



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CASE NO. 281 OF 2018

EON ENERGY LIMITED.....APPLICANT

VERSUS

DESOL INVESTMENT LIMITED.....1ST RESPONDENT

JOAN PRISCA ARUM.....2ND RESPONDENT

CLIVE OUKO NATOME..... 3RD RESPONDENT

NOEL KAGAME NATOME..... 4TH RESPONDENT

DESMA ADHIAMBO NATOME5TH RESPONDENT

RULING

1. The Applicant **M/s EON ENERGY LIMITED** through a chamber summons brought pursuant to Article 159 (2) (c) of the (Constitution of Kenya; Section 1A & 1B of the Civil Procedure Act, Chapter 21 of the Law of Kenya; Sections 7(1) & (2), of the Arbitration Act 1995; Sections 68(1).(2) & (3), 69 of the Land Registration Act 2012; Sections 1A, 1B & 63(d) of the Civil Procedure Act 2010 and Order 37, 40, 41 & 51 of the Civil Procedure Rules 2010 the inherent power of the Honourable Court and all other enabling provisions of Law prays for the following orders:-

a) **THAT service of this application be dispensed with in the first instance and the same be certified as urgent and the same be heard ex-parte for purposes of prayer 3 hereof.**

b) **THAT there be an interlocutory injunction against the Directors of Desnol Investments Limited, their agents and/or servants restraining them from commencing, continuing or concluding any transactions for the selling, transferring, leasing or utilizing the real, movable and cash assets of the company including the lands registered as KSM/KOCHIENG/4157, KSM/OJOLA/4116, KSM/OJOLA/3927, & KSM/OJOLA/4393 without the authorization of the court and/or the involvement of the Applicant pending the hearing and determination of this Application.**

c) **THAT there be an interlocutory injunction against the Directors of Desnol Investments Limited, their agents and/or servants restraining them from commencing, continuing or concluding any transactions for the selling, transferring, leasing or utilizing the real, movable and cash assets of the company including the lands registered as KSM/KOCHIENG/4157, KSM/OJOLA/4116, KSM/OJOLA/3927, & KSM/OJOLA/4393 without the authorization of the court and/or the involvement of the Applicant pending the completion of the arbitral proceedings.**

d) **THAT there be an interlocutory injunction against the 3rd Respondent, his agents and/or servants restraining them from commencing, continuing or concluding any transactions for the selling, transferring, leasing or otherwise disposing the lands registered as NANDI/KAPSENGERE/1257 without the authorization of the court and/or the involvement of the Applicant pending the hearing and determination of this Application.**

e) **THAT there be an inhibition against the lands registered as KSM/KOCHIENG/4157, KSM/OJOLA/4116, KSM/OJOLA/3927, & KSM/OJOLA/4393 pending the completion of the arbitral proceedings.**

f) **THAT there be an inhibition against the lands registered as N/KAPSENGERE/1257 pending the completion of the arbitral proceedings.**

g) THAT the Applicants be at liberty to apply for such further Orders and/or directions as this Honourable Court may deem fit and just to grant.

h) THAT the costs of this Application be provided for.

2. The Application is premised on the ground on the face of the application *inter alia*:-, that the Applicant herein entered into contract with the 1st Respondent on 2nd October 2017 for supply of petroleum products to the 1st Respondent, that the 2nd, 3rd, 4th and 5th Respondents are directors of the 1st Respondent, the 5th Respondent being the majority shareholder; the 1st Respondent is indebted to the Applicant in the tune of Kshs. 20,237,815/- as at 14th June 2018 owing to the default in payment for supplies on time which figure includes accrued penalties; that in keeping with clause 20 of the contract, the matter has now been referred to arbitration at the application of the **Applicant and Eunice Lumallas, FCIArb** has been appointed the arbitrator; that the Applicants are apprehensive and have reasonable grounds to believe that the Respondents are in the process of disposing of the property of the 1st Respondent; that under the Arbitration Act, 1995 this court is empowered to make such orders as may be necessary to meet the ends of justice, before and during arbitration in order to ensure that the arbitral proceedings are not rendered nugatory; that if this Honourable Court does not intervene and grant the orders sought herein, the Applicant will be left with a right but with no remedy and the envisioned arbitral proceedings will be rendered useless; that further to the foregoing the Applicant is entitled to prayers sought *ex-debitio justitiae* since it is beyond peradventure that the affairs of the company are being run fraudulently, in a manner that is calculated to defeat the interests of the Applicant and other creditors.

