



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 36 OF 2019

AIA ARCHITECTS LTD FORMERLY ADVENTS IN HOUSE LIMITED....PLAINTIFF

VERSUS

YOOSHIN ENGINEERING CORPORATION.....DEFENDANT

R U L I N G

1. Before the court for determination are two Applications by the plaintiff and a Notice of Preliminary Objection by the defendant.

2. On the 20/5/2019, the court gave directions to the effect that the two applications and the Notice of Preliminary Objection be heard together. Even with that order in place, the neater way to deal with the neither is to handle the Preliminary Objection first and only if it fails would the court delve into the application.

3. However before that detour, it is desirable that I set out what each of the three matter seek of the court by way of determination. The application by Notice of Motion dated 8/5/2019 seeks orders that:-

i. Spent

ii. An order suspending the date of effect of Notice of termination of contract issued by the defendants to the plaintiffs dated 4/5/2019 pending *inter-partes* hearing of this application.

iii. An order suspending the date of effect of Notice of termination of contract issued by the defendants to the plaintiffs dated 4/5/2019 pending hearing and determination of this suit.

iv. THAT the plaintiffs to continue working on the project as per the terms of the contract of the tender award pending hearing and determination of this suit.

v. THAT the defendant be ordered to pay to the plaintiff such sums of monies that will facilitate the continuation of the works in accordance with the financial offer to Kenya Ports Authority, bill of quantities and financial statements submitted to them by the plaintiffs herein as per the terms of the contract pending hearing and determination of this suit.

vi. THAT the plaintiffs herein to continue holding on to the soft copies of the designs for the buildings and associated infrastructure pending the hearing and determination of the inter parties application.

vii. THAT the plaintiffs herein to continue holding on to the soft copies of the designs for the buildings and associated infrastructure pending the hearing and determination of the suit.

viii. THAT the suit be heard on a priority basis.

ix. The costs of this application be borne by the respondents.

4. The application by Notice of Motion dated 31/5/2019 seeks orders that:-

i. Spent

ii. An order of temporary injunction be issued against the defendants, their employees, agents, contractures, associates, consultants and or any firm, company and or persons working under them or under their instructions restraining them from constructing, supervising, and or doing any works on the buildings and associated infrastructure at Lamu Port Manda Bay

using the designs or any any part thereof created by the plaintiffs herein either on soft or hard copy or in any way manipulated, copied, reviewed and or altered pending inter-partes hearing and determination of this application.

iii. An order of temporary injunction be issued against the defendants, their employees, agents, contractures, associates, consultants and or any firm, company and or persons working under them or under their instructions restraining them from constructing, supervising, and or doing any works on the buildings and associated infrastructure at Lamu Port Manda Bay using the designs or any part thereof created by the plaintiffs herein either on soft or hard copy or in any way manipulated, copied, reviewed and or altered pending interparties hearing and determination of this application this suit.

iv. Order of injunction to issue against the defendant/respondents restraining them from conducting the works of design, construction and supervision of buildings and associated infrastructure of the Lamu Port in Manda Bay either by themselves, associates, employees, agents or any other person or firm working under them or through their instruction and or through any other consultants and or entering into any sub-consultancy agreement with any other person, company for the design and supervision of the construction of buildings and associated infrastructure of the Lamu Port in Manda Bay pending inter-parties hearing and determination of this application.

v. An Order of injunction to issue against the defendant/respondents restraining them from conducting the works of design, construction and supervision of buildings and associated infrastructure of the Lamu Port in Manda Bay either by themselves, associates, employees, agents or any other person or firm working under them or through their instructions and or through any other consultants and or entering into any sub-consultancy agreement with any other person, company for the design and supervision of the construction of buildings and associated infrastructure of the Lamu Port in Manda Bay pending hearing and determination of this suit.

vi. Pending hearing and determination of this application interparties the defendant respondents to deposit with this Honourable court the sum of Kshs.200,000,000/= (Kenya Shillings two hundred million) being security monies for the works of design and supervision of the buildings and associated infrastructure of the Lamu Port at Manda Bay already performed by the plaintiffs/applicants herein as the local component of the tender award.

vii. Pending hearing and determination of this suit the defendant respondents to deposit with this Honourable court the sum of Kshs.200,000,000/= (Kenya Shillings two hundred million) being security monies for the works of design and supervision of the buildings and associated infrastructure of the Lamu Port at Manda Bay already performed by the plaintiffs/applicants herein.

