REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL SUIT NO. 329 OF 2018

AFRIKON LIMITED .....PLAINTIFF

VERSUS

IVRCL LIMITED .....1ST DEFENDANT

SUTANU SINHA .....2ND DEFENDANT

RULING

1. The power this Court is asked to exercise by Afrikon Limited (Afrikon or the Applicant) has been described by the Court of Appeal as a delicate one (Scope Telematics International Sales Limited vs. Stoic Company Limited & Another (2012) eKLR). The intricate nature of that duty was elaborated as follows:-

> **"The court is called upon to strike a balance to ensure that the intended arbitration proceedings are not prejudiced either by failing to protect the status quo and or the subject matter of the intended arbitration and at the same time to ensure or avoid making an order that goes to resolving the dispute between the parties which ought to be left exclusively in the hands of the arbitrator"**

2. That is the tightrope this Court must walk in determining the Notice of Motion dated 14th August 2018 for the following prayers;-

> ***1. Spent***
>
> ***2. Spent***
>
> ***3. Spent***
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> ***4. Spent***
>
> ***5. Spent***
>
> ***6. That an order be issued directing that the dispute between the Plaintiff and the 1st Defendant arising from the sub-contract agreement dated 28th April 2016 and 18th August 2016 be referred to an Arbitrator for hearing and final determination in accordance with the provisions of the contract;***
>
> ***7. That pending the commencement, hearing and final determination of the Arbitration proceeding, an injunction do issue restraining the Defendants and each of them whether by themselves, their servants, directors, employees, Advocates or any agent whatsoever from terminating or suspending the sub-contract agreements dated 28th April 2016 and 18th August 2016 signed between the Plaintiff and the 1st Defendant pending further orders of this Honourable Court;***
>
> ***8. That pending the commencement, hearing and final determination of the Arbitration proceedings, an injunction do issue restraining the 1st and 2nd Defendants and each of them whether by themselves, their servants, directors, employees or any agent whatsoever from paying out, withdrawing, transferring, utilizing or otherwise alienating any portion of the monies deposited in the 1st Defendant's bank accounts in the following banks pending further orders of this Honourable Court, namely:-***

i. UBA Bank,

Westlands Branch [.....]

ii. UBA Bank,

Westlands branch [....]

iii. Kenya Commercial Bank,

Moi Avenue branch [....]

iv. Kenya Commercial Bank,

Moi Avenue branch [....]

9. That pending the commencement, hearing and final determination of the Arbitration proceedings, an injunction do issue restraining the 1st and 2nd Defendants and each of them, whether by themselves, their servants, directors, employees or an agent whatsoever from demanding or receiving any further payments from National Irrigation Board and/or from the donor in respect to the Tender to BURA IRRIGATION AND SETTLEMENT SCHEME REHABILITATION PROJECT FOR OPTION II (LINE CANALS) in Tana River County and/or from utilizing or alienating any payments made in respect to the said contract pending further orders of this Honoruable Court;

10. That pending the commencement, hearing and final determination of the Arbitration proceedings, an interim injunction do issue restraining the 1st and 2nd Defendants from removing the site and/or the jurisdiction of this court and/or from charging, leasing, selling, alienating and/or interfering with all the vehicles, machinery, equipments and tools of trade currently on site at Bura Irrigation and Settlement Scheme Rehabilitation Project for option II (lined canals) in Tana River County pending further orders of this Honourable Court;

11. That pending the commencement, hearing and final determination of the Arbitration proceedings, an order be issued directing the 1st and 2nd Defendants to make a full and frank disclosure by means of a detailed Affidavit to be filed in this Honourable Court of all the funds received from National Irrigation Board and the donor in respect to the Tender for BURA IRRIGATION AND SETTLEMENT SCHEME REHABILITATION PROJECT FOR OPTION II (LINE CANALS) in Tana River County.

