REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 231 OF 2014

JUNG BONG SUE…..……..……..PLAINTIFF

Versus

AFRIKON LIMITED…….…… ……..DEFENDANT

RULING

Interim measure of protection

[1] I have before me a Chamber Summons Application dated 3rd June, 2014 in which the Plaintiff is seeking from the Court for an interim measure of protection by way of temporary injunction pending the hearing and determination of intended Arbitration between the parties. The Applicant says that the relief sought is necessary to safeguard the subject matter of the Arbitration. The application is expressed to be brought under section 7 of the Arbitration Act and is supported by the Affidavit of Jung Bong Sue, the Plaintiff. The Defendant has opposed the application through a Replying Affidavit of Woosun Jung, the Defendant's Managing Director sworn on 24th June 2014.

The Applicant's gravamen

[2] The Plaintiff is a trained Civil Engineer, currently resident in Kenya, and has practiced as such with various companies including Hyundai Engineering Company and Afrikon Limited (the Defendant). On or about 12th November 2013, the Plaintiff and the Defendant entered into a "**Loan Agreement & Debt Settlement Agreement" ("the Agreement"),** by which the parties agreed that, by way of take over and assumption of rights and obligations as between J. H. Seung and H. H. Kang, a loan amount of 700,000.00 Korean WON would be due and owing from the Defendant to the Plaintiff, and that repayment of the loan would be by way of transfer of a drilling rig BG-20 ("the drilling rig") from the Defendant to the Plaintiff.

[3] There is a valid Arbitration Agreement which provides for dispute resolution by way of Arbitration by a single Arbitrator to be agreed upon by the parties, failing which the parties shall request the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) to appoint an Arbitrator. The arbitration agreement is contained in clause 4.5 of the Agreement and provides as follows:-

"4.5 Any dispute, difference or question which may arise at any time between the parties touching upon the construction of this Agreement or the respective rights and liabilities of the

parties with respect hereto, or otherwise arising in respect of the matter the subject of this Agreement shall be referred to the decision of a single Arbitrator to be agreed upon between the parties or, in default of agreement within fourteen (14) days thereof, to be appointed at the request of either of them by the Chairman for the time being of the Chartered Institute of Arbitrators (Kenya Branch), in accordance with and subject to, the provisions of the Arbitration Act, 1995 or any statutory modification or re-enactment thereof for the time being in force."

A dispute has arisen between the parties and in particular the Plaintiff contends that although the Defendant has duly released actual possession of the aforesaid drilling rig to him, the Defendant has, contrary to the Agreement, refused and neglected to facilitate the perfection of ownership in the drilling rig to the Plaintiff to date. The Defendant has set up various Defences to the Plaintiff's claim including challenging; the proper execution of the Agreement; partial performance; presence of any consideration for the Agreement; and the feasibility of the transfer on account of an alleged Debenture created in favour of Ecobank. Despite all these defences, the Applicant insists there is a real dispute pertaining to the Agreement and he has duly invoked the Arbitration clause. The Applicant has proposed suitable Arbitrators (James Ochieng Oduol and Peter Njeru) for the Defendant's consideration. The process of appointing an Arbitrator under the terms of the Agreement is in progress. According to the Applicant it is important for the court to issue an interim order of protection to secure and safeguard the subject matter (the drilling rig) pending the hearing and determination of the Arbitration. Unless the subject matter is protected from alienation, the purpose of the arbitration will be defeated.

[4] The Applicant submitted that under section 7 of the Arbitration Act, this Honourable Court has power to intervene and to give an interim measure of protection. The 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."

[5] At this stage, the Court should not to delve into the merits or demerits of the respective claims and/or counterclaim or to attempt to resolve this dispute. That is for the Arbitrator. What is required of this Court is to intervene under section 7 of the Arbitration Act and to give an interim measure of protection pending resolution of the dispute through Arbitration. The Applicant cited the case of **Indigo EPZ Limited v Eastern and Southern African Trade & Development Bank (2002) 1 KLR,** where the Court (Mbaluto J) held as follows:-

"In agreement where parties have agreed to refer disputes to Arbitration the position is that the jurisdiction to deal with substantive disputes and differences is given to the Arbitrator and the Kenyan Courts retain residual jurisdiction to deal with peripheral matters and to see that any disputes are dealt with in the manner agreed between the parties under the agreement."