3. The Application is supported by supporting affidavit of **DWALO ARIARO**, the Chief Executive Officer of the Applicant who has reiterated the contents of the grounds in support of the application and attached the contract entered into for supply of petroleum products between the Applicant and the 1st Respondent to pay for the said supplies within 7 days of supply marked "**DA-I**" dated 2nd October 2017; that the 1st Respondent started defaulting on payment forcing Applicant to follow up through text messaging, annexed and marked "**DA-2**" being copies of messaging exchanged together concerning the default; Notice dated 11th April 2018 was issued keeping with clause 20 of the contract annexed and marked collectively as "**DA-3**" being a copy of notice of default; annexed and marked "**DA-4**" is a copy of a letter to the Chairman of the Chartered Institute of Arbitration Kenya dated 24th April 2018 seeking appointment of an arbitrator after 7 days period given under clause 20 had lapsed.

4. It is further deponed that the Chartered Institute of Arbitration responded and appointed Eunice Lumallas, FCIArb the arbitrator in the instant dispute; annexed and marked "**DA-5**" are copies of letters concerning the appointment of arbitrator by the institute. Annexed is "**DA 6**" being copies of letters concerning preliminary meeting and Applicant's confirmation for the meeting scheduled to be held on 25th June 2018; Annexure "**DA-7**" is a copy of the 1st Respondent's account with the Applicant revealing the amounts owing of Kshs. 20,237,815/-; annexure "**DA-8**" are copies of searches revealing ownership and entitlement, which properties were promised to be security of the Applicant's interest and which search revealed that two of the parcel of lands are registered in the name of the 1st Respondent whereas one is in the name of 3rd Respondent who is a shareholder and director of the 1st Respondent.

5. It is deponed further that the plaintiff has demonstrated that it has established a prima facie case with high chances of success and as such the law favours granting the interim relief sought and that there is no prejudice whatever that will be suffered by the directors who are shareholders of the defendant company. It is further deponed that if the application is not granted, the subject matter of the envisioned arbitration proceedings may be depleted since the property may be leased or sold to a third party.

6. The Respondents filed grounds of opposition on 10th July 2018 setting out the following grounds of opposition:-

1. THAT the application is misconstrued and the injunctive reliefs sought are misconceived with no basis and therefore bad in law;

2. THAT the application is based merely on apprehension and the Applicants have not placed before court tangible evidence to support the same;

3. THAT the Applicant has failed to enjoin the chargee of KSM/KOCHIENG/4157 being I & M Bank for a charge of Kshs. 5,400,000/- and the chargee for KSM/OJOLA/4116 being Family Bank Limited for Kshs. 26,000,000 and a further charge of Kshs. 36,000,000 and a 2nd Further charge of Kshs. 10,514,000. The Chargees have interest in the land in question being security for loans advanced and therefore not in consonance with the provisions of the Land Act, 2012;

4. THAT the application is void ab initio as it infringes on the fundamental rights and freedoms of the company as a going concern;

5. THAT the Applicant has no claim against the 3rd Respondent as the property NANDI/KAPSENGERE/1257 is not the property of the company, neither has the director given guarantee for the loan using the property;

6. THAT the application offends the fundamental rights and freedoms of the 1st Respondent Company, directors and the principles of company law and legal personality for corporations as it is an attempt to lift the Corporate Veil of the company;

7. THAT the Applicant has not met the requirements for granting of interim injunction under section 7(1) of the Arbitration Act No. 4 of 1995; and

8. THAT the application is frivolous, vexatious, incompetent, lacks merit and is an abuse of the court process and should be dismissed with costs.

