



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E007 OF 2020

BOEX CONSTRUCTION LIMITED.....PLAINTIFF/APPLICANT

VERSUS

FATHER JUSTUS ROTTUK – FATHER IN CHARGE DIVINE WORD

PARISH (DIWOPA)CATHOLIC CHURCH KAYOLE AS A TRUSTEE AND

AGENT OF DIVINE CATHOLIC CHURCH KAYOLE.....1ST DEFENDANT

MICHIRE MUTO T/A GREENWORLD CONSULTANTS LIMITED

(SUED AS AN AGENT/CONSULTANT/TRUSTEE OF DIVINE WORK

PARISH CATHOLIC CHURCH KAYOLE.....2ND DEFENDANTS

RULING

1. The subject of this ruling is a notice of motion application dated 20th January 2020 filed by the Plaintiff (herein “the Applicant”) under the provision of; Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act and all other enabling provisions of the law.

2. The Applicant is seeking for orders;-

(a) An order of temporary injunction do issue restraining the defendants jointly and severally, themselves, their agents, servants, employees, officers, functionaries, workers by whatever name called from entering or compelling the plaintiff to vacate, cease, interfering with and/or disrupting the plaintiff's constructions works commenced on the property registered as LR. No. 121/242 Komarock, pending the hearing and determination of this suit;

(b) That costs of this application be provided for.

3. The application is based on the grounds thereto and the affidavit sworn by the Applicant Athman Sifi Oduki. In a nutshell he avers that, on 7th October 2017, the Applicant and the 1st defendant (herein “the 1st Respondent”) entered into an agreement whereby the Applicant was contracted to erect, built, construct, develop on the 1st Respondent’s land parcel Number IR No. 12 situated at Komarock area in Nairobi a church worship.

4. The Applicant was to render the services to completion at the sum of Kshs. 38,589,81. A sum of Kshs. 16,450,366 has been paid so far. The project was to be undertaken in five phases and is currently at the second phase. However, on or about 17th December 2019, the 1st Respondent issued the Applicant with a default notice to which the Applicant responded vide a letter dated 15th January 2020. The 1st Respondent thereafter terminated the contract.

5. The Applicant avers that its effort to discuss the matter with the Father in charge of the 1st Respondent has not yielded fruits. The construction material at site were procured on credit and the termination of the contract will expose it to serious ramification and irreparable damage. That the decision to terminate the contract is a breach of the contract Further, the 1st Respondents have opted out of the arbitration

clause in the contract.

6. Further, following the termination of the contract, the Applicant has been ordered out of the construction site immediately and it is apprehensive that they will lose the tools of trade, and be unable to take stock of materials and/or preserve the same. Further the subject notice issued based in clause 38.2 and 38.4 of the germane contract was issued and served without any breach on the part of the Applicant. Hence the plea for the grant of the orders sought for herein.

7. However, the Respondent opposed the application vide a Replying affidavit dated 12th February 2020 sworn by the Project Architect, Michire Mugo. He took issue with the manner in which he has been sued and described as “Michire Mugo” trading as “Greenworks Consultancy Limited” and argued that, the company has a legal entity distinct from its members therefore; he cannot be sued as its agent. He sought that his name be struck out of the proceedings. Further that, Mr. Athman Siati Oduki is neither a director or duly appointed secretary in the Applicant’s company and therefore has no locus standi to depone to the matter in the supporting affidavit.

8. That as a project manager herein, he realized that the Applicant’s works was wanting due to high labour turnover, inconsistent work progress, failure to provide weekly reports, delays in the time lines, and failure to pay the works. All these went into the performance of the contract. The Applicant was told vide a letter dated 14th January 2019 to improve on these areas of concern and a reminder letter send. However, there was no improvement and on 1st August 2019, he was served with the first default notice.

9. Despite the notice, the sit in by workers and default in payment of wages persisted. On 17th December 2019, the client was concerned over the slow pace of work. The same was not addressed as a result; the works were stopped on 24th December 2019 to 6th January 2020 for Christmas holiday. On 17th December 2019, the Applicant was served with 1st notice and the 2nd notice given on 31st December 2019. As the Applicant did not heed the notices, it was served with a letter dated 14th January 2020 to the effect that, it was in default of clause 38.12 of the contract and the contract would be terminated forthwith.

