



Automated Entrance Systems Limited v China Railway Construction Engineering Group Ltd; Trademark Africa (Interested Party) (Civil Suit E615 of 2024) [2024] KEHC 15986 (KLR) (Commercial and Tax) (20 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15986 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E615 OF 2024
FG MUGAMBI, J
DECEMBER 20, 2024**

BETWEEN

AUTOMATED ENTRANCE SYSTEMS LIMITED APPLICANT

AND

CHINA RAILWAY CONSTRUCTION ENGINEERING GROUP LTD RESPONDENT

AND

TRADEMARK AFRICA INTERESTED PARTY

RULING

1. The application dated 17th October 2024 is brought under Sections 7 and 12 of the *Arbitration Act*, Rules 2 and 3 of the *Arbitration Rules*, Section 1A, 18, 3A, 3B and 59 of the *Civil Procedure Act* as well as Order 51 Rule1 of the *Civil Procedure Rules*.
2. It emanates from a Finder's Fee Agreement which the applicant contends it entered into with the respondent, on 6th February 2024 (hereinafter the Agreement). The applicant contends that under the Agreement, it was appointed as an agent of the respondent for Contract No PRQ2023198 for Proposed Procurement for Civil Works Contractor for Infrastructure of One Stop Boarder Post at Nakonde Republic of Zambia (TENDER N0. PRQ2023198), issued by the interested party (hereinafter the tender).
3. The applicant contends that it fulfilled its obligations under the agreement by coordinating the tender process, assisting in the preparation of bid documents, and providing guidance throughout the tendering stages. As a result, the respondent was awarded the tender, valued at USD \$5,255,542.85,



- on 7th June 2024. The applicant now claims 10% of the contract value, which is USD \$525,554.29, as agreed under the commission agreement. It states that the respondent has allegedly refused to pay this amount, prompting the Originating Summons dated 15th October 2024 and the present application.
4. The applicant further asserts that while arbitration proceedings have already commenced, it is apprehensive that, without the interim orders sought in this application, the respondent may receive full payment from the interested party and subsequently transfer or dissipate the funds. This would leave the applicant without recourse, even in the event of a successful arbitration, as the respondent is a foreign entity with no known assets. The applicant also argues that the OS filed herein would also be rendered nugatory.
 5. Against this background the applicant seeks the following substantive orders:
 - i. That pending the hearing and determination of this application, this Honourable Court be pleased to issue an interim order compelling the interested party to preserve and/or withhold payment of 10% of the contract value, amounting to USD \$525,554.29, due in respect to the subject tender, owed to the respondent.
 - ii. That this Honourable Court do issue an Order amending the arbitration process by directing the Chairman of the Chartered Institute of Arbitrators Kenya Branch to appoint a single arbitrator to preside over the intended arbitration between Automated Entrance Systems Limited and China Railway Construction Engineering Group Limited, instead of the 3 arbitrators stipulated in the commission/finder's fee agreement dated 6th February 2024 between the applicant and respondent.
 6. The application is supported by the affidavits of Dr. Peter. N. Mwaniki, the Managing Director of the applicant, sworn on 17th October, 6th and 26th November 2024. It is opposed by both the respondent as well as the interested party.
 7. The respondent opposes the application through a replying affidavit sworn by Wu Haibo, its General Manager, on 3rd November 2024. The respondent argues that the tender is irrelevant to the proceedings before this court and asserts that the matters raised fall outside the court's jurisdiction. Additionally, the respondent maintains that the applicant is not a party to the tender and, therefore, has no basis to make any claims related to it.
 8. Without prejudice to this, the respondent argues that the applicant has presented no evidence to show the respondent's inability to pay the claimed amount. It further claims that granting the orders sought would delay the performance of the tender contract.
 9. The respondent also denies the existence of an enforceable arbitration agreement with the applicant. Wu Haibo, in his affidavit, asserts that the alleged commission agreement is fraudulent and denies any knowledge of the applicant or its Managing Director. He states that no agreement was ever entered into, further noting that he was not in Kenya at the alleged time of execution and has never visited the country. The respondent also disputes the authenticity of the Power of Attorney and denies the existence of any correspondence between the parties. In light of the above, the respondent claims the arbitration agreement is non-existent
 10. The interested party opposes the application through Grounds of Opposition dated 5th November 2024 and a replying affidavit sworn on 12th November 2024 by Joseph Namwaya, its Head of Procurement.
 11. The interested party argues that the applicant has no cause of action against it, as it is a stranger to the purported commission agreement. Consequently, no orders can issue against the interested party.



