IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL CASE NO. 361 OF 2012 (O.S)

INFOCARD HOLDINGS LIMITED ….....APPLICANT

Versus

THE HON. ATTORNEY GENERAL .....…1ST RESPONDENT

PERMANENT SECRETARY

MINISTRY OF TRANSPORT….....……..…..2ND RESPONDENT

RULING

Relief of interim measure

[1] The application before me is for an order of interim measure of protection in the form of a temporary injunction to restrain the Respondent from entering into or signing any contracts for the analysis, design, or financing of second generation Smart Card Based Driving Licence pending reference to arbitration and conclusion of the arbitral proceedings. Inforcard Holdings Limited is the Applicant and has applied for the said orders in a Chamber summons dated 10th June, 2012 and expressed to be brought under Section 7 of the Arbitration Act and Rule 2 of the Arbitration Rules of 1997. The application is grounded on the supporting affidavit sworn by Albert Karaziwan on the 20th day of June, 2012 together with the grounds on the face of the application and others in the submissions.

[2] The Applicant and the 2nd respondent entered in to an agreement for analysis, design, finance, development, operation and maintenance of second generation smart card based driving license build, operate and transfer (BOT) Annuity Basis (hereinafter referred to as the agreement). The Permanent Secretary Ministry of Transport and the director of the applicants duly executed the agreement- annexure AK5 to the supporting affidavit of Albert Karaziwan. A dispute arose between the parties, that the respondent breached its obligations under Clause 6.1 of the Agreement and failed, refused and/or neglected to furnish the Applicant with a letter of credit from a commercial bank of Kenya for the sum of Kshs. 173,976,060.00 as security for payment of annuity, which has resulted into the execution of the project not commencing. Pursuant to Arbitration Clause 38.2, parties referred the dispute to arbitration, and the Arbitral Tribunal has been established comprising in Mr. Ahmednasir Abdullahi.

The Applicant's gravamen

[3] The Applicant has signed the following issues for determination by the court:-

A. ***Whether the undated Replying Affidavit of Dr. (Eng) Karanja Kibicho is admissible.***
B. ***Whether the applicant has established good and sufficient cause to warrant the exercise of this Honourable Court's discretion under Section 7 of the Arbitration Act to grant an order for interim measure of protection pending reference to arbitration and conclusion of the arbitral proceedings.***

[4] On issue 1, the Applicant submitted that the Replying Affidavit served upon the Applicant and the one in the court records are not dated. Section 5 of the Oaths and Statutory Declaration Act Cap 15 of the Laws of Kenya provides as follows:

> ***"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly on the jurat or attestation at what place and on what date the oath or affidavit is taken or made."***

The admissibility or otherwise of an undated affidavit and the consequence of noncompliance with the provisions Section 5 of the Act were considered by the court in the case of **Charles Muturi Mwangi v Invesco Assurance Co. Limited Cause No. 128 of 2011 as follows:-**

> ***"These are mandatory provisions. There is no discretion for this court to vary these provision as these are statutory provisions with regard to what constitutes a valid disposition to matters before court. The omission to indicate the date of swearing of the affidavit attached to the application before the court renders the same defective…. The defect on the affidavit is not a mere technicality that can be addressed as under Article 159 of the Constitution. The undated affidavit violates a statutory mandatory provision and thus the striking out."***

[5] The undated Replying Affidavit is incurably defective which leaves the application unopposed. On that basis, the application should be allowed. But the Applicant addressed the second issue in the alternative and without prejudice to the foregoing matters. The Applicant submitted that the court's jurisdiction to grant an interim measure of protection to protect the subject matter of the arbitration pending the institution of arbitral proceedings is conferred by the provision of Section 7 of the Arbitration Act which provides as follows:-

> ***"it is not incompatible with an arbitration agreement for a par ty 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."***

[6] The Applicant cited the decision of the Court of Appeal on the efficacy of Section 7 of the Arbitration Act in the case of **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others CA 327 of 2009** that:-

> ***"...it may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve the outcome of the arbitral evidence, to protect assets or in some way to maintain the status quo pending the outcome of the arbitral proceedings themselves… whatever their description however, they are intended in principle to operate as "holding orders'', pending the outcome of the arbitral proceedings. The making of interim measure was never intended to anticipate litigation."***

The Court of Appeal went on to set out the factors to be taken into account before issuing the interim measure of protection to be:-

