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Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	Onguto Joseph Louis Omondi
Citation:	Ongata Works Limited v Tatu City Limited [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
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Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 504 OF 2017

ONGATA WORKS LIMITED.....PLAINTIFF

VERSUS

TATU CITY LIMITED.....DEFENDANT

RULING

Introduction

1. This is an application by the Plaintiff (whom I shall call “Ongata Works”) for intermediary injunctions which are to bind the Defendant (whom I call “Tatu City”) pending hearing and determination of an arbitration which will decide the dispute between the parties. The application is made pursuant to the provisions of *s*.7 of the Arbitration Act No. 4 of 1995 (“the Act”).

2. The injunction sought is framed in seven sub-paragraphs but the essence of the application by Ongata Works is that Tatu City should be prevented from terminating a contract between the parties. The contract agreement was concluded on 3 February 2017.

3. The application is opposed and a prolix 38-paragraph opposing affidavit has been filed.

Factual background

4. In view of the nature of the application which dictates that I avoid venturing into the merits of the underlying dispute, there is no need for a detailed explanation of the facts. I shall however set out something of a narrative. I do so on the basis of both the founding affidavits by Gibson Githumbi Wambugu and the opposing affidavit of Joram Ocholla.

5. Tatu City is the proprietor of Land Reference No. 28867/1 and is undertaking an ultra-mixed development thereon. By a contract not under seal, made on 3 February 2017, Tatu City engaged Ongata Works to carry out part of the development works on the property namely the construction of Trunk Roads TC101 and TC301 as well as the construction of Kijani Infrastructure. The contract was valued at Kshs. 1,442,460,961.77 and was awarded to Ongata Works following a competitive tender process replete with all the specifications, drawings and Bill of Quantities.

6. The award of contract had itself been made on 9 September 2016, and duly accepted by Ongata Works on the same date. The contract period was 13 months from time of commencement with provision for extension which was duly exercised and utilized at the prompting of Ongata Works. The new anticipated completion date was thus 3 April 2018.

7. Ongata Works took possession of the site and hit the ground. They commenced the works on 7 October 2016 the scope of works having earlier been varied and revised. Disputes then apparently

riddled the contract. Ongata Works complained of frustrations on the part of Tatu City which led to non-expeditious and non-effective performance of the contract. Ongata Works also complained of breaches by Tatu City of its obligations under the contract including the failure to participate in the constitution of one of the dispute resolution forums.

8. In turn, Tatu City accused Ongata Works of failure to execute and complete the works in accordance with the contract. Tatu City additionally accused Ongata Works of failing to comply with and heed several notices issued by Tatu City under the contract. Ultimately, Tatu City issued Ongata Works with a termination Notice on 13 December 2017. The Notice period was 14 days.

9. The contract incorporated the International Federation of Consulting Engineers terms and conditions (FIDIC conditions), as amended by the parties. Of relevance for purposes of this application is clause 20 of the FIDIC conditions, the dispute resolution clause which is aptly intutled “Claims, Disputes and Arbitration”. Whilst Ongata Works has made reference to the 1999 edition of the FIDIC conditions, Tatu City has exhibited the complete version of the harmonized 2005 edition. However, a cursory comparison of Clause 20 of both editions does not reveal any material difference.

10. Clause 20 of the FIDIC conditions is extremely detailed and lengthy. I however see no reason to re-produce the same in this ruling as it did not generate any controversy between the parties. I will nonetheless make reference to it where necessary as I determine this application.

Initial proceedings

11. It is relevant that I detail the initial proceedings in view of one of the exceptions raised by Tatu City that the application has been overtaken by events.

12. On 21 December 2017 Ongata Works applied before me without notice for orders against Tatu City pending the hearing of the instant application. The orders were basically to restrain Tatu City from effecting a notice it had issued to Ongata Works. Tatu City was also to be restrained from taking possession of the site the subject area of the contract between the parties. I made an order on the same day maintaining the status quo and directed a mention date of 3 January 2018. Mr. Justice F. Tuiyott extended the order albeit conditionally on two occasions before the matter was finally listed before me on 24 January 2018 for hearing. Ongata Works, meanwhile, fully complied with the conditions which Justice Tuiyott attached to the without notice orders. Tatu City has however taken exception to the application and to the without notice (ex parte) orders. The exceptions include the contention that the order has been overtaken by events.