7. The Applicant relies on further affidavit by **DWALO ARIARO** dated 18th July 2018 deponing:- that the process of arbitration has begun but the Respondents have not participated in the process ignoring all communication from the arbitrator; with preliminary meeting held on 12th July 2018 (annexture "**DA-1**") attached being a letter dated 4th July 2018 from the Arbitrator seeking to set up a meeting with parties and annexures "**DA-3**" a letter dated 9th July 2018 from the arbitrator requiring attendance by parties; annexture "**DA-2**" email correspondence ignored by Respondents concerning arbitral meeting); that the application is based on apprehension; of the Respondents are already in the process of disposing of the petrol stations to other companies with the aim of defeating the interest of the Applicant (*see annexture "DA-4" pictures showing that the petrol stations are already being operated by a new company*).

8. It is further deponed that as far as ground no. 3 of the ground of opposition is concerned, the orders sought would not in any way prejudice chargee since the orders sought are meant to prevent fraudulent disposal of the assets of the Respondents; that the charges remain in force and the joinder of the said chargee serves no effectual purpose.

9. At the hearing of the application Mr. Kosgei, learned Advocate appeared for the Applicant whereas Mr. Odoyo, learned Advocate appeared for the Respondent.

10. Mr. Kosgei, learned Advocate for the Applicant sought prayers nos 3, 5 and 6 urging the Respondent had not filed Replying affidavit but grounds of opposition. He urged the case relates to petroleum previously supplied to the Respondent's who is indebted to the Applicant by the tune of Kshs. 20,237.815 as at of 14th June 2018.

11. Under annexture "**DA-1**" Clause 20.1 on Product Supply Agreement between the parties on page 9 it is provided:-

"Any dispute arising out of or in connection with this Agreement shall first be resolved through amicable negotiations

between the parties. If such negotiations are unsuccessful, the dispute shall be referred by written request of any party to the decision of a single Arbitrator to be agreed upon by the Parties; In default of such agreement within 7 days, such appointment shall be made by the Chairman for the time being of the United Kingdom Chartered Institute of Arbitrators (Kenya Chapter), or his appointee within 7 days of written request of a party."

12. Further Clause 20.8 provides:-

"Nothing in this agreement shall preclude either Party from seeking any interim relief from a competent court having jurisdiction pending the institution of arbitral proceedings."

13. The Applicant's Advocate urges that the Respondents are in the process of transferring the properties which are known as properties of the Respondents and are therefore seeking that the company be prohibited from transferring the same in a manner that is fraudulent, and that injunctive orders do issue to the Applicant because if the orders sought are not granted the Applicant will stand to suffer irreparable harm as there will be no security. The Applicant's counsel relied on the case of **Safaricom Limited Vs. Ocean View Beach Hotel Limited & 2 others (2010) eKLR** and Article 159 of the Constitution of Kenya 2010.

14. Mr. Odoyo, learned Advocate, on his part relied on the ground of opposition dated 10th July 2018. He urged the Applicant do not merit to be granted any of the prayers sought, urging the principles applicable are as set out in the case of **Safaricom Limited Vs. Ocean View Beach Hotel Limited & 2 others (2010) eKLR**, urging what the court is required to consider is well set out in the aforesaid case. He urged the court as required to consider whether the subject matter of arbitration is under threat, whether the agreement has arbitration clause to warrant parties to go for arbitration. He referred to **Black-law dictionary** on the definition of the subject matter.

15. He urged further the properties subject of the application do not form part of the dispute and therefore it is not subject of dispute and cannot be preserved to the detriment of the Respondents when the Applicant is concerned with the debt.

