



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO 359 OF 2013**

**SEVEN TWENTY INVESTMENTS LIMITED.....PLAINTIFF**

**VERSUS**

**SANDHOE INVESTMENT KENYA LIMITED.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Applicant's Chamber Summons application dated and filed on 16<sup>th</sup> August 2013 was brought under the provisions Section 7 of the Arbitration Act and any other enabling provisions of the law. Prayer Nos (i) and (ii) are spent and the court will therefore not deal with the same. The application sought the following remaining orders:-

- i. **Spent**
- ii. **Spent**
- iii. **THAT the Honourable Court do grant an interim measure of protection by way of injunction restraining the Defendant either by itself or through its directors, servants or agents from acting further on its notice of termination of the agreement issued on 31<sup>st</sup> July 2013 and further restraining the Defendants either by itself or through its directors, servants or agents from repossessing or grounding aircrafts Nos 5Y BSS and 5Y NON or in any way interfering with the possession and use of the said aircrafts by the lessee East African Safari Air Express Limited until the determination of the intended arbitral proceedings between the Plaintiff and the Defendant or until further orders of the Honourable Court.**
- iv. **THAT the costs of this application be provided for.**
- v. **THAT the Honourable Court do grant further or any other orders that it may deem fit to grant.**

2. The grounds which the Plaintiff relied on to support its application were generally as follows:-

- a. **THAT there was a need to issue interim measure of protection by way of injunction to preserve the subject matter of the intended arbitration so as to preserve the sub-stratum of the intended arbitration.**
- b. **THAT it was in the interest of justice to preserve the subject matter of the intended**

**arbitration otherwise the whole exercise would be merely academic.**

### **AFFIDAVIT EVIDENCE**

3. The application was supported by the Affidavit of Donald Earle Smith sworn on 16<sup>th</sup> August 2013. The deponent stated that he was a significant shareholder of Five Forty Aviation Limited and the Plaintiff.
4. He deponed that the Plaintiff entered into an agreement with the Defendant in which it agreed to purchase the Defendant's two (2) aforementioned aircrafts for a sum of \$ 1,200,000.00 after the Defendant was unable to pay Barclays Bank of Kenya Limited to whom the said aircrafts had been charged. It was his further contention that the Plaintiff was to pay the said Bank directly and that as at 6<sup>th</sup> June 2013, it had paid a sum of \$ 1,200,434.00.
5. He stated that the Plaintiff sought to know the balance of the monies through the Defendant's agent namely Collins Otieno but he did not respond until 23<sup>rd</sup> July 2013 when he indicated that the balance due and owing to the bank was \$ 124,038.00. He added that before the plaintiff's advocates could remit the monies, the Defendant sent it a notice purporting to terminate the agreement of purchase of the said aircrafts for non-payment of \$ 700,000.00 which figure he said the Plaintiff disputed.
6. It was the Plaintiff's case that a dispute had arisen that needed to be referred to arbitration. He said that because the said aircrafts had been leased to East African Safaris Limited and were fully booked as it was high season in the Kenyan tourism circuit, grounding of the said aircraft was expected to cause significant damage not only to the Plaintiff but also to the said East African Safaris Limited. It was also his contention the Plaintiff had spent about \$ 650,000.00 in terms of repairing and replacing parts of the said aircrafts and that the Plaintiff stood to lose all its investment if the said aircrafts were taken by the Defendant.
7. He said that the Plaintiff was ready to deposit the sum of \$ 124,038.00 in court pending the hearing and determination of the arbitral reference because if the said aircrafts were taken away, the subject matter of the suit would cease to exist thus frustrating the process further.
8. In response thereto, on Bret Lang swore a Replying Affidavit on behalf of the Defendant herein. It was the Defendant's averment that the Plaintiff had defaulted in making payments as per the agreement they had both entered into and it therefore had basis to terminate the agreement. It was the Defendant's contention that there was no dispute between it and the Plaintiff that could be adjudicated through an arbitral process and that there was no bar to exercising its discretion to terminate the said agreement which had been provided for in Clause 5.1 of the said agreement.

