REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

HCCC NO. E467 OF 2020

MASON SERVICES LIMITED & QNTRA TECHNOLOGY LIMITED.....PLAINTIFFS/APPLICANTS

VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect to the application dated 11th November 2020 wherein the applicants seek the following orders: -

a) Spent.

b) Spent.

c) THAT, pending the hearing and determination of the arbitration, the Honourable court be pleased to issue an Interim injunction against the Defendant/Respondent, its agents, servants and employees restraining them severally and jointly from terminating cancelling, reviewing altering and or interfering with the concessionary contract dated 7th February 2020 entered between the Plaintiffs/Applicants and Defendant/ Respondent and further be restrained from advertising and/or entering into any contract with any person and/or entities whatsoever in respect of the services rendered by the Plaintiffs/Applicants.

d) THAT, pending the hearing and determination of the intended arbitration, the Honourable court be pleased to issue a mandatory injunction compelling the Defendant/ Respondent, its agents, servants and/or employees to reinstate the Plaintiffs/Applicants to their contractual status and/or position held before the 5th October 2020.

e) THAT, in the alternative and without prejudice to prayers 3 and 4 above, the Honourable Court be pleased to issue an interim protection order protecting the Plaintiffs Applicants' contractual rights accrued from the concessionary contract dated 7th February 2020 entered between the Plaintiffs Applicants and Defendant/ Respondent pending the hearing and determination of the intended arbitration.

f) THAT, the Honourable court do issue such other orders as it may deem fit.

g) THAT, the costs of this application be provided for.

2. The application is brought under **Section 7(1) of the Arbitration Act** (hereinafter "the Act"), **Rule 2 of the Arbitration Rules** and **Article 159 (2(C) of the Constitution of Kenya**. The application is supported by the affidavit of the applicant's Director **Mr. Stephen Njoroge** and is premised on the following main grounds: -

a) ***That the Plaintiffs/ Applicants herein had earlier filed a Miscellaneous Application E151 of 2020 against the Defendant/ Respondent but promptly withdrew the same upon discovering a procedural technicality that was incurable.***

b) ***There exists a three (3) years concessionary contract dated 7th February 2020 entered into between the Applicants and Respondent for the installation and commissioning of an integrated parking management system for Standard Gauge Railway (SGR) passenger stations between Mombasa and Nairobi.***

c) ***That the commencement period was set for 1st April 2020 but before they commenced the installation of parking equipment, the world was hit by the unprecedented outbreak of COVID 19 Pandemic.***

d) ***That the contract was affected by a FORCE MAJEURE situation which the tender document, in Clause 3.16, had exempted any failure during the said period to be the basis of forfeiture of the performance security and/or termination of contract.***

e) ***That the passenger services were suspended between March to July when resumption of service commenced at half capacity.***

f) ***That the Applicants, pursuant to the terms and conditions of the said contract, installed parking equipment at Nairobi and Mombasa and employed 14 personnel who started collecting parking charges once the services resumed at half capacity.***

g) ***That due to the said COVID 19 Pandemic, the Applicants were unable to secure all the equipment from abroad as movement around the world was halted.***

h) ***That on 5th October 2020, without prior notice, the Respondent illegally, unlawfully and without any just cause interfered with the Applicants' management and operation of parking sites by stopping their employees from accessing its stations and collecting parking charges.***

i) ***That on 6th October 2()2() the Respondent, in total breach of the said contract with the Applicants, illegally and unlawful took over the collection of parking charges by deploying its employees.***

j) ***That on 5th October 2020, the Applicants wrote a letter to the Defendant/ Respondent and sought an explanation but to-date no response has been received.***

k) ***That before the said unilateral and blatant breach of the contract by the Respondent both parties had exchanged correspondences raising a number of issues which needed to be sorted out.***

l) ***That the salient issues which the Applicants had called for discussion through their letter of 30th July 2020 were: -***

i ***Payment of Minimum Annual Guarantee (MAG)***

ii ***Revenue share***

iii ***Commencement date for the performance bound and contract period***

iv ***Measures to be taken to improve and boost sales revenue.***

m) ***That through its Managing Director by letters of 12th May 2020 and 20th July 2020 the Respondent assured the Applicants that the effect of COVID 19 will be taken into account in respect of Minimum Annual Guarantee (MAG) and Revenue Sharing.***

