REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 130 OF 2016

H. YOUNG & CO. (E.A) LIMITED….....PLAINTIFF

VERSUS

HYUNDAI ENGINEERING CO. LTD.....1ST DEFENDANT

GENERATING CO. LTD……....2ND DEFENDANT

RULING

1. The application before me is dated 25th May 2016. It is an application made by the 1st Defendant, **HYUNDAI ENGINEERING CO. LIMITED** *(hereinafter "Hyundai?).* The application asks the court;

> ***"….to limit the Orders of Interim Injunction given by Honourable Mr. Justice Ochieng ex-parte on 20th April, 2016 and extended on 25th May, 2016 so as to restrain the 2nd Defendant from paying to the 1st defendant only the aggregate sum claimed by the plaintiff, namely Kshs. 650,986,548.90?.***

2. When canvassing the application Mr. Amoko, the learned advocate for the applicant, submitted that the initial orders had been obtained on the grounds that the defendant may obstruct or delay the Decree. Therefore, it was the understanding of the applicant that the orders made, were for security for the due performance of the Decree.

3. Meanwhile, as the applicant had served the respondent with an Arbitration Notice, the applicant pointed out that the arbitration process could take place in Singapore or anywhere else.

4. On his part, Mr. Otieno, the learned advocate for the 2nd Defendant, **KENYA ELECTRICITY GENERATING CO. LIMITED** *(hereinafter "Kengen")* associated himself with the submissions made by Mr. Amoko advocate.

5. Kengen added that the plaintiff, **H. YOUNG (E.A) LIMITED** *(hereinafter "H. Young")* had misrepresented or had mis-apprehended the 3 contracts at play between the parties. The 3 contracts were between;

> ***a) AFD and Kengen;***

b) Kengen and Hyundai

c) Hyundai and H. Young.

6. The contract between Kengen and H. Young was described as the main contract.

7. Secondly, there was said to be a Financing Agreement, which governed the distribution and use of the funds used to pay for the work. According to Kengen, the funds to be paid to Hyundai would never come into the hands of Kengen.

8. Therefore, as Kengen was not holding any funds that may become payable to Hyundai, it was the case of Kengen that the orders issued by the court were un-enforceable.

Why does Kengen say so?

9. In its view, it is because the funds for the project could only be disbursed into the Project Account as agreed upon between Kengen and **AFD.**

10. Therefore, as **AFD** was not a party to this case, Kengen says that the orders already made were incapable of enforcement. For that reason, the court was called upon to set aside the orders made on 20th April 2016.

11. In answer to the application Prof. Mumma, the learned advocate for H. Young, submitted that the application dated 25th May 2016 did not seek the discharge of the interim orders.

12. The court has already set out above, the particulars of the relief sought. It is limited to seeking to limit the scope of the interim order, so that it does not extend to any funds exceeding Kshs. 650,986,548.90.

13. Therefore, when Kengen submitted that the interim orders should be discharged altogether, that was a submission for the grant of a relief which had not been sought in the application in issue. In the event, the court tells Kengen that the orders for the discharge of the interim orders cannot be granted in the present application.

14. H. Young then pointed out that the effect of the application dated 25th May 2016 was to vary the Directions which the court had given on 25th May 2016.

15. The said Directions had been given by the consent of the parties. Therefore, when Hyundai brought the present application, H. Young perceives the said application to constitute an attempt to vary the terms of the consent order, by moving forward prayer (3) of the application dated 18th June 2016.

16. In **RATILAL GOVA SUMARIA Vs. FINA BANK LIMITED Hccc No. 640 of 2004,** Njagi J. reviewed several decisions on the issue regarding the setting aside of consent orders. The learned Judge concluded thus;

> ***"Suffice it to say that, in principle, a consent order acts as an estoppel. However, it can be set aside on any ground which would invalidate an agreement, such as misrepresentation, fraud or mistake. Otherwise a consent order cannot be set aside by an appeal or by review".***

17. I have no doubt about the correctness of that decision. A consent order cannot be set aside unless the applicant satisfies the court that it had been entered into in a manner which would justify the setting aside of a contract.

18. But it is to be noted that in this case, the court expressly granted liberty to all the parties to bring applications, whilst awaiting the Directions to take effect.

19. By granting liberty to the parties, the court did not vary the legal requirements which must be met if consent orders are to be varied, discharged or otherwise set aside.

