



Coastal Kenya Enterprises v China City Construction International Engineering (K) Ltd (Civil Suit E695 of 2021) [2021] KEHC 149 (KLR) (Commercial and Tax) (22 October 2021) (Ruling)

Neutral citation: [2021] KEHC 149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E695 OF 2021
A MABEYA, J
OCTOBER 22, 2021**

BETWEEN

COASTAL KENYA ENTERPRISES PLAINTIFF

AND

**CHINA CITY CONSTRUCTION INTERNATIONAL ENGINEERING (K)
LTD DEFENDANT**

RULING

1. Vide an application dated 19/7/2021, the plaintiff came to Court contending that there was a contractual relationship between it and the defendant regarding the upgrading of Tawa-Nguluni-Itangani Road Contract No. RWC312. It further contended that the defendant was in breach of the contract between them and that the said contract provided for arbitration in the event of conflict.
2. The plaintiff sought injunctive orders pending arbitration on the grounds that it had sub-contracted the defendant to complete the construction as stipulated in the contract. That although it had made all payments to the defendant, the defendant had failed complete the construction and had denied the plaintiff access to the construction site. The plaintiff therefore sought injunctive orders to restrain the defendant from removing any construction equipment from the construction site.
3. On 22/7/2021, Majanja, J considered the application ex-parte and gave directions that the matter be fixed for directions on 29/7/2021. In addition, he granted conservatory orders restraining the defendant from removing from the construction site of Tawa-Nguluni-Itangani Road Project Contract No. RWC 312 (“the Project”) any construction equipment materials and stores pending the hearing and determination of the application inter-partes. That order was extended thereafter.
4. On 29/9/2021, the defendant brought the current Motion on Notice under Order 40 Rule 1,2,7, 10 (b) & 11, Order 51 Rule 1 of the *Civil Procedure Rules*, and Section 1A, 1B, 3A, 63 (c) & (e) of the [Civil](#)



Procedure Act seeking a raft of orders. Pertinent thereto are orders to set aside the order of 22/7/2021 and a mandatory order to compel the plaintiff to restore to the defendant's possession, the equipment the subject of the project.

5. The Motion was based on the grounds on the face of it and the affidavit of Liu YongJun sworn on 29/9/2021. It was contended that the orders of 22/7/2021 were obtained on the basis of material non-disclosure. That the plaintiff had failed to disclose that there was an addendum agreement between the parties dated 21/9/2018 which varied the terms of and set aside the agreement of 3/9/2018.
6. It was also contended that after the subject orders were issued, the plaintiff used the same to seize, retain and employ the defendant's equipment towards implementation of the roadworks without any payment to the defendant for such use. That the plaintiff has continued with the construction of the road.
7. The plaintiff opposed the application vide a replying affidavit of Bhupinder Singh Bhogal sworn on 19/10/2021. The plaintiff confirmed that it had begun the arbitral process and the parties were awaiting the appointment of an arbitrator by the Chairman of the Chartered Institute of Arbitrator's. It denied the defendant's claim and contended that the site, materials and equipment were all intact, for this, the plaintiff produced photos taken of the site, which were sent to the plaintiff's advocates on 5/10/2021. It urged that the application be declined.
8. I have considered the entire record. The main contention is that the orders of 22/7/2021 were obtained as a result of material non-disclosure and that the plaintiff wrongly used them to take possession of the site and the equipment on site.
9. The defendant accused the plaintiff of failing to disclose that the parties had entered into an addendum agreement dated 21/9/2018 which set aside the initial contract of 3/9/2018. That the plaintiff had failed to pay the defendant in accordance with that addendum agreement. The plaintiff denied that the addendum varied or set aside the initial contract and contended that it only introduced additional terms.
10. The orders of 22/9/2021 were made for the sole purpose of protecting the subject matter of the suit. The construction site and equipment therein being the subject of the dispute, needed conservation until the application was determined. At the point of making the orders, there was a risk that the construction site would be tampered with and that the defendant would have taken away its equipment before completion of the construction. Indeed, the defendant itself confessed that construction works had not been completed.
11. In my view it is paramount that the construction site and the equipment and material are protected until the application of 19/7/2021 is considered by Majanja J.
12. What has disturbed this Court is the allegation that the plaintiff had taken over the construction and was using the defendant's equipment to continue with the construction. The plaintiff denied the allegations and attached photographs of the construction site in its replying affidavit.
13. It is painful that a matter of public interest such as this one has to be affected by the greed of business corporates. The stoppage of the construction affects the public who should enjoy the fruits of the massive over Kshs.600 million already used for the construction of the road. But for the unexplained greed of the parties herein, the construction would have to be halted albeit temporarily.
14. It is clear from the reading of prayer nos. 2 and 3 of the Motion dated 19/7/2021, that the defendant was the one in possession of the site as well as the equipment on site. It is clear that the plaintiff by



gaining possession of the site and equipment must have abused the order it had obtained from Majanja J.

15. What is important is that the site and equipment be preserved pending the determination of the Motion dated 19/7/2021. In light of the foregoing, I hereby make the following orders: -
- a) The application is declined.
 - b) The status quo obtaining as at 22/7/2021 be and is hereby maintained pending further orders on the application dated 19/7/2021.
 - c) The parties herein are restrained from continuing with any construction works on Tawa-Nguluini-Itangani Road Contract No. RWC 312 project until further orders of the Court.
 - d) Each party to bear their costs

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

A. MABEYA, FCI Arb

JUDGE