13. At the hearing of the application I was not immediately convinced that the application had indeed been overtaken by events. I passively allowed counsel therefore to argue the merits. My understanding of the appellations ” status quo” and ” overtaken by events” as well as the factual background outlined above, dictated my thoughts in this respect.

14. I may shortly at this stage point out that it is a fundamental principle of the law that no man is allowed to take the law into his hands where the court has made an order and urged that a particular state of affairs be maintained. If he does so, the court will summarily restore the state of affairs ante. An order for the maintenance of a status quo effectively seeks to maintain a specific state of affairs. Even where the specifics are not given, the order is intended to bring to a halt any act the subject of a complaint before the court. Any action that is detractive and perverse to a state of affairs ordered by the court will be deemed an affront to the court’s authority. Of course, it is always appropriate to define any particular state of affairs but it must be understood that minute specifics may never be possible in certain cases.

15. Where the parties however also clearly understand the status quo to be maintained, it is unnecessary to be more detailed. A quick reading of the opposing affidavit of Joram Ocholla and the Further Affidavit of Gibson Githumbi, reveals that both parties herein clearly understood what status quo was to be maintained or at least Tatu City did. Both parties were basically frozen to not doing anything in relation to the contract, including terminating it. Neither could either party act in any manner as to suggest that there were no court proceedings and or a court order in place. The reason is simple as of 21 December 2017 when the court issued the order the contract was still in force and that was the status quo to be maintained. It would thus be untoward to suggest that some sudden and unforeseen event has now changed the status quo and further made the instant application moot.

16. Ongata Works came to court to challenge a termination notice and it's after effects. The court ordered the parties to maintain a state of affairs. The parties could not certainly take it that they could continue with the impugned termination and neither could the impugned termination, in my judgment, run its course until the court dictated otherwise.

17. The application has not, in my view, been overtaken by events.

The claim

18. I start with the claim.

19. I stress that at this time what I am dealing with are allegations which have yet to be proven. I need not and do not make any assumptions as to their truth or falsity. Besides, the application strictly seeks that particular state of affairs be preserved and the parties disputes (the allegations and counter-allegations) be referred to the agreed dispute resolution forum for resolution. I must consequently, even in my analysis, restrain myself from conducting a mini-trial or even making conclusive findings of fact lest I prejudice any arbitral proceedings should I ultimately find that the parties should be before an arbitral forum.

20. The claim by Ongata Works is straightforward. Ongata Works says that it is a victim of a high-handed employer in Tatu City. Ongata Works laments that, from the get go, Tatu City subjected it to mistreatment and frustrations. Hardly a week into the contract, Ongata Works says, Tatu City varied the scope of works. Ongata Works accuses Tatu City of failing to participate in the constitution of an important component of the contract, the Dispute Adjudication Board (DAB). The DAB according to Ongata Works was the first port of call for the resolution of any dispute between the parties. Ongata Works then adds that without issuing any notice to Ongata Works to remedy any defects or breaches, Tatu City has proceeded to issue a termination notice. Ongata Works faults the termination notice.

21. Ongata Works complains that the termination notice was not issued in good faith and pegs its reasoning on two grounds. First, Tatu City was pretty aware that there was a sub-contractor working on drainages on site and hence Ongata Works could not also be expected to work on the roads at the same time. Secondly, the termination notice was issued hardly a couple of weeks after the extension to perform and complete the contract had been granted by Tatu City.

22. Ongata Works then complains that if no provisional measure of protection is granted and Tatu City restrained from taking over the site then Ongata Works will suffer immeasurable hardships as it has carried works whose scope was extended but is yet to be measured. According to Ongata works, if the termination is allowed to be carry through, evidence will be tampered with destroyed and or compromised. Ultimately, Ongata Works will be placed in financial ruins as no adjudicator will be able to carry out any measurements of the works hitherto undertaken by Ongata Works.

23. Effectively, Ongata Works contends that the intended arbitration would be rendered nugatory.

The Response

24. Just like the claim, the response by Tatu City appeared to be focused on the underlying dispute; whether or not the termination of the contract was valid.