To support this, the interested party has produced the Invitation for Bid and a bid extension notice, which indicate that at no point did the respondent disclose the applicant as its agent. Furthermore, the interested party asserts that it is not a party to the arbitration agreement and cannot be compelled to produce evidence under these circumstances.

12. The interested party also takes issue with the form of the application, which invokes provisions of the *Civil Procedure Act* alongside the *Arbitration Act*, instead of relying solely on the latter.

Analysis and determination

13. I have carefully considered the pleadings, submissions, evidence and authorities cited by the parties in support of their claims.
14. The respondent challenges this court's jurisdiction to hear and issue orders in this matter. As a preliminary issue, I must address this question of jurisdiction before considering any substantive prayers, in tandem with the finding in *Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd*, [1989] eKLR.
15. The respondent's argument is based on the fact that the tender contract in question is to be performed outside the jurisdiction of this court. It is undisputed that the tender, as advertised, pertains to the construction of the One Stop Border Post at Nakonde in the Republic of Zambia. When it comes to jurisdiction in civil matters, Section 14 of the *Civil Procedure Act* provides as follows:

“Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of those courts.”

16. Section 15 provides further that:

“Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

- (a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or
- (b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or
- (c) the cause of action, wholly or in part, arises”.

17. Explanatory note 3 to section 15 is relevant. It provides that:

“In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely—

- i. the place where the contract was made;



- ii. the place where the contract was to be performed or the performance thereof completed;
 - iii. the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.”
18. These provisions clarify that a court’s jurisdiction in civil matters hinges on several factors. In contractual disputes, such as the instant one, jurisdiction is established in places where the contract was made, where it was performed, or where payment under the contract was due.
19. The applicant asserts that this court has jurisdiction over the matter, emphasizing its status as a registered corporate entity in Kenya. It further argues that the events leading to the Agreement are closely tied to this court’s jurisdiction. According to the applicant, the Agreement was executed in Kenya, and the tendering process to which the Agreement is ancillary was also conducted in Kenya. Furthermore, the applicant states that it fulfilled its obligations under the Agreement within Kenya by coordinating and assisting in the preparation of the tender documents.
20. Upon evaluating the evidence presented and applying the principles in Sections 14 and 15 of the *Civil Procedure Act*, I am satisfied that there is a sufficient and logical connection between this court and the facts of the case. Therefore, this court is vested with the jurisdiction to hear and determine the substantive prayers in this matter.
21. Turning to the substantive prayers, two key issues arise for determination: first, whether the applicant has established a case for the grant of interim injunctive relief, and second, whether the court should vary the arbitration clause.

Whether the court should issue an interim order compelling the interested party to preserve or withhold payment of 10% of the contract value, amounting to USD \$525,554.29, due in respect to the subject tender, owed to the respondent:

22. To succeed in its prayer for interim injunctive relief, the applicant must satisfy the conditions established in *Giella v. Cassman Brown & Co Ltd*, [1973] EA. 358. These conditions require the applicant to demonstrate:
- (i) a prima facie case with a probability of success;
 - (ii) that they would suffer irreparable harm which cannot be adequately compensated by damages; and
 - (iii) if the court is in doubt, that the matter should be decided on a balance of convenience.
23. Applying these principles to the present application and reviewing the evidence presented by the applicant, I note that the respondent and the interested party have raised the issue of privity of contract as a bar to the interim orders sought. Under the common law doctrine of privity of contract, rights and obligations under a contract are typically enforceable only by the parties to that contract. However, exceptions to the doctrine of privity have been recognized by courts.
24. For instance, in *Savings & Loan (K) Ltd V Kanyenje Karangaita Gakombe & Automobile Association of Kenya*, [2015] KECA 784 (KLR), the Court of Appeal dismissed an application challenging a suit on grounds of lack of privity, acknowledging:

“Over time, some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied



by a collateral contract between one of them and a third party relating to the same subject matter.”

