



**Oris & Sons Contractors Limited v Huruma Mixed Sec. Pmc & another;
NGCDF Board, Mathare Constituency (Interested Party) (Miscellaneous Case
E027 of 2021) [2022] KEHC 12697 (KLR) (Civ) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 12697 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CASE E027 OF 2021
DO CHEPKWONY, J
MAY 31, 2022**

BETWEEN

ORIS & SONS CONTRACTORS LIMITED APPLICANT

AND

HURUMA MIXED SEC. PMC 1ST RESPONDENT

FUNDS ACCOUNT MANAGER, MATHARE 2ND RESPONDENT

AND

NGCDF BOARD, MATHARE CONSTITUENCY INTERESTED PARTY

RULING

1. There are two applications before this court. One is filed by the Plaintiff/Applicant vide the Chamber Summons application dated January 12, 2022 and another by the proposed 3rd Defendant vide a Notice of Motion dated February 7, 2022.
2. The Plaintiff's/Applicant's application is seeking for orders that;-
 1. Spent;
 2. Spent;
 3. As interim measures of protection, a restraining order barring the Respondent by themselves, their agents, their servants, their employees or anyone under their instructions or authority from entering or taking over the project site:



4. An order directing the Officer Commanding, Huruma Police Station to ensure compliance with any orders of the court pending the hearing and determination of the arbitral proceedings ; and
 5. Costs of this Application to be borne by the Respondent.
3. It is premised on the grounds on face of it and the dispositions in the Supporting Affidavit sworn by Oris Okuku on January 12, 2022. It is stated therein that the Applicant was awarded a tender by the Interested Party herein on August 10, 2018 to construct an Administration and Tuition Block at Huruma Secondary School which project the Applicant contends that it has completed as per its contractual obligation. Also, that despite completion of the project, the Respondents have not made good the payment due despite various certificates raised by the Applicant and various letters to them by the Applicant. That owing to the Respondent's failure to meet the payment obligations, the Applicant declared a dispute on July 15, 2021 as per the contract and demanded a total of Kshs Five Million Seventy Two thousand and Thirty five Shillings (Kshs 5.072,035/=) for the completed project. Further, that in compliance with Clause 17 of the Agreement which requires that any dispute arising for the tender must be referred to Arbitration, the Applicant has engaged the Respondents with a view to settling the matter amicably through arbitration but the Respondents have remained adamant.
 4. The Applicant is apprehensive that the Respondents intend to breach the agreement by forcefully taking over the project without fulfilling the payment obligations hence prejudicing the Applicant and subjecting it to potential litigation from third parties who advanced loan facilities to the Applicant for the completion of the project.
 5. It is the Applicant's prayer that an interim order restraining the Respondents pending the hearing and determinations of the arbitral proceedings. It is contended that no prejudice will be suffered by the Respondents if the orders sought are granted.
 6. The application has not been opposed by the Respondents on record as there are no responses on their part.
 7. The proposed 3rd Defendant has filed a Replying Affidavit and a Further Affidavit sworn by Moses Akaalo on May 13, 2021 and May 17, 2021 respectively in opposition to the Applicant's application. It is worth noting that the proposed 3rd Defendant is not a party to the proceedings herein.;
 8. On May 9, 2022, this court gave directions for all the parties herein including the proposed 3rd Defendant to put their houses in order and the proposed 3rd Defendant has not complied. In the circumstances, the Replying Affidavit and the Further Affidavit filed in opposition to this application by the proposed 3rd Defendant are inconsequential and cannot be considered.
 9. On the question of whether the Applicant has established the conditions for the grant of an injunction, the celebrated case of *Giella vs Cassman Brown* [1973] EA 358 set out grounds which were reiterated in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others*, CA No77 of 2012 [2014]eKLR, where the Court of Appeal held that:-

“in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a *prima facie* level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, allay any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. it is established that all the above three conditions and states



are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

10. A *prima facie* case was defined in the case of *Mrao Limited vs First American Bank Limited & 2 Others*, [2003] KLR 125 to mean: -

“ ... a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter....

But as I earlier endeavored to show, and I cite ample authority for it, a *prima facie* is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case”

11. It is not in dispute that the Applicant was awarded a tender by the Interested Party herein. What is in dispute is whether it has been paid for work done. The Respondents on record have not opposed the Applicant’s assertions as to the said payments owed to it. The Applicant has indicated its apprehension that the Respondents are likely to take over the project and deny it its dues and further subject the Applicant to potential litigation by 3rd Parties who advanced loans to it.
12. I have perused a Notice to Vacate made vide a letter dated January 13, 2022 in support of the Applicant’s fears. I am satisfied that a *prima-facie* case has been established and there is a likelihood of substantial loss being incurred by the Applicant if the orders herein are not granted. I am therefore convinced that the Applicant has made a case for grant of a restraining order. As such, a restraining order per prayer No 3 of the application dated January 12, 2022 pending the arbitral proceedings to issue.
13. The proposed 3rd Defendant’s application on the other hand filed an application dated February 7, 2022 seeking for orders that:-
- a) Spent;
 - b) The NG-CDF Mathare Constituency Committee be joined to these proceedings as the 3rd Defendant/Respondent;
 - c) Any other remedy that the court deems fit.
14. It is premised on the grounds that the applicant deliberately omitted and failed to join the proposed 3rd Defendant/Respondent to this suit while being aware that any arising orders would affect it. Also, that the Applicant failed to disclose the fact that it has filed a suit seeking similar orders in Nairobi Chief Magistrate Court Comm Suit No E039 of 2022, *Oris & Sons Contractors Limited vs Victor Ochieng & Others* and obtained interim orders on January 24, 2022. Further, that the Applicant has failed to disclose that the project site has been completed and handed over to the NG-CDF Mathare Board and Committee and neither has it disclosed any communication to this effect. It is contended that the proposed 3rd Defendant is a crucial party to these proceedings and its participation would greatly assist the court in arriving at a just decision. It is therefore in the interest of justice that this application is allowed.
15. The Plaintiff/Applicant opposed the proposed 3rd Defendant’s/ Respondent’s application vide a Replying Affidavit dated May 5, 2022 by Oris Okuku. It is stated that the application is fatally defective and is premised on a misapprehension of facts and failure to understand the nature of the instant proceedings for the reason that the agreement in issue provides for an Arbitration Clause at Clause 17E,



