



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO.E162 OF 2019

AEE POWER SAPLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT

RULING

1. Through chamber summons dated 10th June 2019, the plaintiff/applicant herein seeks orders that:

1. Spent
2. Spent
3. Spent

4. That pending the reference of the disputes between the parties to the Dispute Board and arbitration and the hearing and determination of the arbitral proceedings, this court grants an interim measure of protection restraining the defendant from calling the following Bank Guarantees in respect contracts numbers KPI/12A-2/PT/2/15/A40-LOT 2 and KPI/12A-2/PT/2/15/A40-LOT 4, both dated 10th December 2015 between the plaintiff and the defendant:-

- i. Performance Guarantee No TFBG/18/0432KE for USD797,971.00 issued by Co-operative bank due to expire on 30th June 2020 in respect of LOT 2.
- ii. Performance Guarantee NO. 0771TGU183090001 for Kshs 160,925,826.00 issued by Barclays Bank due to expire on 30th June 2020 in respect of LOT 2.
- iii. Advance Payment Guarantee No. 0771TGU1720700023 for USD 246,240.08 issued by Barclays Bank due to expire on 30th June 2019 in respect of LOT 2.
- iv. Advance Payment Guarantee No. 0771TGU1720700025 for Kshs 143,586,062.50 by Barclays Bank due to expire on 30th June 2019 in respect of LOT 2.
- v. Performance Guarantee No TFBG/18/0433KE for USD 612,935.00 issued by Co-operative bank due to expire on 30th June 2020 in respect of LOT 4.
- vi. Performance Guarantee No TFBG/18/0430KE for Kshs 98,492,573.00 issued by Co-operative bank due to expire on 30th June 2020 in respect of LOT 4.
- vii. Advance Payment Guarantee No. 0771TGU172070004 for USD 17,889.84 issued by Barclays Bank due to expire on 30th June 2019 in respect of LOT 4.
- viii. Advance Payment Guarantee No. 0771TGU172070002 for Kshs 87,779,356.65 issued by Barclays Bank due to expire on 30th June 2019 in respect of LOT 4.

5. That pending the reference of the disputes between the parties to the Dispute Board and arbitration and the hearing and determination of the arbitral proceedings, this court grants an interim measure of protection restraining the defendant from terminating the contracts numbers KPI/12A-2/PT/2/15/A40-LOT 2 and KPI/12A-2/PT/2/15/A40-LOT 4, both dated 10th December 2015 between the plaintiff and the defendant:-

6. That the costs of this application be awarded to the plaintiff.

2. The application is brought under Section 7 of the Arbitration Act and is supported by the affidavit of the applicant's Regional Manager, **Olivier Munga**, sworn on 10th June 2019. The applicant also filed a supplementary affidavit on 3rd July 2019.

3. A summary of the applicant's case is that on 10th December 2015, it entered into two contracts with the defendant, to wit, contracts numbers KPI/12A-2/PT/2/15/A40-LOT 2 for the procurement of plant, design, supply and installation of extensions to LV Single Phase Lines and Service Cable Last Mile Connectivity Project (LMCP) in Kisumu, Siaya, Vihiga, Busia, Bungoma and Kakamega Counties and KPI/12A-2/PT/2/15/A40-LOT 4 for procurement of plant, design, supply and installation of extensions of LV Single Phase Line and Service Cable Last Mile Connectivity Project (LCMP) in Narok, Nakuru, Samburu and Nyandarua Counties (hereinafter "**the contracts**").

4. The plaintiff contends that the contracts had been extended several times with the most recent extension being up to 30th June 2019. The plaintiff's deponent states that under clause 8.2. of the General Conditions of the contracts it was mutually agreed that in the event of a dispute (of any kind whatsoever) arises between the parties in connection with the performance of contracts, either party may refer to the dispute in writing to the Dispute Board for its decision. If the dispute is not resolved amicably and in respect of which the Dispute's Board decision is not become final and binding, or if there be no Dispute Board, the said dispute would be referred to arbitration.

5. He further states that about 30th November 2018 the parties herein together with the Project Stakeholders namely the African Development Bank and the Ministry of Energy, mutually agreed on an amicable reduction of the scope of the works in the contracts in view of the challenges facing the project. He adds that pursuant to the said agreement, the plaintiff and the Project Consultant appointed by the defendant presented the Scope Reduction Proposal on 22nd March 2019. The contractual period for rejecting any change proposal is 14 days.

6. That on 28th May 2019, the defendant issued the plaintiff with notices of alleged default and termination of the contracts and purporting to reject the change proposal. The notices are to take place within 14 days from that date. They purport to reject the change proposal that was made more than two months after the presentation of the change proposal and after the plaintiff had in the meaning abided by.

