



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO.17 OF 2020

KING INVESTMENT MANAGEMENT CO. LTD.....PLAINTIFF/APPLICANT

VERSUS

RIVATEX EAST AFRICA LIMITED.....RESPONDENT/DEFENDANT

RULING

1. The applicant moved this court by way of notice of motion under certificate of urgency dated 25.6.2020 on the grounds that the plaintiff obtained ex-parte orders of injunction on 23.6.2020 restraining the defendant from receiving, opening, considering, evaluating or dealing in any manner with tender no. REAL/51/2019-2020 for supply and delivery of Virgin Polyester and Viscose Staples fibres. The applicant seeks for the following orders:

i. Spent

ii. That pending the hearing and determination of this application, this honorable court do discharge, vary and or set aside the ex-parte orders issue on 23.6.2020.

iii. That this honorable court do set aside, discharge and or vary the ex-parte orders issued on 23.6.2020, pending hearing and determination of the suit.

iv. That the costs of this application be provided for.

2. The application is premised on the grounds that there was a virtual court session on 17.6.2020 for directions yet the defendant had not been served with pleadings in this case. The response to the plaintiff's application was to be filed by 23.6.2020, the date the matter was also to be mentioned. The replying affidavit and statement of defence were prepared and sent to the court's email address for assessment but the same was not responded to early enough.

3. The plaintiff's advocate was served with the said above documents via email and he acknowledged receipt of the same. Counsels for both parties in this case were in communication though the Applicant was unable to participate in the hearing due to the technological challenges. The injunctive orders were issued despite having complied with the court directions and the replying affidavit having been finalized.

4. The injunctive orders had been issued against the tender, which was to close on 26.6.2020, 3 days before the injunctive orders were issued. The defendant is a public entity tasked with fighting the COVID-19 pandemic through making of masks and if the orders issued on 23.6.2020 are not set aside there shall be a delay in procuring the goods and the tender will not be finalized. The plaintiff is capable of being compensated by way of damages.

5. The application was supported by an affidavit sworn by Thomas Kipkurgat the managing director and the accounting officer of the defendant. In addition to the grounds relied upon, he deposed that the goods to be supplied were through tender no. REAL/51/2019-2020 for the supply of virgin polyester and viscose staple fibres for making masks in the fight against Covid-19 pandemic. This was for the reason that the government required about 24 million masks for distribution to schools when they re-open in the month of September. The Cabinet Secretary for Education made the said announcement on 22.6.2020 and further that they received instructions from the Ministry of Education on the prototype to be made for students.

6. In addition to the above the tender was at an advanced stage, set to close on 26.6.2020, if the suit is determined in the plaintiff's favor, damages would be sufficient recourse. The applicant may incur additional costs of re-advertising the tender and would therefore suffer greatly.

7. A further supporting affidavit was sworn by Risper Oloo an advocate who in addition to the grounds stated above, deposed that she personally served the plaintiff's advocate with a replying affidavit and statement of defence via email and the same was acknowledged by text message on the morning of 23.6.2020.

8. She was also attending to an arbitration case and her colleague Wanjuku Mwangi was to attend to this instant case through virtual court session but due to technological challenges she was unable to get through.

9. Finally she urged the court to grant the said orders in the interest of justice.

RESPONSE

Plaintiff's replying affidavit

10. The counsel for the plaintiff responded to the two affidavits sworn by Thomas Kipkurgat and Risper Oloo as follows:

11. He averred that the annexure "TK-1" was irrelevant and immaterial to the plaintiff's application dated 26.5.2020 since it was of no value and its source cannot be trusted. The defendant was diverting the course of the case by citing the government and the Cabinet Secretary for Education.

12. Further that tender No. REAL/51/2019-2020 for the supply of Polyester and Viscose Staple fibre was advertised after cancellation of Tender no. REAL/38/2019-2020 for the supply of Polyester and Viscose Staple fibre which had been awarded to the plaintiff and a contract executed between the parties. The tender REAL/38/2019-2020 had been advertised on 17.12.2020 long before the outbreak of COVID-19. The cancellation of the contract was illegal and the defendant had not honored its obligations in the contract.

13. If the court had not issued the said orders the goods already produced by the plaintiff would have gone to waste since the defendant would have entered into a new contract with another party. The plaintiff's managing director in her supporting affidavit showed how she continues to incur expenses and storage charges of the goods which she had already produced as per the initial tender no. REAL/51/2019-2020.

14. In response to the affidavit sworn by Risper Oloo, the counsel averred that the affidavit of service dated 5.6.2020 and 15.6.2020 shows that the defendant was properly served with the pleadings but they neglected or failed to appear in court.

15. The matter was first mentioned in court on 8.6.2020 and the defendant was directed to file its response before 11.6.2020. This was served upon them. On 17.6.2020 the defendant's counsel was present through the courts virtual session and heard the court's directions. The counsel for the plaintiff was present when the directions were issued by the court that they were to comply with the filing before the 22.6.2020, thus when the matter was mentioned on 23.6.2020 the defendant had not complied.

