Exon Investments Limited v Alliance Leasing Limited (Commercial Case E009 of 2024) [2024] KEHC 10316 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEHC 10316 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL CASE E009 OF 2024

F WANGARI, J

MAY 30, 2024

BETWEEN

EXON INVESTMENTS LIMITED ..... PLAINTIFF

AND

ALLIANCE LEASING LIMITED ..... DEFENDANT

RULING

1. The application subject of this ruling is dated 19th February, 2024. It is brought under the provisions of section 7 (1) of the *Arbitration Act*, No. 4 of 1994 and all enabling provisions of the law. It seeks the following orders: -

    a. Spent;

    b. Spent;

    c. Upon inter-parties hearing, an order of injunction be issued to compel the Defendant by itself, agents, servants or any person acting on its behalf to return to the Plaintiff the illegally repossessed motor vehicles registration numbers KDH 744N and KDG 279X pending the hearing and determination of the dispute by an arbitrator;

    d. An injunction be issued retraining the Defendant from breaching the loan agreements dated 24/2/2022 and 27/5/2022 by inter alia unlawfully repossessing, selling, transferring, charging or otherwise interfering with the Plaintiff's possession of motor vehicles registration numbers KDG 278X, KDG 279X, KDG 280X, KDH 743N, KDH 744N and KDH 178T pending the hearing and determination of the disputes raised herein before an arbitrator in accordance with the arbitration agreement under clause 20.3 of agreements dated 24/2/2022 and 27/5/2022 between the Plaintiff and the Defendant;.

    e. Costs.

2. In summary, the grounds in support of the application are that the Defendant in various instances of the breach of the law and the terms of the foresaid letters of offer is clogging the Plaintiff's right of redemption of the assets namely motor vehicles registration numbers KDG 278X, KDG 279X, KDG 280X charged in the agreement of 24/2/2022 and motor vehicles registration numbers KDH 743N, KDH 744N and KDH 178T charged in the second loan agreement dated 27/5/2022.

3. The Plaintiff set out the facts of the case and concluded that a dispute has arisen between the parties that requires adjudication by the arbitration. Among the disputed facts is that though the Defendant disbursed a sum of Kshs. 23,970,000/= to the Plaintiff, it is now demanding a sum of Kshs. 29,394,127/= which amount is said to be about Kshs. 6,000,000/= more. There is equally a demand of Kshs. 29,650,514/= which amount is said to be over Kshs. 5,400,000/= of the principal amount. It is averred that the Defendant has been charging interest on this disputed sum.

4. The other complaint is that the Defendant issued the Plaintiff loan agreements that were undated and had blanks on the part of the amounts advanced, interest and penalty. The Plaintiff states that the Defendant exerted upon it undue influence in making the Plaintiff sign the loan agreements that had gaps only for the Defendant to unilaterally amend the agreements by pen by inserting fresh amounts, punitive interest rates and other oppressive clauses after the Plaintiff had signed and submitted the agreements back to the Defendant. Despite the Plaintiff disputing the oppressive interest rates through its letter dated 12/4/2023, the Defendant has refused and/or denied to regularize the accounts. It is for these reasons that the Plaintiff is seeking an order of injunction.

5. The Plaintiff pointed out several anomalies that the Defendant perpetuated amongst them non-compliance with the *Auctioneers Act* particularly section 23 (b) and Rule 12 (1) (b), (c) and (g) of the *Auctioneers Rules*, 1997. The failures highlighted among others is non-preparation of valid proclamation of sale in the prescribed form, failure to issue seven (7) days' notice of sale in the prescribed form and failure to give the Plaintiff seven (7) days' notice before removing the subject motor vehicles from the Plaintiff's possession.

6. It concluded that the arbitration process would be rendered useless if the Defendant is allowed to execute its threat to repossess the motor vehicles. The application is supported by an affidavit sworn by one Ateet Jetha who is the Plaintiff's director. In the sixteen (16) paragraphs of the affidavit, the Plaintiff highlighted the salient features of the parties' understanding from the beginning to the point of repossession. Documents in support of the averments among them the two (2) loan agreements are annexed to the affidavit. They are more or less a restatement of the grounds in support of the application.

