



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**MISCELLANEOUS CAUSE NO. 265 OF 2018**

**CIVICON LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA RURAL ROADS AUTHORITY.....DEFENDANT/RESPONDENT**

**RULING**

1. The plaintiff, **CIVICON LIMITED**, has filed this Miscellaneous action, by a Notice of Motion application dated 7<sup>th</sup> June 2018. The plaintiff seek injunctive orders to restrain Kenya Rural Roads Authority (KeRRA), the defendant, from, inter alia, terminating or assigning to any other person four contracts, awarded to the plaintiff; and from the defendant calling, making demand or making claim on the plaintiff's various performance guarantees.

2. The injunctive orders, sought by the plaintiff as aforesaid relate to four contracts between the plaintiff and defendant as follows:

*a. Contract No. RWC 342 for "Upgrading To Bitumen Standard And Performance Based Routine Maintenance of Danger-Chemuswa, Cheptiret-Kesses-Lessos-Junction C36, Cheptiret-Moi University & Himak-Nandi Hills Project.*

*b. Contract No. RWC 314 for "Upgrading to Bitumen Standard And Performance Based Routine Maintenance of Kali-Kikima-Kuthungu-Nduluku/Kikima-Kyambalasi/Mbooni Forest-Kikima and Kikima, Utangwa Township Roads.*

*c. Contract No. RWC 287 for "Upgrading to Bitumen Standard And Performance Based Routine Maintenance of Kenyenyemo-Motonto/Parainye-Mesesi-Tabaka/Bonyancha Nyabisongororo/Iyabe-Sengera-Nyansara/Sengera-Nyakioba Roads.*

*d. Contract No. RWC 290 for "Upgrading to Bitumen Standard And Performance Based Routine Maintenance of Keboko-Nyangusu-Nyamache Roads.*

3. The plaintiff through the affidavit of **Benjamin Mutinda Kiilu**, Its Chief Executive Officer (CEO), stated that the defendant purported to unilaterally terminate the contract. The CEO termed that attempt to terminate the contract as unlawful. The CEO further stated that at the time the defendant gave notice of termination of the contracts the plaintiff, with the knowledge of the defendant, was in advanced stage of assigning the contracts.

4. That as a consequence of the defendant intention to terminate the contracts the plaintiff invoked sub-clause 67.1 of the contract which clause provides for dispute resolution and arbitration upon declaration of a dispute. The plaintiff's CEO also termed the defendant's act of calling the plaintiff's guarantees as unwarranted.

5. The application was opposed by the defendant.

6. The defendant through the affidavit of Eng. Luka Kimeli, the acting Director General of the defendant, deponed that since the award, to the plaintiff, of the four contracts the defendant had experienced problems in ensuring that the plaintiff mobilized its staff and equipment to do the works, to comply with the terms and conditions of working, and generally ensuring that the works done were upto standard.

7. The deponent of the defendant's affidavit in reply discussed each of the four contracts and stated that the plaintiff submitted various versions of programme of works, which did not comply with requirements of the contracts; the plaintiff, despite holding a meeting with the defendant, failed in its obligation; despite several letters of the defendant the plaintiff failed to comply with requirements that are key to the progress of the projects; and that inspite of the assurances by the plaintiff, the plaintiff still continued in defaulting in its obligation which compelled the defendant to terminate the contracts. It is on those grounds that the defendant stated that the plaintiff was not entitled to the prayers sought before this court. The defendant stated that a court of equity should not assist a person to extricate themselves from the

circumstances they have created. The defendant alluded to the fact that the four contracts are public projects of road construction which the plaintiff had stopped working on after obtaining temporary orders of court. It is the view of the defendant that in the interest of justice and the public interest the plaintiff's application should be dismissed.

## ANALYSIS

8. What the plaintiff seeks is interim measure of protection as provided under section 7 of the Arbitration Act. That section provides:

### **7. Interim measures by court**

**(1) 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.**

**(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.**

9. Clause 67.1 of the parties contract provide for the settlement of dispute. It reads as follows:

*“67.1 If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the works or after their completion and whether before or after repudiation or other termination of the contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this clause. No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the employer and the contractor. Such decision shall state that it is made pursuant to this clause.”*

10. Clause 67.1 further provides that if the engineer fails to give notice of his decision within 84 days of receiving the reference either the employer or contractor may give notice to the other party with a copy to the engineer of his intention to commence arbitration. Clause 67.2 further provides that unless attempts has first been made to settle the dispute amicably arbitration may be commenced after 56 days after the day notice to commence arbitration is given.

