



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO.10 of 2018

MAGNATE VENTURES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KENYA.RAILWAYS.GOLF.CLUB.....DEFENDANT/RESPONDENT

RULING

The plaintiff filed the application dated 12th January 2018 against seeking to restrain the defendant by an order of injunction from interfering in any manner with the plaintiff's Billboard sites located and erected on the defendant's property **L.R. No. 209/11379** within Nairobi county pending hearing and determination of the arbitration proceedings envisaged under the Sites License Agreement dated 5th September 2012 between the parties herein.

Ground set out on the face of the application are:-

1. THAT the plaintiff and the defendant entered into a Sites License Agreement dated 5th September 2012 under which the plaintiff was granted contractual rights to erect the advertisement Billboards on the defendant's property **L.R. No. 209/11379** situated within Nairobi City County.
2. THAT the said agreement under Clause 18 provides that all disputes shall be referred to arbitration for final determination.
3. THAT the commencement date of the Sites License Agreement was 1st January 2013 for a term of five (5) years expiring on 31st December 2017.
4. THAT Clause 5 of the Sites License Agreement provided that upon expiry of the term, the plaintiff had the first option to renew the said agreement for another term on the existing terms or new terms as may be negotiated and agreed upon.
5. THAT by a letter dated 4th October 2017, the plaintiff gave a notice of the intention to renew the said Sites License Agreement and requested for commencement negotiations but the defendant failed to respond.
6. THAT by a letter dated 8th January 2018, the plaintiff exercised its option to renew the contract for another 5 years as provided for in Clause 5 and made full payment of the license fee s for the year 2018 of **Kenya Shillings Five Million, Seven Hundred and Ninety Seven Thousand, Eight Hundred and Thirty Six (Kshs. 5,797,836)**.
7. THAT on the 9th January 2018, the defendant responded to the plaintiff stating that they had signed a new the Sites License Agreement with a third party and had refunded the amount paid being **Kenya Shillings Five Million, Seven Hundred and Ninety Seven Thousand, Eight Hundred and Thirty Six (Kshs. 5,797,836)**.
8. THAT the plaintiff is aggrieved as its rights of first option to renew the Sites License Agreement were blatantly breached by the defendant without valid or contractual reason.
9. THAT on 11th January 2018, the plaintiff declared a dispute to be resolved by arbitration pursuant to Clause 18 of the Sites License Agreement and further the defendant to concur in the appointment of an arbitrator.

10. THAT the plaintiff is apprehensive that the defendant may proceed to interfere with the Billboards prior to the settlement of the dispute by arbitration.

The application is supported by affidavit sworn by Stanley Kinyanjui who is the Director of the plaintiff Company. He restated the grounds on the face of the application

In response the defendant filed grounds of objection dated 29th January 2018 and replying affidavit sworn by Walter Onyino the chairman of the defendant's management committee on 29th January 2018.

Ground raised in opposition of the application are as follows:-

- THAT the application for Interim Injunction is incompetent and misconceived as it seeks to enforce an expired contract and the plaintiff had given up on enforcing it in writing on the 8th January 2018 and opted for arbitration.
- THAT the participated in after being invited by the defendant on 23rd November 2017 plaintiff participated in tender on invitation by the defendant. That plaintiff was informed that the defendant was entering into a step change to re-evaluate her business models across board land and had invited several bids from a few outdoor media players regarding billboards business on her land.
- THAT the plaintiff knowing the consequences of the expiry of the agreement on 31st December 2017 was required to remove all her billboard from the six(6) sites on the defendant's land failed to do so even after conceding in writing that the contract had expired on 8th January 2018.
- THAT the application for injunction on 12th January 2018 was an afterthought and abuse of the due process of court.
- THAT the plaintiff's remedy in this matter is not an Interim Injunction but suit for damages.
- THAT the plaintiff has no Prima Facie case with overwhelming chances of success on a balance of probabilities to justify granting of Interim Injunction
- THAT the plaintiff's suit discloses no reasonable cause of action and should be dismissed with costs to the defendant

The replying affidavit by Walter Onyino restated grounds of opposition, he denied averments of Stanley Kinyanjui in the supporting affidavit and stated that by letter dated 23rd November 2017, he informed the plaintiff of step to change and re-evaluate her business models and partnerships across board and had invited several bids from a few outdoor media players regarding billboards business on her land. He added that the plaintiff was invited to renew her offer and informed that all bids would be considered on their own business merit and financial viability to the club.

He averred that in response the plaintiff tendered her bid on 7th December 2017 in time for evaluation on 8th December 2017; and on completion of the evaluation process, the defendant entered into a contract with Backlite Limited who emerged the highest evaluated bidder.

