REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 345 OF 2017

ISOLUX INGENIERA, S.A……...……...PLAINTIFF

VERSUS

KENYA ELECTRICITY TRANSMISSION

COMPANY LIMITED…….....1ST DEFENDANT

BANK OF AFRICA LIMITED…….....……..2ND DEFENDANT

KCB BANK LIMITED……...……3RD DEFENDANT

ECOBANK KENYA LIMITED…….....…….4TH DEFENDANT

ECOBANK NIGERIA LIMITED…….....…….5TH DEFENDANT

COMMERCIAL BANK OF AFRICA LTD…….....…….6TH DEFENDANT

RULING

Introduction

1. This is an application for an injunction pending the hearing and determination of an appeal.

2. The application seeks the following surviving substantive prayer:

> ***"That an injunction be and is hereby issued restraining the 2nd Respondent from effecting the calling up of the guarantee of the Advance Payment Bond Ref. G12240 for the sum of €5,749,587.06 pending the hearing and determination of the intended appeal".***

Background

3. The application, which is contested, arises as follows.

4. The Applicant ("Isolux") is a corporate entity incorporated in Spain. Isolux entered into a contract with the 1st Respondent ("Ketraco") for the procurement and construction of an electricity transmission line running some 420 odd kilometers from Loyangalani in the Northern part of Kenya to Suswa in the Rift

Valley.

5. The contract provided for the provision of guarantees and performance securities to be availed by Isolux. Isolux secured such guarantees and performance securities from the 2nd through 6th Respondents. The 6th Respondent is however no longer part of these proceedings having been discharged from the proceedings on 29 September 2017.

6. The contract also included an autonomous arbitration agreement in the event a dispute arose between Isolux and Ketraco. The arbitral clause was lengthy and densely packed. A dispute arose in 2017 after Isolux filed for insolvency in Spain and Ketraco quickly gave notice to terminate the contract and so shortly thereafter called in the guarantee and performance securities as well as the Advance Payment Bonds. All the other respondents honored their guarantees but the 2nd Respondent did not as there was in place a court order.

7. Isolux had moved the court on 18 August 2017. The proceedings were an action for relief pending reference to arbitration and the hearing of the arbitral proceedings.

8. I heard the application(s) for interim measures of protection pending arbitration on its merits on 13 December 2017. I dismissed the application(s). My detailed reasons were handed down on 19 December 2017, by which time Isolux had on 14 December 2017 filed its Notice of Appeal to the Court of Appeal.

The application for injunction

9. The application is made on the grounds that absent any injunctive orders, the intended appeal will be rendered nugatory as Ketraco would have proceeded to enforce the calling up of the Advance Payment Bond. Isolux will thus be greatly prejudiced. The brief affidavit sworn by Jose Enrique Myro Borrero, in support of the application, is to like effect.

10. In response, the General Manager of Ketraco Mr. Joseph Siror swore an affidavit. Mr. Siror depones that Ketraco is a state corporation and Isolux, if successful on appeal, will never suffer irreparably as Ketraco will be able to refund any monies paid by the 2nd Respondent. Further Mr. Siror depones that the Bond had been issued as security for monies paid in advance to Isolux by Ketraco for work and services that Isolux was supposed to do and render. Mr. Siror then, argumentatively, depones that Isolux is simply seeking the same orders the court had denied it on 13 December, 2017.

Arguments

11. Mr. Ngeno who appeared for Isolux fervently argued as follows.

12. First, he focused on the court's jurisdiction. Making references to various decided cases amongst them **Madhupaper International Ltd *v* Kerr [1985] KLR 840,** counsel submitted that the court has jurisdiction even where it has dismissed an interlocutory injunctive application to grant an injunction pending appeal.

13. Secondly, Mr. Ngeno submitted that the intended appeal was not frivolous but arguable. Though counsel did not say so, the implication of this submission is that I am not in a position to say who will win in the intended appeal and thus there is a need to maintain the status quo and ensure that the appeal is not rendered nugatory.