7. The application is opposed. Through a document titled as a supporting affidavit dated 1/3/2024, the Defendant strenuously opposes the application. It is sworn by one Willy Kipkorir Bore, the Defendant's head of operations. The deponent restated the non-contested factual positions from the parties' initial engagement up to the date of the dispute. At paragraph 13 of the response, the Defendant averred that the Plaintiff willingly entered into the agreements and after consistently making payments as agreed, it has defaulted and continues to default thus forcing the Defendant to invoke clause 14 on breach and default.

8. The Defendant equally avers that the Plaintiff is making false and misleading statements by alleging to have made payments until 16/1/2024 and 23/1/2024. The cheques issued are said to have bounced and were returned unpaid. The Plaintiff is equally faulted for alleging that no notice was issued yet it has attached a notice marked a-11 in the supporting affidavit. On the issue of sale, the Defendant avers that none has taken place since certain legal requirements such as advertisement has to be undertaken prior to any sale.

9. The Defendant further avers that it is operating on the principle that parties are bound by the terms of their agreement and it is simply invoking clauses 14.1.1 and 14.13. Despite there being a clause on arbitration, the Defendant avers that there is no dispute that warrants arbitration since the Plaintiff is in default and breach on the terms of the agreement. Contrary to the Plaintiff's assertions, all the interest charged was made known to the Plaintiff prior to execution of the agreements. Clauses 2, 9 and 9.5 are cases in point.

10. Both loan agreements clearly broke down how each item was to cost and that a wrong interpretation of the loan statement does not give rise to a dispute to be arbitrated upon. The Defendant avers that the Plaintiff is perpetuating falsehoods and innuendoes when it alleges that it is up to date in repayment but has been issuing bouncing cheques which repayment remains unpaid thus rendering his loan repayment in default thus it is approaching court with unclean hands. The Defendant is thus seeking for the application to be dismissed in limine with costs.

11. Directions were taken to have the application canvassed by way of written submissions. Both parties duly complied. The Plaintiff's submissions are dated 21/3/2024. The Plaintiff identified five (5) issues for determination which are; whether there is a valid arbitration agreement between the parties, whether a dispute has arisen between the parties hence a need for arbitration, whether the subject matter of arbitration is under threat, in the special circumstances, which is the appropriate measure of protection and for what period must the measure be given especially so as to avoid encroaching the tribunal's decision making power.

12. The Plaintiff addressed each of the issues distinctly and cited various authorities to support its position for grant of the interim protection measures. The Plaintiff cited amongst other authorities, the case of *Aikman v Muchoki* [1984] KLR 353 cited in *Olympic Sports House Limited v School Equipment Centre Limited* [2012] eKLR and *Safaricom Limited v Ocean View Beach Hotel Ltd & 2 Others* [2010] eKLR. In conclusion, the Plaintiff prayed that the application be allowed and the matter be referred to arbitration.

13. The Defendant's submissions are dated 5/4/2024. Three (3) issues were delineated as those to be determined. These are; whether the application should be dismissed and interim orders be vacated; whether the Applicant meets the threshold to be granted interim orders of injunction and whether there is a dispute ripe for arbitration. The Defendant just as the Plaintiff duly addressed each issue separately.

14. The Defendant cited various authorities in support of its position to have the application dismissed. Among them are *Giella v Cassman Brown* [1973] EA 353, *Mrao v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, *Mbuthia v Jimba Credit Corporation Ltd* [1988] KLR 1 and *Stella Kavutha Muthoka & Another v Kenya Women Finance Trust Ltd* [2022] eKLR. The Defendant concluded thus that the application is bereft of merit and the same ought to be dismissed with costs.

Analysis and Determination

15. I have carefully considered the application, the response, the rival submissions, the authorities cited as well as the law and I discern only one (1) issue for determination which is whether the Plaintiff has made out a case for grant of interim protection measure of injunction and refer the matter to arbitration. Corollary to this is issue of costs.

16. The application is brought under the provisions of section 7 (1) of the *Arbitration Act*. It provides as follows: -

> " 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."

17. The above provision has been interpreted to empower court to grant interim orders for purposes of preserving the subject matter and or maintaining the status quo so as to ensure tranquility before the hearing and determination of the dispute. The primary objective of the court when intervening under Section 7 is to ensure that the subject matter of the arbitration proceedings is not jeopardized before an award is issued, thereby rendering the entire proceedings nugatory.

