

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM. CASE NO. E677 OF 2025

BETWEEN

CHINA CAMC ENGINEERING COMPANY LIMITED..

.....PLAINTIFF

AND

THE KENYA ELECTRICITY

TRANSMISSION COMPANY LIMITED.....

....DEFENDANT

RULING

Introduction and Background

1. There are two applications before the court for determination; the Plaintiff's Notice of Motion dated 12th October 2025 that seeks an injunction restraining the Defendant from forcefully taking over or completing the Mwingi-Kitui-Wote transmission line project on their own and from accessing the project site to intimidate, harass, or cause fear among the Plaintiff's employees. It also seeks an order directing the Defendant to remove the police and its security teams from the project site and camp. This application is supported by the

affidavits of the Plaintiff's director, GAO LI, sworn on 12th October 2025 and 15th October 2025 and opposed by the Defendant through the replying affidavit of the Defendant's Ag. General Manager - Design and Construction, Eng. JUSTIN MUNA, sworn on 28th October 2025.

2. There is also the Defendant's Chamber Summons dated 15th October 2025 that seeks to stay these proceedings and refer the dispute to arbitration. This application is supported by the affidavit of the Eng. JUSTIN MUNA sworn on 15th October 2025 and opposed by the Plaintiff through the replying affidavit of GAO LI, sworn on 19th October 2025. The parties have canvassed the two applications by way of written submissions which together with the pleadings I have considered and I will be making relevant references to in my analysis and determination below.

Analysis and Determination

3. From the pleadings and submissions, the court is being called upon to determine whether these proceedings should be stayed and this matter referred to arbitration and whether the injunctive and mandatory orders sought by the Plaintiff should be granted. I propose to first deal with the jurisdictional issue raised by the Defendant that the contract between the parties contains a

mandatory arbitration clause which requires that any disputes be resolved through arbitration at the Nairobi Centre for International Arbitration (NCIA). That by filing this suit, the Plaintiff has improperly bypassed this agreed-upon dispute resolution method.

4. In response, the Plaintiff argues that there is no real dispute to arbitrate as the Defendant has already admitted liability for the claims and debt and that the contractual timeframe for forming a Dispute Board, which is a precursor to arbitration, has already expired. The Plaintiff further states that even if an arbitration clause exists, the court still has the jurisdiction and power to issue interim orders to preserve the subject matter of the dispute and prevent substantial injustice.
5. The parties agree that as per Clause 8.2 of their contract, disputes are first to be determined by a Dispute Board(DB) and if the same is not settled amicably thereafter, then the dispute shall be referred to arbitration. However, the Plaintiff has argued that there is in fact no dispute to referred to arbitration which ground forms part of what the proviso to **section 6** of the **Arbitration Act** sought to exempt as follows:

6(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that

party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

6. This court has always stated that where there is no explanation or indication of the existence of a dispute, or where the claim is simply for the recovery of an admitted or uncontested debt, no genuine dispute arises for referral to arbitration. In such circumstances, the court must decline an invitation to stay proceedings and refer the matter to arbitration, as doing so would amount to facilitating a party's effort to delay or obstruct legitimate debt recovery (see **Magnate Ventures Limited v Interbrand Africa Agencies Limited & 2 others (Commercial Appeal E071 of 2024) [2025] KEHC 9997 (KLR)** and **County Government of Kirinyaga v African Banking Corporation Ltd [2020] KEHC 5213 (KLR)**]
7. Going through the pleadings, the only document that could be construed as supporting the Plaintiff's contention that the debt is "admitted" is the Defendant's Letter dated 9th October 2025 and

referred to as 'KET-06' in the Defendant's affidavit. This letter commits to settling the amounts owed to the Plaintiff but then the Plaintiff was to "resume substantive works towards completion and delivery of the project." My wholistic reading of this letter indicates that the Defendant's commitment to pay was explicitly conditional on the Plaintiff's performance. The Defendant claims that the Plaintiff failed to meet this condition, as it did not remobilize or complete the work and the entire reason for the Defendant's actions of de-scoping is their assertion that the Plaintiff was in breach of contract for failing to progress the works, despite having received a formal payment commitment. The Defendant's decision to de-scope part of the works is a core contractual action that the Plaintiff is challenging and constitutes a dispute as the Plaintiff argues it was unlawful and done without consent. The validity of this de-scoping is a significant, live dispute that goes to the heart of the parties' rights and obligations.