3. IVRCL Limited (IVRCL or the 1st Defendant) is a Foreign Limited Liability Company duly incorporated in the Republic of India while Afrikon is a Limited Liability Company incorporated in Kenya. IVRCL was on 27th February 2013, awarded a contract for substantial Construction works at Bura Irrigation and Settlement Scheme Rehabilitation Project (the project) by National Irrigation Board (N.I.B.). The Tender amount was Kshs. 7,355,829,104/=. On 28th April 2016, desirous of subcontracting Afrikon to carry out certain Works and Services under the main Contract, IVRCL entered into an agreement with Afrikon for the subcontract. The Works were part of greater Works and involved undertaking bored, and cast in situ installation Works for IVRCL.

4. It would seem that because of some challenges, IVRCL was unable to carry out the rest of the Works and so by another Contract dated 18th August 2016, the two entered into a further Contract in which Afrikon was to carry out the remainder of the greater Works and Services via a Back to Back Agreement to the main Contract between IVRCL and N.I.B on 6th February 2018. The parties executed an addendum to the sub-contract Agreement of 18th August 2016.

5. Afrikon has complaints in respect to both sub-contracts. In regard to the 1st sub-contract, the estimated price was USD 13,681,825 exclusive of V.A.T. The complaint is that having paid 50% of the agreed advance payment, IVRCL has failed to pay the balance with the consequence that the piling works project has stalled. Afrikon points to Article 3.1.1 of the sub-contract and alleges its breach.

6. There is then the more expanded sub-contract. Afrikon asserts that it has carried out substantial Works and is owed Kshs. 761,364,945.13 in respect to the Certificate of Completion of Works for the various stages of the Project. The tenor and content of the sub-contract was that Afrikon was entitled to receive 99% of all payments for the project covered thereunder and IVRCL 1%. So as to facilitate that arrangement, clause 2.3.1.1 obligated the parties to open a Joint Account at Eco Bank wherein all payments received for work done by Afrikon under the subcontract would be paid and apportionment made therefrom. Afrikon accuses IVRCL of deliberately failing to co-operate and/or refusing to open the agreed Joint Account.

7. On its part, IVRCL refutes breach and instead blames Afrikon for violating the Addendum Agreement which has culminated in the difficulties that have given rise to the controversy. IVRCL asserts that under the terms of the Addendum Agreement, Afrikon was to issue an Assignable and Irrevocable on Demand Bank Guarantee in accordance with the original Contract to cover the performance security that was to be issued and submitted to N.I.B. Because of this default, IRVCL is exposed to substantial loss and has been impeded in opening the escrow Account.

8. IVRCL suggests that Afrikon lacks financial liquidity and is to blame for the State of affairs. That the woes of Afrikon began after Eco Bank filed Nairobi HCCC No. 121 of 2016, Ecobank Kenya Limited vs. Afrikon Limited in which Afrikon was found unable to pay Kshs. 331,370,748.73 and USD 11,402,847.28 and in execution thereof Afrikon's Machinery and Equipment which were in use at the Project site were seized.

9. As to the first Contract, the case by IVRCL is that it was to make an advance payment only upon receipt of a Performance Bank Guarantee valid up to the completion of Contract equivalent to 15% of the subcontract. That the part payment of Kshs. 100,000,000/= to Afrikon was equivalent to the Insurance Bond secured by Geminia Insurance Company Ltd for the sum valid upto 30th June 2017. No further Bank Guarantee or Insurance Bond has been forthcoming.

10. In response to the allegation of failure to pay the mobilization costs, IVRCL argues that this was to be done only upon mobilization of Equipments to site which has not happened.

11. Those, in brief, are the issues forming the background to the matter before Court.

12. This Court has considered and read the Written Submissions filed herein together with the Oral arguments made in supplement thereof. The Court bears these and the issues that have emerged from the rival positions taken by the parties in determining the questions.