### **LEGAL SUBMISSIONS BY THE PLAINTIFF**

9. In its written submissions that were dated and filed on 19<sup>th</sup> September 2013, the Plaintiff reiterated the averments in its Supporting Affidavit and set out the Defendant's case as it saw it. The Plaintiff argued that a dispute had arisen with the issues being:-
  - a. **Whether the termination of the agreement was made for valid reasons and thereby making the termination legal;**
  - b. **Whether the outstanding amount purported to be due to the Defendant from the Plaintiff was \$ 700,000.00;**
  - c. **Whether the Defendant having received and accepted the monthly instalments of \$ 79,519.00 can raise the issue of late payment as a reason for terminating the agreement;**
  - d. **Whether the alleged non-payment of the deposit of \$ 300,000.00 was true and therefore a valid reason for terminating the lease;**

**e. Whether the delay in payment of the last instalment was deliberate or whether the delay was occasioned by the Defendant.**

10. The Plaintiff submitted that this court had jurisdiction to grant the interim measure of protection and that the law required it to show that it was just and convenient to grant the said orders and which it said it had done. It asked the court not to look at the technicalities of how its prayers had been framed but rather that it should grant an injunction as it was one of the orders that it had sought in its application.
11. It relied on several cases which were listed in its List of Authorities dated 19<sup>th</sup> September 2013 and filed on 25<sup>th</sup> September 2013. It referred the court to the cases of Cetelem SA vs Roust Holdings (2005) 4 All ER 52, NCC International AB v Alliance Concrete Singapore Pte Limited (2008) 5 LRC 187, Donwood Company Limited vs Kenya Pipeline Company Limited [2005] eKLR and Geilla vs Cassman Brown which it contended supported its case for an grant of an interim measure of protection and injunction.
12. It argued that Section 7 of the Arbitration Act did not empowers the arbitral tribunals to grant such interim reliefs necessitating it to come to this court and that the law only required the applicant to show that it was just and convenient for the order to be granted.

**LEGAL SUBMISSIONS BY THE DEFENDANT**

13. In its written submissions dated 23<sup>rd</sup> September 2013 and filed on 24<sup>th</sup> September 2013, the Defendant submitted that the Plaintiff's application was triggered by the exercising its right to terminate the Agreement between itself and the Plaintiff. It opined that it would address itself to the following issues:-
  - a. **Whether the application was one for the grant of an interim measure of protection as contemplated under Section 7 of the Arbitration Act and the jurisprudence thereon; and**
  - b. **Whether the Defendant's entitlement to termination can form the basis of an interim measure of protection.**
14. As regards the first issue, the Defendant relied on the case of CMC Holdings Ltd & Another vs Jaguar Land Rover Exports Limited [2013] eKLR in which this court held as follows:-

**"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 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."**

15. It was its argument that that was the same finding in Donwood Company Limited vs Kenya Pipeline Company Limited (Supra) which was upheld in the case of Mugoya Construction & Engineering Limited vs The National Social Security Fund Board of Trustees & Another [2005] eKLR where it was held as follows:-

**"...the jurisdiction to grant injunctive relief was to preserve the subject matter of the suit pending determination of the issues between the parties..."**

16. Its further submission was that the Plaintiff was seeking an injunction to restrain the Defendant from doing the following three (3) things:-
  - a. **acting further on its notice of termination of the agreement issued o 31<sup>st</sup> July 2013;**

b. **repossessing or grounding the aforesaid aircrafts; and**

c. **interfering in any way with possession and use of the said aircrafts.**

17. The Defendant argued that it was entitled to rescind the said agreement upon default by the Plaintiff to complete the purchase price. It was its submission that its discretion to rescind the contract under clause 5.3.1 of the said agreement precluded the existence of any dispute whatsoever so long as the Plaintiff had not fully paid the balance of the purchase price.
18. It contended that the purport of the said application was not the preservation of the said aircrafts but rather for their continued usage which would waste the subject matter. It submitted that this would be prejudicial to its proprietary interests.
19. It was its further contention that restraining it from acting further on its notice for termination would amount to this court re-writing the contract as had been held in the **CMC & Another vs Jaguar Land Rover Exports Limited** (Supra).