11. In the case IWK Health Center v. Northfield Glass Group Ltd., 2016 NSSC 281 (CanLII), the Supreme Court of Nova Scotia referring to the case Cityscape Richmond Corp. v. Vanbots Construction Corp., [2001] O.J. No. 638, had this to say:

**“Arbitration clauses are to be given a large, liberal and remedial interpretation to effectuate the dispute resolution goals of the parties. They survive the completion of the contract as well as a fundamental breach. ... .”**

12. The court of appeal in discussing the provisions of section 7 of the Arbitration Act in the case Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR had this to say:

*“An interim measure of protection such as that sought in the matter before us is supposed to be issued by the court under section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for the grant of injunctions as the High Court purported to do in this matter.*

*To illustrate the point Article 26-3 of the UNICTRAL Arbitration rules states:-*

**“A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement.”**

**Section 7 of the Arbitration Act is modeled on this.....**

*Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-*

- 1. The existence of an arbitration agreement.*
- 2. Whether the subject matter of arbitration is under threat.*
- 3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?*
- 4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties?”*

13. There is no doubt that parties choice for their dispute resolution was through arbitration. There exists an arbitration clause in the parties agreement. The dispute the plaintiff has given notice over is its contention that the termination of the contract, by the defendant, was unlawful. The plaintiff seeks for maintenance of status quo while proceeding to arbitration. Whether or not the defendant's termination of the contract was unlawful and whether the plaintiff failed to perform the contract is not the function of this court to rule on. The parties chose their mode of dispute resolution to be arbitration and that is the forum that will determine who has acted unlawfully.

14. I have noted the time line for proceeding to arbitration, set out in the arbitration clause are long past. It is for that reason I will give interim protection for a limited period to enable the plaintiff approach the arbitration tribunal for protection.

## **CONCLUSION**

15. Since what this court is called upon is to give interim protection by ordering status quo to be maintained pending arbitration. I am of the view that justice will best be served by each party bearing their own costs in respect to this matter.

16. In the end the orders issued by this court on 12<sup>th</sup> June 2018 are hereby vacated and I grant the following orders:

### **IT IS HEREBY ORDERED AS FOLLOWS:**

(a) **THAT** an injunction do issue for 60 days from todays date to restrain the Defendant from terminating, retendering and/or assigning to any person whatsoever or howsoever the benefit in the whole or part of **CONTRACT NO. RWC 343 FOR UPGRADING TO BITUMEN STANDARD AND PERFORMANCE BASED ROUTINE MAINTENANCE OF DANGER-CHEMUSWA, CHEPTIRET-KESSES-LESSOS-JUNCTION C36, CHEPTIRET-MOI UNIVERSITY & HIMAK-NANDI HILLS PROJECT** and Defendant/Respondent be restrained for 60 days form todays date from confiscating, selling , disposing of, removal, utilization or interference with the plant, machinery, equipment, motor vehicles, temporary or permanent works and other items situated at the project sites in Eldoret.

(b) **THAT** an injunction do issue for 60 days from todays date to restrain the defendant from terminating, retendering and/or assigning to any person whatsoever or howsoever the benefit in the whole or part of **CONTRACT NO. RWC 314 FOR UPGRADING TO BITUMEN STANDARD AND PERFORMANCE BASED ROUTINE MAINTENANCE OF KALI-KIKIMA-KITHUNGU-NDULUKU/KIKIMA-KYAMBALASI/MBOONI FOREST-KIKIMA AND KIKIMA, UTANGWA TOWNSHIP ROADS** and the defendant/respondent be restrained for 60 days from todays date from confiscating, selling, disposing of, removal, utilization or interference with the plant, machinery, equipment, motor vehicles, temporary or permanent works and other items situated at the project sites in Makueni.

(c) **THAT** an injunction do issue for 60 days from todays date to restrain the Defendant from terminating, retendering and/or assigning to any person whatsoever or howsoever the benefit in the whole or part of **CONTRACT NO. RWC 287 FOR "UPGRADING TO BITUMEN STANDARD AND PERFORMANCE BASED ROUTINE MAINTENANCE OF KENYENYA-MOTONTO/PARAINYE-MESESI-TABAKA/BONYANCHA NYABISONGORORO/IYABE-SENGERA-NYANSARA/SENGERA-NYAKIOBA ROADS** and the Defendant/Respondent be restrained for 60 days from todays date from confiscating, selling, disposing of, removal, utilization or interference with the plant, machinery, equipment, motor vehicles, temporary or permanent works and other items situated at the project sites in Kisii.