18. In *Infocard Holdings Limited vs AG & 2 Others* [2014] eKLR, the court held that section 7 does not give courts the power to look into the merits of the agreement and the dispute generally lest it interferes with the jurisdiction of the arbitral tribunal. Similarly, in *CMC Holdings Limited v Jaguar Land Rover Exports Limited* [2013] eKLR the court held that: -

> "...In practice, parties to international arbitrations normally seek interim measures of protection. They provide a party to the arbitration an immediate and temporary injunction if an award subsequently is to be effective. The measures are intended to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. 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 reference is concluded before it can grant an interim measure of protection..."

19. From the loan agreements entered into by the parties and particularly clause 20.3, it is not in contest that parties expressly agreed on a dispute resolution forum and in this case, arbitration. In *Alison Jean Louis vs Rama Homes Limited* [2020] eKLR, it was held as follows: -

> "...where parties mutually agree and contract their own forum of choice and process of dispute resolution by virtue of Article 159 *COK* 2020, the court downs its tools and allows parties to pursue alternative dispute resolution mechanism, in this case, arbitration..."

20. Does it mean that where parties have expressly agreed to refer their disputes to arbitration the court will allow applications such as the present one as a matter of course? No. A party must tender evidence that a dispute has arisen to set in motion invocation of reference to arbitration. In the present case, parties are in agreement that there exist loan agreements and that indeed, money has been disbursed. However, on one part, the Plaintiff states that it is not in default to warrant the Defendant to repossess the financed motor vehicles. However, the Defendant is of a contrary view.

21. Since parties expressly consented on their dispute resolution forum, it is not this court's position to re-write what parties consciously agreed. However, as decreed by section 7 of the *Arbitration Act*, any party who feels that the subject matter of arbitration is under threat, it will not hesitate to issue the protection measure sought. The subject matter of the arbitration in the present case are motor vehicles. The Defendant has repossessed some of the them and in the event no order is issued, there is an obvious risk that the motor vehicles are likely to be sold to third parties. This will defeat the very reason for reference to arbitration.

22. Having found as above, which is the appropriate measure of protection? In *Safaricom Limited v Ocean View Beach Hotel Ltd & 2 Others* (supra), Nyamu JA observed 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, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions..."

23. In the present application, the Plaintiff sought for protection measure in the form of an injunction. As was held in Safaricom Limited (above), when considering applications for grant of interim protection measures in the form of injunction, the court is not bound to determine it on the basis of *Giella v Cassman Brown's* principles. The Court of Appeal (Nyamu, JA) noted 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..."

24. Therefore, the Defendant's submissions based on the principles of *Giella v Cassman Brown* are misplaced as this is an injunction not in the sense of the civil procedure requirements but under section 7 of the *Arbitration Act*. Based on the special circumstances of the case, an interim protection measure in the nature of injunction is appropriate as it would restrain the Defendant from repossessing, selling, charging, leasing or in any other manner interfere with the Plaintiff's rights over the motor vehicles pending arbitration.

25. The last consideration is for what period must be given. Arbitration is a time bound dispute resolution mechanism and which was designed to on save time. This being the case and since parties did not submit on the timelines, I shall exercise my discretion by fixing timelines for the parties to appoint an arbitrator for the formal commencement of the arbitral proceedings. Accordingly, I find merit in the Plaintiff's application.

26. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not

deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The *Halsbury's Laws of England*, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -

> " The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice"

27. Any departure from this trite position can only be for good reasons which the Supreme Court in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted as follows: -

> " The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Costs follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

28. Considering the purpose for grant of interim protection measures, that is, they are issued not intending a litigation, I direct that each party shall bear own costs.

29. Having found as above, the following orders flow therefrom: -

    a. The application dated 19th February, 2024 has merits and the same is allowed in terms of prayers (c) and (d);

    b. Each party to bear own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 30TH DAY OF MAY,2024.

F. WANGARI

JUDGE

In the presence of:

Mr. Karina Advocate for the Plaintiff/Applicant

Mr. Lang'at Advocate for the Defendant/Respondent

Mr. Barille, Court Assistant