- (F), & (G). Also, the Applicant's application is not a suit but a Miscellaneous application for interim orders hence the proposed 3rd Defendant filed the application on the belief that this was a suit. Further, that the proposed 3rd Defendant was not a party to the contract giving rise to this dispute hence the reason it was not included as such. In any case, the functions of the 2nd Defendant/Respondent, the Interested Party and the proposed 3rd Defendant are intertwined for the reason that it created the 1st Defendant/Respondent and the 2nd Defendant/Respondent is a member to it and at the center of its operations. Also, that it reports to the Interested Party hence fully represented.
16. That on the claim that there exists another suit at the lower court seeking similar orders, the lower court has since dismissed the application and the entire suit based on the submission by the proposed 3rd Defendant and as such, the claim is now moot. It is stated that the proposed 3rd Defendant's joinder will add no probative value to the instant proceedings and its application should be dismissed with cost.
17. The Applicant claims that the proposed 3rd Defendant was misled to think that this is a suit but it is not. I am inclined to believe that it is the Applicant who has misled all the parties by how it has described parties including itself. The Applicant has described itself as "Plaintiff/ Applicant" and the proposed 3rd Defendant has described itself at prayer No.2 of its Defendant as "3rd Defendant/Respondent". I am convinced that the proposed 3rd Defendant intended to be joined as a 3rd Respondent but only confirmed to the Plaintiff/Applicant's description.
18. On joinder, Order 1 Rule 10(2) of the said Rules 2010 provides that:-
- "The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."
19. In the case of *Martin Kirima Baithambu vs Jeremiah Miriti* [2017]eKLR, where the court pronounced itself as hereunder:-
- "The pragmatic reality has been for courts to add parties in a suit based on guarantee if it is desirable to add such party so that the court can resolve all the matters in controversy effectually and completely. Aply here would be to invoke the procedure provided under Order 1 rule 15 of the Civil Procedure Rules. I say these things for the sake of jurisprudence".
20. The question at this stage is, is the proposed 3rd Defendant a necessary party? The National Government *Constituencies Development Fund Act* No 30 of 2015, at Section 14 established the National Government Constituencies Development Fund Board and it provides:-
- (14) Establishment of the Board.
- (1) There is established a Board to be known as the National government Constituencies Development Fund Board.
- (2) The Board shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of-
- a) Suing and being sued;



- b) Taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;
- c) Borrowing money or making investments; and
- d) Doing or performing all other acts or things for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate”.

21. From the above provision, the body to sue and be sued is the Board. The Board further seconded one person to sit at the Constituency Committee referred to as the Fund Account Manager according to Section 43(9) of the Act which provides:-

“[43(9)] The Fund Account Manager seconded by the Board to the Constituency shall be the custodian of all records and equipment of the Constituency during the term of Parliament and during transitions occasioned by general elections or a by-election”.

22. In view of the above, the proposed 3rd Defendant is already represented by virtue of the fact that the 2nd Respondent is its member and the Interested Party is the body corporate with the powers to use and be sued. The parties already on record can prosecute the dispute the same way the proposed Interested Party would have prosecuted although it is at liberty to raise the question of joinder before the arbitrator.

23. The request by the Applicant to refer the dispute to arbitration as per their agreement has not been disputed by either party and the same is as per Section 56(4) of the Arbitration Act which allows parties to jointly appoint an arbitrator of their choice as per the provision hereunder:-

“[56(4)] Notwithstanding subsection (3), parties shall be at liberty to jointly appoint an arbitrator of their choice in the event of a dispute but where parties fail to jointly agree on an arbitrator, any of the parties may apply to the Cabinet Secretary to reconsider the Board’s decision and determine the matter”

24. I am bound by the provisions above and direct that the dispute herein be and is hereby referred to an arbitrator to be appointed by both parties within the next 60 days.

25. From the foregoing, this court makes orders that:-

- a) The Applicant’s application dated January 12, 2022 succeeds in terms of prayer No (3).
- b) The proposed 3rd Defendant’s application dated February 7, 2022 fails and is thus dismissed.
- c) The matter is referred to arbitration and parties to appoint an arbitrator within 60 days from the date of this Ruling.
- d) Each party to bears own costs.

Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MAY, 2022.

D O CHEPKWONY

JUDGE



In the presence of:

Mr Wesonga counsel holding brief for Mr Mbugua counsel for applicant

Mr Momanyi counsel holding brief for Mr. Omwenga counsel for 2nd Defendant

Mr Ochieng Oginga counsel for proposed 3rd Defendant

Court Assistant - Kimoine