viii. Pending hearing and determination of this suit the defendants be ordered to pay the plaintiffs the sum of Kshs.53,085,830/= (fifty three million, eighty five thousand, eight hundred and thirty shillings) being the balance of payment due to the plaintiff/applicants for the designs, disbursements for preparation of the designs, 16% VAT and 5% value added tax up to the design stage as per the tender award.

ix. An order to issue against the defendant/respondents that should they with impunity and with disregard of any orders of this court continue to work on the project either by themselves, servants, agents or employees or through other firms or consultants by designing, constructing and or supervising the buildings and associated infrastructure of the Lamu Port in Manda Bay without the participation of the plaintiff/applicants herein they will nevertheless pay the plaintiffs the full amounts due to them for the full contract as shall be determined by this honourable court notwithstanding that the plaintiff/applicants did not do some of the works.

x. The costs of this application to be given to the plaintiff/applicants.

5. The Notice of Preliminary Objection dated 31/5/2019 on its side asserts and prays that the entire suit be dismissed, struck off and/or stayed with costs to the defendant on account of the fact that:-

i. THAT this Honourable Court lacks the jurisdiction to hear and determine the matter;

ii. THAT matter ought to be referred to arbitration in accordance with the contract entered between the parties; and

iii. THAT the Suit is otherwise premature, bad in law, frivolous, vexatious and an abuse of the court process”.

6. As crafted, the preliminary objection simply asserts that there being an arbitration agreement between the parties, the court's jurisdiction has been ousted. To put the matter into perspective it is appropriate to identify what is contended to be the arbitration clause. The Defendant identifies the arbitration clause to reside in clause 9/1 of the FIDIC Contract, 1998 edition, itself incorporated in the sub-consultancy agreement between the plaintiff and the defendant.

7. That position is indubitable as it is expressly pleaded by the plaintiff in the amended plaint that the privity between the parties is a sub-consultancy contract even though the plaintiff contends that the same was forced upon it by the defendant long after the joint bid which resulted in the tender being won by the two parties. I do thus find that there is an arbitration agreement between the parties as known to law under the Arbitration Act 1995 Laws of Kenya.

8. I also find that as the defendant has sought to terminate the agreement incorporating the arbitration clause, there is indeed a dispute for reference. The question is however whether the defendant has acted within the time frame fixed by the law for it to take advantage of the arbitration clause.

9. Section 6(1) of the Arbitration Act provides:-

Stay of legal proceedings

i. A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds:-

a) That the arbitration agreement is null and void, inoperative or incapable of being performed or

b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration”

10. The question whose answer will dispose the preliminary objection is whether the Notice of Preliminary Objection, the only step taken by the defendant to enforce its right to the arbitration clause, was taken in time or belatedly.

11. The words of the statute are straight forward, candid and unambiguous that the objection to jurisdiction must be taken not later than the time of entry of appearance. Here the appearance was entered on the 20/5/2019 before filing the preliminary objection on the 24/5/2019. It is my finding that by the time the objection was filed the statutory time for insisting on the arbitration clause had passed and the defendant was thus deemed to have forfeited the right to insist on reference to arbitration, stay or lack of the court's jurisdiction to entertain the matter and to have it referred to arbitration. This is a well walked path by the superior courts in Kenya. The decision of the Court of Appeal I find to succinctly settle the point is that of **Lofty Vs Bedouin Enterprises Ltd [2005]2 Ealr** where the Court said:-

“We respectfully agree with these views, so that even if the conditions set out at paragraph a & (b) of Section 6(1) are satisfied, the court would still be entitled to reject an application for stay of proceedings and reference to arbitration, if the application to do so is not made at the time of entering an appearance...”

12. By Parity of reasoning, if no objection can be raised to the jurisdiction to entertain a matter taken after appearance, then it is also, unacceptable to defeat a suit by striking out on account of lack of jurisdiction grounded on arbitration clause when the challenge was made some 4 days outside the time frame set by the statute.

13. Accordingly, I do find no merit in the Notice of Preliminary Objection and direct that it be dismissed with costs to the plaintiff.

The plaintiff's Applications

14. Even if dated and filed on different dates, the two applications as set hereinbefore seek orders of temporary injunction to restrain the defendant from among other things terminating the plaintiffs sub-consultancy agreement and from continuing with the work using the designs by the plaintiff, however altered or manipulated, and from engaging another sub-consultant. The same applications also seeks an order for payment of sums of money the plaintiff considers and terms security money for design works and supervision thereof and other sums being the balance of payment due to the plaintiff upon the suit contract.

