



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.E164 OF 2019

AEE POWER SA.....PLAINTIFF/APPLICANT

VERSUS

KENYA POWER &

LIGHTING COMPANY LTD....DEFENDANT/RESPONDENT

RULING

1. Through the application dated 10th June 2019, the plaintiff/applicant seeks orders that:-

1. 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 in interim measure of protection restraining the defendant from calling and enforcing the following Guarantees in respect of the contract number KP1/6E/8CFI dated 24th December 2013 between the plaintiff and the defendant namely:-

i. Advance Payment Guarantee No.201020142308 for USD 920,569.42 issued by Standard Chartered Bank due to expire on 31st December 2019 in respect of the contract.

ii. Advance Payment Guarantee No.201020142282 for USD 13,690,938.39 issued by Standard Chartered Bank due to expire on 31st December 2019 in respect of the contract.

iii. Performance Guarantee No. 201020144379 for USD 2,572,080.00 issued by Standard Chartered Bank due to expire on 31st May 2021 in respect of the contract.

iv. Performance Guarantee No. 201020144351 for USD 29,292,018.00 issued by Standard Chartered Bank due to expire on 31st May 2021 in respect of the contract.

2. 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 of the contract, namely:-

i. Advance Payment Guarantee No. 201020142308 for USD 920,569.42 issued by Standard Chartered Bank due to expire on 31st December 2019 in respect of the contract.

ii. Performance Guarantee No. 201020144351 for USD 29,292,018.00 issued by Standard Chartered Bank due to expire on 31st May 2021 in respect of the contract.

iii. Advance Payment Guarantee No.201020142282 for USD 13,690,938.39 issued by Standard Chartered Bank due to expire on 31st December 2019 in respect of the contract.

iv. Performance Guarantee No. 201020144379 for USD 2,572,080.00 issued by Standard Chartered Bank due to expire on 31st May 2021 in respect of the contract.

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

2. The application is supported by the affidavit of **Olivier Munga** sworn 10th June 2019 and the supplementary affidavit dated 2nd July 2019.
3. The application is opposed through the replying affidavit of **Godfrey Ticha** and the Grounds of Opposition dated 24th June 2019.
4. The background/summary of the case is that on 24th December 2013 the plaintiff and the defendant entered into contract number KP1/6E/8CF1 for the construction of Thika Road 220/66KV Substation and Associated Transmission Line Works (hereinafter referred to as “**the contract**”). The contract was thereafter extended on several occasions with the most recent extension being to 15th September 2019.
5. The plaintiff claims that defendant failed to fulfil its obligations under the contracts through persistent failure to make timely payments of invoices to the plaintiff, refusal to extend the Letter of Credit despite the plaintiff’s requests, refusal to grant shipment authorization despite the plaintiff’s requests, refusal to reimburse the plaintiff for clearance of materials and equipment at the port and retention of 3% withholding tax outside the provisions of the contract which constituted a substantial breach of the terms of the contract. It states that the breaches occasioned delays in the time schedule for the completion of the works thereby causing the plaintiff to incur extra costs by injecting its own finances in order to carry on with the works.
6. The plaintiff contends that in order to mitigate its loss and as required by the contract, by a letter dated 7th June 2019, it plaintiff issued the defendant with a default and termination notice informing the defendant that if it fails to rectify the default within 14 days, the plaintiff will terminate the contract. The plaintiff further contends that it has a claim in excess of USD 3,944,838 arising from the defendant’s breaches which the plaintiff intends to refer to Dispute Board and or Arbitration as provided in clause 45 of the contract.
7. The plaintiff’s position is that it is reasonably apprehensive that the defendant will with a view to frustrate it and defeat its claims pending reference and determination by the Dispute Board and Arbitration, call and enforce the Bank Guarantees even though the plaintiff has completed over 87% of the works. The plaintiff therefore seeks orders 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 call and enforce the Bank Guarantee thus nullifying the intended arbitration proceedings or rendering them nugatory.
8. At the hearing of the application, both parties adopted the arguments that they presented before the court in a similar and related case being HCC COMM. E162 of 2019. **Mr. Muthui**, learned counsel for the applicant submitted that there was a risk of respondent calling up the bank guarantees in retaliation to their issuance of the default notice.
9. On his part, **Mr. Kiragu**, learned counsel for the respondent submitted that the objective of Section 7 of the Arbitration Act is to preserve the status quo between the parties pending the arbitration and that there was no threat of calling up the guarantees. He further submitted that there was no real dispute to be taken to arbitration as the notices issued to the applicant had been withdrawn.
10. Counsel further submitted that the respondent has no intention of calling up the guarantees the complaints that the parties had have been addressed.
11. As I have already noted in this ruling, the present application is related and similar to the application in the earlier case being E162 of 2019. This court has already delivered a ruling in the said earlier case dismissing a similar application therein on the ground that it did not meet the threshold of the conditions set for the granting of interim orders of protection pending arbitration.
12. This court therefore adopts the ruling in the said similar case delivered today on 28th November 2019 as the ruling of this case. I hasten to add that the respondent herein was categorical that it has no intentions of calling up the bank guarantees and consequently I find that it would be pointless to grant the orders sought in the application in the face of assurance, by the respondent, that no such threats exists on the said bank guarantees.
13. Consequently, I dismiss the instant 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/plaintiff.

Miss Songok for Kimani for defendant/respondent

Court Assistant – Sylvia