25. Tatu City contended that the termination notice issued on 13 December 2017 was valid and warranted as Ongata Works was in breach of contract. Tatu City asserted it was entitled to terminate the contract following the failure of Ongata Works to comply with and heed the various notices issued to Ongata Works to make good the various breaches.

26. Additionally, Tatu City contended that the court lacked the requisite jurisdiction to grant the orders sought. Firstly, it is stated that the termination notice already took effect on 27 December 2017. Secondly, Tatu City states that granting the orders sought would amount to re-writing the contract between the parties which has clear provisions for termination and expulsion of the contractor as well as engagement of a new contractor, amongst other post-termination contractual provisions**.**

27. Further and in response, Tatu City accuses Ongata Works of non-disclosure of material facts. Tatu City, for example, points to the non-disclosure of all contractual provisions some of which entitle Tatu City to terminate expel and appoint new contractors. Tatu City also points to non-disclosure of contractual provisions providing for consequential steps to be undertaken immediately after termination.

28. Finally, it is also Tatu City's case that the interim orders issued on 21 December 2017 are already causing unimaginable hardship to Tatu City and if the orders are extended the hardship may not be redeemed at all.

Arguments in court

29. Mr. J. Mwenda made submissions on behalf of Ongata Works while Mr. Issa Mansour urged Tatu City's case.

30. Both Ongata Works and Tatu City again advanced their arguments largely along the lines of the merits and demerits of the termination of the contract, with each party determined to convince the court that the termination was or was not warranted, as the case may be. I have resisted the temptation, and I hope successfully, of focusing on such arguments. For this reason, I have also tried to avoid detailing such arguments in this ruling at the risk of being awkward.

Ongata Works submits

31. Mr. Mwenda insisted that Tatu City were in breach of the contract. He pointed to Tatu City's failure to appoint its member of the DAB on time adding that Tatu City only nominated the member after the expiry of the original contract period. According to counsel, if Tatu City had acted within the time stipulated the current dispute would not have arisen. Counsel then added that Tatu City had completely failed to show that Ongata Works was in breach of the contract, before reiterating the bad faith on the part of Tatu City. In this latter regard, Mr. Mwenda pointed to the fact that the termination notice was issued just so shortly after Tatu City had granted extension of the contract to Ongata Works. Mr. Mwenda also pointed to the fact that there was no pre-termination notice given.

32. Focusing more on the application, Mr. Mwenda submitted that the extent of the works had not been

measured and even if the parties moved on to arbitration, the arbitral forum would face difficulties if the site was now to be tampered with by Tatu City or any other third party contractor. For this reason and the additional reason that the reputation of Ongata Works was at stake, Mr. Mwenda urged me to maintain the status quo.

33. Counsel referred to the case of **Don-Woods Company Ltd *v* Kenya Pipeline Company Ltd [2005]eKLR** for the proposition that a contract may be maintained even as parties are directed to arbitration. Counsel also relied on the case of **John Harun Mwau & 2 others *v* Independent Electoral and Boundaries Commission & 4 others [2017]eKLR** for the proposition that the court ought to always promote the right to arbitrate.

Tatu City submits

34. Mr. Issa's first line of argument, relevant to the application, was that the instant application did not fall under *s*.7 of the Act in view of the reliefs sought and secondly, on the admission of Ongata Works that it was headed to the DAB not arbitration. Mr. Issa pointed to the fact that one month after Ongata Works came to court it had not attempted to invoke the arbitration clause.

35. Tatu City then accused Ongata Works of material non-disclosure and in this regard it was Mr. Issa's submission that the court's discretion could not be exercised in favour of a party who was not candid with the court.

36. The third limb of Mr. Issa's submissions was that Ongata Works stood to suffer no prejudice or loss as it was entitled to damages at the end of the day while Tatu City would be prejudiced if the works and thus the multi-billion project was grounded.

