



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL, ADMIRALTY & TAX DIVISION

CIVIL SUIT NO. 416 OF 2016

HYDRA INDUSTRIAL SERVICES LIMITED 1ST PLAINTIFF/APPLICANT

AL-SHOUMOUK ENGINEERING KINETICE

GENERAL CONTRACTING LLC

(suing through the 1st Plaintiff under a

Master Consortium Agreement Dated 18th May, 2015).....2ND PLAINTIFF/APPLICANT

VERSUS

GEOHERMAL DEVELOPMENT CORP.....DEFENDANT/RESPONDENT

KREDITANSTANT FUR WIEDERAUFBAU (KFW)INTERESTED PARTY

RULING

1. This ruling is a subject of a preliminary objection raised by the Defendant, against the notice of motion application dated 15th May 2017, filed by the Plaintiff, seeking for orders inter alia that: Interested Party named above be joined to the suit, that injunctive orders be issued to restrain the Defendant from terminating the contract, and to have the officers of the Defendant cited for contempt on grounds that, they have disobeyed the order of the Court issued on 10th November 2016. However, subsequently, prayer (2) of the application for joinder of the Interested Party was withdrawn by the consent of the parties on 25th May 2017.

2. The preliminary objection is based on the grounds that;

(a) Once a court has granted a stay of proceedings, in proceedings for interim measures of protection pending arbitration, it can only resume its jurisdiction if it can be shown that the arbitration has broken down;

(b) The Plaintiff having been precluded from taking or continuing judicial proceedings by the order staying proceedings, it cannot purport to assert new claims and/or seek new/further orders. That the Court has gone as far as it is empowered by law to, under the Arbitration Act, unless special circumstances arise to require the setting aside of the order of stay;

(c) The order staying the suit and referring the matter to arbitration has not been discharged or set aside. Even assuming that the Court could in fact deal with the new proceedings, its hands are tied on account of the order it issued on 10th November 2016;

(d) Further, the Plaintiff having already commenced proceedings cannot pick and choose what aspects of the dispute to arbitrate and what to litigate. The setting aside of the order staying proceedings would mean that the Plaintiff can pursue claims in various fora, which is an abuse of Court process.

3. The Plaintiff filled a Replying affidavit in response to the preliminary objection. The Defendant however attacked the affidavit that, given that a preliminary objection can only be made on points of law the Court ought not to entertain the facts as alleged therein as they do not have any bearing on the question of law. The case of; Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Company Limited (1969) EA 696 was relied on.

4. The Defendant further refuted the Plaintiffs' averments that, the events that occurred to the granting of the order staying proceedings and referring the matter to arbitration, should be considered in this matter. It also refuted the argument that, its continued participation in the arbitral proceedings portrays it as having unclean hands.

5. It was argued that, the continuation of the arbitral proceedings is the clearest indication that the subject matter of the arbitration is still intact. Therefore the order of injunction sought is without merit, as the order of stay of proceedings herein has the effect of; suspending the court's jurisdiction to entertain any further proceedings in the suit. The case of; Johnstone Ewoi Lotiir & Another vs Jeremiah Ekamais Lomorukai & 4 Others Petition No. 252 of 2017, which referred to the case of; Dickson Mukweluine vs Attorney General & Four Others Nbi Petition No. 390 of 2012, was cited where the court stated that;

"The alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 152(2) of the Constitution of Kenya 2010, the court is obligated to promote these modes....."

"The Court is entitled to either stay the proceedings until such time as the alternative remedy has been pursued or bring an end to the proceedings before the court or leave the parties to pursue the alternative remedy. In the result we are of the view and hold that the Court's jurisdiction under Article 165 can be limited and/or restricted by an Act of Parliament."