13. As a starting point, I need to observe that both sides have asked this Court to approach this matter as though it was a typical Application for grant of Interlocutory Injunction and to therefore apply the well known and weather beaten principles that govern the grant or refusal therefore as set out in the decision of Giella vs Cassman Brown. This invitation however ignores the reality that the power of Court to grant Protective Orders under section 7 of the Arbitration Act is somewhat unique. Section 7 reads 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".**

14. And whilst certain Protective Orders granted under this Jurisdiction will be in the nature of Interlocutory Injunctions, yet still our Courts have developed peculiar principles to guide the exercise of judicial discretion in granting or declining Protective Orders. The decision of Hon. Nyamu (JA) in Safaricom Limtied vs Ocean View Beach Hotel Limited & 2 Others (2010) eKLR is locus classics in this regard. It not only discusses the efficacy of Section 7 of the Arbitration Act, but the factors to be considered in determining such an Application. On the efficacy, The Judge observed:-

> **"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"**

15. The factors to be considered are 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**?

16. Now, there is consensus that the Contracts which give rise to this matter have an Arbitration Agreement. In the first subcontract it is clause 8.5 which reads:-

> **"8.5.1 Any controversy between the parties to this Agreement involving the construction or application of any of the terms, provisions, or conditions of this Agreement, shall on written request of either party served on the other, be submitted first to mediation by a person agreed between the parties and then if still un resolved to binding arbitration. Such binding arbitration shall comply with and be governed by the provisions of the Arbitration Act of Kenya unless the parties stipulate otherwise. The parties agree on one person to hear and determine the dispute and, if within 14 days of the dispute they are unable to agree, then the Chairman of the Chartered Institute of Arbitrators, Kenya Chapter shall select, appoint an arbitrator whose decision shall be final and conclusive upon both parties.**
>
> **8.5.2 The Arbitration seat shall be Nairobi".**

Clause 7.5 of the 2nd sub-contract is word for word of the above provisions.

17. But IVRCL has a contestation about whether this matter is indeed ripe for Arbitration. From the clear and unambiguous language of the Dispute Resolution and Arbitration Clause, the first port of call, when a controversy arises between the parties involving the construction or application of any terms, provisions or conditions of the subcontract, is Mediation. The words used make this step mandatory. Looked at from another perspective therefore, an attempt at settlement through Mediation is a condition precedent to referral of any controversy to Arbitration. The parties agreed to this two-tier process and the requirement to first seek an amicable settlement by way of Mediation cannot be taken to be fanciful or pretentious. An attempt to leapfrog Mediation will therefore not be countenanced by Court.

18. So has Afrikon sidestepped Mediation as asserted by IVRCL? A couple of letters could provide the answer to this question. In a Letter dated 22nd May 2018 written by Kagwimi Kangethe & Company Advocates (the lawyers for Afrikon) to LJA Advocates (the lawyers for IVRCL), Afrikon declares that a dispute has arisen and then invokes the Dispute Resolution and Arbitration Mechanism as follows:-

> ***"Consequently and in accordance with clause 7.5 of the sub-contract Agreement, our Client demands that the dispute be referred to the current chairman of the Architectural Association of Kenya for Mediation as provided by the Contract. Please let us have your Client's confirmation in this regard by the close of business on 23rd May 2018 failure to which we shall refer the Dispute to the proposed person without any further reference to your client."***

19. Some discussions between the parties alone towards an amicable resolution of the Matter appear to have followed after that Letter with the result that by a Letter of the very same day (22nd May 2018), Afrikon (through its lawyers) suspended any further action against IVRCL 'as threatened'. That is as threatened in the letter of 27th May 2018. But matters seem to have turned for the worse so soon thereafter, at least from Afrikon's perspective, and on 22nd June 2018, the Laywers wrote another letter with this ultimatum:-

> ***"In the premises, we hereby reinstate our earlier Demand Letters herein dated 30th April 2018 and 22nd May 2018 and hereby place you on FINAL NOTICE to pay our Client immediately, failure to which we shall file appropriate Legal proceedings against you without any further warning."***

The threat to take out Legal proceedings is again made on 5th July 2010 and 17th July 2018. This suit is then filed about a month later on 14th August 2018.