10. On 15th January 2020, acting on instructions of the 2nd defendant, the 1st Respondent terminated the contract. The Applicant was then invited for joint inspection on several occasions but refused to turn up and decided to move to court for no apparent reason. That the contract was labour contract and the issue of material on site does not arise. The Applicant has been paid more money than the works done and there is no valid contract between the parties.

11. The application was also opposed through a Replying affidavit sworn by Father Justus Rottuk, in charge of the 1st Respondent’s church. His averments in the affidavit dated 10th February 2020 are similar in all aspects with those of the Architect/Project manager, Mr. Mugo.

12. The application was filed on 20th January 2020, whereupon the court upon considering the same ex parte, ordered that it be served for mention inter parties on 27th January 2020. On that date, the court ordered that, the status quo be maintained to allow the parties conduct joint inspection. All through, the parties have been engaged in the inspection of the works and an attempt to settle the matter amicably. On the 2nd March 2020, the Applicant informed the court that, as there was no negotiated settlement, the Applicant was desirous of proceeding to arbitration as agreed by the parties in their contract. The court then ordered the parties should refer the matter to arbitration within thirty (30) days of the date of the order. That the status quo on the ground be maintained until the Arbitrator is seized of the matter and issues further relevant orders.

13. However, that did not happen and the parties sought to negotiate the matter and with the court’s assistance, they embarked on arrangements for a joint inspection and although initially they could not agree on the procedure and who should conduct the same, with the court’s intervention, the parties agreed that an independent Quantity Surveyor be appointed by the relevant professional body to conduct the joint inspection.

14. The court was not able to deal with the matter as scheduled on 24th March 2020 due to the outbreak of COVID-19. Be that as it were, the Report was eventually filed on 4th February 2020. On 16th June 2020, the court invited the parties to address the it on the same. The Applicant was seeking for an opportunity to address the court on the report on the ground that the final report does not represent the real position and/or the findings of the inspection. The Respondent argued that, if the court were to interrogate the contents of the report, it shall be descending into the arena of litigation. Yet this matter is a subject of Arbitral proceedings.

15. I have noted that, whatever the case may be, the parties are in agreement that this matter be referred to arbitration. That means the court can only intervene in the matter as provided for under the law. I realize that the Applicant has moved the court under the provisions of the Civil Procedure Act and the Civil Procedure Rules, yet the Applicant concedes that, the contract executed by the parties herein contains an arbitral clause under Clause 45 thereof wherein the parties agree that; in case of a dispute between them during the progress of the works such dispute shall be referred to arbitration and therefore the application should have invoked the relevant law of Arbitration Act No. 4 of 1995. It has not been cited.

16. Be that as it were, the intervention of the court in arbitral matters is limited. The circumstances under which a court will intervene before a dispute is referred to arbitration is guided by inter alia; the provisions of Section 7 of the Act. These provisions provide that; a party may request from the High court before arbitral proceedings commence for interim measure of protection to be granted.

17. However the provisions of Section 10 of the Act expressly states that; except as provided for under the Act, no court shall intervene in matters governed by the Act. Therefore in relation to the instant matter, the orders the court can give will be limited to interim measures of protection. The Applicant’s concern is that, if the status quo on the ground is not maintained, the proceedings before the arbitral tribunal may be prejudiced. The court in an effort to address that concern ordered for the joint inspection of the project to preserve evidence as at the date the inspection is conducted. The prayers in the application herein, are basically injunctive in nature. The provisions of Section 18 of the

Arbitration Act, provides that; unless the parties otherwise agree an arbitral tribunal may, on the application of a party order any party to take such interim measures of protection as the Arbitral Tribunal may consider necessary in respect of the subject of the dispute. Thus, upon commencement of the arbitral proceedings, the prayers sought for herein can still be applied for before the Arbitral tribunal.

18. In that regard, it will not be in the interest of justice, and of the parties, for this court to delve into the merits of the matter and any evidence collected so far including the report of the joint inspection which can only be adduced at the arbitral tribunal. To guide this matter, I make the following orders;-

(a) The parties shall in accordance of provisions of clause 45 of the contract initiate the process of arbitration or refer the matter to Arbitration within thirty (30) days of the date of this order;

(b) the status quo prevailing as of now, shall be maintained during that period and the status quo position shall vacate automatically at the expiry of the thirty days;

(c) the costs of the application shall abide the outcome of the arbitration.

20. Those are the orders of the court.

Dated, delivered and signed this 26th day of June 2020

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Nyabenga for the plaintiff

Mr. Ayieko for the defendant

Robert -----Court Assistant