



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 80 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF AN ADJUDICATION AWARD IN AN ADJUDICATION BETWEEN**

**INTEX CONSTRUCTION LIMITED.....APPLICANT**

**AND**

**KENYA RURAL ROADS AUTHORITY.....RESPONDENT**

**RULING**

1. Before this Court is the Notice of Motion dated 5<sup>th</sup> February 2019 by which **INTEX CONSTRUCTION LIMITED (the Applicant)** seeks the following Orders:-

**“1. THAT this Honourable Court be pleased to enforce the Adjudicator’s Award in the sum of Kshs.41,841,066.67 (Forty One Million, Eight Hundred and Forty One Thousand, Sixty Six and Sixty Seven Cents) against the Respondent, being the incurred costs of extended preliminaries for Farm-Kawiru-Mutuati-Kachulu (E817, E831 & D486) Roads Project as ordered and directed by the Adjudication Tribunal in its Award given on 19<sup>th</sup> October, 2016 plus VAT with interest amounting to Kshs.16,417,199.28/= as of end of January 2019.**

**2. THAT this Honourable Court be pleased to enforce the Adjudicator’s Award in the sum of Kshs.11,494,116.67/= (Eleven Thousand Four Hundred and Ninety Four, One Hundred and Sixteen and Sixty Seven Cents) against the Respondent, being the incurred costs of extended preliminaries for the Kagio-Baricho-Kibirigwi-Kerugoya (D455) and Baricho Kibirigwi (D454) Road Project as ordered and directed by the Adjudication Tribunal in its Award given on 19<sup>th</sup> October 2016 plus VAT with interest amounting to Kshs.4,509,952/= as of end of January 2019.**

**3. THAT the costs be in the cause.”**

2. The Application was premised upon **Rule 27** of the Adjudication Rules for the Construction Industry, **2003 Order 30 Rule 1** and **9, Order 51, Rule 1** of the **Civil Procedure Rules 2010** and **Section 3A** of the Civil Procedure Act and any other enabling provisions of the law. The application was supported by the Affidavit of even date sworn by **SAMIT GEHLOT** the Managing Director of the Plaintiff Company.

3. The **KENYA RURAL ROADS AUTHORITY** who were the Respondents opposed the application and in doing so relied upon the Replying Affidavit dated **6<sup>th</sup> March 2019**, sworn by **ENG LUKA K. KIMELI**, the Acting Director General of the Respondent and the Further Affidavit dated **30<sup>th</sup> April 2019** sworn by **ENG P.P. GICHOHI** the Director for Research Strategy and compliance with the Respondent.

4. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed its written submissions on **16<sup>th</sup> May 2019** whilst the Respondent filed its submissions on **22<sup>nd</sup> May 2016**.

**BACKGROUND**

5. The Plaintiff is a Company duly incorporated under the provisions of the **Companies Act, 2015**, whilst the Respondent is a State

Corporation duly established under the provisions of the **Kenya Roads Act, 2007**. The parties entered into two contracts one dated **16<sup>th</sup> May 2007** in respect of the **Farm-Kawiru Road** and the second contract dated **20<sup>th</sup> February 2008**, in respect of the **Kagio-Baricho Road**. The period for completion of the **Farm-Kawiru Road** was 18 months while for the **Kagio-Baricho Road** the completion period was 24 months.

6. During the period of the two contracts the Government of Kenya restructured the then Ministry of Roads and Public Works and established among others a parastatal known as the **Kenya Rural Roads Authority** a state corporation under the Ministry. The two contracts were then transferred from the parent Ministry of Roads to the Respondent, thereby creating a contractual bond between the Plaintiff/Applicant and the Defendant/Respondent.

7. During the construction of the two roads factors arose which led to delay which factors included inter alia, delayed payments, variations in the contract and Post -election violence. Accordingly, the Applicant applied for and obtained an extension of time for completion of the two projects. The extension of time granted for **Farm-Kawiru road** was 288 days and an extension of 156 days was granted for the **Kagio-Baricho road**.

8. The Applicant's position was that it was entitled to recover time-related costs for remaining on the site longer than the expected period. The Applicant then submitted a claim of **Kshs.369,419,227.38** in respect of the Farm-Kawiru road and **Kshs.288,597,917.43** for the **Kagio-Baricho road**.

9. The Respondent however rejected both claims on grounds that the Applicants had not provided proof that additional costs had actually been incurred, and on grounds that the Applicants did not provide valid notice to the Respondent of its intention to claim additional payments due to the extension of time granted to them.

10. A dispute arose between the parties over this issue and said dispute was referred to adjudication on **19<sup>th</sup> October 2016**. The sole adjudicator reached his final decision in both disputes, in which decision the Applicant was awarded the sum of **Kshs.41,841,066.67** for the **Farm – Kawiru road** and **Kshs.11,494,116.67** for the **Kagio-Baricho road** together with interest plus **VAT** all to be paid within 30 days of the Ruling. The aggrieved party was allowed an option to appeal within 30 days.

