



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 291 OF 2016

CONGRESS RENTAL SOUTH AFRICAPLAINTIFF/RESPONDENT

VS.

KENYATTA INTERNATIONAL

CONVENTION CENTREDEFENDANT/APPLICANT

RULING

1. Through an application of 21st July 2016, the Plaintiff sought the following orders:-

1. That the application herein be certified urgent and fit to be heard on priority basis.

2. That as an interim measure of protection, a mandatory injunction order do issue to permit the Plaintiff, its agents and or servants to enter into Kenyatta International Convention Centre and to remove the bosch computerized conference management equipment installed by the Plaintiff between 11.12.2015 to 17.12.2015 pending the hearing and determination of the suit or the arbitration.

3. That, in the alternative, the Defendant do pay the Plaintiff the undisputed claim of US\$ 158,000.00 being the outstanding debt due and owing by the Defendant to the Plaintiff in respect of clearing and forwarding charges paid for the said equipment.

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

2. That application has not been heard and it has turned out that the dispute herein is subject to an Arbitration clause. The dispute herein revolves around a contract entered between the parties herein on 11th December 2015.

3. Clause 30 of that agreement provides:-

‘The parties agree that they will use their best efforts to resolve amicably all disputes arising out of or in connection with this agreement or in its interpretation. However, in the event that this is not possible, such dispute, difference or questions between the parties with respect to any matter or thing arising out of this agreement shall e referred to an arbitrator. The seat of arbitrator shall be in Nairobi, Kenay and the Arbitrator shall be appointed by mutual consent of the parties hereto. The language of the Arbitration shall be in the English Language.

If the parties fail to agree on the Arbitrator, they shall refer the matter to the Chairperson for the time being of the Chartered Institute of Arbitrators Kenya section who shall appoint an arbitrator on their behalf. The Arbitration shall be governed in accordance with the provisions of the Arbitration Act (Act No.4 of 1995) of the laws of Kenya.

It is further agreed between the parties that should any arbitration or dispute resolution mechanism be put in place in accordance with the terms of this agreement, the parties shall, pending the determination of the dispute, continue with the services not in dispute in accordance with the provisions of this agreement'.

4. On 11th October 2016 parties herein through Counsel, informed Court that they had agreed the matter goes to Arbitration. What was not agreed was the issue of costs for the current proceedings. The Applicant ask that they abide the outcome of the Arbitration while the Respondent insist that costs are due to it immediately.

5. At the time of presenting the Plaintiff, it was the contention of the Plaintiff that this was not a matter for Arbitration. The prayers in the Plaintiff of 21st July 2016 are unequivocal on this:-

a. US\$ 158,000.00

b. A declaration that there is no dispute capable of being referred to arbitration in the circumstances of this case;

c. A mandatory Injunction do issue to allow the Plaintiff to enter into the KICC premise and to remove the bosch conference management computerized equipment installed by the Plaintiff in KICC between 11.12.15 and 18.12.15.

d. Costs

e. Interest on (a) at prevailing commercial rates. (*emphasis mine*)

6. Having now accepted that the matter is subject to the Arbitral process as contemplated by clause 30 of the Agreement, the Plaintiff cannot deprive the Defendant of its costs herein. The proceedings herein were not simply in the nature of a plea for Interim Measures of Protection as provided by Section 7 of the Arbitration Act which reads:-

“(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”.

Those were substantive proceedings.

7. Generally speaking costs of any action or cause follow the event (section 27 of The Civil Procedure Act). The action herein may have been misadvised as it proceeded on the basis that the Arbitration clause did not apply. The Defendant has incurred costs for resisting what may had been improperly brought and should not be deprived of its costs.

8. Costs herein will be to the Defendant to be borne by the Plaintiff.

Dated, Signed and Delivered in Court at Nairobi this 10th day of November, 2016.

F. TUIYOTT

JUDGE

PRESENT;

Githinji for Kyalo for Plaintiff

Nyambati for Defendant

Alex - Court clerk