6. Further reliance was placed on the case of; R vs Jewitt (1985) 2SCR 128, where the Court held that;

"A stay of proceedings is a stopping or arresting of judicial proceedings by the direction or order of a court. As defined in Black's Law Dictionary (5th Ed. 1979), it is a kind of injunction with which a court freezes its proceedings at a particular point, stopping the prosecution of the action altogether, or holding up some phase of it. A stay may imply that the proceedings are suspended to await some action required to be taken by one of the parties as for example, when a non-resident has been ordered to give security for costs. In certain circumstances, however, a stay may mean the total discontinuance or permanent suspension of proceedings."

7. The Defendant therefore argued that, where proceedings are stayed pending reference to arbitration, those proceedings are consequently permanently suspended and the Plaintiff cannot purport to take out further court process in such a suit.

8. However, as stated herein, the Plaintiffs opposed the objection by filing a Replying affidavit dated 27th June 2017, sworn by Ferdinand Wanyama, a director of the 1st Plaintiff. Basically he reiterated the background facts of the case, to the effect that, on 17th January 2017, the Defendant purported to terminate the contract between the parties, which is, the subject of arbitral proceedings, and in which the Defendant is actively involved. It was argued that, the reasons advanced for termination of the contract, are unfounded as on 7th June 2016, the Plaintiffs had replaced the Advance Payment Guarantee, provided by the Ecobank Limited, which the Defendant found to be inadmissible with a replacement issued by Co-operative Bank of Kenya. Even then, the Defendant has not served the Plaintiffs with a notice to terminate the contract.

9. That in any event, the termination is unfounded as the Plaintiff is enjoying protection granted by the Honourable Court, which did not lapse in any way or at all and it also protected by the on-going arbitral proceedings. Thus the Defendant is stopped from seeking to walk away from a contract whose validation it has been party to.

10. The Plaintiffs further averred that, they desire to perform the contract and be paid the contractual sum due and not to stall the project or deny Kenyans the benefit of the envisage project as alleged. That, on 17th March 2017, the Defendant purportedly entered into another contract with a Third Party for the delivery of the same services it had contracted the Plaintiffs to perform, during the pendency of the Arbitral proceedings, and before seeking to release the Plaintiffs from the earlier contract.

11. That, the Defendant has not offered to deposit any funds as security for damages in relationship to the contract pending arbitration and yet it is insisting that the Plaintiffs can be compensated by way of damages. Therefore, the Defendant is not in Court with clean hands, as on one hand, it alleges that the subject contract was properly terminated and still participates in Arbitration proceedings emanating from a dispute related to the same contract. The Court was urged to dismiss the preliminary objection, as it is meant to deny the Plaintiff access to justice.

12. The Plaintiffs filed submissions in addition to the Replying affidavit, arguing that, the purpose of interim measures of protection as provided for under Section 7(1) of the Arbitration Act, 1995 is to protect the subject matter in question and that, if the subject matter is destroyed during the pendency of the arbitration process, then the arbitration would be rendered nugatory and reduced to an academic exercise, as it would lack its purpose.

13. That the interim measure of protection issued herein, was limited to thirty (30) days within which period the Plaintiff duly complied and started the Arbitral proceedings and therefore kept the protection alive. The Plaintiffs referred to the Court of Appeal case of; Safaricom Limited vs Ocean View Beach Hotel Limited & 2 Others CA No. 327 of 2009 (UR 225/2009), where it was stated that;

"On the available material, if the Applicant does not comply with the Respondent's demands, the Applicant may well be evicted and its equipment removed. That, in my view, would render the Applicant's intended appeal nugatory. The same position would apply if eviction of the Applicant and the demolition of its equipment were to go on when the arbitral process is underway."

14. The Plaintiffs further submitted that, the action by the Defendants is against the law and is contemptuous of the Court's order for interim measures of protection, stated by the Court of Appeal in the above case that:

“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.”

15. The Plaintiff argued that, court does not lose its power to superintend the observation of the orders for interim measures of protection and if the subject matter protected is destroyed then, the Court whose orders are violated has powers to intervene and establish why.