## **LEGAL ANALYSIS**

20. Having carefully analysed the oral and written submissions by counsel for both the Plaintiff and the Defendant, the court notes that there was a lot of emphasis on the question of whether or not there was in existence, a dispute between them that was capable of being referred to arbitration as that is what would then empower this court to grant the orders for an interim measure of protection or injunction for the preservation of the subject matter.
21. 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 a 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.
22. This conclusion has basis on Section 7(1) of the Arbitration Act stats as follows:-

**“It is not incompatible with an arbitration agreement for a party to request from the High Court before or during the arbitral proceedings, an interim measure of protection and for the High Court to grant the same.”**

23. Having said so, it is important to have a close look at the definitions of an interim measure of protection and injunction with a view to establishing whether indeed the Plaintiff was entitled to the orders sought.
24. According to the Black’s Law Dictionary 9<sup>th</sup> Edition, an interim measure of protection is defined as follows:-

**“An international tribunal’s order to prevent a litigant from prejudicing the final outcome of a lawsuit by arbitrary action before a judgment has been reached. This measure is comparable to a temporary injunction in national law.”**

25. In the same dictionary, injunction has been defined as:-

**“A court order commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate and complete remedy at law and that an irreparable injury will result unless the relief is granted.”**

26. A court must therefore be satisfied that such an injunctive order is essential and that it esteems

that the act being restrained is contrary to equity and good conscience. It is a remedial writ which a court issues for purposes of enforcing its equitable jurisdiction.

27. The issue in dispute between the Plaintiff and the Defendant herein relate to the termination of an agreement between them. Such an agreement cannot be preserved under Section 7 of the Arbitration Act as it is not subject matter that is capable of being preserved it does not present a situation for this court to be satisfied that irreparable loss will result unless the relief was granted. If the court were to grant the orders as sought, it would mean that the court would be preventing one of the parties to the contract from terminating the contract.
28. Once such a party is prevented from exercising what it would be entitled to do under an agreement between itself and the other party, it would essentially mean the court would be re-writing the contract that had been entered between the parties. There would therefore be no dispute capable of being referred to the arbitral tribunal as the court would have stopped such termination any way. There would be no motivation for such a party who would be enjoying the contract to go to arbitration.
29. 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.
30. Termination of a contract cannot therefore be deemed to be the subject matter to be preserved under Section 7 of the Arbitration Act. The contract between the Plaintiff and the Defendant was separate from the assets which were the subject matter of the arbitration proceedings. This therefore means that the court could make an interim measure to preserve the assets, which in case, are the two (2) aircrafts as the Plaintiff and the Defendant ventilate their issues of breach of contract, if at all before the arbitral tribunal. Once they are through with the said arbitral proceedings, they would then find the said two (2) aircrafts in the same state as they left them before they went to the said proceedings.
31. Contrary to what had been argued by the Plaintiff, the arbitral tribunal also has power to grant such an interim measure of protection as it may consider necessary and the tribunal may seek assistance of the High Court in exercise of any power conferred under Section 18(1) of the Arbitration Act. A party to the proceedings can seek assistance of the High Court with the approval of the arbitral tribunal.
32. Section 18 (1) of the Arbitration Act states as follows:-

**“1. Unless the parties otherwise agree, an arbitral tribunal, may on the application of a party-**

- a. **order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure.”**

? The powers under the said section can, however, only be exercised if parties have agreed that the arbitral tribunal shall have such power. It is perhaps because of that reason that parties opt to go under Section 7 of the Arbitration Act as the granting of an interim measure of protection is not dependent on any approval by the arbitral tribunal or consent of the parties. It is granted by the court if such an application is merited.