37. Counsel then referred the court to the decisions in **CMC Holdings Ltd & another *v* Jaguar Land Rover Exports Ltd [2013] eKLR (HC & CA)** and **Giant Holdings Ltd *v* Kenya Airports Authority [2010] e KLR** for the proposition that no interim measures of protection ought to issue where a contract has been terminated. The cases of **Surrey Heath BC *v* Lovek [1988] 42 BLR 144 and Tara Civil Engineering Ltd *v* Moorfield Dev. Ltd [1989] 46 BLR 72** were also relied on for the proposition that in construction contracts once a notice for termination is given the court ordinarily should not interfere.

38. Mr. Issa closed his submissions by stating that the instant case had not met the test for interim measures of protection.

Discussion and Determination

39. The application by Ongata Works is brought under s. 7(1) of the Act which reads as follows.

"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."

40. The types of interim measures of protection which may be granted by the court are basically unlimited, even from a basic reading of *s.*7 of the Act. The rationale is that the court, unless the parties agree otherwise, has under s. 7 of the Act the mandate to support and assist the arbitral process. Thus the court may grant any measure so long as it aids the arbitral process and prevents any party from ultimately being award-proof or proceedings-proof. The court need only be satisfied on the need to intervene and protect the parties rights and preserve the status quo until the arbitral process commences

and/or is finalized. For this reason the form and categories of the measure may not be closed: see **Futureway Limited *v* National Oil Corporation of Kenya [2017]eKLR.**

41. The whole purpose of the powers of the court under *s.*7 of the Act to issue interim orders of protection is to assist the arbitral process whether already commenced or not. The court enjoys a rather loose discretion with the aim of achieving the ideals of justice. With such loose discretion, I have found difficulty in agreeing with Mr. Issa's submissions that where a contract is terminated or a termination notice has been issued the court may not and cannot intervene. I found no binding authority to the effect that the court cannot intervene when a party to an arbitration agreement seeks the court's assistance and intervention in whatever mode to preserve the status quo or the parties' rights in any underlying contract. In my judgment, it will depend on the circumstances of each case.

42. Thus in **Richard Boro Ndungu *v* KPMG East Africa Association & 2 Others [2017]eKLR, Sabmiller Africa BV & another *v* East African Breweries Ltd [2009] EWHC, 2140, Cetelem SA *v* Roust Holdings [2005] 2 Lloyd's Rep 495, Coppee – Lavalin NV *v* Ken-Ren Chemicals & Fertilizers Ltd (In liquidation in Kenya) [1994] 2 All ER 449** and **Channel Tunnel Group Ltd *v* Balfour Beauty Construction Ltd [1993] AC 334** the courts made it clear that interim measures of protection may include orders protecting contractual rights and continuing contractual relations. Of course, I have no issue drawing from and finding solace in foreign court decisions due to the popular trend of global harmonization of arbitration and arbitral principles.

43. An application for interim measures of protection under *s*.7 of the Act nonetheless still falls to be determined by reference to the principles set out by the Court of Appeal in the case of **Safaricom Ltd *v* Ocean View Beach Hotel Ltd & 2 others [2010] eKLR.** The court stated thus:

"… 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".

44. I find this a compelling basis for my determination. As the powers under *s*.7 of the Act are discretionary, I must add that the court will always take into account all the circumstances including the applicant's conduct.

45. I will now consider seriatim, the factors settled in **Safaricom Ltd *v* Oceanview Beach Hotel Ltd & 2 Others (Supra)** as well as the conduct of Ongata Works who was accused of lacking the requisite candour.

Existence of an arbitration agreement

46. Mr. Issa for Tatu City variously attacked the application by Ongata Works. In his submissions,

Counsel stated that the court lacked jurisdiction as the applicant was only following up the DAB rather than arbitration as the dispute resolution forum. Counsel fell short of submitting that there was no arbitration consequently intended by the parties.

47. The starting point for an application under *s*.7 of the Act is to ascertain that the parties have an enforceable and valid arbitration agreement. The jurisdiction of the court is conferred by the establishment of that factual position.

48. I have already indicated that the parties in this case had agreed to arbitrate their unresolved disputes before the International Chamber of Commerce. This is not contested by either party. Tatu City only seems to question the wisdom of concentrating on the DAB.