16. The Plaintiffs relied on the case of; *Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another (2014) eKLR*, where the court stated that;

“in The Owners of Motor Vessel “Lilian S” vs Caltex Oil Kenya Ltd., (1989) KLR 1, this Court held: “Jurisdiction is everything, Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a constitution of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”

17. The Plaintiffs submitted that during the Arbitral proceedings, the Court only lacks jurisdiction on determining the merits of the subject matter but not the protection of the subject matter as ordered while arbitration is under way. That in the case of; *Mara Conservancy vs County Council of Transmara (2010) eKLR*, the court quoted with approval from the legal text in “The Law and Practice of Commercial Arbitration in England” by Sir Michael J. Mustill and Stewart C. Boyd, 2nd Edition at page 329, where the Learned authors stated as follows:

“An interlocutory injunction is an order of the court, normally negative in form, designed to protect the property or the rights of the parties from prejudice pending the resolution of the dispute.” At page 330 the Learned Authors further state that: “The Court has power to grant an interlocutory.”

18. That similarly, in the case of; *Justus Kariuki Mate & Another vs Martin Wambora & Another (2014) eKLR*, it was stated that:

“The duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule of law and the due administration of justice. In Hadkinson vs Hadkinson, (1952) ALL ER 567, Romer, L.J. stated: “It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, L.C., said in Chuck vs Cremer (1) (1 Coop. temp.Cott 342): “A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it.....It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That, they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

19. Finally, it was submitted that the preliminary objection is a smokescreen meant to avoid the court looking at the question of why its order for interim measures of protection was disobeyed and the contract secretly awarded to a Third Party and bring the culprits to account. The same ought to be dismissed with costs to the Plaintiffs.

20. I have considered the rival arguments, and find that the only issue to determine is whether; the Court has jurisdiction to entertain and/or hear the subject application dated 15th May 2017. The main ground raised in the preliminary objection is that once the Court has issued interim measures of protection in a matter pending referral to arbitration and that process has commenced, then the Court’s jurisdiction over the matter is extinguished.

21. However, before I deal with this issue, I wish to deal with the issue raised regarding the Replying affidavit filed by the Plaintiffs. The question is can a party rely on an Affidavit in support or opposition to a preliminary objection? The law is now settled as stated in the case of; *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Company Limited (supra)* that;

“ a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

22. To the contrary, an Affidavit is a written statement of facts sworn to and signed by a deponent before a commissioner of oaths or some other authority having the power to witness an oath. It therefore follows that; a Respondent to a preliminary objection cannot raise matters of facts. In that case, the Replying affidavit filed by the Plaintiffs, will not be considered in so far as, it relates to factual matters.

23. To revert back to the issue under consideration, it suffices to note that, the Plaintiffs commenced this matter by filing a Plaint dated 12th October 2016. The same was filed alongside a notice of motion application dated 12th October 2016, of the same date, seeking for various orders, inter alia that; the Defendant be restrained by an order of injunction, from terminating the contract dated 6th July 2016, executed by the parties.

24. Upon service of the pleadings, the Defendants filed a chamber summons application dated 21st October 2016, seeking for stay of proceedings, pending the referral of the matter to Arbitration. The chamber summons application was heard and determined on 10th November 2016, whereby the Court allowed the application in terms of prayer (2). The Plaintiffs were granted interim measure of protection for Thirty (30) days, to enable them institute Arbitral proceedings. It was further ordered that, if the Plaintiffs did not comply with Thirty

(30) days period, the order would automatically lapse.

25. Subsequently, the Plaintiffs moved the court for protection under the provisions of Order 40 Rule 2 of the Civil Procedure Rules, 2010, which prayer was opposed by the Defendant and upon hearing the parties, the application thereof was rejected. It has been averred herein, that the parties have subsequently subjected themselves to the Arbitration process.

26. As the Arbitral process is still ongoing, the subject Application has been filed. Does the Court have jurisdiction to hear this matter when it is before the arbitrator? In my considered opinion, the entire matter rests on issue of the extent to which a court can intervene in an Arbitration process.