1. ***The existence of an arbitration agreement.***

2. ***Whether the subject matter of arbitration is under threat.***
3. ***In the special circumstances, which is the appropriate measure of protection after an assessment of the merits of the application?***
4. ***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?***

[7] Based on the above thresholds, the Applicant avers that, contrary to the submissions by the Respondents there is in existence an Agreement. And their allegations that the parties only engaged in negotiations that did not conclude into an agreement between the parties, are untrue. The true position is that there was a legally binding contract entered into between the parties having been duly executed by both parties and the annexed agreement is self-evident. The Applicant also refers to a letter dated 2nd day of September, 201 from the 1st Respondent addressed to the 2nd Respondent in which the 1st Respondent has not only unequivocally admitted the existence of the Agreement signed on the 12th day of June, 2009, but has also called upon the 2nd respondent to furnish the Attorney General with a brief on the status of the implementation of the signed concession agreement in order to mitigate the risk of impending civil proceedings and attendant costs. By that admission, the Respondents are estopped from denying the existence of the signed Agreement in accordance with Section 120 of the Evidence Act.

[8] Under Clause 38 of the Agreement ANY DISPUTE shall be referred to Arbitration, and that has been done. In any event, the Arbitral Tribunal, which has already been established, has the power to rule on its jurisdiction and also to determine the validity or otherwise of the Agreement in question. Section 17 of the Arbitration Act provides follows:-

> ***"The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose;***

a. ***An arbitration clause which forms part of a contract shall be treated as an independent agreement of the other terms of the contract; and***
b. ***A decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.***

[9] In the case of **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others CA 327 of 2009,** the Court of Appeal upheld the doctrine of Kompetez where the tribunal can rule on both the validity of the arbitral clause and the underlying contract. Similarly, in the case of **Kenya Airports Parking services Ltd & Another v Municipal Council of Mombasa Civil case 434 of 2009** the Hon. Justice Kimaru applied the principle of separability of an arbitration clause and stated 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."***

The learned judge quoted with approval the observations made by the supreme Court of United States of America in the case of **Buckeye Check Cashing Inc. v Cardegena et all 546 U.S 440 (2006)** and went on to hold as follows:

> ***"...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."***

[10] The question of validity of the arbitration agreement is a preserve for the Arbitral Tribunal.

The court should resist the temptation by the Respondents in Replying Affidavit to determine whether or not the agreement is valid lest the court should be ursurping the jurisdiction of the arbitrator in contravention of Section 10 of the Arbitration Act. The observations in **Kenya Airports Parking Services Ltd (Supra)** by Hon. Mr. Justice Kimaru in applying the dicta in the Court of Appeal case of **Anne Mumbi Hinga Vs Victoria Njoki Gathara** elucidates the principle of non-intervention by court where parties have agreed to resolve any dispute between them by arbitration. The learned judge made the following observations:-

> ***"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.***

See also the case of **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others (supra)**, where the Court of Appeal held 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] The Applicant stated that it is genuinely concerned that in the intervening period, the Respondents shall jointly and severally maliciously conspire to enter into a contract with a third party for the analysis, design, finance, development, operation and maintenance of second generation smart card based driving licence thereby unilaterally breaching and/or terminating the contract to the Applicant's detriment. In the premises of the aforesaid unless the orders sought for interim measure of protection pending the determination of the arbitral proceedings by the Arbitral Tribunal are granted the arbitration proceedings and the consequential award shall be rendered nugatory to the Applicant's untold disadvantage. The court should be guided by the principle of justice in Article 159 (c) of the Constitution to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The court should exercise discretion in favour of granting interim measure of protection pending the determination of the arbitral proceedings. Costs of the application should be provided for.