8. In my view, there is no evidence that indicates an unambiguous admission of liability on the part of the Defendant for the court to conclude that there is "no dispute" to refer to arbitration. It is clear that the parties are actively disputing fundamental issues including

the validity of the claims, the Plaintiff's performance, the lawfulness of the de-scoping by the Defendant and the correct completion date. It is therefore my finding that there is indeed a live dispute between the parties and that this dispute ought to be referred to arbitration as outlined in the parties' contract.

9. In any case, I agree with the Plaintiff that even though the parties are referred to arbitration, this court has the jurisdiction to issue an interim measure of protection as set out in **section 7** of the **Arbitration Act** which provides as follows:

7. Interim measures by court

(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.

10. One of the leading cases that outlined the principles governing the grant of interim measures of protection is **Safaricom Limited v Ocean View Beach Hotel Limited, Salim Sultan**

Moloo & Alsai (K) Limited [2010] KECA 346 (KLR) by the Court of Appeal where Nyamu JA., observed as follows;

By determining the matters on the basis of the [GIELLA] principles the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. 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. In the case of Kenya, the Arbitration Act is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as “interim measures of protection” under section 7 of the Arbitration Act. On the other hand, in the English version of the ICC Rules for example, they are known as “interim conservatory measures”. 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 measures was never intended to anticipate litigation.

.....

An interim measure of protection such as that sought in the matter before us is supposed to be issued by the court under section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for

the grant of injunctions as the High Court purported to do in this matter.

To illustrate the point Article 26-3 of the UNICTRAL Arbitration rules states:-

“A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement.”

Section 7 of the Arbitration Act is modeled on this. However, in the matter before us and with due respect, the Commercial Court (Koome, J.) contravened the above principles by firstly either declining to issue any measure of protection or granting such a measure. The Court also failed to correctly address the principles for the issue of any such measures and worse still, the supreme court took over the subject matter altogether and ruled on the merits of the subject matter of the arbitration thereby prejudicing the outcome of the arbitration. This explains why in the special circumstances of this matter, this Court must take extraordinary measures to rectify an extraordinary illegality. 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, measures 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 the law on arbitration the essentials 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 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.

[Emphasis mine]

11. The Defendant has deponed and the Plaintiff has admitted that the Defendant has since taken over the project and assumed responsibility for the remaining portion of works and that it has "... since completed, stringing of the conductor (1.78Km) and OPGW stringing (22Km) for the project. To this end, the parties are only to conduct an inspection of the project works, end to end testing and commissioning". A court will not grant an injunction, or any order, to restrain an action that has already been fully completed. The purpose of an injunction is to prevent a future or ongoing harm, not

to undo a past action. I am in agreement with the Defendant that a court shall not issue orders in vain or where the actions sought to be restrained have already occurred.

12. Since the Defendant has already taken over the site and completed the specific stringing works, an injunction to prevent those actions would be meaningless and serve no practical purpose (see **Malewa Raching Company Limited v Nganga & 146 others [2024] KEHC 2780 (KLR)**)

Conclusion & Disposition

13. In conclusion, the court finds that the Plaintiff's Notice of Motion dated 12th October 2025 has no merit and it is hereby dismissed. The Defendant's Chamber Summons dated 15th October 2025 is allowed and the Court finds that as between the parties, they have their choice of forum as arbitration and there is a dispute to be determined through arbitration. The import of this finding is that this Court lacks jurisdiction to hear and determine the dispute as canvassed in the underlying suit in the Plaint dated 12th October 2025. The instant proceedings are stayed and the dispute is referred to Arbitration under *Particular Condition GC- 8.2* of the Parties' Contract dated 15th April 2019. The Plaintiff shall bear the costs of this suit and the two applications.

**DATED SIGNED and DELIVERED virtually at NAIROBI this
1ST DAY of DECEMBER 2025**

.....
**J.W.W. MONGARE
JUDGE**

IN THE PRESENCE OF

1. Ms. Shamalla holding brief for Mr. Odera for the plaintiff.
2. Mr. Gacuca for the Defendants.
3. Ivan - Court Assistant

ORIGINAL