16. The Respondent's counsel on issue of the subject matter referred to the case of **Synohydro Corporation Limited Vs. G C Retail Limited & Equity Bank Limited** Nairobi High Court Civil Case no. 487 of 2015 (2016) eKLR paragraphs 35 and 36 and **Inforcard Holding Limited Vs. The Hon. Attorney General and Permanent Secretary Ministry of Transport Nairobi High Court Civil Case no. 361 of 2012 (OS) (2014) eKLR** paragraphs 15, 17 and 19.

17. The Respondents Advocate further referred to Clause 8.4 of the agreement which provides:-

"The Buyer shall provide Supplier with security in support of credit terms extended by way of guarantee from a bank acceptable to SABILI and in SABILI approved format /OR Asset Title Charge/OR Postdated Cheque, all at the discretion of the Supplier. Where and when a postdated Cheque is agreed, the Cheque shall be delivered with each Purchase Order and dated a day before payment due date. Otherwise, the payment Security shall be of value equal to value of approved credit limit."

18. It was further urged under annexture **DA-8**, two of the listed properties has been charged to the bank. On the other two which are not charged are in the name of the 3rd Respondent who is not a party to the agreement on the contract and would be prejudiced if injunction is issued. It was further urged the application is a nullity as the Applicant has no contract with the Respondents as per agreement **DA-1** urging there is no prove of a deed of variation signed between the parties or transfer of the obligation under the said agreement.

19. Mr. Kosgei in brief response urged on the issue of the subject matter, pointing out that the arbitration has already commenced, in which the Applicant is a creditor in respect of a debt which has not been disputed and has an interest over the company which owns the four properties. He urges it is dishonest to try to distinguish the subject matter from the property. On issue of fraud he referred to annexture **DA-4**

urging there is evidence the Respondents are in the process of disposing of the property on which the petrol station is built. On the parties on the contract he urged the same has not been contested and that the Applicant has been engaging with the Applicant after it changed its name from **Sabili Energy Limited to EON Energy Limited**.

20. In the present application before me, it is clear the application as formulated; the Applicant is seeking an interim measure of protection pending the completion of the arbitral proceedings. The orders sought are under several provisions of the law, but mainly under **Section 7 of the Arbitration Act, 1995** which provides:-

"(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."

21. Whereas the court has powers to grant an order of interim measure of protection under section 7 of the Arbitration Act, the principle of party autonomy still reigns supreme as the court is precluded from making orders undermining the arbitration or which may be prejudicial to the outcome of the arbitration. The interim measures are otherwise supposed to be in a such way that would support the arbitral process and ensure the process is not undertaken in vain. The court should guard against undermining the arbitral process by the kind of orders it issues. It should issue orders that are compatible with an arbitration agreement as made by the parties.

A. Whether the Applicant proved there is existence of an arbitration Agreement?

22. The principle upon which interim measure of protection will be granted under section 7 of the Arbitration Act 1995 is now well settled. In the case of **Safaricom Limited Vs. Ocean View Beach Hotel Limited & 2 others (2010) eKLR**, the Court of Appeal, stated the following with regard to factors to be taken into account before granting of an interim measure of protection under the aforesaid section:-

"i) The existence of an arbitration agreement.

ii) Whether the subject matter of the arbitration is under threat?

iii) In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.

iv) For what period must the measure be given especially if requested for before commencement of the arbitration so as to avoid encroaches on the tribunal's decision making powers as intended by the parties?"

23. I have considered that in this matter it is only the Applicant who has filed and annexed several annexures including *"Product Supply Agreement between the parties marked DA-1"*. The Respondent has opted not to file an affidavit challenging any of the annexures. I therefore find that the agreement between the parties is the one marked **DA-1**, in which both the Applicant and the Respondents have subscribed to; incorporating Arbitration clause under clause 20.1, which prescribes any dispute arising out of the connection with the agreement. Further clause 20.8 provides nothing in the agreement shall preclude either party from seeking any interim relief from a competent court having jurisdiction pending the institution of the arbitral proceedings.