(d) **THAT** an injunction do issue for 60 days from todays date to restrain the Defendant from terminating, retendering and/or assigning to any person whatsoever or howsoever the benefit in the whole or part of **CONTRACT NO. RWC 290 FOR "UPGRADING TO BITUMEN STANDARD AND PERFORMANCE BASED ROUTINE MAINTENANCE OF KEBOKO-NYANGUSU-NYAMACHE ROADS** and the Defendant/Respondent be restrained for 60 days from todays date from confiscating, selling, disposing of, removal, utilization or interference with the plant, machinery, equipment, motor vehicles, temporary or permanent works and other items situated at the project sites in Kisii.

(e) **THAT** an injunction do issue for 60 days from todays date to restrain the Defendant/Respondent or its agents from calling, making demands and/or making any claim on the Plaintiff's Performance Guarantee dated 17<sup>th</sup> January 2017 in the sum of Ksh 186,530,607.90 and the plaintiff's Advance Payment Guarantee dated 19<sup>th</sup> January 2017 in the sum of Ksh 433,583,827 issued by Equity Bank Limited in relation to Contract Number **RWC 343 FOR UPGRADING TO BITUMEN STANDARD AND PERFORMANCE BASED ROUTINE MAINTENANCE OF DANGER-CHEMUSWA, CHEPTIRET-KESSES-LESSOS JUNCTION C36, CHEPTIRET-MOI UNIVERSITY & HIMAK-NANDI HILLS PROJECT.**

(f) **THAT** an injunction do issue for 60 days from todays date to restrain the Defendant or its agents from calling, making demands and or making any claim on the plaintiff's performance Guarantee dated 13<sup>th</sup> April 2017 in the sum of Ksh 180,203,943.23 and the Plaintiff's Advance payment Guarantee dated 8<sup>th</sup> May 2017 in the sum of Ksh 240,271,924.30 issued by Equity Bank Limited in relation to Contract Number **RWC 314 FOR UPGRADING TO BITUMEN STANDARD AND PERFORMANCE BASED ROUTINE MAINTENANCE OF KALI-KIKIMA-KUTHUNGU-NDULUKU/KIKIMA-KYAMBALASI/MBOONI FOREST-KIKIMA AND KIKIMA, UTANGWA TOWNSHIP ROADS.**

(g) **THAT** an injunction do issue for 60 days from todays date to restrain the Defendant or its agents from calling, making demands and or making any claim on the Plaintiff's Performance Guarantee dated 8<sup>th</sup> May 2017 in the sum of Ksh 227,200,190.50 and the Plaintiff's Advance Payment Guarantee dated 11<sup>th</sup> July 2017 in the sum of Kshs 302,933,587.33 issued by Equity Bank Limited in relation to Contract Number **RWC 287 FOR "UPGRADING TO BITUMEN STANDARD AND PERFORMANCE BASED ROUTINE MAINTENANCE OF KENYENYA-MOTONTO/PARAINYE-MESESI-TABAKA/BONYANCHA NYABISONGORORO/IYABE-SENGERA-NYANSARA/SENGERA-NYAKIOBA ROADS.**

(h) **THAT** an injunction do issue for 60 days from todays date to restrain the Defendant or its agents from calling, making demands and or making any claim on the Plaintiff's Performance Guarantee date 8<sup>th</sup> May 2017 in the sum of Ksh 78,454,858.95 and the Plaintiff's Advance Payment Guarantee dated 11<sup>th</sup> July 2017 in the sum of Kshs 104,606,478.60 issued by Equity Bank Limited in relation to Contract Number **RWC 290 FOR "UPGRADING TO BITUMEN STANDARD AND PERFORMANCE BASED ROUTINE MAINTENANCE OF KEBOKO-NYANGUSU-NYAMACHE ROADS.**

(i) Each party to bear their own costs of this action.

**DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2019.**

**MARY KASANGO**

**JUDGE**

*Ruling Read in Open Court in the presence of:*

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

.....**FOR THE DEFENDANT**