the parties to the dispute. As the Bonds are separate agreements between the Banks and 1st Defendant, it follows that the Plaintiff case lacks any foundation and as a result the application is dismissed with costs to the Defendants.

Conclusion and Disposition

30. The Notice of Motion dated 3rd February 2021 is therefore dismissed with costs to the 1st, 3rd, 4th and 6th Defendants. The interim orders in place are now discharged.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF APRIL 2021

D. S. MAJANJA

JUDGE

Mr Marete with him Mr Osamba instructed by Osamba Otieno and Company Advocates for the Plaintiff.

Mr Mutea instructed by Gikera and Vadgama Advocates for the 1st Defendant.

Mr Wawire instructed by Wamae and Allen Advocates for the 3rd and 6th Defendant.

Mr Kuyo with Ms Omondi instructed by Coulson Harney and Company Advocates for the 5th Defendant.