24. Upon perusal of the parties' agreement and relevant clauses thereto, it is clear in my mind that the parties intention, where dispute arose related to the agreement they had entered into, was and is to have the dispute resolved through Arbitration. I therefore find in the instant agreement there was a valid arbitration agreement from which the court can consider whether to grant an order for interim measure of protection or injunction to safeguard the subject matter pending completion of the arbitral proceedings.

25. In view of the above I am satisfied the Applicant has demonstrated from the contents of the *"Product Supply Agreement"* dated 2nd October 2017, which contents are not contested by the Respondent, that there exists a valid Arbitral agreement, which was voluntarily entered into by the parties and which is binding both parties.

B. Whether the subject matter of the arbitration is under threat?

26. Under the **Black's Law Dictionary**, Ninth Edition at page 1561, **"subject matter"** is defined as follows:-

"The issue presented for consideration;

the thing in which a right or duty has been asserted, the thing in dispute."

27. In **Sinohydro Corporation Limited Vs. G O Retail Limited & Equity Bank Limited** Justice C. Kariuki; stated as follows:-

"The subject matter under threat was further described as assets that need to be preserved until an arbitral tribunal can give its decision. In this matter, it is not clear what the subject matter of the arbitration would be, since the dispute is yet to be referred to arbitration. I also find that the Applicant has also failed to identify what the subject matter of the arbitration would be. It is highly unlikely that the monies of to be collected under the performance guarantee would be the basis of the arbitration."

28. In the instant case, the subject-matter are the listed parcel of lands **KSM/Kochieng/4157, KSM/Ojola/4116, KSM/Ojola/3927 and KSM/Ojola/4393**. The Applicant has urged the Respondents are directors of the 1st Respondent, who is indebted to the Applicant to the tune of Kshs. 20,237,815/- as of 14th June 2018. That under the contract, in law, the 2nd to 5th Respondents, as brains of the 1st Respondent, the company, owe an obligation to ensure that the 1st Respondent honours its obligations including payment for supplies by the Applicant. That after that it has been demonstrated through the Applicant's unchallenged affidavit, after several instances of supply, the 1st Respondent started defaulting on payment, leading to delayed payments and in the process it became clear the Respondents would not make good any payments to the Applicant. That the Respondents in spite of being notified of Appointment of an arbitrator have failed to show interest in attending arbitration. The Respondents do not deny the claim nor are they showing any signs of willingness to settle the debt. The Applicant is apprehensive the Respondents may dispose of the listed properties by transferring or leasing or sells the listed properties. The properties registered as - **KSM/Kochieng/4157 and KSM/Ojola/4116** are registered in the name of the 1st Respondent whereas **N/Kapsengere/1257** is registered in the name of the 3rd Respondent a director to 1st Respondent Company. **KSM/Ojola/3927 and KSM/Ojola/4393** have not been disclosed in whose names they are as no search certificate is attached in respect of the same. The Applicant's averment that the listed properties are in the names of the company and directors is under threat has not been challenged or controverted as the Respondent did file any affidavit in response. I find the Applicant's apprehension cannot be said to be a matter of speculation.

29. The properties listed and owned by the 1st Respondent and the directors who are indebted to the Applicant to the tune of Kshs.20,237.815/- which debt is not denied cannot as urged by the Respondent, be said not to be in dispute and that they do not form part of the dispute, when it is averred and not disputed the petrol station is on the disputed property and when that is the only asset which the Applicant can fall to, to have the debt settled if not otherwise. The Respondents rely on clause 8.4 urging the listed properties do not form part of the dispute. Clause 8.4 deals with payment and credit terms but not in a matter dealing with an outstanding debt, as is the case herein. Clause 11.3 clearly states a buyer represent that sufficient resources are presently available to meet its obligations under the terms of the contract. In my mind whether the listed properties are mentioned in the agreement or not, they form part of the resources which the Respondent represented to have available to meet its obligations under the terms of the contract including now the outstanding debt.