25. The Court of Appeal in *City Council of Nairobi V Wilfred Kamau Githua T/A Githua Associates & Nairobi City Water and Sewerage Co Ltd*, [2016] KECA 649 (KLR) outlined circumstances where the privity doctrine may not apply, such as when a collateral contract involving a third party exists. Similarly, in *Aineah Likuyani Njirah V Aga Khan Health Services*, [2013] eKLR, the Court recognized that there are numerous exceptions to the privity rule under both common law and statutory frameworks, including instances where a third party is granted the right to enforce a contract made for their benefit.
26. The applicant has produced the Agreement dated 6th February 2024. On the face of it, the Agreement is executed by the applicant and the respondent, even though the respondent denies having executed the same. Clause 3 of the Agreement states;

“That it is hereby agreed that upon the success award of Tender No. PRA 20230198 and contract agreement the agent herein shall be entitled and owed ten (10) percent of the value of the tender.”
27. The applicant has also produced a Power of Attorney, dated 5th February 2024 authorizing its Managing Director to execute the Agreement on behalf of the respondent. As proof that the tender was awarded to the respondent, the applicant relies on press releases which are attached to its bundle of documents.
28. The applicant argues that its rights under the Agreement are directly dependent on the contract between the respondent and the interested party. The applicant asserts that without the tender contract between the respondent and the interested party, it would have no claim under the Agreement. Based on this, and having reviewed the documents filed, I am satisfied that the applicant’s claim falls within the exceptions to the privity of contract doctrine.
29. Additionally, the applicant has submitted evidence showing that the respondent has failed to honor demands for payment of the agreed sum. This failure is substantiated by the record. Given the applicant’s legitimate apprehension of non-payment, I find that the loss, damage, and inconvenience to the applicant, should the orders not be granted, would far outweigh any potential prejudice to the other parties. Consequently, the balance of convenience lies in favor of granting the interim relief as sought.
30. The interim preservation orders sought are contemplated under the *Arbitration Act*. Section 7(1) provides that:

“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.”
31. As guided by the Court of Appeal in *Safaricom Limited V Ocean View Beach Hotel Limited, Salim Sultan Moloo & Alsai (K) Limited*, [2010] KECA 346 (KLR), I am satisfied that on the face of it, there exists an arbitration clause in the purported Agreement between the applicant and the interested party. Clause 15 of the said agreement states as follows: -

“ Any difference or dispute between the parties (or their respective representatives) which at any time arises out of or in connection with this Agreement shall, failing any agreement to



settle it in any other way, be referred for decision to an arbitrator to be agreed upon between the parties. In the event of failure to agree [on] sic an arbitrator, the difference or dispute shall be referred to and finally resolved by arbitration appointed under the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitration. The number of arbitrators shall be three and the place of arbitration shall be Nairobi.”

32. I am mindful of the fact that the validity of the Agreement is contested. The respondent has produced a forensic document examiner’s report together with passport records of the respondent’s Managing Director in opposition.
33. However, this and other disputed factual issues can only be conclusively resolved after a full hearing before the arbitrator, where evidence will be presented and tested. Additionally, I have established that the subject matter of the arbitration is under threat. In light of this, I find that the applicant has satisfied the requirements under Section 7 of the *Arbitration Act* for the grant of the relief sought.

Whether this court should issue an Order amending the arbitration process:

34. The limited role of the court in matters which are governed by the *Arbitration Act* is emphasized under Section 10 of the *Arbitration Act*. Having noted the existence of an arbitration clause, I emphasize that these are not court proceedings but arbitration proceedings, where parties voluntarily chose to resolve their dispute by arbitration. When parties expressly exclude court intervention in their arbitration agreement; the court will only intervene by virtue of the very limited parameters provided for. Amendment of the arbitration process is not one of the stipulated instances.
35. Issuing the orders sought to vary the arbitration process would amount to this court interfering with the agreement freely entered into by the parties and imposing terms to which they did not consent. Likewise, issuing orders compelling a party to produce specific evidence for use in the arbitration process would constitute an overreach of this court’s authority, as such matters fall within the exclusive purview of the arbitration proceedings.

Disposition

36. Accordingly, the application dated 17th October 2024 is successful to the extent that an order compelling the interested party to preserve and/or withhold payment of 10% of the contract value amounting to USD \$525,554.29, due to the respondent in respect of the subject Tender N0. PRQ2023198, pending the hearing and determination of the arbitration, hereby issues. Each party shall bear its own costs of the application.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF DECEMBER 2024.

F. MUGAMBI

JUDGE