49. Clause 20 of the FIDIC conditions is very exhaustive on dispute resolution. It is long and densely parked. It includes a pre-arbitration dispute resolution forum in the form of the DAB as constituted by the parties. The DAB decision may be final if both parties are satisfied but where they are both not satisfied or either party is not satisfied, the dispute may be moved to arbitration. Clause 20, at sub clause 20.8, also provides that amicable settlement of disputes through the DAB does not apply "*if a dispute arises between the parties in connection with, or arising out of, the contract or the execution of the works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise*".

50. There is little doubt that there was no DAB in place or at least fully constituted as the dispute herein emerged in mid December 2017. There were definitely attempts (resisted by Tatu City) to fully constitute the DAB post the filing of the instant suit. Prior to the filing of the suit, Tatu City were definitely contented with a DAB in place notwithstanding the fact that the contractual date for the constitution of the DAB was long behind the parties.

51. In my judgment, the absence of the DAB and indeed the attempts by Ongata Works to have the dispute initially adjudicated by a yet to be constituted DAB would not negatively impact the instant application.

52. Ongata Works has made it clear that the orders sought are pending the determination of the intended adjudication and/or arbitration. Tatu City is perfectly entitled to optionally resist any resolution before the DAB but Tatu City may not resist any resolution of the dispute by a panel of three arbitrators. The court's powers under *s*.7 of the Act will obtain once it is established that there is an agreement to arbitrate and it matters little that the arbitration is yet to be commenced.

53. I am satisfied that clause 20 of the FIDIC conditions which form part of the contractual arrangements between Tatu City and Ongata Works is valid and enforceable. Ongata Works is perfectly before the court under s.7 of the Act, notwithstanding the pragmatic attempts to initially refer the dispute to a DAB which would have been a more efficacious way to resolve the dispute. The attempts should be praised not condemned.

Whether the subject matter of arbitration is under threat

54. The question, put in another way, is whether the arbitral proceedings will be rendered worthless either during or at the end of the arbitral proceedings and post the Award.

55. The subject matter of the arbitration herein will be the termination of the contract between the parties and the post-termination effect. Ongata Works are insisting that the termination is wrongful and spiteful and must not stand. Tatu City insists that it is perfectly entitled to terminate and did so within the confines

of Clause 15 of the FIDIC conditions.

56. A cursory reading of Clause 15 of the FIDIC conditions reveals that the employer, namely Tatu City in this case, was conferred with the right to terminate. The contractor, in this case Ongata Works, was also conversely conferred with the right to terminate the contract (cl. 16 FIDIC conditions).

57. As to whether the right of termination has been correctly exercised and executed is a question to be determined by the arbitrator and not this court. This applies to the post-termination effect as well. The fear expressed by Ongata Works is that if the state of affairs is not maintained then the arbitral proceedings may end up being a farce. There may be nothing to look up to post termination as according to Ongata Works, Tatu City may appoint third party contractors who will tamper with and intermeddle with the site. This will result in evidence dissipating and any arbitral forum will find it very difficult to proceed with a fair adjudication of the dispute itself, to the detriment of the aggrieved party. This may very well be so as, post termination and appointment of a new contractor; the project and site may and shall not be static.

58. I have read the contract between the parties including the FIDIC conditions which were incorporated by reference. I must bear in mind what the parties have agreed on before intervening, if at all. The court must not seek to set any other standards which may lead to undesirable commercial uncertainty unless it is to ensure that the ideals of justice are ultimately met. The ideals of justice may certainly not be met if evidence dissipates and/or the entire arbitral process is prejudiced. Did the parties however reflect on this possibility"

59. In my judgment, clauses 15.3 of FIDIC conditions in the instant case are pertinent in answering this question. The clause provides that:

"As soon as practicable after a notice of termination under sub-clause 15.2 [Termination by Employer] has taken effect, the Engineer shall proceed in accordance with sub-clause 3.5 [Determination] to agree or determine the value of the works, Goods and Contractor's Documents, and any other sums due to the contractor for work sums due to the contractor for work executed in accordance with the contract".

60. The essence of this clause, in my view, is to take care of situations where there is a post- termination dispute. It is a cushion for both parties. It is plainly intended to protect both parties.