27. The general principles of the law on Arbitration, is that, by entering into an arbitration agreement, parties express their intention that, all the disputes between them be settled by arbitration. With the acceptance of party autonomy, the level of court intervention to those cases has significantly diminished over the years. There are however, some situations where court intervention is needed, for example, where the court is asked to assist with the appointment or removal of arbitrators, collection of evidence or support with protective measures in cases where the arbitrator lacks coercive power and finally the court will give effect to and enforce the arbitration award if it is not complied with voluntarily.

28. In addition the court may intervene to guarantee the minimum requirements of procedural fairness are fulfilled and exercise a supervisory role, for example, remove an arbitrator for lack of impartiality or may annul an award based on unfair procedures.

29. These position of giving the party autonomy priority and eschewing intervention is supported by Article 5 Model Law, which is similar to Section 10 of the Arbitration Act No. 4 of 1995, states that, “no court shall intervene except where so provided in this law”. Thus court intervention is permitted in two ways: where expressly provided for in the arbitration law or where the issue is not covered by the law. The specific areas of court intervention include injunction restraining arbitral proceedings, which have been wrongly brought, or restraining parallel proceedings: Section 6 of the Arbitration Act and the case of; *Aggeliki Charis Compania Maritima vs Pagnan Spa. ((The Angelic Grace). (1995) 1 Lloyd’s Rep. 87, 96.*

30. The court’s intervention during the arbitral proceedings include granting of interim relief, extension of time limits, or determining preliminary points of law. In dealing with these issues, different considerations apply depending on the type or nature of measures requested. These may be classified into three categories;

a) The ordering of purely procedural steps which cannot be ordered or enforced by the arbitrators; which does not involve encroachment on the merit of the dispute;

b) Orders for maintaining status quo; such as money or asset blocking orders, may call for assessment of the claim, as they involve trespassing on the arbitrator’s territory, therefore the courts are and should be hesitate to grant these orders. In fact the grant of interlocutory injunction may cause stronger potential for encroachment. and even greater where the interim measure takes the shape, of an order that the party, shall perform in advance of an award the very obligation the existence of which the arbitrators are in the course of deciding; and

c) Measures to ensure that the award has the intended practical effect and can be enforced; this should generally be preserved for the arbitrators.

31. Taking into account the above legal principles and the facts in this matter, I find that it is not in dispute that, this court granted the Plaintiff interim measures of protection for a period of Thirty (30) days before the establishment of the Tribunal. If there are circumstances that have arisen that necessitates the issuance of further interim measure of protection, then I find that, the provisions of Section 18 of the Act, come into play, where the Arbitral Tribunal has the power, at the request of a party, order a party to take such interim measure of protection as the Tribunal may consider necessary, in respect of the subject matter of the dispute. Sub-Section (2) thereof, states that, the Tribunal or a party with the approval of the Tribunal may seek assistance of the High Court in enforcing the order given under Sub-Section (1).

32. Therefore, once the Arbitration Tribunal is seized of the dispute then the court downs its tool until the matter is determined and/or party appeals against any interim decision of the arbitrator. In that case, the court cannot grant the injunctive order sought. The issue should be raised before the Honourable Arbitrator.

33. Similarly, although the Plaintiffs argue that, the Court should intervene in this matter and stamp its authority over the enforcement of the interim measure of protection given, but these proceedings are basically stayed and the matter is before the Arbitral Tribunal. The Court cannot run parallel proceedings with the Arbitral proceedings, as this will be contrary to Party Autonomy, the independence and authority of Arbitrators, which are the hallmarks of the Arbitration law and/or the Act.

34. The upshot of all, is that, the Preliminary Application is upheld, in that, the subject notice of motion application dated 15th May 2017, cannot be heard, as the Court lacks jurisdiction to do so. The costs of the Preliminary objections are awarded to the Defendant.

35. It is so ordered.

Dated, delivered and signed on this 2nd day of November, 2018

GRACE L NZIOKA

JUDGE

In the presence of:

Mr. Wangila for the Plaintiffs/Respondents

Ms. Wataka holding brief for Ms. Kirimi for the Defendant/Applicant

Dennis..... Court Assistant