14. The third limb of Mr. Ngeno's submissions was that the balance of convenience (which he termed hardship) titled towards Isolux. In this regard, counsel said that if the monies under the Advance Payment Bond were paid out it would be irreversible and if the appeal succeeded the 2nd Respondent would never be able to issue the guarantee if there were no monies. On the contrary, if at all the appeal failed Ketraco would still access the monies (with interest) and would not have suffered any sweat in the interim period. For Mr. Ngeno, "the last straw" that Isolux was clutching to as far as the contract with Ketraco was

concerned was the Advance Payment Bond.

15. Enter Mr. Mbaka for Ketraco and his first point in submission was that Isolux should have filed any application for injunction before the Court of Appeal and not this court. According to Mr. Mbaka, the instant application was an abuse of process in so far as Isolux were seeking the same orders it was earlier denied by the court.

16. Next, it was Mr. Mbaka's submission that the Advance Payment Bond had already been honoured and thus the application had been overtaken by events. The court would simply be acting in vain if it issued any orders. For Mr. Mbaka, the contract between Ketraco and Isolux was long terminated and there is no right to be protected. Counsel then lamented that Isolux was meddling in a contractual relationship between Ketraco and the 2nd Respondent before winding up his submissions by urging that the court should not be guided by the emotions exhibited by Isolux through 'the last straw' analogy.

Analysis and determination

17. The parties appeared not to agree on whether this court has jurisdiction to entertain the current application or even the principles applicable in such a situation. Mr. Ngeno referred the court to various authorities in an attempt to show that the court has jurisdiction and Mr. Mbaka, in turn, constantly jibed that Isolux was simply intent on having a second bite at the cherry.

18. I have no doubt that a court having refused an application for an injunction, has jurisdiction to grant a shorter interim injunction pending the appeal of the applicant for the injunction against that refusal. This proposition may be derived from the cases cited by Mr. Ngeno. The case of **Madhupaper International Ltd *v* Kerr [1985] KLR 840** reiterated this jurisdiction which is court-founded and dates back to the 19th century in the case of **Pollini *v* Gray [1879] 12 ChD 438**. The power has been invoked subsequently in various jurisdictions.

19. There is of course the difficulty that a decision has been made and the circumstances are still the same hence the fear that the invite to reconsider the decision will lead to inconsistency if an injunction pending appeal is then granted. Megary J in **Erinford Properties Ltd *v* Chesire County Council [1974] 2 All E R 448** however disagreed with this difficulty and fear. He said as follows:

> "***Judges must decide cases even if they are hesitant in their conclusions, and at the other extreme a judge may be very clear in his conclusions and yet on appeal held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than that for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may perfectly consistently with his decision, recognize that his decision might be reversed and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending appeal".***

20. It is clear that a judge does not become *functus officio* after disposing of an application for interim injunction. He can entertain yet another application for injunction pending appeal. He must then be open-minded and not second guess the appellate court by summarily dismissing the application. He must however not revisit his own decision. He must reflect on the hardships to either party and ask himself whether, in so much as it may be more appropriate in any given circumstances to maintain the status quo, to grant the injunction would inflict greater hardship than it would avoid. He must think not just about the winning candidate before him but the winning candidate before the appellate court, who may turn out to be the appellant. The principle that justice requires that the court should take steps to ensure that judgments are not rendered valueless should guide the judge. The discretion is with the judge.

21. I had earlier heard the parties on the substantive application and their subsequent arguments and evidence in the instant application certainly covered familiar territory. I must however clear the undergrowth by pointing out that on 13 December 2017; I exercised discretion and jurisdiction under *s.*7 of the Arbitration Act. As I disposed of an application for interim measures of protection I was exercising the rare jurisdiction conferred by the Arbitration Act.

