REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HCCC NO. 56 OF 2018

WILSON KIPKEMBOI KIPKOTI.....1ST PLAINTIFF

LALLY FARM LIMITED.....2ND PLAINTIFF

VERSUS

SAMUEL KIPTALA CHEMILIL.....1ST DEFENDANT

ALBERT KIMWATAN.....2ND DEFENDANT

ENDO INVESTMENTS LIMITED.....3RD DEFENDANT

SIRIKWA ELDORET HOTEL LIMITED.....4TH DEFENDANT

MAYFAIR SERVICES AND INVESTMENTS LIMITED.....5TH DEFENDANT

RULING

1. WILSON KIPKEMBOI KIPKOTI (1ST Applicant) and LALLY FARM LIMITED (2ND Applicant) filed this suit by way of plaint dated 8th August 2018 seeking various orders as set out therein. They contemporaneously filed an application dated 8th August 2018 seeking various orders as set out therein. The 4th – 5th respondents raised a preliminary objection to the suit challenging this court's jurisdiction on the basis of Clause of Clause 9 of the Shareholders Agreement between the parties. The application was dismissed by ruling delivered on 2/5/2019.

The court in dismissing the preliminary objection stayed its proceedings and directed that the parties honour the arbitration clause in its agreement and referred the matter for hearing and determination before the arbitral tribunal. Directions were then taken as regards the application filed by the applicants dated 9/1/2019 seeking interim orders. The respondents filed their response to the application and the court directed that the application be heard by way of written submissions.

2. The applicants have preferred this application dated 9th January 2019 under order 40 of the Civil Procedure Rules seeking interim orders:

> **a) restraining the respondents from deducting or withholding money from the monthly drawings of Kshs.750,000/- duly entitled to him pursuant to the board resolution held on 13/2/2016,**
>
> **b) mandatory orders to issue compelling the respondents to pay him his money as was agreed at the board meeting of 13/2/2016 and to continue remitting the 1st applicant's monthly drawings in two instalments of Kshs. 400,000/- on or before the 15th day of every calendar month, and Kshs. 350,000/- on or before the end of every calendar month**
>
> **c) a mandatory injunction to issue compelling the respondents to refund the withheld from the monthly drawings of Kshs. 750,000/-**

3. It is the 1st applicant's case that on 13th February 2016, the board of directors of the 4th respondent met and passed a decision entitling him to a net monthly drawing of Kshs 750,000/-, which the 4th respondent **(SIRIKWA ELDORET HOTEL LIMITED)** had been paying to him until October 2018, when the same was stopped, and a deduction of Kshs 225,000/- was made from those monthly drawings. This was done arbitrarily, and there is even no written acknowledgment of the said deductions. That the decision was made in a discriminatory manner, as

the 1st and 2nd respondents continue to receive their monthly drawings of Kshs. 1,750,000/- in full, every month. Thereafter, the 1st applicant has been receiving the sum of Kshs. 525,000/- only, albeit in an erratic manner, and the same is designed to frustrate, ridicule, and impoverish the applicants, and without any resolution by the board of directors. That the decision has negatively impacted on the 1st applicant's ability to repay his mortgage and there is imminent danger of losing the family home which is the subject of the mortgage, as he is now left in a very vulnerable position. The applicant is also apprehensive that they might be listed as a bad debtor by the Credit Reference Bureau, and this would injure their reputation, which would lead to irreparable damage

4. These monthly drawings are as a result of the shares each of the parties in this matter have in the 4th respondent where the 1st applicant is said to hold 30% shares, whilst the 1st and 2nd respondents own 70% shares through the 3rd respondent. Incidentally the 1st applicant is a director as well as chairman of the board of both the 4th and 5th respondent

5. The respondents while acknowledging that the 1st applicant has been drawing a sum of Kshs. 750,000/- nonetheless contend by the replying affidavit sworn by **SAMUEL KIPTALA CHEMELIL** that, engagements between the shareholders is regulated by a share-holders agreement dated 3rd November 2011 which provides an explicit dispute resolution mechanism, and which excludes litigation. Further, that the nature of prayers sought are final in nature, and cannot be granted at an interim stage. That in any event, the deductions were effected after a notice of distress, proclamation notice, and an order by the Kenya Revenue Authority (KRA) had been served on the 4th respondent

6. There is no dispute that the parties are members and directors of the 4th respondent. The issues for determination in this case include:

i) The jurisdiction of this court following its ruling on 2/5/2019;

ii) Whether the interim orders as sought can be granted.

i) Jurisdiction

The applicant elected not to address the issue on jurisdiction- probably on account of the earlier ruling on the preliminary objection whose subject was the question of this court's jurisdiction

7. However, the respondents' counsel revisited the matter in his written submissions, pointing out that this court stayed these proceedings and directed the parties to invoke the arbitration clause as per the agreement. The court in doing so acknowledged that the agreement didn't oust this court's jurisdiction but also went ahead and gave effect to the parties' intention to refer the dispute to arbitration. It is the respondent's contention that upon delivery of the said ruling on 2/5/2019, all the disputes between the parties would abide the **Arbitration clause** including this application. They submit that the Civil **Procedure Act and Rules and especially Order 40 of the Civil Procedure Rules** are not applicable in the circumstances.