20. The Court notices two things from these correspondence. The letter of 22nd May 2018 which was the first to invoke the Dispute Resolution Mechanism invited IVRCL to indicate its concurrence to the appointment of the Chairman of the Architectural Association of Kenya to be its Mediator. IVRCL was given up to close of business of 23rd May 2018 to do so. This was necessary because the Dispute Resolution clause to the Agreement contemplated that the Mediator would be agreed between the parties. Secondly, Afrikon made it clear that if that concurrence would not be received by the deadline, then the Dispute would nevertheless be referred to the proposed person.

21. It being clear that the later letter of 22nd May 2018 suspended that intended action, the effect was that the deadline of 23rd May 2018 stood suspended. It seems logical therefore that any subsequent letter reinstating the Dispute Resolution Mechanism needed to give another opportunity for an agreement by the parties of a Mediator. This however is missing in the letter of 22nd June 2018 which purports to reinstate the demand letters.

22. One also considers the letter of 5th July 2018 in which the threat for Legal action by Afrikon is restated as follows:-

> ***"Finally, we reiterate our demand letters dated 30th April 2018, 22nd May 2018, 31st May 2018 and 22nd July 2018 and hereby place you on NOTICE that our client is in the process of filing appropriate legal proceedings against you in order to protect its interests and you will be served shortly."***

In a response dated 10th July 2018, IVRCL makes certain demands then and closes,

> ***"Therefore, you are requested to withdraw all your Legal Notices/final demand Notice(s) served till date, unconditionally, failing which you will be prosecuted under applicable Laws and Jurisdiction of the signed Contracts."***

Unhappy with this letter, Afrikon (through Kagwimi Kangethe & Company) replied on 17th July 2018 making it clear that litigation was inevitable and indeed these Proceedings followed about twenty two (22) days later.

23. To be gleaned from this scenario is that the important step of agreeing on a Mediator and referring this matter to Mediation was not exhausted by either side. It is infact lost in the exchanges between the two. The effect is that the attempt to have this matter referred to Arbitration through the current Application is therefore premature.

24. That finding heralds a difficulty on the part of Afrikon. To make the point, the Court again sets out the provisions of Section 7 of the Arbitration Act under which Afrikon brings the Application before 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".**

The Protection grantable under the Statutory provision cannot be available to Afrikon now given that the moment for Arbitration has not reached in that the Mediation which is explicitly provided as an inaugural Dispute Resolution Mechanism has not been exhausted.

25. This is not to say that the Court can never entertain a plea for an Interim Measure of Protection before or during Mediation where Mediation is agreed upon as a Dispute Resolution Mechanism by contracting parties. First, prudent parties may wish to inbuilt in the Dispute Resolution Clause, a Right to seek the intervention of Court for Measures of Protection as they pursue mediation. Second, it is not beyond the inherent power of a Court to grant Interim Measure of Protection, even in the absence of express reservation by the parties, where a contracting party has properly initiated, or commenced Mediation. The Courts are directed by the provisions of Article 159 of the Constitution to promote alternative forms of Dispute Resolution including Mediation. The efficacy of Mediation would be lost if events that can render its outcome nugatory are not checked. One way of strengthening Mediation as a Dispute Resolution mechanism is for the Courts to provide refuge to a party who has properly invoked the Mediation Mechanism, from losing out irreparably as the party pursues that avenue of Dispute Resolution. Parties would have little faith in mediation if it can be used by unscrupulous rivals to inflict irreparable harm

26. Regrettably, for Afrikon, the Right to seek Interim Protection pending Mediation is not reserved in the two subcontracts and neither has it properly called forth the Mediation process so as to be deserving of this Court's intercession.

2. For the reasons given the Notice of Motion dated 14th August 2018 comes earlier than it should. It is premature and is hereby struck out with costs to the Defendant. Any Interim Orders granted to date in favour of Afrikon are hereby discharged.

Dated, Signed and Delivered in Court at Nairobi this 18th day of January, 2019.

F. TUIYOTT

JUDGE

PRESENT;

Kangethe for Plaintiff

Wachira for Defendant

Nixon - Court clerk