



REPUBLIC OF KENYA



KENYA LAW
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**Azicon Kenya Ltd v Kenya Airports Authority (Civil Case E040 of 2022)
[2022] KEHC 16127 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16127 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E040 OF 2022
WA OKWANY, J
NOVEMBER 24, 2022**

BETWEEN

AZICON KENYA LIMITED PLAINTIFF

AND

KENYA AIRPORTS AUTHORITY DEFENDANT

RULING

1. The plaintiff seeks the following orders in the application dated February 11, 2022:-
 1. Spent
 2. Spent
 3. That the defendant/respondent, its servants and/or agents be restrained from undertaking a fresh procurement process for the contract for supply and replacement of taxiway lighting fittings and damaged signages at Jomo Kenyatta International Airport, implementing the works outlined in the contract dated January 30, 2020 through any third parties and/or evicting the plaintiff/ applicant from any and all parcels of land and access roads upon which the project and its related infrastructure will be located pending the hearing and final determination of the main suit.
 4. That the costs of this application be in the cause.
2. The application is supported by the affidavit of David Kibet Tonui and is based on the following grounds:-



1. That by a contract dated January 30, 2020, the defendant/ respondent herein contracted the plaintiff/ applicant herein to supply and replace taxiway lighting fittings and damaged signages at Jomo Kenyatta International Airport.
2. That after commencement of the project on March 4, 2020, the plaintiff/ applicant fully mobilized on site by March 30, 2020 as required by the contract.
3. That the defendant/ respondent ignored and/or refused to perform its part of the contract occasioning lengthy delays that affected the performance of the contract.
4. That the defendant/ respondent ignored and/or refused to facilitate the issuance of the letter of credit for imported materials as per sub-clause 33.1 of contract.
5. That following the refusal and delay on the part of the defendant/ respondent to facilitate the issuance of the letter of credit for imported materials as per sub-clause 33.1 of contract, the currency for importation of the said materials fluctuated significantly and by over 20%.
6. That the plaintiff/ applicant wrote several letters to the defendant/ respondent reminding them to perform their part of the contract but the said letters were ignored.
7. That by a letter dated December 23, 2021, the defendant/ respondent herein arbitrarily, irregularly and unlawfully terminated the said contract dated January 30, 2020 without performing its duties under the contract and expressed its intention to undertake a fresh procurement process on basis of effluxion of time.
8. That the said termination of contract was unfair and unjustified, considering that the project delays were caused by the defendant/ respondent.
9. That below is a summary of delays caused by the defendant/ respondent.



	Request made to defendant	Plaintiff request date
1	Airside safety training	March 2, 2020
2	Drawing and information	March 2, 2020
3	Submittals (all materials)	April 9, 2020
4.	Submittals (RW 06 vacate sign and resin)	June 30, 2020
5	Variation request for resin	June 30, 2020
6	Request of letter of credit	July 16, 2020
7	Request for a meeting to discuss project delays	January 19, 2021
8	Request for extension of time	February 16, 2021
9	Detailed explanation of challenges faced by the plaintiff	March 18, 2021

10. That the plaintiff/ applicant wrote to the defendant/ respondent on several occasions pointing out the challenges it encountered and there was no response whatsoever. The plaintiff/ applicant also made telephone calls to the project manager which went unanswered.
 11. That the plaintiff/ applicant is apprehensive that the defendant/ respondent shall proceed to undertake a fresh procurement process as clearly stated in the termination letter dated December 23, 2021.
 12. That unless the defendant/ respondent herein is urgently restrained by this honourable court, the plaintiff/ applicant stands to suffer irreparable loss and damage and the suit herein, will be rendered nugatory and the ends of justice defeated.
 13. That the defendant/ respondent herein will not suffer any prejudice if the orders sought herein are granted as the plaintiff/ applicant is still ready and willing to perform its duties as per the contract.
 14. That the balance of convenience tilts in favour of the plaintiff/ applicant herein.
3. The respondent opposed the application through the replying affidavit of its Engineer Mr James Mbui who confirms that the parties herein entered into a contract for the supply and replacement of taxiway lighting fittings and damaged signage at Jomo Kenyatta International Airport. He states that the contract was to be for a term of 52 years was terminated due to the applicant's non-performance. He explained that the applicant requested for a letter of credit for importation of materials which request was not be fulfilled because such credit could not be issued to a third party. He accuses the respondent



- accuses the applicant breaching the regulatory and safety requirements governing the taxiway lighting services.
4. The application was canvassed by written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of the equitable remedy of injunction.
 5. In *Giella vs Cassman Brown and Company Limited* (1973) EA 385, the court set out the principles governing the granting of orders of injunction as follows: -

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”
 6. What amounts to a *prima facie* case defined in the case of *Mrao Limited vs First American Bank of Kenya and 2 others* (2003) KLR 125, as follows: -

“A *prima facie* case in a civil case includes but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court; a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but 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.”
 7. The applicant seeks an order of injunction to restrain the respondent from undertaking fresh procurement process for the contract for supply and replacement of taxiway lighting fittings and damaged signages at Jomo Kenyatta International Airport. The applicant’s case is that the defendant did not perform its part of the contract as it refused to facilitate the issuance of the letter of credit for imported materials thus causing the delay in its implementation.
 8. In a rejoinder, the respondent argued that the applicant’s request for a letter of credit in foreign currency was not tenable since the contract stipulated that the same would be issued in Kenyan currency. The respondent further stated that the respondent’s non-performance of the contract resulted in breach of the regulations that require the taxiway lighting services at to be at 75%. It was the respondent’s case that the taxiway were a safety hazard due to the applicant’s nonperformance.
 9. It was not disputed that the parties herein entered into a contract for the supply and replacement of taxiway lighting fittings. It was also not disputed that the plaintiff did not commence the work citing lack of facilitation by the defendants. The plaintiff is apprehensive that the defendant might terminate their contract and has filed this application to restrain the defendant from entering into a new deal over the same subject of taxiway fittings.
 10. It is trite that parties enter into contracts freely and that such contracts have termination clauses. The plaintiff herein has moved the court to stop the defendant from terminating their said contract. I have considered the averments made by the parties and I find that the plaintiff/applicant has not established a *prima facie* case with probability of success. No material was place before this court to show that there is a threat of infringing any of the plaintiff’s rights under the contract.



11. On irreparable loss, I am guided by the decision in the case of *Paul Gitonga Wanjau vs Gatbuthi Tea Factory Company Ltd & 2 others* [2016] eKLR where the court considered Halsbury's laws of England on what irreparable loss is and stated that:-

“First, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”

12. I find that the plaintiff did not state that it will suffer loss that cannot be remedied by an award of damages at the end of the case should the defendant terminate their contract. The balance of convenience in this matter would tilt in favour of the defendant in view of the safety hazard that is involved in the matter should the taxiway at the airport continue to be without proper lighting.

13. In the upshot, I find no merit in the application dated February 11, 2022 and I therefore dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Court Assistant- Sylvia