The Respondents resisted any relief

[12] The Respondents relied on the Replying Affidavit sworn by Dr. (Eng) Karanja Kibicho on January, 25th 2013. Contrary to the Applicant's contention in paragraph 5 of the Applicant's skeleton submissions dated July, 3rd 2014 the said replying affidavit is duly dated January 25th 2013. On substantive issues, the Respondents submitted that orders of interim protection may only arise upon the existence of a valid contract between the parties; and upon demonstration that the subject matter of the contract is in real danger of being wasted. They submitted that there was no valid contract existed between the parties. There is therefore no arbitration agreement which is a prerequisite before section 7 relief is availed. It then follows the Applicant must demonstrate that a valid arbitration agreement existed between the parties. The averments in paragraph 6 of the Affidavit in support of the application sworn are not sufficient to prove existence of a contract agreement with the 2nd respondents entered into on June 12th 2009. The purported concessional agreement produced by the applicant is evidently partially executed and is unenforceable. Whereas the Respondents agree with the principles of law established in the appeal case of **Safaricom Limited Vs Ocean View Beach Hotel Limited & 2 others CA 327 of 2009,** they are of a firm opinion that the contract was not binding unless it has been executed by parties. In the absence of such execution no valid contract could possibly exist. They cited the principle in the case of **Locke v Bellingdon Ltd and others (No.2) (2002) 65 WIR 19 (Court of Appeal of Barbados)** and **Maser v Cameron (1954) 91 CLR 353, Dixon CJ in the High Court of Australia** explained at p.360 that

> ***"It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute contract.***

[13] According to the Respondents, estoppel does not, therefore, arise as the there is no binding contract between the parties. The letter dated September, 2nd 2010, does not help either as it is not admissible in evidence for being privileged communication whose source is not disclosed. The letter is not addressed to the applicant. The concessional agreement referred to in the said letter is indicated to be dated June, 12th 2009 and the one the subject of this matter is dated April, 24th 2009. The letter does not amount to an admission. The Applicant does not demonstrate in what way they relied on any representations by the Respondents on account of the said letter as to act to their detriment. Section 120 of the Evidence Act is succinct as to the requirement for acting on the belief of the representation. The representation pertain to privileged communication between the Respondents which was not intended for any other persons and as such the same does not meet the threshold for being intentional as set out in Section 120 of the Evidence Act. Similarly, the said communication being privileged cannot have be regarded as a declaration as contemplated in the said section 120 of the Evidence Act.

[14] The Respondents argued that the likelihood of loss or unilateral breach of contract as contended by the Applicant are not grounds envisaged under Section 7 of the Arbitration Act on which orders of interim protection may be given. See the decision of the Hon. Kamau J in the case of **Seven Twenty Investments Kenya Limited v Sandhoe investment Kenya limited (2013) eKLR** that:-

> ***Perusal of Section 7 of the Arbitration Act clearly shows that the issue of whether or not there is a dispute or whether or not there would be losses by either side would not be a factor for a court to take into consideration when deciding whether or not it should grant an order from interim measure of protection or injunction to safeguard the subject matter of the arbitral proceedings. All that a court would be interested in is whether or not there was valid arbitration agreement and if indeed the subject matter of the arbitral proceedings was in danger of being wasted or dissipated so as to preserve the same pending the hearing and determination of the arbitral reference.***

Accordingly, orders for interim protection may only be issued for the preservation of the subject matter of the arbitral proceedings from imminent threat. In this regard, the court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded. The injunction or interim measure must be of urgent nature to preserve the subject matter of the dispute so that the proceedings before the arbitral tribunal are not rendered nugatory. It therefore follows that the subject matter and the dispute or difference being referred to the arbitral tribunal are separate and distinct entities. The protection under Section 7 of the Arbitration Act is strictly for purposes of preserving assets and evidence. The applicant is seeking protection 'precluding the respondents from entering into or signing any contract...' It obvious they are seeking to conserve the contract agreement the subject of the suit. To the Respondents, "a contract is not something that would be wasted if it was not conserved'. See **CMC Holdings Limited & Anor v Jaguar Land rover Exports Limited (2013) eKLR.**

In any case, the Respondents were of the view that any breach will be addressed by an award of damages. Meanwhile, the Respondents thought that granting the orders on the basis of the alleged breach will be tantamount to a finding of breach of contract by the court which will be interference with the jurisdiction

of the arbitral tribunal. There is not any urgency which requires protection under Section 7 of the Arbitration. In the case of **Cetelem v Roust Holdings (2005) EWCA civ 618** it was stated:

> ***The whole purpose of giving the court power to make such orders is to assist the arbitral process in cases of urgency before there is arbitration on foot…. Of course, in any case where the court is called upon to exercise the power, it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertaking from the claimant, that the substantive questions are reserved for the arbitrator or arbitrators***
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> ***Orders for the preservation of assets… can only be invoked (a) when "the case is one of urgency" and (b) when the judge thinks that it is "necessary" to make the order….***