What was the order made on 20th April 2016?

20. It was in the following words;

> ***"Until 25/04/2016 the 2nd Defendant shall NOT remit payment to the 1st Defendant in respect of the settlement of the Prolongation Claims made by the 1st Defendant, arising from the OLKARIA 1 AU and IV GEOTHERMAL POWER PLANT PROJECT; in relation to which the plaintiff was a sub-contractor".***

21. On 25th April 2016 the said order was extended, subject to 1st defendant retaining its challenge to the court's jurisdiction.

22. On 25th April 2016, the interim order was extended by consent.

23. Similarly, on 27th April 2016 the parties consented to the extension of the interim order.

24. Again, on 12th May 2016 the order was extended by consent.

25. However, on 16th May 2016 Hyundai opposed the extension of the interim order. But Ogola J. did grant an extension of the order.

26. The record shows that on 25th May 2016, the parties recorded a consent order on the Directions regarding the sequence and method through which the court would hear and determine the 3 applications which were then pending.

27. Having granted the Directions in terms of the consent, the court further ordered that the interim orders be extended until 27th June 2016. The court also granted liberty to each of the parties to make applications, as may be deemed appropriate.

28. In other words, the extension of the interim orders was not made with the consent of the parties.

29. And, indeed, it is because there was a disagreement on the issue of the possible extension of the interim order, that the court granted to the parties, the liberty to apply.

30. In the circumstances, the application seeking the variation of the interim order is not one that was seeking the variation of a consent order.

31. The order in question was issued *ex-parte*. Therefore, at the time when the court granted it, the said court had not had the benefit of hearing from all the parties. The court had only heard the case which was presented by the plaintiff.

32. It is because of the appreciation that when other parties begin to put forward their respective cases, the court might become aware of matters which had hitherto been unknown, and which if it had become aware of, may have coloured the order given originally that it has been acknowledged that the discretion to set aside or vary *ex-parte* orders;

> ***"….is a wide and flexible one, and is exercised upon terms that are just".***
>
> See ***PATEL Vs. E.A. CARGO HANDLING SERVICES LTD [1974] E.A. 75***

33. In **REPUBLIC Vs LUCAS M. MAITHA, CHAIRMAN BETTING CONTROL AND**

LICENSING BOARD & OTHERS EX PARTE INTERACTIVE GAMING & LOTTERIES LTD Misc. Appl. No. 360 of 2010 Odunga J. said;

> ***"Applications to set aside ex-parte orders are by no means rare. They are frequent occurrence and they occur due to different reasons in different cases. The aim being to do the justice between the parties, the court has been given wide and unfettered discretion, but to be exercised judicially, to set aside or vary such orders inter alia in the exercise of the inherent powers of the Court reserved in section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".***

34. In this case the plaintiff has made a claim for Kshs. 578,324,781.78 in respect to prolongation, plus a further sum of Kshs. 72,661, 767.2 arising from the concluded contractual works.

35. Of course, it is also clear that the plaintiff believes that **HYUNDAI** was hiding information which could entitle the plaintiff to further sums.

36. The suggestion, as I see it currently, is that until the 1st defendant makes available some information to the plaintiff, the claims so far particularized would remain.

37. That implies that the further claims may or may not ever materialize.

38. In the circumstances, as the claims in excess of Kshs. 650,986,548.90 may well be nothing more than speculative. Therefore, I hold the considered view that justice demands that the interim order be varied so that it is limited to the sum of Kshs. 650,986,548.90.

39. The fact that **HYUNDAI** may leave the jurisdiction would not, of itself, be reason enough to warrant extending the interim order to cover all the funds that may be in the hand of either Kengen or in the hands of **AFD.** I so find because, inter alia, the parties had contemplated international arbitration as a means of resolving disputes which might arise between them. In those circumstances, it must be deemed that the parties had contemplated that legal action, to recover any sums awarded by the arbitral tribunal could be conducted outside Kenya.

40. In conclusion, therefore, the interim injunction will forthwith be varied so that, although it shall remain in force until the substantive application is determined, the order will be limited to cover not more than Kshs. 650,986,548.90.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **11th day** of **July** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Agwara for the Plaintiff

Amoko for the 1st Defendant

No appearance for the 2nd Defendant

Collins Odhiambo – Court clerk.