



**Umeme Services Limited v AEE Power SA; Kenya Power and Lighting Co Limited (Interested Party) (Miscellaneous Application E735 of 2021) [2023] KEHC 18157 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18157 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E735 OF 2021**

**A MABEYA, J**

**MAY 26, 2023**

**BETWEEN**

**UMEME SERVICES LIMITED ..... APPLICANT**

**AND**

**AEE POWER SA ..... RESPONDENT**

**AND**

**KENYA POWER AND LIGHTING CO LIMITED ..... INTERESTED PARTY**

**RULING**

1. The application before court is dated September 29, 2021. It was brought under section 7 of the *Arbitration Act*, sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, order 40 rules 1, 2 and 3 and order 51 rule 1 of the *Civil Procedure Rules*.
2. The application sought injunctive orders to restrain the interested party from releasing payment to the respondent pursuant to their contractual agreement pending the hearing and determination of the arbitral proceedings between the parties. It also sought orders directing the respondent to deposit Kshs 53,114,936.59 plus costs of the arbitration pending the determination of the arbitral proceedings.
3. The application was supported by the affidavit sworn by Stanley Kitur on September 29, 2021. It was contended that the applicant and respondent had a written agreement entered into on September 19, 2017 for transportation of materials from the respondent's warehouse in Kisumu. The respondent had a contract with the interested party for the supply and installation of Last Mile Connectivity Project (LMCP).



4. That the respondent had failed to comply with the agreement making it impossible for the applicant to complete the remaining work. That the ongoing arbitral proceedings would be rendered nugatory if the application was not allowed.
5. That the interested party was in the process of paying the respondent and the applicant feared that being an international company, the respondent would move out of the court's jurisdiction upon receiving the payment. That the respondent had no other known assets in Kenya, and if successful, the applicant would not be able to recover the arbitral award.
6. The respondent opposed the application *vide* the replying affidavit sworn by Francis Kahumbi on November 6, 2021. It was contended that the applicant failed to complete the works as contracted and whatever was done was poorly done.
7. That when a dispute arose, the same was referred to arbitration as per clause 15 of the contract. That the same commenced before Hon Collins Namachanja and the proceedings were at an advanced stage as the hearing was concluded and parties had filed submissions and were waiting for the arbitral award. That the proceedings begun in 2020 thus the application was filed inordinately late.
8. It was further contended that none of the three pillars of injunction had been demonstrated and the applicant was undeserving of the orders sought.
9. The court on various dates directed that the application be canvassed by way of submissions. Only the respondent complied by filing its submissions dated January 28, 2022. Despite numerous opportunities, the interested party failed to reply to the application. More interestingly, the applicant failed to file its written submissions and the same remain unfiled as at the time of writing the ruling.
10. It is highly doubtful whether the applicant is still interested in prosecuting the application. Indeed, on January 26, 2023, this court deemed the instant application as unprosecuted due to the inordinate delay in complying with court orders.
11. Looking at the merit of the application, the applicant did not disclose any *prima facie* case as against the respondent, and more importantly, against the interested party against whom the injunction orders were sought. The contract sought to be enforced was only between the applicant and the respondent, and payments were to be done to the applicant directly by the interested party as per article 8 of the contract.
12. It is doubtful how the applicant would benefit if the interested party was to be barred from making any payments to the respondent. As submitted by the respondent, this court cannot make a blanket order against the interested party where there is no proof of a *prima facie* case with probability of success.
13. The applicant admitted that it had not completed the works as stipulated in the contract due to the respondent's breach of article 2 of the contract which provided for readiness of the site. The respondent on the other hand confirmed that indeed the works had not been completed and what had been done was sub-standard. In light of those facts, there was no strong case that was established against the respondent to warrant any interim protection. The dispute can only be determined at the arbitral proceedings.
14. In any case, the applicant has been asleep since 2021 and has not bothered to prosecute its application. No injury would be suffered if the application was to be denied. The prayer for security cannot be granted.
15. In addition, when the parties' advocates appeared before court on July 26, 2022, the respondent's advocate Mr Onyango disclosed to this court that the arbitral proceedings had been concluded and



the instant application had been overtaken by events. The same point was pleaded in the respondent's response where it was averred that the arbitral proceedings had been concluded and parties were awaiting the arbitral award.

16. The applicant's advocate who was present in court did not challenge that submission. Neither did the applicant respond to those pleadings despite being given an opportunity to file a supplementary affidavit.
17. This being the case, any orders by this court would be made in vain. That would amount to a waste of judicial time and resources.
18. In the end, this court finds that the application dated September 29, 2021 is without merit and is dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

