



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 271 OF 2016

DIMENSION DATA SOLUTIONS LIMITED.....PLAINTIFF

VERSUS

KENYATTA INTERNATIONAL CONVENTION CENTRE.....DEFENDANT

RULING

1. For determination by this court is the Plaintiff's Chamber Summons dated **11th July, 2016** brought under **Section 7** of the **Arbitration Act No. 4 of 1995** (as amended) and **Rule 3** of the **Arbitration Rules, 1997**. The Plaintiff seeks the following orders against the Defendant :-

a) Spent

b) That as an interim measure of protection, a temporary injunction order do issue to stop the Defendant from any further usage of all that conference communication and instrumentation infrastructure equipment installed by the Plaintiff between 30/11/2015 to 22/12/2015 pending the hearing and determination of the suit or the arbitration herein.

c) That, in the alternative, the Defendant do pay the Plaintiff or into a joint interest earning account the undisputed claim of Kshs. 157,238,524.69 being the outstanding debt due and owing by the Defendant to the Plaintiff as at 22/11/2015 in respect of the provision of the said equipment.

d) That in any event, the costs of the application be awarded to the Plaintiff herein.

2. The application is based on the grounds contained in the application and supported by the affidavit of **David Wahome**, described as the Plaintiff's Finance Director, sworn on **11th July, 2016**. It was contended that the parties entered into two agreements, whereby the Plaintiff was to supply and install conference communication and infrastructure systems at an agreed cost of **Kshs. 157,238,524.69** at the Defendant's premises. It was the Plaintiff's case that the said equipment was delivered and installed as per the agreement, but that to date, despite acknowledging the debt owed to the Plaintiff, the Defendant is yet to pay for the goods and services rendered under the subject contracts. The Plaintiff further claimed that after protracted negotiations, the Defendant alleged that the two agreements entered into by the parties were irregular as the same were procured in breach of the **Public Procurement and Asset Disposal Act, 2015** and the **Regulations** thereunder.

3. The Plaintiff however contends that this posturing is an afterthought aimed merely at denying it the balance of the contract price. It was further averred that that posturing is antithetical to the Defendant's continued use of the equipment in question for the various conferences, including global conferences, that it is currently hosting. Thus, given the defendant's obvious reluctance to pay for the equipment installed, and in order to protect itself from further loss and damage, it was the Plaintiff's prayer that the court do grant it the interim measure of protection sought herein, pending the hearing and determination of the arbitral proceedings, pursuant to **Section 7 of the Arbitration Act**.

4. In response to the application, the Defendant filed Grounds of Opposition dated **15th July, 2016** and the Replying Affidavit of **Justus Kivindyo** sworn on **25th July, 2016**. The Defendant contended that since the Plaintiff contains a prayer for Judgment in the sum of **Kshs. 157,238,524.69**, the prayer for interlocutory injunction is misplaced, as the Plaintiff can be adequately compensated in monetary terms. It was further the Defendant's case that the Plaintiff has not demonstrated that it shall be unable to satisfy any money decree so as to warrant the order that the contractual sum be deposited in a joint interest earning account.

5. The Defendant further averred that the interim orders sought will cause undue and unjustified hardship as its operations will be completely paralyzed. It was further contended that the agreements in question were entered into without the sanction of the Defendant's Tender Committee, and therefore are irregular. The deponent averred that the Plaintiff had submitted to the arbitration process as a Sole Arbitrator had already been appointed and therefore, the Plaintiff could not question whether or not there was a dispute to be referred to arbitration. It was also the Defendant's position that it never admitted to being indebted to the Plaintiff and as such admission of debt cannot form the basis for the Court to grant the orders sought. The Defendant therefore urged the court to dismiss the application.

6. The application was dispensed by way of written submissions that were orally highlighted in court on **26th July, 2016**. The plaintiff argued that it had made out a good case for the grant of interim orders pending the arbitral proceedings. Counsel for the Plaintiff, **Mr. Kyalo**, relied on the case of **Safaricom Limited –vs- Ocean View Beach Hotel Limited & 2 others (2010) eKLR**, to augment his submission that the Plaintiff had satisfied the conditions-precedent for the grant of interim measures of protection by the Court, pending arbitration, namely: that there is an arbitration agreement in existence; that the subject matter of the arbitration was under threat since the equipment in question was still being used and there were high chances that the same would waste away; that the appropriate measure of protection was for the Defendant's to stop using the equipment that they had not paid for; and that the period of time for protection was pending the hearing and determination of the arbitral proceedings.

7. **Mr. Kyalo** further urged the argument that though there is the existence of an arbitration agreement, there is no dispute that warrants arbitration since the Defendant has unequivocally admitted the existence of the debt as due and owing to the Plaintiff and even called for negotiations on several occasions to mitigate the risk of the then impending civil proceedings. He pointed out that the Plaintiff continues to suffer loss for as long as the Defendant continues to use the equipment without paying for the same.

8. In response to the Plaintiff's submission, Counsel for the Defendant, **Mr. Wena**, maintained that the application before the court lacks merit. According to **Mr. Wena**, whereas the agreements in question may have been executed by the parties, the contracts were entered into in breach of the provisions of the **Public Procurement Regulations** and without the sanction of the Defendant's Tender Committee. He refuted the allegations that the debt has been admitted, and argued that the mere existence of delivery notes and the agreements could not amount to an admission of debt.