He averred that they were shocked to receive a letter from the plaintiff purporting to invoke Clause 5 and filing of court proceedings which were not served on the defendant in good time. He averred that the plaintiff does not have a good cause to seek for Interim Injunctions.

Plaintiff's Submissions

Counsels herein submitted orally on 13th April 2018

Plaintiff's Submissions

Counsel for the plaintiff submitted that the plaintiff is seeking interim measure of protection pending hearing and determination of arbitral reference arising out of contract dated 5th September 2012. He submitted that the contract between plaintiffs was for maintenance of 6 sites.

He submitted that under Section 7 of Arbitration Act, the court has power to issue interim measures which may be in two kinds... He referred to the case of *Lagoon Development Ltd Vs Beijing Industrial Designing and Researching Institute (2014) eKLR* where Judge Angote referred to court of Appeal decision in Safaricom Ltd where it held that it is not the 3 tier consideration for grant of injunction. He submitted that the interim measure is to ensure that the subject matter is preserved at the state it was at the commencement of the Arbitral proceedings and that at this stage, the court cannot delve into the merits of the case as in the case of *Giella vs Cassman Brown*.

He further submitted that from his interpretation of the agreement, the plaintiff had first option of renewal which was exercisable before 30 days of expiry of the contract and if not exercised it would be lost 30 days after expiry of the contract. He submitted that the plaintiff exercised his right to renew the contract by letter dated 4th October 2017 which is duly stamped as received by the defendant earlier that 30 days.

He submitted that a reminder for renewal was done vide letter dated 20th December 2017.

He submitted that the dispute submitted to arbitration is whether the defendant had power to submit procurement of the 6 sites to a tendering

process in total disregard of the plaintiff's contractual right to renew.

He submitted that arbitral tribunal will determine whether the defendant had right to evaluate tender and whether licence contract between plaintiff and defendant has been terminated

He submitted that as the arbitral tribunal is being constituted the plaintiff has a right to maintain, do panel and change appearance subject to agreed licence fee. He submitted that print out of RTS transaction has been attached to confirm that **Kenya Shillings Five Million, Seven Hundred and Ninety Seven Thousand, Eight Hundred and Thirty Six (Kshs. 5,797,836)** was forwarded to the defendant but defendant purported to return to the plaintiff. He submitted that the danger necessitating grant of interim measure is real; that it is not speculative as the expiry of contract require plaintiff to remove the 6 billboards and if he fails the contract obliges the defendant to remove; that by letter dated 9th January 2018 the defendant has taken position that the contract has terminated. He referred to ***Talewa Road Construction Limited Vs Kenya National Highways Authority (2014) eKLR*** where the court issued injunction to preserve machinery on site as the items were capable of being dissipated if not preserved. He argued that whether or not there is a breach, is a matter to be determined before tribunal and that parties have each appointed an Arbitrator and the chartered institute of arbitrators have appointed retired Judge Havelock as the chair. He urged court to rely on the last limb of ***Giella vs Cassman Brown***. He submitted that plaintiff has been on site and is ready to pay licence fee as he awaits determination of Arbitration proceedings

Submissions by Defendant

In response Mr. Gaturu for the defendant submitted that the contract between plaintiff and defendant expired on 12th January 2018 and that the plaintiff was notified of the new arrangement .He submitted that the plaintiff was free to bid and that evaluation was done on merit; that the highest bidder quoted 15 Million while the plaintiff quoted 5.2 million; that the club had a right to elect not to have billboards.

Mr. Gaturu submitted that the highest bidder has made payment to the defendant and has also paid licence to the county government but cannot move to the site. He however did not avail any receipts to confirm that. He submitted that clause 5 of the agreement provide that if there is no agreement, the first option to renew cease to exist on 31st December 2017.He submitted that there is no contract between plaintiff and the defendant at the moment and that the court cannot issue an injunction for a contract which has expired. He submitted that what remain for the plaintiff is damages.

Mr. Gaturu further submitted that the plaintiff failed to disclose that it had been inviting to bid and participated in the bidding; that the plaintiff concealed facts to create an impression that the defendant was in breach of the contract

He argued that all the authorities referred to by counsel for the plaintiff relate to contracts which were still on. He said the plaintiff nullified the contract they are seeking to rely on when they bided on 7th December 2017; submitted that the plaintiff do not deserve injunction and should pull down the billboards within 4 weeks of being informed failure which the defendant would remove at the plaintiffs expense and install the highest bidder. He prayed that the application be dismissed.

Plaintiff's Rejoinder

In a rejoinder Mr. Havi for the plaintiff submitted that all the issues raised by the defendants counsel are before arbitral tribunal for determination.