61. Additionally, I may also advert to Clause 20.1 of the FIDIC conditions. This clause provides, inter alia, that:

"The contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the site or at another location acceptable to the Engineer…"

62. Read within the context of claim, disputes and arbitration as well as in the context of extension of the time for completion, clause 20.1 in my judgment may only make commercial sense if interpreted to mean a cushion for the contractor, with the contractor taking charge of its own destiny by assembling all necessary evidence. As it were, the court should always adopt a non-intervention approach in matters arbitration if there is an alternative.

63. I return the verdict in the end that the subject matter of arbitration that is to say both the termination notice as well as the site of works is unlikely to be compromised as to be beyond the arbitrators as contended by Ongata Works. There is apparent and clear contractual provisions which once observed,

and it has not been suggested they will not be observed, will ensure that at the time of any arbitration the forum will be well apprised. In the presence of such safeguards, I must exercise reticence when a party claims to have exercised its contractual right to terminate a contract.

Any special circumstances

64. There is yet the question of the existence of any special circumstances to be considered. This is to be reflected upon in the context of any hardships to be occasioned to an applicant.

65. I did not hear Ongata Works to suggest that the instant contract has any special circumstances as such. The chief worry akin to a special circumstance was the submission that Ongata Works holds a special place in the construction industry and it would not augur well for its business as well as reputation if the termination was to carry through. I must confess that this line of argument had me staggering. Termination of any contract where justified is a commercial tenet. No party can and should ever be faulted for either terminating a contract or itself being subjected to a termination. Procurement principles actually proscribe past –performances from being used as yardsticks.

66. Assessing the merits of the application has, in my judgment, not revealed any special circumstances to warrant this court's intervention in this case.

A question of candor

67. Ongata Works was accused of not being candid, when it approached the court without notice.

68. It was stated that Ongata Works had failed to disclose that it had been given notices to make good its breaches of the contract. It was stated that Ongata Works did not reveal that it sought extension of the contract and was given a conditional extension. It was additionally stated that Ongata Works failed to disclose that it had agreed to the variations made to the scope of works. Finally it was stated that Ongata Works had failed to disclose that it only prompted the DAB after receipt of the Notice of termination. According to Tatu City, the non-disclosure on the part of Ongata Works was material and only intended to find favour with the court to the detriment of Tatu City.

69. A duty to fully and frankly disclose all relevant material is imposed by the court on any party who approaches the court ex parte. Where there is proven material non-disclosure, the guilty party may be denied relief even after the hearing on merits. It is up to a litigant to determine the information it will disclose and give to the court and for the court to determine whether any non-disclosed fact is material. The guiding factor to the court, in my view, is whether such non-disclosed fact would form a ground of the defence for the absent party.

70. I have reviewed the alleged non-disclosed facts. I am satisfied that Ongata Works was sufficiently candid with the court. It disclosed the termination notice and exhibited the same. The termination notice made explicit references to the cure notices issued prior to the termination notice itself. Likewise, Ongata Works exhibited a letter from Tatu City dated 27 October 2016. This letter expressly states that Ongata Works accepted the change in the scope of works on 15 September 2016. The extension of works was also disclosed via exhibit "GGW 16", annexed to the founding affidavit, as having been granted at the instance of Ongata Works.

71. It is true that Ongata Works did not disclose expressly that it approached the DAB after receipt of the termination notice. The materiality of this non-disclosure is however doubtful. I do not see how this could have led the court to think otherwise on 21 December 2017.

72. In sum, I would not have decided the application simply on the basis of material non-disclosure.

Conclusion and disposal

73. In the totality of the evidence and the circumstances of this case, I am unable to find that absent all or any of the sought interim measures of protection, the arbitral process or ultimate award will be prejudiced and or compromised. I do not find it appropriate that the status quo ought to be maintained any longer. Rather the frozen state of affairs must now take its course. The interim orders are hereby vacated and discharged. The remainder period of the termination notice will now run to its end and as per the contract between the parties with the post termination provisions thereafter taking effect...

74. I have to dismiss the application dated 21 December 2017. It is dismissed with costs to the Defendant.

75. Order of dismissal, accordingly.

Dated, signed and delivered at Nairobi this 31st day of January, 2018.

J.L.ONGUTO

JUDGE