30. It is contended that some of the properties are charged and that fact is not in dispute. That where a property is charged the chargee interest overrides the interest of the Applicant herein as a creditor as his interest is not secured. That in this application the orders sought by the Applicant affect or impair the interest of the chargee not- withstanding that the court has jurisdiction to grant the orders sought under Section 7 of the Arbitration Act so as to preserve the Applicant's interest and the property or rather maintain the status pending the completion of the arbitration. However as the Applicant interest is not secured it cannot be allowed to override that of the chargee.

31. It has been urged that he application is a nullity on the basis the Applicant never entered into contract with the Respondents as per agreement **DA-1** and urged further that no evidence has been adduced to prove a deed of variation signed between the parties or transfer of the obligation under the said agreement. The point was raised for the first time during submissions. It is not one of the grounds of opposition nor is there affidavit to that effect. This being an issue of fact it should have been raised and controverted by replying of an affidavit, which has not been contested. The Respondents have been engaged with the Applicant all the time after the change of the name as alleged in the submission. The Respondents by their very own conduct are estopped from denying the contract between themselves and the Applicant. They have been communicating with the Applicant and have never denied having knowledge of who the Applicant is. I therefore do not find any basis in the Respondent's contention on that point.

32. This court's understanding of the purpose of the interim measure of protection, is that it must be of urgent nature to preserve the subject matter of the dispute, so that the proceedings before the arbitral are completed and not rendered nugatory. In the instant matter the dispute is now before the arbitration having been referred there by the Applicant. The Applicant is apprehensive that without the protection by the court the Respondents will dispose of or transfer or lease the listed properties, which are the subject matter of dispute or difference between the parties herein and which must be dealt with by an Arbitral Tribunal. It is further urged that if the honourable court does not intervene and grant the orders sought, the Applicant will be left with a right but with no remedy and the envisioned arbitral proceedings will be rendered useless.

33. I find in the instant Application the Applicant is not seeking settlement or determination of the issues that has arisen between the parties, which is not a mandate of the court in this application, but is seeking an order which is intended to maintain status quo pending the completion of the arbitral proceedings.

34. The purpose of the interim measure of protection is in my view to preserve the subject matter pending arbitration and in doing so the court should always be concerned with finding out whether granting or rejecting the application, whether the subject matter of arbitration is in danger of being wasted or disposed of and whether the application would be rendered nugatory by declining to grant the orders sought. The court at the same time in dealing with such an application should not endeavor into going into merits of the dispute as is not its merit to determine the merit of the dispute. It should steer off the making of the ultimate award as it proceeds to consider an application for interim measure of protection, beyond that it is not court's business save to ensure the aim and propose of an interim measure of protection is achieved.

35. In view of the aforesaid I am satisfied that the Applicant case meets the test upon which interim measure of protection will be granted under Section 7 of the Arbitration Act and the settled law.

36. The upshot is that the Applicant's application succeeds. I accordingly proceed to make the following orders:-

a) THAT there be an interlocutory injunction against the Directors of Desnol Investments Limited, their agents and/or servants restraining them from commencing, continuing or concluding any transactions for the selling, transferring, leasing or utilizing the real, movable and cash assets of the company including the land registered as KSM/KOCHIENG/4157 & KSM/OJOLA/4393 without the authorization of the court and/or the involvement of the Applicant pending the completion of the arbitral proceedings.

b) THAT there be an interlocutory injunction against the 3rd Respondent, his agents and/or servants restraining them from commencing, continuing or concluding any transactions for the selling, transferring, leasing or otherwise disposing the land registered as NANDI/KAPSENGERE/1257 without the authorization of the court and/or the involvement of the Applicant pending the hearing and determination of this Application.

c) THAT there be an inhibition against the land registered as KSM/KOCHIENG/4157 & KSM/OJOLA/4393 pending the completion of the arbitral proceedings.

d) THAT there be an inhibition against the land registered as NANDI/KAPSENGERE/1257 pending the completion of the arbitral proceedings.

e) Cost of the application be in the cause.

Dated, signed and delivered at Nairobi this 4th day of October, 2018.

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J .A. MAKAU

JUDGE