7. That by a letter dated 7th June 2019, the plaintiff rejected the defendant purported default and termination of the contracts as it was based unsubstantiated allegations thereby commencing the Dispute Resolution Mechanism provided in the contract including arbitration as provided for under clause 8.2.of the contracts.

8. He further states disputes have arisen between the plaintiff and the defendant contracts. On one hand, the plaintiff contends that defendant failed to fulfill its obligations under the contracts including failure to make timely payments of invoices and delays in certification of works according to the terms of the contracts which constituted a substantial breach of the terms of the contracts and occasioned challenges and delays in the completion of the works and causing the plaintiff to inject its own finances to carry on with the works.

9. The plaintiff therefore prays for interim measures of protection under Section 7 of the Arbitration Act and argues that if the orders sought in the application herein are not granted there is a real danger that the defendant will terminate the contracts, call and enforce the Bank Guarantees thus nullifying the intended arbitration proceedings or rendering them nugatory.

10. It is the plaintiff's case that if the orders sought in the application are not granted it will suffer substantial and irreparable loss and be seriously prejudiced in its claim against the defendant and that it is only just and fair that this Honourable court protects the plaintiff by way of an interim measure of protection pending the hearing and determination of the arbitral proceedings as the plaintiff has already extended the validity of the Bank Guarantees that were due to expire on 30th June 2019 to 31st December 2019.

11. At the hearing of the application, Counsel for the plaintiff submitted that under Section 7 of the Arbitration Act, the court has jurisdiction to grant an interim measure of protection pending arbitration and that such measure of protection may be sought before or during arbitral proceedings. While relying on the decision in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] e KLR, counsel submitted that the purpose of interim measure of protection is to preserve the rights which are the subject matter of the dispute in arbitral proceedings while the determination of the substantive dispute is pending.

12. Counsel added that the sole purpose of the instant application is to preserve the contracts and Bank Guarantees that are the subject of the arbitral proceedings as the said contracts and Bank Guarantees may not be in place if the orders sought herein are not granted since defendant had through a notice dated 28th May 2019 issued the plaintiff with a notice to terminate the contracts if the plaintiff did not remedy the alleged defaults within 14 days.

13. Counsel also cited the decision in *Talewa Road Contracts Ltd v Kenya National Highways Authority* [2014] eKLR for the argument that whether or not there would be losses by either side is not a factor when deciding whether or not to grant interim measure of protection or injunction to safeguard the subject matter of arbitral proceedings as all the court is called upon to consider is whether or not there is a valid arbitration agreement and if the subject matter is in danger of being wasted or dissipated.

14. Counsel submitted that the subject matter of the arbitration, being the contracts and Bank Guarantees, are under threat as the defendant has threatened to terminate the contracts and call for the Bank Guarantees, thus occasioning the plaintiff irreparable harm, loss and damage.

15. Counsel further submitted that it is in the interest of justice that the orders sought by the plaintiff are granted and that no prejudice would be suffered by the defendant should the application be allowed.

Defendant/respondent's case

16. The defendant opposed the application through the Grounds of Opposition dated 24th June 2019 and the replying affidavit of its Project Manager, **Jared Biwott**, sworn on 21st June 2019.

17. The defendant's deponent avers that the contracts were indeed awarded to the plaintiff at a total contract price of approximately Kshs 4 Billion and were initially for a term of 18 months with effect from April 2015 but were extended on four (4) occasions to enable the plaintiff complete the project with the last extension being for 3 months from 31st March 2019 to 30th June 2019.

18. He states that both parties continued to perform their obligations under the contract even though the plaintiff was behind schedule in its performance and that by a letter dated 28th February 2017, the defendant sought clarification, from the plaintiff, on its poor performance. He avers that the plaintiff then acknowledged its challenges and sought for more time to remedy the breach but that despite the plaintiff's numerous assurances no substantial progress was made thereby prompting the defendant to issue a 14 days notice dated 10th May 2017 terminating the contract in accordance with the terms of their agreement.

19. He further states that the overall implementation of the projects was affected by the plaintiff's poor performance and failure to complete the same within the loan validity period. He adds that through letters dated 6th December 2018 and 19th March 2019 the plaintiff requested the defendant for reduction of the scope of work in both contracts citing inability to complete obligations under the contracts but that no agreement was reached as to the reduction of scope of work. He contends that by a letter dated 22nd May 2019, the defendant rejected the plaintiff's said request for reduction of scope of work.

20. He further avers that based on the rejection of the request and the plaintiff's own admission of inability to complete its full obligations under the contract, the defendant issued a notice of default and termination of contract on 28th May 2019.