[6] The Applicant also cited the case of **Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others (2010) eKLR** where the Court of Appeal set out, *inter alia*, what the Court is required to look into in such an application as follows:

"Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measure relating to preservation of evidence, measures aimed at preserving the status quo, measures intended to provide security for costs and injunctions. Under our system of law on arbitration the essential which the Court must take into account before issuing the interim measures of protection are:-

1. ***The existence of an arbitration agreement.***
2. ***Whether the subject matter of arbitration is under threat.***

3. ***In the special circumstances, which the appropriate measure of protection after an assessment of the merits of the application?***
4. ***For what period must the measure be given…?***

[7] The Applicant stated that using the usual test for the granting of injunction s laid out in *Giella v Cassman Brown*, he has demonstrated that, *prima facie*, there is an Arbitration Agreement. Though the Defendant raises issue as to the validity of the Arbitration Agreement because of the manner in which it was executed, it is reiterated that s an issue for the Arbitrator to rule upon in the course of the Arbitration. The Applicant has also demonstrated that there is subject matter (the drilling rig) that is in danger of being alienated unless an interim measure of protection is granted; failure to protect it will defeat the entire purpose of the Arbitration. On those reasons, the Plaintiff urged the court to grant the Application dated 3rd June 2014 in terms of prayer 2 thereof.

The Respondent opposed application.

[8] In response to the application, the Respondent filed a replying affidavit sworn by WOOSUN JUNG on the 24th June 2014. The Respondent is of the view that he never owed the Plaintiff any monies under the agreement. Indeed, according to the agreement, the sum in issue was owed by one J.H Seung to H.H Kang which was lent whilst in Korea. Whilst it may have been the intention of the parties that the Defendant takes over the debt, such intention was to be confirmed and formalized upon the execution of the agreement by the parties, and that the Applicant was well aware that the co-director of the Respondent was not within the country, being mostly based on Korea and that being the case, it was agreed that the said document would become effective once the same was sealed by the company and executed by the co-director. As at to-date, the said director is yet to arrive into the country and the agreement is thus yet to be executed as by law required by the Defendant, a limited liability company, and formalized and as it is there is no agreement between the parties. In law, agreements are executed by companies under seal, witnessed by two directors. In this case, the said agreement was never sealed nor executed by the required directors of the company. It is thus not a binding agreement upon the company. That means the debt still belongs to the said H.H Kang who is owed by J.H Kang pursuant to their agreement executed in Korea and no money has ever been advanced to the Defendant Company. This fact was communicated to the Applicant by letter dated 21st February 2014. The response by the Applicant to the letter, by letter dated 27th February 2014 indicated that in view of the issues arising from the non-execution of the agreement, the parties would revert to the original positions for the outstanding debts owed by Mr. H.H Kang. Therefore, the claim by the Applicant at paragraph 10 that he gave up his right to demand payment of the sum lent under the agreement, cannot arise. In addition, no consideration was ever given by the Applicant to the Respondent as claimed at paragraph 11 of the affidavit. The Applicant was to be a mere assignee of the debt.

[9] The Respondent continued to submit that contrary to the assertions by the Plaintiff, the Respondent did not release possession of the BG-20 Rig to the Applicant. The Respondent has always been and continues to have possession of the BG-20 Rig and is using the same to-date and is still in possession of the title documents and ownership has never been transferred. No rights which accrued under the contract to either party. In any event, the Applicant, who was working with the Defendant before is well aware and has not disputed that the said bit was offered as security to M/s…Eco Bank to secure a sum of Kshs. 65,000,000.00 advanced to the Defendant. A copy of the debenture and Certificate is annexed as MJ 3. The Debenture created a charge over all the fixed and floating assets of the Defendant. There is also a further Debenture over the same assets of the Company for the further principal amount of USD 1,000,000.00. In another sense, having been offered as security, the Drill Bit cannot be sold nor transferred either by the Respondent or any other party until the debenture is discharged. For the reasons above, the Applicant has not lost anything and does not stand to suffer in any manner. The Applicant has not demonstrated that any rights in the drilling bit had accrued to him as the agreement has never been finalized and therefore, he cannot claim ownership over the drilling bit or for the title documents to be deposited in court as they were offered as security to the bank by way of debenture dated 17th January 2013, way even

before the date of the purported agreement. The drill as security under the Companies Act cannot be interfered with until such security is discharged. The application should be dismissed.