16. In addition to the above, the averment by counsel that she asked her colleague to attend the virtual court session on her behalf but was faced with technological challenges is neither here nor there. The plaintiff would have been greatly prejudiced had the court not have granted an injunction since tender no. REAL/51/2019-2020 was at an advanced stage and the same would have been closed on 26.6.2020.

17. The Applicant cannot allege the tender had to be advertised and be finalized due to the government directive on fighting of the covid-19 pandemic and thus they had to produce the masks yet they are the same reasons used to cancel the plaintiff's contract via a letter dated 26.3.2020.

18. Further the order issued by this court was served upon the defendant but they have blatantly ignored it and went ahead to extend the closing date of the tender no. REAL/51/2019-2020 to 10.7.2020 through a memo dated 18.6.2020 and an addendum document posted or uploaded on 30.6.2020. This therefore implies that the defendant has opened a chance for receiving, opening, considering, evaluating and dealing with tender bids, which is a violation of the court's order.

19. In addition counsel averred that the defendant was approaching the court with unclean hands.

Submissions.

20. The parties submitted virtually in court.

Defendant's submission

21. Counsel for the defendant Risper Oloo retaliated most of the averment in the supporting affidavit. In addition, she submitted that the said order restrained the defendant from getting raw materials used to make the masks. The plaintiffs could adequately be compensated by way of damages, so that the defendant could be allowed to run its business. She urged that the application be allowed.

Plaintiff's submission

22. Mr. Kuria counsel for the plaintiff strongly opposed the said application stating that the defendant had already violated the injunctive order granted by the court by advertising another tender. They had raised the issue of contempt in their replying affidavit. He urged the court to order that status quo be maintained since the matter had been slated for hearing on 29.7.2020.

23. In response, counsel for the defendant urged that the defendant had not violated any court order and further that the document relied upon had not been signed and it was not certain if it emerged from the defendant. Further there was no application for contempt on record thus the court should allow their application.

Analysis and determination

24. The issue that arises for determination is whether the application is merited to vary and or set aside the injunctive orders previously granted by this court.

25. The jurisdiction of this court to vary or set aside the injunctive orders is premised on Order 40 rule 7 of the civil procedure rules which provides as follows:

“Any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order”

26. The defendant herein is a corporation and therefore the entity and all its employees are bound by the said order, once the same has been served. The defendant does not dispute the service of the injunctive order, only that the same was issued in their absence due to technological hitch. They ask this court to vary the same. *Order 40 rule 8* provides as follows:

“An injunction directed to a corporation is binding not only on the corporation itself but also on all members and officers of the corporation whose personal action it seeks to restrain.”

27. Court orders should be obeyed as they are always granted in interest of justice and in maintenance of the Rule of Law. In the famous case of *Giella v. Cassman Brown & Co. Ltd 1973 E.A 360, Mrao v. First American Bank of Kenya Ltd and 2 others 2003 klr 125,* and *American Cynamid Co v. Ethicon Ltd 1975 1All E.R.* The principles for granting an injunctive order are:

“(a) an applicant must show a prima facie case with a probability of success (b) In an interlocutory injunction the applicant must show that unless injunctive orders are granted he will suffer irreparable harm which would not be adequately compensated for by damages.

(c) And if in doubt in any of the above conditions the court will decide then on a balance of convenience.”

28. The court was alive to the fact that tender REAL NO.51/2019-2020 was for the supply of Polyester and viscose Staple fibre which the defendant states is to be used for making of masks. The plaintiff's pleadings indicate tender No. REAL 38/2019-20202 was for the supply of polyester and Viscose Staple fibre which is the same as the type of fabric issued in tender no. 50, though tender No. 38 was issued before the pandemic hit Kenya.

29. The suit had a hearing date of 29.7.2020 and it is not prudent to delve into the merits of the case in which parties are yet to tender their evidence. The purpose of an interlocutory injunction is to maintain the position that will enable justice be met when the court delivers its final determination, and also to regulate the acts of the parties in the interest of justice, pending the hearing of the case. In this case the defendant either by itself or its employees, agents, officers were restrained from receiving, considering, evaluating or dealing in any manner with bids submitted in respect to Tender no. REAL/51/2019-2020.

30. The plaintiff alleged that the defendant was in contempt of the court order since it went ahead and extended the closing date of the tender, an issue disputed by the defendant citing that the authenticity of the documents relied upon by the plaintiff is in question. However, at this point the court can only determine the application at hand.

31. Having weighed the foregoing I do find that the orders issued to the plaintiff on 23/6/2020 are still relevant towards meeting the ends of justice after hearing of the suit. The applicant have not raised sound grounds on which the injunctive orders can be vacated. The application dated 25/6/2020 is unmerited and is hereby dismissed.

Costs be in the cause.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 17th day of September, 2020.

In the presence of:-

Mr. Kuria for the applicant

Miss Oloo for the respondent

Ms Gladys - Court assistant