15. The plaintiff contends in the main that its participation in the joint venture was in consonance with the law under the Section 157(9) enacted pursuant to Article 227 of the constitution. According to the plaintiff the law mandated that the contract be awarded to a consortium with local participation of at least 42% stake and that the bidding leading to the tender entitled it to the said portion of the fees payable. It is therefore contended and asserted that the subsequent sub-consultancy agreement executed and awarding to it fees in the sum of Kshs 18 million was contrary to the law and thus not enforceable for being null and void.

16. To the plaintiff, the imposition of the sub-consultancy agreement and the subsequent notice of its termination is a design by the Defendants to circumvent the law and thus control the contract wholly when in law the defendant has no capacity to terminate the contract flowing from the joint tender process.

17. In opposition to the plaintiff's position the defendant took the position that there was only one contract between the parties being the sub-consultancy contract which it has lawfully sought to terminate.

Analysis and determination

18. It is not in dispute that the Plaintiffs and the defendants entered into an agreement to place a bid and tender No. KPA/057/2012=13/MD with Kenya Ports Authority in the year 2012, for consultancy services for ***Detailed Designs, Review and Supervision of the Construction for the First Three Berths and Associated Infrastructure for the Proposed Lamu Port at Manda Bay, Lamu.*** This is evidenced by a letter of association dated 20th November 2012 between the plaintiffs and the defendants annexed to the plaintiffs affidavit in support of its application dated 8th May 2019. The court notes that the letter is part of the bid documents that was submitted to Kenya ports Authority in the bid documents filed herein by the plaintiffs. Both parties in their affidavits in support of their case and rival submissions rely on this letter as a basis of their relationship. That letter is thus a common document to them and must be taken regard of by the court. The totality of papers filed thus reveals that both parties participated in placing the bid and tender documents with Kenya ports authority as a consortium. This was evidenced by the tender documents that were submitted to Kenya ports Authority annexed to the plaintiff's affidavit in support of the Notice of Motion dated 8th May 2019.

19. It is the plaintiff's case that after the award of the tender by a letter dated 31st January 2013, the defendants sidelined them from participation in project despite several attempts at negotiation as members of the consortium that was awarded the tender. In addition

plaintiff's claims that the defendants coerced them into signing a sub-consultancy agreement dated 18th August 2017 which changed the terms of their original agreement made in 2012 that formed the consortium that led to the award.

20. The defendants on the other hand although not disputing having entered into an agreement to place the bid and tender together with the plaintiff in 2012, argue that the plaintiff's participation in the tender was only to boost their bid and nothing more. It is the defendant's contention that the only agreement between the parties that is binding is the sub-consultancy agreement signed between them on the 18th August 2017.

21. I remind myself that the Court, at this interlocutory stage, is not to make any final and definitive findings on the substantive issues in dispute between the parties as that may prejudice the case but at this stage will only make a finding as to whether the plaintiff has demonstrated a prima facie case that entitles it to the prayers sought.

22. The guiding definition of what constitutes a prima facie case were set out by the Court of Appeal in the case of **Mrao Ltd versus First American Bank of Kenya Ltd & 2 Others, Nairobi CA No. 39 of 2002 [2003] eKLR**, as follows:

“A case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

23. Having perused and reviewed the material availed to court by both sides, and having found that the subject tender awarded was premised on the joint bid by the two parties now in dispute and that the bid was necessitated by the requirement of the law under Section 157(9) of the Public Procurement and Asset Disposal Act. That to this court was the genesis and foundation of the relationship between the parties. The need to comply with the law was expressly brought out in the advert by the proponent of the project, the Kenya Ports Authority.

24. Having so said, I do find that the plaintiff had an established proprietary interest in the tender well founded before the sub-consultancy Agreement dated 18/8/2017. with such interest, which I find were not sidestepped by the sub-consultancy agreement, because nothing in the said consultancy agreement purports so, I do find that there is a right of the plaintiff that stands to be infringed in total violation of the law which to this court established a prima facie case and thus invites an injunction pending the hearing and determination of the suit. I thus grant to the plaintiff orders in term of prayer 3, 4 & 7 of the Notice of Motion dated 8/5/2019.

25. I also accede to the plaintiffs request for prayer 3 & 5 in the application dated 31.5.2019 and grant an injunction against any award of a sub-consultancy agreement as to be inconsistent with the rights and benefits due and expected to flow to the plaintiff pursuant to the tender subject of the suit.

26. I award the costs of the application to the plaintiff.

Dated and delivered at Mombasa this 23rd day of September 2019.

P.J.O. OTIENO

JUDGE