



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

MISCELLANEOUS CIVIL APPLICATION NO. 1 OF 2015

PRIME TECH ENGINEERING LTD.....CLAIMANT/APPLICANT

-VERSUS-

- 1. NAROK COUNTY GOVERNMENTRESPONDENTS**
- 2. THE OFFICER COMMANDING POLICE
DIVISION, NAROKRESPONDENTS**
- 3. THE HONOURABLE ATTORNEY GENERALRESPONDENTS**

RULING

1. The Preliminary Objection raised by the 1st Respondent to the Applicant's Chamber Summons was dismissed by this court paving way for the hearing of the Chamber Summons on **28th January 2015**.
2. The Chamber Summons brought under Certificate of Urgency has several prayers, some of which are spent. Of significance are prayers 3 and 5 which seek:-

“(3) THAT pending the hearing and determination of the intended arbitration, the Honourable court be pleased to grant and hereby grants a temporary injunction against the 1st Respondent either by themselves, agents, servants, and/or employees procuring, signing or entering into a new contract, or from accepting a tender for works of any other Contractor in respect to which the Claimant/applicant has a subsisting contract dated 3rd July 2014 and No. NCG/RD/026/2013-2014 with the 1st Respondent for upgrading and/or maintaining the road network described as Salabwek-Sachangwan-Mwangaza.

(5)THAT the dispute between the parties herein be referred to arbitration forthwith as contained in the agreement dated 3rd of July 2014.”

3. The grounds upon which the application is based, and which are expanded in the supporting affidavit of the director of the applicant are as follows. The 1st Respondent entered into a contract with the Applicant for the upgrade and maintenance of the road network identified as Salabwek-Sachangwan-Mwangaza. Works commenced and are allegedly 95% complete and certain payments have been made. However, the works cannot be completed due to the interference by the agents of the 1st Respondent resulting in the impounding of the applicant's machinery and arrest of its workers, on charges of excavating without permission.

4. The Applicant desires to refer the dispute to Arbitration pursuant to the arbitration clause in the contract but is meanwhile seeking an interim measure of protection. The applicant withdrew its case against the 2nd and 3rd Respondents. The 1st Respondent did not file a Replying Affidavit.

5. Without rehashing the arguments made in respect of the Preliminary Objection, it is the court's considered view that where, as in this case, a contract contains an express arbitration clause, this court is clothed with jurisdiction under section 7 of the Arbitration Act to entertain an application of the nature now before it.

6. Section 10 and 18 of the Arbitration Act cannot be read in isolation of the entire text of the legislation, and in particular section 10 which grants to the High Court similar powers to those given to the arbitral tribunal for the making of interim orders of protection under Section 18 of the Act. I think that the misunderstanding arose from the Respondent's perception that the miscellaneous application was brought as a suit in lieu of arbitration proceedings.

7. Secondly, nothing in the authority relied on by the 1st Respondent **Hausram Limited –Versus- Nairobi City County (2013) eKLR** supports the 1st Respondent's submissions with respect to the jurisdiction of the High Court under Section 7 and 10 of the Arbitration Act. The authority merely emphasizes the limited scope of the jurisdiction of the High Court under Section 10 but does not and could not take away its authority expressly granted under Section 7 of the Act in matters subject to arbitration. For these reasons the Preliminary Objection was dismissed.

8. During arguments in respect of the Chamber Summons Mr. Omwanza, Counsel for the Applicant restated the grounds in support of the application. He relied on the case of **Vital Plantation Lease Company Ltd & Another –Versus-Agricultural Development Corporation (2014) eKLR**. Mr. Faraji for the 1st Respondent urged the court to consider and apply the principles enunciated in the case of **Giella –Versus- Cassman Brown Limited** on injunctions. He however affirmed that his client was ready and willing to pursue arbitration. He was averse to the granting of an injunction as sought in prayer 3 which he argued would prejudice the 1st Respondent.

9. There is no contention that there is a dispute between the parties which is rightfully subject to arbitration proceedings. With regard to interim measures of protection available under Section 7 of the Arbitration Act, the Court of Appeal in the case of **Safaricom Limited –Versus-Ocean View Beach Hotel Limited and 2 others (2010) eKLR** cited in the Vital Plantations case) defined the nature and purpose of interim measures of protection under the Arbitration Act and excluded application of the **Giella** principles in consideration of such matters even where the final orders given by a court may effectively amount to what is conventionally known as an interim injunction.

10. In this regard the Court of Appeal stated:

“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. Such orders take different forms and go under different names.....whatever then description, however, they are intended to operate as “holding” orders, pending the outcome of the arbitration proceedings.”

(see also **CMC Holdings Limited and Another -Versus- Jaguar Land Rover Experts Limited (2013) eKLR** and **seven Twenty Investments Limited -Versus- Sandhoe Investment Kenya Limited (2013) KLR**.)

11. What is the subject matter to be preserved in this case? Paragraphs 4, 5, 13 of the Applicant's supporting affidavit appear to suggest that the arbitration proceedings may be jeopardized if the works done are not preserved, or protected from interference, pending the outcome of the proceedings. I have used the word **suggest** advisedly because nowhere in the supporting affidavit does the Applicant

expressly state the precise subject matter that he desires to have safeguarded: whether evidence, assets, etc. Counsel orally submitted that the works already completed were physical and interference with them will destroy the “substratum” of the case.

12. In my view therefore, there is no ready connection between the orders sought in prayers 3 of the Chamber Summons and the supporting affidavit. Nonetheless, this being a matter subject to arbitration, and in view of the half hearted opposition put up by the 1st Respondent, I would grant prayer 5 of the Chamber Summons. Additionally, I do order that pending any other specific interim order that the arbitrator may deem fit to grant, there will be an order directed against the 1st Respondent to maintain the status quo as subsisting at the time the dispute broke out. Costs will be in the cause.

Delivered and signed this **2nd day of February, 2015** in the presence of:-

Mr. Kiarie Mungai holding brief for Mr. Omwanza for applicant.

Respondent absent

Court Clerk Steven

C. MEOLI

JUDGE