8. It is contended that the effect of this, on the court's jurisdiction must be considered in light of **section 10 of the Arbitration Act** which provides that no court shall intervene in matters governed by this Act except as provided therein. That where the Act specifically stipulates for this court to intervene, it shall and the extent of intervention has been limited to **Section 7** which dictates that this court shall intervene only in applications seeking interim protection orders pending arbitration.

In support of this argument the respondents refer to the case of **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR** where the Court of Appeal held that the court's jurisdiction is limited to issuance of holding orders for purposes of preserving evidence, protecting assets or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. The court held that when a court is called upon to determine such applications, it should ensure that it does not travel outside its scope as set out under section 7 of the Act. In exercise of its mandate, courts ought to be careful not to delve into the rights of the parties when the interim protection orders are being sought before the commencement of the intended arbitration.

9. In the said case, the court also held that, an application seeking interim protection measures defines the substance of the suit under section 7 of the Arbitration Act and if the application is granted or denied, there is no pending suit.

10. I concur with the respondent that there an arbitration agreement and clause 9 of the Shareholders Agreement provides that should any dispute arise, the parties should refer the matter for arbitration should negotiations fail. Following the ruling of this court on 2/5/2019, the court stayed its proceedings and directed the parties to arbitrate the dispute herein. The court in making such directives was empowering the agreement made between the parties herein calling for arbitration. The court was also promoting alternative dispute resolution which is a goal for the overriding objective as established under Article 159 of the Constitution.

11. Should the interim orders issue?

The applicants submit that all what is required by this court in relation to the prayers sought, is simply whether the circumstances meet the test set out in the case of **Giella vs Cassman Brown** and state that they have an arguable case and have demonstrated that there is a legal and equitable right that is being infringed and have thus established a prima facie case with a probability of success.

The respondents on the other hand submit that in contemplating issuance of these orders, the court is called upon to find that the plaintiffs are asking for interim protection to preserve the status quo pending arbitration and not asking for settlement of any rights of parties or issues that have arisen between the parties herein in order to avoid compromising the arbitration proceedings as no cause of action exists at this stage. It is reiterated that the court is also to keep in mind that in determining such applications, it is to ensure that it does not undermine the arbitral proceedings or its outcome. See the **Safaricom case (supra)** and **Smatt Construction Co. Ltd vs County Government Of Kakamega [2016] eKLR.**

12. The test for granting interim orders of protection under section 7 of the Arbitration Act was established in the case of **Safaricom Limited (supra)** as follows:

> ***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?***

13. I take note that as pointed out by the respondents, it is now close to a year since the ruling was delivered by the court directing the parties to pursue arbitration, but the applicant has not initiated the process for arbitration. I can only infer a lack of interest in arbitration, for reasons best known to the applicants

Whether the subject matter of arbitration is under threat

The applicants argue that the entitlement of the 1st applicant to the sum of Kshs 750,000/- is a right accruing after the statutory deductions and taxes, and the timing of the impugned deductions is calculated at causing the applicants impoverishment. That the 1st applicant is at the risk of financial embarrassment, as he will be unable to service a loan facility with Kenya Commercial Bank Ltd which stands at **Kshs. 7,360,265/40cts**, and which will lead to irreparable suffering.

14. The respondents submit that, at the time of institution of this suit vide plaint dated 8/8/2018, the plaintiffs raised issues with management and operations of the 4th respondent to the extent that they sought orders *inter alia* the appointment of a receiver to manage the company as well as permanent restraining orders against the 1st, 2nd and 3rd respondents from running the operations of the company. The interim orders sought in the application dated 8/8/2018 at the time of the filing of this claim were interim protective orders pending hearing and determination of the main suit. Before the application was heard, the plaintiffs filed this subject application seeking interim orders restraining the respondents from deducting any monies allegedly entitled to the plaintiffs; mandatory orders compelling the payment of monies when they allegedly fall due; and mandatory orders compelling refund of sums allegedly withheld by the respondents. Before directions were taken with respect to this application, this court gave its ruling on the preliminary objection raised by the 4th and 5th respondents that the issues raised in the application and plaint both dated 8/8/2018 be heard by the arbiter.

15. Directions were thereafter issued by the court on this application which is the basis herein. It is their submission that the issues raised in the plaint and application both dated 8/8/2018 are substantially different from this application although the underlying issue is management of the company by the respondents.