[15] There is nothing to show the subject matter herein is under threat. In fact the alleged cause of action in this matter dates back to the year 2009 yet court action was commenced in 2012 and so far the application does not indicate what circumstances have arisen fundamentally altering the existing state of affairs as to give rise to the urgency being pleaded by the applicant. There is no evidence of any commercial or otherwise subsisting process of tender for the second generation driving licence. Furthermore the tendering process is a long one with the signing of the contract being the last stage of the process. There have been some changes in law which fundamentally alters the manner concessional agreements are administered in Kenya especially the coming into force of the Public private partnership Act (PPP Act) No. 13 of 2013. The upshot being that the substratum of the applicant's application has been so fundamentally modified as to be cognizable. Thus, the Respondents therefore submit that the balance of convenience will be in favour of not granting the orders for injunction. The Respondents therefore, pray that the said application be dismissed with costs.

THE DETERMINATION

[16] In the case of **BABS Security Limited v Theothermal Development Limited [2014] eKLR** the Court had the following to say:-

> ***A consensus seems to have emerged from the string of judicial authorities cited and which the Court is familiar with, that, if an injunction is sought as the interim relief under section 7 of the Arbitration Act, existence of an enforceable arbitration agreement constitutes prima facie case in the context of GIELLA v CASSMAN BROWN CASE. But, of course, that is not enough to grant interim relief by way of a temporary injunction as the Court will be obligated to consider all the other factors before it comes to a decision that the Applicant deserves an injunction as a measure of protection of the subject of the arbitral proceedings. The protection envisaged under the section is to ensure that the subject matter of the arbitral proceedings is not in any danger of being wasted or dissipated before the final decision by the arbitral tribunal is made on the matter. But the ultimate decision will depend on the peculiar circumstances of each case and matters such as; the nature of the contract to be preserved; the nature of and the potentiality of dissipation of the subject of the arbitral proceedings; and any other relevant factor attending the case will guide the decision of the Court in determining whether or not an order for interim protection should be made.***

[17] What there is before me is an agreement which has not been performed at all due to some misunderstandings between the parties leading to a dispute that has now been referred to arbitration by this court upon consent of the parties. I will say something in detail on this issue. Meanwhile, the agreement has been denied by the Respondents but the Applicant has insisted a valid agreement exists. 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.***

[18] 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 the 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 length 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.

[19] I promised to look in greater detail the request by the Applicant that the Court does conserve the agreement herein by restraining the Respondents from entering into another contract of similar nature with any other person while the arbitral proceedings are afoot. Let me revisit the purpose of interim measure protection under section 7 of the Act. See the case of **Nbi Hccc No 105 Of 2013 Elizabeth Chebet Orchardson v China Sichuan Corporation For Tecno-Economic Corporation &**

Another that the purpose of the interim measure of protection is to preserve the subject matter of the dispute pending arbitration. The Court, therefore, should be concerned with finding out whether the subject matter of the arbitration is in danger of being wasted. On this, see also the case of **CMC HOLDINGS LIMITED & ANOTHER v JAGUAR LAND ROVER EXPORTS LIMITED [2013] eKLR.** The basis of the application is the agreement. The agreement in a sense is what the Applicant wants the court to conserve. It fears that the Respondent will enter into another contract of similar nature but they have not demonstrated how that would affect them in an irreparable manner as to warrant an injunction. Indeed, the argument by the Respondents is more plausible; this being a procurement process, it takes time and several procedures will have to be adhered to before another contract is awarded. That notwithstanding, the agreement has not been performed at all. One wonders what is to be conserved in the agreement. On this, I am in agreement with what Kamau J stated in **CMC Holdings Limited & Anor v Jaguar Land rover Exports Limited (2013) eKLR** that ***"a contract is not something that would be wasted if it was not conserved'.*** I do not see any merit in the request for an interim measure of protection because there is nothing the Respondents have done or are in the process of doing which will prejudice the final outcome of the arbitration action before judgment has been reached therein. Or in other words, I do not fathom, in the circumstances of this case, the subject matter will not be in the same state as it was at the commencement or during the arbitral proceedings. All the concerns being raised here form the substratum of the dispute for which the arbitral tribunal will offer relief. There is absolutely not basis laid for an injunction. The test in **Giella v Cassman Brown** has not been met. The upshot is that I dismiss the application with costs to the Respondents.

Dated, signed and delivered in court at Nairobi this 6th day of November, 2014

F. GIKONYO

JUDGE