



REPUBLIC OF KENYA



Muga Electrical Contractors Ltd & another v Rimun Ventures Ltd & another (Civil Case E142 of 2021) [2021] KEHC 90 (KLR) (Commercial and Tax) (24 September 2021) (Ruling)

Neutral citation: [2021] KEHC 90 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E142 OF 2021
A MABEYA, J
SEPTEMBER 24, 2021**

BETWEEN

**MUGA ELECTRICAL CONTRACTORS LTD 1ST PLAINTIFF
REALTECH PLUMBERS LTD 2ND PLAINTIFF**

AND

**RIMUN VENTURES LTD 1ST DEFENDANT
KENYATTA NATIONAL HOSPITAL 2ND DEFENDANT**

RULING

1. Before Court is the plaintiffs' Notice of Motion dated 19/3/2021. The same was brought under Order 51 Rule 1, Order 40 Rules 1 and 2 of the *Civil Procedure Rules, 2010* and Section 3A of the [Civil Procedure Act](#).
2. The plaintiffs sought an injunction to restrain the defendants or their agents from undertaking any further construction of the mortuary at Kenyatta National Hospital, Othaya. They also sought to restrain the 2nd defendant from making further payments to the 1st defendant in respect of the said construction and tender number KNH/T/63/2020-2021 pending the determination of the suit.
3. The Motion was supported by the affidavits sworn by Andrew G. Mugo and David N. Komu, who are directors of the 1st and 2nd plaintiff, respectively.
4. The grounds included: that sometime in August, 2020, the 2nd defendant advertised a tender for the construction of a mortuary at Kenyatta National Hospital, Othaya ("the project") vide tender number KNH/T/63/2020-2021 ('the tender').



5. The plaintiffs and the 1st defendant made a joint bid for the tender with the understanding that the 1st defendant was to be the main contractor and the plaintiffs were to be subcontractors as indicated in the Pre-Subcontract Agreement ('the Agreement') entered between them.
6. That the 1st defendant commenced construction of the project without the involvement of the plaintiffs which led them to be apprehensive that the 1st defendant had engaged other subcontractors in breach of the Agreement. As per the Agreement, the plaintiffs were to be involved from the inception of the project so that each of the plaintiffs could undertake their distinct roles in the project. The 1st plaintiff would undertake electrical works while the 2nd plaintiff plumbing works ("the said works").
7. The plaintiffs contended that the said works were to be undertaken as the structure took shape and not when the project is completed. In the premises, the ongoing construction gave the plaintiffs a strong inference that the 1st defendant may have procured the services of other subcontractors in breach of the Agreement. The 2nd defendant had already disbursed a sum of Ksh.8,000,000/- to the 1st defendant despite full knowledge that the 1st defendant was acting in breach of the Agreement by failing to involve the plaintiffs in the project.
8. The application was opposed vide the 1st defendant's replying affidavit of Omar Mohamud Abdi sworn on 4/6/2021. He averred that in August 2020, the 1st defendant made a bid on the tender and on 25/8/2020 entered into the Agreement with the plaintiffs. The latter were to offer mechanical and electrical services after the 1st defendant finalizes the construction.
9. The 1st defendant was awarded the tender on the 4/9/2020 and commenced construction on 25/9/2020. However, the plaintiffs breached their part of the Agreement by failing to avail themselves on the site despite several attempts to reach out to them. Despite knowing that the project had a deadline, the plaintiffs ignored calls from the 1st defendant to visit the site and carry out their part. As a result, the 1st defendant procured the services of other providers to undertake the said works.
10. The 2nd defendant also opposed the application vide a replying affidavit of John Kamau Miringu sworn on 28/6/2021. He averred that the plaintiffs did not submit their bids for the tender jointly with 1st defendant rather that the 1st defendant did so on its own. Following evaluation, the 2nd defendant awarded the tender to the 1st defendant and a contract was entered into for the construction of the mortuary.
11. The 2nd defendant asserted that it had no contractual relationship with the plaintiffs arising out of the award of the tender and that it is not privy to the Agreement between the plaintiffs and the 1st defendant.
12. Both of the plaintiffs filed further affidavits in response to the defendants replying affidavits. They reiterated the contents of the supporting affidavit. They further averred that the 1st defendant ignored the plaintiffs' calls and gave misleading information on the status of the project.
13. Having reviewed the record in its entirety, the main issue for determination is whether the plaintiffs have met the conditions for granting an interim injunction.
14. The principles applicable were well set out in *Giella v Cassman Brown* [1973] EA 358. These are that the applicant must establish a *prima facie* case with a probability of success, he must illustrate that he will suffer loss that cannot be compensated by and award of damages and that if the court is in doubt, it will determine the matter on a balance of convenience.



15. In *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, *prima facie* case was defined to be a case in which on the material presented, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
16. The plaintiffs submitted that they entered into a sub-contract agreement with the 1st defendant to the effect that if the 1st defendant was awarded the tender, the plaintiffs would be subcontractors. That the bid was made jointly with the 1st defendant. However, on being awarded the tender, the 1st plaintiff took over the project to the exclusion of the plaintiffs. The agreements were produced in evidence.
17. Clause 1.0 of both the agreements provided that the plaintiffs and 1st defendant entered into a teaming agreement whereby they would work together for the purpose of preparing and submitting a bid for procurement of the project.
18. While Clause 2.0 the agreements stated that: -

“Provided the Contractor (1st defendant) receives a cost and technical proposal that is acceptable, the Contractor will name the Subcontractor as a potential subcontractor for the following areas as mutually agreed: Mechanical Installation Works and Electrical Installation Works.”
19. On the foregoing, the Court holds that the parties entered into the agreements with the intention to submit a joint bid for the tender. As such, and in accordance with the case of *Mrao Ltd (supra)*, the Court finds that the plaintiffs have established an existing right that has apparently been infringed. Therefore, the court finds that a *prima facie* case with a probability of success has been established by the plaintiffs.
20. On the second limb, the applicant must illustrate that he will suffer irreparable loss and damage if the injunction is not granted.
21. The plaintiffs submitted that they are likely to suffer injuries that cannot be adequately compensated for in damages if the injunction is not granted. The plaintiffs submitted that they relied on the agreements and entered into other agreements with third parties and will likely face claims from them.
22. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, it was held that: -

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima facie*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be an adequate remedy”.
23. The court adopts the foregoing herein. The plaintiffs have stated that they will suffer losses particularly from third party contracts that they entered into on the reliance of the pre subcontract agreements but



they have not demonstrated the extent of it, they have merely mentioned it. No such agreements were produced in evidence.

24. The court finds that the plaintiffs have failed to show how they will suffer irreparable loss if the injunction is not granted. An irreparable loss is one whose amount cannot be adequately measured with reasonable accuracy or the injury is of such a nature that monetary compensation will not be an adequate remedy.
25. In this case, the plaintiffs do not stand to suffer irreparable harm. If the suit is concluded in the plaintiffs' favor, the court can award damages as stipulated in the tender project amount.
26. Although the plaintiffs have established a prima facie case, they have failed to prove to the Court that they will suffer irreparable loss and damage.
27. The third limb is to determine where the balance of convenience lies. In *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR, it was held: -

“The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it”.

28. Applying the foregoing in the present case, the Court finds that the balance of convenience lies with denying the injunction sought. The inconvenience that would be caused to the defendants would be greater if the injunction is granted as the construction work, which is already underway, would be brought to a halt. That would inconvenience the public which is the beneficiary of the project.
29. The upshot is that the application fails and is dismissed with costs to the defendants.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2021.

A. MABEYA, FCI Arb

JUDGE