21. He avers that the defendant's obligation under the Last Mile Connection Project is to deliver increased electricity access to Kenyans and that plaintiff's delay in executing its obligations under the contracts will result in huge financial losses to the defendant.

22. At the hearing of the application **Mr. Tugei**, learned counsel for the respondent submitted that the contracts in question expired on 30th June 2019 following their last extension and that the court cannot therefore review or rewrite the contract between the parties. It was therefore counsel's submission that the orders sought regarding the contracts had been overtaken by events and that in any event, the plaintiff breached the contracts by failing to perform the works in accordance with the terms of the contracts.

23. On Bank Guarantees, counsel submitted that the said guarantees are distinct and separate from the contracts as the parties to the guarantees is the defendant and the bank in which case, the plaintiff is not a party to the guarantees so as to warrant its application to restrain the defendants from calling up the Bank Guarantees. Counsel emphasized that the dispute between the plaintiff and the defendant only arises in the context of 2 contracts.

24. It was submitted that the application does not meet the general test for grant of interim measures of protection under Section 7 of the Arbitration Act and further, that there was no basis for restraining the defendant from calling up the guarantees. For this argument, counsel cited the case of **Curber International Limited v National Bank of Kuwait** [1981] 3 ALL ER 667(CA) wherein it was held that a letter of credit is separate and independent of the underlying contract and had to be honoured irrespective of claims or defences by an applicant resulting from its relationship with issuing bank or the beneficiary.

25. Counsel submitted that the application does not meet the test for grant of interlocutory injunction and further, that the contracts in question had, in any event, lapsed.

Analysis and determination.

26. I have carefully considered the plaintiff's application, the respondent's response, the submissions made by the parties' respective counsel together with the authorities that they cited.

27. The main issues for determination is whether the plaintiff has made out a case for the granting of the orders of interim measures of protection under Section 7 of the Act and orders of temporary injunction pending the reference of the dispute to arbitration.

Section 7 of the Act stipulates as follows:

“It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings an interim measure of protection and for the High Court to grant that measure.”

28. In the case of **Safaricom Ltd v Ocean View Beach Hotel Limited & 2 Others** (supra), the Court of Appeal highlighted the factors to be taken into account before granting an interim measure of protection as follows:

i. The existence of an arbitration agreement;

ii. Whether the subject matter of the arbitration is under threat;

iii. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?

iv. For what period must the measure be given especially if requested for before commencement of the arbitration so as to avoid encroaching on the tribunal's decision making powers as intended by the parties?"

29. In the present case, it was not in dispute that the parties herein entered into an agreement that had an arbitration clause and I therefore find that the first condition for grant of interim measure of petition has been fulfilled.

30. Turning to the 2nd condition on whether the subject matter of the arbitration is under threat, I note that the main bone of contention between the parties is whether an agreement was reached upon the reduce the scope of the work that was to be undertaken by the plaintiff as while the plaintiff contends that a proposal to reduce scope was signed on 22nd March 2019, the defendant maintains that no such arrangement was agreed upon that in fact, through a letter dated 25th May 2019, the defendant expressly rejected the plaintiff's request to reduce the scope of the works.

31. I have perused the plaintiff's annexure "OM6" attached to the affidavit in support of the application and I note that indeed, the proposal of change order agreement was duly signed by both parties on 22nd March 2019. I further note in the said proposal of change order agreement, the period of contract completion was extended by 3 months from 31st March 2019 to 30th June 2019 to allow for completion of project. My finding however that is the issue of whether or not the scope of works was reduced is not a matter for determination by this court the most glaring fact is that the contracts whether reduced in scope or not were to expire on 30th June 2019.

32. The question which this court has to grapple with is whether, following the expiry of the contracts, the plaintiff is still entitled to the orders of interim measure of protection to restrain the defendant from termination of the contracts and calling up the Bank Guarantees. My take is that the answer to the above question is to the negative for the following reasons: Firstly, as correctly submitted by the plaintiff, the Bank Guarantees were under clause 3.3 of the contract, part and parcel of the said contracts. Clearly therefore, with the expiry of the contracts' term, one can say that the issue of the Bank Guarantees is also spent.

33. Secondly, and similarly, the contracts having lapsed, this court cannot be seen to issue orders restraining the defendant from terminating the same contracts that have already lapsed. I find that the plaintiff did not demonstrate that the contracts were to be in place even after the agreed expiry date of 30th June 2019.

34. For the above reasons I find that the prayers sought in this application cannot be issued. Consequently, I dismiss the application with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered in open court at Nairobi this 28th day of November 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Muthui for applicant

Miss Songok for Kimani for defendant/respondent

Court Assistant – Sylvia