n) ***That in total disregard of the effect of COVID 19 and the said assurance, the Respondent's Acting General Manager (Business & Operations) through a letter dated 8th September 2020 made several demands and expressed the Respondent's dissatisfaction with the Applicants' performance in total disregard of the FORCE MAJEURE Clause in the Tender document which clause exempted any adverse action during the current situation.***

o) ***That a dispute has now arisen between the Applicants and the Respondent in connection with the said contract.***

p) ***That the tender document, pursuant to Clause 3.14, provides for the mode of solving disputes and in case of disagreement, the same to be referred to arbitration.***

q) ***That Clause 13 of the contract provides for a similar mode of solving the disputes and that in case of disagreement, the same be referred to arbitration.***

r) ***That on 13th October 2020 the Applicants initiated the process of arbitration by asking the Chairman, Chartered Institute of Arbitration, Kenya Branch to appoint an arbitrator.***

s) ***That the Applicants have acquired contractual rights which need immediate protection awaiting the outcome of the intended arbitration.***

t) ***That the Applicants have invested heavily on equipment which have been installed and that they currently have no access to them yet the same needs immediate protection and/or preservation.***

u) ***That the Respondent, in sheer violation of the said contract, has illegally and unlawfully assumed contractual obligations accruing to the Applicants by purporting to evict the Applicant' employees from the sites and further by commencing collection of parking charges.***

v) ***That the Plaintiffs/Applicants took out a performance bond security of Kshs. 5,000,000/= which bond is valid up to 25th November 2020.***

w) ***That the Applicants have acquired equipment from abroad ready to install pursuant the terms of the said contract and have incurred huge costs in realization of its obligations and stand to suffer substantial loss and damages if the Respondent is allowed to continue with its blatant breach of the contract.***

3. The respondent opposed the application through the Replying Affidavit sworn by **Ms Milly Omido**. She avers that the Applicant on several occasions defaulted in fulfilling the terms of the delivery of the project according to the terms and conditions of the contract. She highlighted the main instances of default as follows: -

a. ***That despite the contract commencing on 7th February 2020, the Applicant had not yet installed the car Parking management system at Mombasa terminus, Voi and Mtito Andei Stations as required under the contract.***

b. ***That the Applicant had neither complied with the work plan submitted nor provided a reviewed work plan on the installation of the system in view of the Ovid-19 pandemic;***

c. ***That even though the Applicant had some installations in Nairobi Terminus, it failed to provide Automated Access Control System, Multichannel Channel Payment System, Foot Pay***

Stations, Reporting, integrated with the Respondent's ERP system as required;

d. ***That having failed to install the parking management system in Mombasa, the Applicant was collecting the revenue manually failing to deliver the objective of a service provider to manage the Parking system;***

e. ***That the Applicant failed to remit the revenue collections to the Respondent in the months of July, August and September 2020. This was despite the agreement that the revenue would be remitted by 5th of every month in arrears.***

f. ***That the Applicant failed to submit any official reports on any issues including performance report despite numerous requests.***

4. She further states that through a letter dated 28th September 2020, the Applicant admitted to being at fault in breaching their agreement and offered a variety of excuses and or promises for the default. It is the respondent's position that it was well within its rights to terminate the agreement in line with clause 11 of the contract and that the court should not interfere with the intention of the parties as clearly stated in the contract.

5. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of the orders for interim measures of protection.

6. Section 7 of the Act stipulates as follows: -

"7. Interim measures by court

(l) 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."

7. In the oft cited case of ***Safaricom Limited v Ocean View Beach Hotel Ltd & 2 others***, the court deliberated on the factors to be considered before granting the interim measure of protection and outlined them as follows: -

a. ***The existence of an arbitration agreement.***

b. ***Whether the subject matter of arbitration is under threat.***

c. ***In the special circumstances, which is the appropriate measure of protection after an assessment of the merits of the application?***

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

8. Applying the above factors to the instant case, I find that it is not disputed that the parties herein entered into an agreement that contained an arbitration clause.