And even though the primary issue is management of the company, the basis of this application is different from the suit instituted on 8/8/2018 for purposes of arbitration. It is reiterated that in accordance to the holding in the case of **Safaricom (supra),** the substance of the suit in applications seeking interim protection under section 7 is limited to the application dated 9/1/2019 in this instance. In contemplating issuance of the holding orders, this court ought to ask itself whether the compliance or none thereof as alleged is under threat warranting protection pending arbitration.

16. The application is grounded on the facts that according to a board meeting held on 13/2/2016, it was resolved that the 1st plaintiff was entitled to Kshs 750,000/- and which sum would be paid in two installments. It is his case that sometimes in October 2018, the respondents failed to honour the resolutions of 13/2/2016 and have been remitting less than what was agreed to-date. He says that the said changes occurred without board minutes to vary said resolution.

On the other hand, the respondents have opposed the application on the basis that on receipt of the order and proclamation notice from Kenya Revenue Authority (hereinafter "**KRA**") both dated 13/9/2018 over sums due to it, they moved court in **Eldoret Judicial Review 8 of 2018** challenging the said tax decision. *See SKC2.* They do admit that indeed the 1st plaintiff was entitled to Kshs 750,000/- but due to the orders issued by KRA, as law abiding citizens, they had to remit the sums at the risk of being found culpable of other tax offences. That the basis for such action was because according to the tax assessment, KRA was levying income tax on director's allowances. The respondents are under legal obligation to deduct the taxes and remit the same to. The Authority. The annexe clearly show that the respondents have paid the applicant the sum of Kshs. 750000/= less the taxes, and that the agreed drawings were statutorily beyond their control of the Respondents.

17. This court is urged to consider that, enforcing the same would present a situation where the 1st applicant should be paid over Kshs 1,000,000/- yet this had not been agreed upon, and would result in inviting this court to re-write this contract when it is not privy to the same. In support of this argument **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR** it was held that a court of law cannot re-write a contract between parties. Enforcing the same would also mean that the respondents would be forced to make payments without complying with its tax obligation under the Income Tax Act and the Tax Procedures Act which would be an illegality and against statute and public policy.

18. I have considered the contents of the letter from KCB regarding the loan facility the applicants have, and which indicates a monthly repayment of Kshs. 205,000/. The applicant has not set out a financial statement demonstrating his other commitments so as to lead to the conclusion that the impugned deductions will paralyze him. What I decipher is that this court into the details of the resolution and determining whether there was breach would be assessing the merits and demerits of the case when this court lacks such jurisdiction under section 7 as read with section 10 of the Arbitration Act. We reiterate that no threat has been demonstrated.

19. ***Are there special circumstances warranting a measure of protection?***

I have already made reference to the arbitration clause governing the parties, and hold the view that that interim protection cannot be ordered as it would be contra the Arbitration Act. Also, this court cannot purport to analyze whether or not there was breach of contract by the respondents in order to preserve subject matter. Besides, in asking for a temporary injunction, the plaintiffs in their submissions have invited this court to invoke Order 40 of the Civil Procedure Rules and apply the test set out in the **Giella case (supra)** that is, whether a *prima facie* arguable case has been established, irreparable injury occasioned and the balance of convenience. Issuance of such orders while applying the principles in **Giella** strictly would mean that there is a case pending trial and as submitted above, section 7 does not contemplate litigation before this court upon issuance of protective orders but dispute resolution before an arbiter.

20. I take into consideration the fact that in considering prayers for a mandatory injunction, this court would have to analyze of the merits and/or demerits of the case to establish whether the applicant has demonstrated special and clear circumstances in such a manner as to warrant the orders. I make specific reference to the holding by Nyamu J, in the **Safaricom** case (supra) that when determining such applications, courts must treat the matter as if there is no suit pending before it as the issuance of such orders does not contemplate litigation. That, even though courts are guided the principles established by the infamous case of **Giella vs Cassman Brown [1973] EA 358,** they should not establish a prima facie arguable case that is, go into the merits and/or demerits of the case. In exercise of section 7, the court ought to make a tentative assessment of the merits of the plaintiffs' case so as to decide if it is strong to warrant protection but also ensure that it avoids encroaching into the arbitral **tribunal's territory. In support of this proposition, the respondent shall rely on case of the CHANNEL TUNNEL GROUP LIMITED vs BALFOUR BEATTY CONSTRUCTION LTD (1993) AC 334.** It should not leave very little for the arbiter to decide. In faulting Koome J, the court held that the court had travelled outside its scope in determining the merits and/or demerits of the case and in doing so it denied the applicant interim protection orders for failing to establish a prima facie case as set out in the Giella case (supra). In dismissing the application, the court had attempted to re-write legislation which fell outside the work of court which was to interpret the law.

21. The sum total of all this is that, there is no basis upon which to grant the prayers sought, and the application is dismissed with costs to the respondents.

Delivered and dated this 20th day of January 2020 at Eldoret

H. A. OMONDI

JUDGE