? What comes out clearly is that when a dispute is before the arbitral tribunal, such a tribunal can grant a measure of interim protection pending the determination of the dispute before it. It cannot therefore be correct that if for instance the Plaintiff herein was before the arbitral tribunal because the dispute or difference relates to a termination of contract, the arbitral tribunal could restrain the Defendant to terminate that contract because that dispute would be the one that would be before it for determination. It is for that reason that this court reiterates that the dispute or difference and

subject matter of the arbitral proceedings are as distinct as water and oil.

- ? In the **NCC International AB vs Alliance Concrete Singapore Pte Ltd** (Supra), the court held that the granting of an interim measure of protection or injunction pending the determination of an arbitral reference was a discretionary measure that should be exercised cautiously so as not to usurp the role of the arbitral tribunal and that could decline to grant such orders where an arbitration tribunal has concurrent jurisdiction to make such orders. The court should therefore come in under very exceptional circumstances.
- ? Perusal of the **Cetelem vs Roust Holdings case** (Supra) shows that the gist of the granting of an order of interim measure of protection or injunction is strictly for purposes of preserving assets and evidence the court said were “...not confined to tangible assets but could for example, include chose in action.” It is for the same reason that the court granted an injunction to preserve a site in **Don woods Company Limited vs Kenya Pipeline Company Limited** (Supra).
- ? Any injunction on the facts on the case as they stand now would definitely be interference by a court which would have no business making preliminary findings on the rights of the parties headed to an arbitration process. In other words, granting the orders being sought by the Plaintiff would amount to this court preventing the Defendant from exercising its rights under the contract.
- ? The question of whether or not the Defendant was entitled to terminate the contract as it purported to do or whether there is a dispute capable of being arbitrated upon should rightly be resolved by the arbitrator.
- ? 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 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.
- ? From the submissions of the Plaintiff, it is clear that it did not want the aircrafts grounded as its business would be affected. As this court found in the case of **CMC Holdings Limited & Another vs Jaguar Land Rover Exports Limited** (Supra), the contract between the Plaintiff and the Defendant cannot be referred or deemed to be an asset, tangible or otherwise. It does not fall within the confines envisaged by Section 7 of the Arbitration Act. There is indeed nothing to be conserved.
- ? This court therefore concurs with the Defendant's submissions that the purport of the Plaintiff's application is hinged on the continued usage of the aircrafts and not for their preservation. The principles in the case of **Geilla vs Cassman (1973) EA 360** are for all purposes and intent irrelevant and immaterial and the court will therefore not analyse the same as the Plaintiff has not demonstrated it will suffer irreparable loss, that damages will not be adequate compensation or that an injunction should be granted on a balance of convenience.
- ? Indeed, the role of the court under the Arbitration Act is merely complementary. It was never intended that the court could intervene in the dispute between the parties who had chosen arbitration as their mode of resolution of the dispute them. Section 10 of the said Act provides as follows:-

**“Except as provided in this Act, no court shall intervene in matters governed by this Act.”**

43. In view of the fact that the court cannot intervene in a dispute where parties have opted to proceed for determination of the same through arbitration, it cannot make any orders that would interfere in the rights of the parties. In the **Cetelem vs Roust Holdings case** (Supra), the court held that **“There was, however, nothing in the subsection to limit the power of the court to the making of orders which did not involve a preliminary determination of a contractual right of the parties...”**
44. For the reason that the court has found that it cannot interfere with the contract entered into by

the parties, it does not find the Plaintiff's application to have satisfied the threshold to empower this court to grant an interim measure of protection or injunction as contemplated under Section 7 of the Arbitration Act.

45. Accordingly, the upshot of this court's ruling is that the Plaintiff's Notice of Motion application dated and filed on 16<sup>th</sup> August 2013 is not merited and the same is hereby dismissed with costs to the Defendant.

46. Orders accordingly.

**DATED** and **DELIVERED** at **NAIROBI** this 17th day of December 2013

**J. KAMAU**

**JUDGE**



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