9. **Mr. Wena** conceded to the jurisdiction of the court to grant an injunction pending arbitration and pointed out that the parties had already kicked off the process by agreeing on an arbitrator. He therefore argued that under those circumstances, the Plaintiff cannot validly posit that there is no dispute to be referred to arbitration, having already submitted to the process. Counsel further reiterated the Defence position that this being a claim for money, there was no basis for the court to grant injunctive relief; and that besides, to order the Defendant to cease using the equipment would be a draconian/disproportionate remedy, granted the circumstances herein. Moreover, it was the Defendant's submission that the Plaintiff

had not demonstrated that the subject matter was being wasted, damaged or destroyed to warrant the orders sought. **Mr. Wena** concluded his submissions by stating that the order for security is unwarranted as the Plaintiff had not illustrated that the Defendant cannot satisfy the awards in case an award is rendered in its favour by the arbitrator. Thus, the Court was urged to dismiss the application with costs.

10. I have considered the pleadings, depositions, the submissions and the various cases cited by Learned Counsel. There seems to be no dispute that the parties entered into two agreements for the delivery and installation of conference communication infrastructure equipment as alleged by the Plaintiff, and that the installation was accordingly done. Thereafter a dispute arose between the parties and all indications are that they have submitted to arbitration pursuant to the terms of their agreement. That being the case, the issue is whether **Section 7 of the Arbitration Act** pursuant to which Plaintiff has moved the Court, would avail relief to the Plaintiff in the terms sought. That section provides as follows :-

“7(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 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 this 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.”

11. As correctly pointed out by the Plaintiff, the Court does have the jurisdiction to grant an interim measure of protection, including an order of interim injunction under **Section 7** aforementioned. However, the Court’s jurisdiction is delineated. In **Safari Limited –Vs- Ocean View Beach Hotel Limited & 2 Others (2010) eKLR** the Court set out some of the factors that should be taken into account in determining whether or not to grant such interim measures of protection, namely:

- a) **The existence of an arbitration agreement;**
- b) **Whether the subject matter of arbitration is under threat;**
- c) **In the special circumstances, what is the appropriate measure of protection after an assessment of the merits of the application?**
- d) **For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal’s decision making power as intended by the parties?**

12. Bearing the above in mind, the question that can be posed at this stage is whether the Plaintiff has met the threshold for the grant of an interim measure as outlined in **Section 7 of the Arbitration Act**. It is not contested that there is indeed an arbitration Clause in subject agreements between the parties. So the first condition has been fulfilled. With regard to whether the subject matter is under threat, I have considered the various arguments advanced by the opposing parties. It is not in contest that the parties entered into two agreements for the supply and installation of conference communication and instrumentation infrastructure together with the relevant memory and LAN/WAN networks. The same was done at the behest of the Defendant in preparation for the **World Trade Organization (WTO) Ministerial Conference** that was held in Nairobi in **December 2015**. The agreed costs of the works was **Kshs. 157,238,524.69**.

13. There appears to be no dispute that the Plaintiff faithfully undertook its end of the bargain and installed the aforesaid infrastructure. However, the Defendant has to date not paid the amounts under the two agreements, for the principal reason that the Plaintiff was single sourced in contravention of the **public procurement regulations and procedures**. There is therefore a dispute in existence which has already been referred to arbitration. Moreover, the Plaintiff has demonstrated that the Defendant continues to use the equipment even after the **WTO conference** for other international and national

conferences. The Plaintiff is therefore justified in its apprehension that the subject matter is under threat, considering the amount spent in the purchase and installation of the infrastructure. It is instructive to note that todate Defendant has not conceded that the Plaintiff is entitled to be paid for the equipment, yet it continues to use the same. As such, it is necessary for this court to preserve the subject matter pending the arbitral process.

14. As held in the case of **CMC Holdings Ltd & Another vs Jaguar Land Rover Exports Limited [2013] eKLR**, the measures under **Section 7 of the Arbitration Act** are intended to preserve assets or evidence which are likely to be wasted away if conservatory orders are not issued. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. Clearly therefore, the Plaintiff has demonstrated that the subject matter of arbitration is under threat. On the question as to what would be the appropriate measure of protection, it is noted that the Plaintiff has asked for either a temporary injunctive order or deposit of the suit amount in an interest earning account. Taking into account the subject matter, **Option 2** would be the better option in the circumstances, granted that the equipment has already been laid.

15. In the result, the Court is satisfied that the Plaintiff has laid a proper bases for the issuance an interim measure of protection pending arbitration, so as to preserve the assets, which in this case, are the communication equipment and infrastructure together with the relevant memory and LAN/WAN networks, as the Plaintiff and the Defendant ventilate their issues of breach of contract, before the arbitral tribunal. I would thus grant the Plaintiff orders as hereunder:-

a) That the sum of Kshs. 157,238,524.69 being the outstanding debt claimed by the Plaintiff from the Defendant as being due and owing as at 22/11/2015 in respect of the provision of the suit equipment be deposited by the Defendant into an interest earning account in the joint names of the parties or their Counsel within 30 days of the date of this order; failing which a temporary injunctive order will thereupon issue to stop the Defendant from any further usage of all that conference communication and instrumentation infrastructure equipment installed by the Plaintiff between 30/11/2015 to 22/12/2015 pending the hearing and determination of the arbitration.

b) The costs of this application are hereby awarded to the Plaintiff.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 9th DAY OF SEPTEMBER, 2016

OLGA SEWE

JUDGE