THE DETERMINATION

[10] The arguments put forth by parties herein relate to factual matters and the substance for the arbitration. Others revolve around whether the validity of the arbitration agreement. And courts have registered visible hesitation to determine the issue on validity of the agreement as well as the merits of the arbitration as it is the arbitrator with the power and is the right person to determine the issues. It is often said that he is the master of facts as well. The following rendition of Court in the case of **Infocard Holdings Limited vs. The A-G & Another [2014] eKLR** suffices explication of the stated stand of the court; that:-

> ***But, the manner in which the parties have submitted on that issue is but a stealth enticement to the court to venture into the merits of the agreement, and if the court were to take that bait, it will be usurping the jurisdiction of the arbitral tribunal which by law is empowered to determine the validity or otherwise of the arbitration agreement. There are ample judicial authorities on this subject which I need not multiply except to cite some few since the issue seems to have been given an overly emphasis by the parties. Consider what was stated in the case of Kenya Airports Parking services Ltd & Another v Municipal Council of Mombasa Civil case 434 of 2009 by Kimaru J that:-***
>
> ***''...it is this court's view that where there exist an agreement with an arbitration clause, under the principle of separability of the arbitration clause, if a party to the agreement is of the opinion that the agreement is unlawful and therefore invalid, such view does not invalidate the arbitration clause in the agreement."***
>
> ***And the observations the leaned Judge made based on decision by the Supreme Court of United States of America in the case of Buckeye Check Cashing Inc. v Cardegena et al 546 U.S. 440 (2006) that:-***
>
> ***"...the principle of separability of an arbitration clause in an agreement has thus been given judicial stamp of approval and is applicable even where one of the parties is challenging the validity or illegality of the agreement itself. As stated in the above U.S case, the issue as to the validity of the agreement is an issue that the arbitrator has jurisdiction to deal with."***

Again, what the learned judge said in the same case of Kenya Airports Parking Services Ltd (Supra) in applying the dicta in the Court of Appeal case of Anne Mumbi Hinga Vs Victoria Njoki Gathara on the principle of non-intervention by court in arbitral process is useful, that:-

"It is clear from the above decision of the Court of Appeal, that this court cannot intervene and consider matters to do with the merit of the dispute between the plaintiffs and the defendant. That is an issue that is squarely within the province of the arbitrator. I decline the invitation by the defendant to consider issues regarding the validity of the agreement between the plaintiffs and the defendant. That issue shall be determined by the arbitrator.

Finally, see what the Court of Appeal said in the case of Safaricom Limited v Ocean View Beach Hotel Limited & 2 others (supra), that:-

"In the matter before us, the court went on to make orders which undermined the arbitration and the outcome of the arbitration contrary to Section 17 of the Arbitration Act. A court of law when asked to issue interim measures of protection must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration.

[11] And as I stated in the above case, I will also say the same here that;-

> ***The foregoing is enough admonition that I should not dare delve into the merits of the agreement and the dispute generally lest I should be interfering with the jurisdiction of the arbitral tribunal. I have used the word ''interfere'' to make a contrast with ''intervene''; the former is prohibited while the latter is permitted in appropriate circumstances, and section 10 of the Arbitration Act is evident on this. Many a fine passage from the foregoing cases and others remains implanted in the memory of the court, and by the familiarity of this subject, I think time has come when courts should be categorical and parties should be always ready to admit that courts will not determine the question of validity of an arbitration agreement for purposes of section 7 of the Act. By that approach, parties will spare courts the lengthy submissions on a matter they ought not to call upon the court to determine in the first place. I too will not determine that issue. I will proceed to the other matters in the application.***

Interim relief

[12] The above notwithstanding, does the Applicant merit an interim measure of protection? The Applicant claims that he is in possession of the Drilling Rig in question. The Respondent claims it has been and is always in possession of the same Drilling Rig. In fact, according to the Respondent, the said Drilling Rig is already security for a loan with Eco Bank which was obtained before the impugned agreement herein. These things place the Court in an awkward position; it is extremely difficult to believe one party and not the other in the absence of physical proof of possession. One of the parties must be telling a lie here. The material in court does not clearly say who could be telling the lie. Even the Respondent who seems to put forth seemingly indomitable arguments that the Drill was already a security for loan is also tinctured with some dishonesty especially given that one of its directors signed the agreement in question whose effect was to give the Drill as consideration of the loan under the impugned agreement. This recapitulation of the unfortunate facts of this case brings me to the point where I think the best course to take is not to resolve the claim on possession of the Drill of one party over the other. And instead leave the parties where I find them. It should be noted, however, that possessory rights are subject to the law as well as any other higher legal right on the property. To achieve the justice of this case, I should refuse the application. Accordingly, I dismiss the application dated 3rd June, 2014. In the face of the facts of the case, I will order each party to shoulder own costs. It is so ordered.

Dated, signed and delivered in court at NAIROBI this 3rd day of February 2015

F. GIKONYO

JUDGE