11. On **21<sup>st</sup> March 2017**, the Respondent appealed to the Adjudicator who on **27<sup>th</sup> April 2017** dismissed the appeal. To date no other appeal has been filed by either party.

12. The Applicant submits that the Respondent is truly indebted to it in the amounts as awarded by the sole Adjudicator plus interest and **VAT**. The Applicant further submits that the Respondent has acknowledged and has not disputed that the said amounts are due and payable by itself to the Applicant. The Applicant therefore seeks for orders to enforce the Adjudicator's Award.

13. As stated earlier the Respondent opposed the application. They submit that there exists no decision before the Court for enforcement and that the Applicants in bringing this application failed to comply with an express statutory provision.

#### **ANALYSIS AND DETERMINATION**

14. I have carefully considered the rival submissions filed in this matter as well as the relevant statute and case law.

The Applicant submitted that under the **FIDIC** conditions or contract an appeal against an adjudicator's decision takes the form of arbitration proceedings. The Applicant's position was that their application is not seeking to enforce an arbitrator's award as no such award exists but rather that the application is for summary judgment and for enforcement of the final decision of the adjudicator.

15. On the other hand, the Respondent submitted that there existed no decision before the court for enforcement as the Applicants failed to file before the Court the original decision of the Adjudicator or a certified copy of the same for enforcement. The Respondent's position was that the Applicant has failed to comply with the express mandatory provisions for enforcing an arbitral award.

16. Accordingly, now the only question for determination before this court is whether or not there exists a decision for enforcement. The respondent states that the Applicant failed to furnish the Court with the original or certified copy of the adjudicator's two decisions thereby failing to tender proof of the existence of said decisions. In support of this position the Respondent cites the case of **VICTORIA FURNITURES LIMITED –VS- ZADOCK FURNITURES SYSTEMS LIMITED [2017] eKLR**, where the court held as follows: -

**“...The question that arises is: Is the failure to provide the original and/or copy of the Arbitral Award a technical issue that can be cured by Article 159(2) (d) of the Constitution that impresses upon the Court to uphold substantive justice as against technicalities. In my opinion the contents of the said Arbitral Award is a matter of evidence which goes to the substance of the Application and is not a mere technical matter.”**

17. Further it is the Respondents position that according to the contract an appeal against the adjudicator's decision takes the form of arbitration. This makes the decision before the court an Arbitral Award which is bound by **Section 36(3)** of the **Arbitration Act No.4 of 1995**, which states that:-

**“Unless the High Court otherwise orders the party relying on an arbitral award or applying for its enforcement must furnish.**

**a. The original arbitral award or duly certified copies of it.**

**b. The original arbitration agreement or a duly certified copy of it.**

18. The Applicant’s position however is that the application before this court is not seeking to enforce an Arbitral award. Rather it is an application for summary judgment in respect of a liquidated sum and for enforcement of the adjudicator’s final decision. The Applicant also takes issue with the fact that although the Respondent claims that the Applicants have failed to comply with statutory provisions, the Respondent have not cited exactly which statutory provision were not complied with.

19. The **Arbitration Act** defines an Arbitral Award as an award of any Arbitral Tribunal. **Sub clause 67.1** of the Contract provides as follows: -

**“Unless the contract has already been repudiated or terminated, the contractor shall, in every case continue to proceed with the works with all due diligence and the contractor and employer shall give effect forthwith to every such decision of the engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement, adjudicators or arbitral award.”**

20. The contract did **not** state that an appeal from the adjudicators decision should be by way of arbitration proceedings. The appeal before the adjudicator was dismissed at the initial directions stage in favour of the Applicant. There is no evidence that arbitration proceedings were ever undertaken. As such **Section 36(3)** of the Arbitration Act would not be applicable since the matter in issue is **not** an arbitration award.

21. The Applicant has prayed to have the adjudicators award enforced. **Section 30** of the Civil Procedure Code Cap 21 laws of Kenya provides that a decree may be executed either by the court which passed it or by the court to which it has been sent for execution.

22. Based on the above, I am satisfied that this application is properly before the court and has merit. Save for a technical objection, the Respondent has not raised any legal objection to the same. It is trite law that a litigant is entitled to the fruits of its judgment.

23. Accordingly, I do grant the Notice of Motion dated **5<sup>th</sup> February 2019** in terms of **Prayer (1)** and **(2)** thereof. I award costs of this application to the Applicant.

**Dated in Nairobi this 27<sup>th</sup> day of May 2020.**

.....

**Justice Maureen A. Odera**