He further submitted the letter which the defendant is alleging concealment on part of the plaintiff was a response to a letter done on a without prejudice basis and could not have been produced. He submitted that the plaintiff did not gain undue favour on account of non-disclosure as the defendant had given an undertaking which was recorded as a court order before order for status quo was granted; that the plaintiff did not get ex parte order on account of non-disclosure; he argued that the balancing of interest is balancing what is already in existence though disputed whether terminated or renewed.

He further argued that existence of a contract before injunction can issue, is not the legal position. He submitted that there exist arbitration clause in the agreement and in the clause there is a window of 30 days to seek renewal and that the plaintiff came to court on 12th January 2018 which was within the 4 weeks.

I have considered rival submissions by counsels' herein. The task before this court is determination whether injunction should issue to preserve subject matter awaiting arbitral process. Section 7(1) of arbitration Act provide as follows:-

“It is not incompatible with 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.”

The court of Appeal in the case of ***Safaricom Limited Vs Ocean Beach Hotel Limited & 2 others CA327 of 2009*** as follows:-

“...it may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve the outcome of the arbitral evidence, to protect assets or in some way maintain status quo pending the outcome of the arbitral proceedings... 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 measure was never intended to anticipate litigation.”

The court proceeded to set out factors to be taken into account before issuing interim orders as follows;-

1. The existence of arbitration agreement

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

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

4. *For what period the measure is supposed to be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunals decision-making as intended by the parties*

Upon considering rival submissions herein what I consider to be in issue whether the plaintiff has demonstrated that factors set above do exist to warrant preservation of the subject matter awaiting arbitral proceedings.

It is not disputed that there was an agreement existed between the plaintiff and the defendant which was executed on 5th September 2012 for a period of 5 years.

A dispute has arisen on renewal of the said contract. Counsel for the plaintiff submitted that renewal is a dispute that has been submitted to the tribunal for determination. The defendant's contention is that contract lapsed on 31st December 2017 and the plaintiff should remove the billboards. Defendant is not however disputing the fact that renewal of the contract is the main issue that has been submitted to the tribunal for determination before tribunal is. Whether the plaintiff was entitled to renewal of contract or the defendant entitled to commence tender process is an issue to be determined by the arbitral tribunal.

From the pleadings and submissions herein, it is not disputed that the contract alleged to have expired has an arbitration clause. It is also evident that, arbitral process has commenced. From the submissions, each party has appointment an arbitrator; plaintiff has appointed Peter Gichui Advocate and defendant Dr Kariuki Muigua; Judge Havelock appointed as chair for the tribunal. Parties who opt to include an arbitration clause in a contract/agreement are taken to have voluntarily constructed a dispute resolution mechanism. They have opted not to have the court determine their dispute. The court can only interfere under circumstances provided in Section 35 of Arbitration Act. While awaiting arbitral process, the courts retain the power under Section 7 of the Arbitration Act to grant interim relief to preserve subject matter or status quo.

In the case of **BABS Security Limited v Theo Thermal Development Limited [2014] eKLR** the Court held that if an injunction is sought as the interim relief under Section 7 of the Arbitration Act, existence of an enforceable arbitration agreement constitutes prima facie case in the context of **GIELLA v CASSMAN BROWN CASE**.

From the foregoing there is no doubt that the plaintiff has established a prima facie case as envisaged in the case of **BABS Security Limited Vs Theo thermal Development Limited [2014] eKLR**. The existence of an agreement with arbitration clause has not been disputed.

On preservation of subject matter the court in the above case further held that the court will consider the factors set out in the case of **Safaricom** cited above before arriving at a decision that applicant deserves an injunction.

The protection envisaged under section 7 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.

Similar position was held in Nbi Hccc No 105 Of 2013 Elizabeth Chebet Orchardson v China Sichuan Corporation for Tecno-Economic Corporation & Another where the court held as follows:-

”...that the purpose of the interim measure of protection is to preserve the subject matter of the dispute pending arbitration. The Court, therefore, should be concerned with finding out whether the subject matter of the arbitration is in danger of being wasted.”

Counsel for the defendant indicated to the court that the plaintiff should remove billboards failure which the defendant will remove that them at plaintiffs costs and install the highest bidder. This clearly demonstrate that the subject matter of the arbitration is threatened or is in danger of being wasted.

From the foregoing I find that it would be in the interest of justice to preserve the subject matter of arbitration by maintaining status quo.

I proceed to issue an order of injunction to restrain the defendant from interfering in any manner with the plaintiff's Billboard sites located and erected on the defendant's property **L.R. No. 209/11379** within Nairobi County pending hearing and determination of the arbitration proceedings.

Costs of this application to be in the cause.

Dated and Delivered at Nairobi this 15th day of May, 2018

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

.....**COURT ASSISTANT**

.....**COUNSEL FOR PLAINTIFF/ APPLICANT**

.....**COUNSEL FOR DEFENDANTS/ RESPONDENT**