22. Section 10 of the Arbitration Act captures both the policy of maximizing the finality of arbitral awards and the principle of minimizing court interference in matters arbitration. The section is clear on the extent of court intervention. It states that:

> ***"Except as provided in this Act, no court shall intervene in matters governed by this Act."***

23. In my judgment, my discretion to entertain and (dis)allow an application for interim orders pending an appeal can only be exercised if Isolux have a right of appeal or may be in a position to appeal with the leave or permission of the court. This was an arbitration case and I must be satisfied that the Court of Appeal may intervene as well in arbitration cases since *s.*10 of the Arbitration Act generally prohibits court intervention. It would be purposeless to give an order pending appeal when in fact no appeal lies.

24. The question thus is: what jurisdiction does the Court of Appeal have in arbitration cases ?

25. The question was considered and answered by the Court of Appeal in the case of **Nyutu Agrovet Limited *v* Airtel Networks Limited [2015]eKLR** and the simplistic answer returned was 'none' unless where expressly provided by the Arbitration Act. The Arbitration Act only allows parties to appeal to the Court of Appeal from decisions of the High Court in two instances. There are particularized under *s.*39(3) of the Arbitration Act.

26. In ***Nyutu Agrovet Ltd*** (s**upra**), the Respondent had sought orders under *s.*35 of the Arbitration Act to set aside an award. The High Court agreed and set aside the arbitral award which involved a distribution agreement. The appellant was dissatisfied with the decision. The appellant did not have a right to appeal and thus sought leave to appeal to the Court of Appeal. Leave was granted. On appeal, the court held on a preliminary issue as to whether an appeal lay, firstly, that appeals to the Court of Appeal could only be made where there was a right of appeal conferred by statute or by leave of the court and not by implication. Secondly, it was held that where a party was not invoking the rights conferred under *s.*39 of the Arbitration Act no appeal lay to the Court of Appeal from decisions made by the High Court under the Arbitration Act. The Court was clear that notwithstanding the provision of *ss*. 12, 15 and 17 which expressly bar appeal, *s.*10 also debarred any further court intervention unless the parties brought themselves under *s.*39. Mwera JA, who wrote the lead opinion, concluded his judgments as follows:

> ***"…I reiterate that by the preponderance of existing material in law and case law to sustain the arbitration principle that intervention by court's participation in arbitral matters be strictly limited leaving the parties to the proceedings to map their own paths out of their disputes, should be sustained and I do so find".***

*27. **Nyutu Agrovet Ltd*** (**supra**) was a five – judge bench constituted to reconsider the conflicting decisions made by the Court of Appeal in **Kenya Shell Ltd *v* Kobil Petroleum Ltd [2006]eKLR** and **Anne Mumbi Hinga *v* Victoria Njoki Gathaara [2009]eKLR.** The decision in ***Nyutu Agrovet Ltd*** is currently the law. It settled the law. An appeal even with leave does not lie from the High Court on matters governed by the Arbitration Act save only those situations indexed under *s.*39 of the Arbitration Act: see also **Tanzania National Roads Agency *v* Kundan Singh Construction Ltd [2014] eKLR.**

28. The application which I determined on 13 December 2017 and from which determination an appeal is now preferred is governed specifically by*s.*7 of the Arbitration Act. An appeal does not expressly lie. No leave too has been sought. Even if sought it may not be granted by reason of the holding of the Court of Appeal in **Tanzania National Roads Agency *v* Kundan Singh Construction (*supra*)** and **Nyutu Agrovet Ltd *v* Airtel Limited (*supra*).**

29. Isolux, in short cannot appeal and must now map its path through the preferred mode of dispute resolution.

30. The effect of my finding is that, it would be moot to delve into the merits of the current application by Isolux. I must now down my tools.

Disposal

31.For all the above reasons, I dismiss the application by Isolux. I award costs to Ketraco.

Dated, signed and delivered at Nairobi this 2nd day of February , 2018.

J.L.ONGUTO

JUDGE