9. On whether the subject matter of the arbitration is under threat, the plaintiff submitted that Applicants' rights have been infringed and violated thus precipitating the need for protection in the interim period pending arbitration as contemplated in Section 7 of the Act. On its part, the respondent submitted that it was, by dint of the provisions of clause 11 of their agreement entitled to terminate the contract following the applicant's unmitigated default of the terms of their contract. The said clause provided as follows: -

> ***"This contract may be terminated by either party by giving thirty (30) days' notice in writing but the procuring entity reserves its right to terminate the contract on it discretion without notice on account of substandard or unsatisfactory performance of the services on the part of the Tenderer. Such Termination shall not entitle the tenderer to any liquidated or unliquidated damages and shall be without prejudice to the procuring entity's right to pursue any other legal remedies available to it".***

10. The respondent argued that it is trite law that parties are bound by the terms and conditions of their agreement. For this argument, the respondent relied on the decision in ***National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd and Another*** (2002) EA 503 where it was held as follows: -

> ***"This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause.***

13. I note that it was not disputed that the applicant was unable to fulfil certain aspects of the agreement for reasons that it attributed to *force majure* following the advent of the covid 19 pandemic that had the effect of delaying or frustrating its performance of contract as had been anticipated. The applicants' case is that the respondent forcefully and unlawfully took over the contract from them. The issue that this court has to grapple with is whether subject matter of the parties' agreement is under threat. In ***BABS Security Limited v Geothermal Development Limited*** [2014] eKLR the Court stated as follows, in part, regarding the protection envisaged under section 7 of the Act: -

> ***"The protection envisaged under the section is to ensure that the subject matter of the arbitral proceedings is not in any danger of being wasted or dissipated before the final decision by the arbitral tribunal is made on the matter. But the ultimate decision will depend on the peculiar circumstances of each case and matters such as: the nature of the contract to be reserved' the nature of and the potential of dissipation o the subject of the arbitral proceedings: and any other relevant factor attending the case will guide the decision of the Court in determining whether or not an order for interim Protection should be made."***

14. My finding is that owing to the undisputed fact that the contract between the parties has for all intents and purposes been terminated, albeit unlawfully according to the applicants, one can say that the orders sought to restrain the respondent from terminating cancelling, reviewing altering and or interfering with the contract have technically been overtaken by events.

15. My further finding is that in the circumstances of this case, it is not possible to compel the respondent to continue with the contract or hold that the contract between the parties is or should be in the same state that it was at its inception in view of the fact that a contract is by its very nature voluntary venture. I am guided by the words of Odero J. in ***Simba Corporation Limited v Caetano Formula East Africa, SA*** [2019] eKLR where she observed that parties have the freedom to enter into and to opt out of contracts as they wish and that accordingly, the Court should be reluctant to compel a party to remain tethered to a contract where that party has already in compliance with said contract, indicated its intention to opt out of the Agreement.

16. My understanding of the applicants' case and argument is that they are apprehensive that the respondent might enter into a fresh agreement with another entity thereby jeopardizing their chances of continuing with the contract. They therefore seek orders to preserve the contract pending the outcome of the arbitral proceedings. Courts have taken the position that a contract is not something that would be wasted if it was not conserved. (see ***CMC Holdings Limited & Anor v Jaguar Land Rover Exports Limited*** (2013) eKLR).

17. This court has not lost sight of the applicants' claim that the respondent acted unlawfully by taking over the contract and that it would suffer loss and damage as a result of the respondent's said actions. My finding that the issue of whether the respondent was entitled to act, as it did, or if the applicant has suffered loss as a result of the said actions are issues which can only be canvassed before the arbitrator.

18. The applicants also claimed that they will suffer substantial loss and damage unless the orders sought in the application are granted. I however not that the applicant's claim was in the nature of a liquidated claim that was particularized in the plaint as follows: -

a. ***KES 4, 1 19,060 for parking equipment installed***

b. ***KES 5,463, 700 for equipment imported and awaiting deliveries***

c. ***Loss of Revenue and profits for three (3) years of the duration of the contract***

d. ***Salaries and wages.***

19. The applicant did not state that the respondent will not be in a position to settle its claim should its case be successful. I am therefore unable to find that the applicant's case meets the threshold for the granting of the interim orders of injunction.

20. Having found that the contract between the parties has technically been terminated, I find that the remaining considerations for the granting of the order sought namely; the existence of special circumstances and the period for such a measure do not arise.

21. For the reasons that I have stated in this ruling, I find that the instant application is not merited and I therefore dismiss it with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF JULY 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Ms Omwanga for Oyugi for Plaintiff.

Mr. Kamau Muturi for the Respondent.

Court Assistant: Sylvia.