



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**

**CIVIL CASE NO.117 OF 2018**

**ATECO TANK ENGINEERING COMPANY.....PLAINTIFF/RESP**

**VERSUS**

**PRASHANT PROJECTS LIMITED.....1<sup>ST</sup> DEFENDANT/APPL**

**RULING**

This is a ruling on the Defendants' Notice of Motion application dated 23<sup>rd</sup> March 2018. It seeks the following orders:-

1. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be compelled to deposit a sum of **USD 235,000** pending hearing and determination of this suit.
2. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their servants or agents be compelled to remove subject materials from the construction site pending hearing and determination of this suit.

Grounds on the face of the application are that the Plaintiff and the 1<sup>st</sup> Defendant acting as the agent of the 2<sup>nd</sup> Defendant entered into an agreement for sale purchase and distribution of four Aluminum Dome Roofs and two Aluminum internal floating roof together with related structures, supports, platforms, appurtenances and accessories for the project carried out by the 1<sup>st</sup> Defendant on behalf of the 2<sup>nd</sup> Defendant.

That the Plaintiff furnished advanced bank guarantee to the 1<sup>st</sup> Defendant as the agent of the 2<sup>nd</sup> Defendant through its bank ING Bank dated 19<sup>th</sup> April 2016.

That the terms of the agreement required that the Plaintiff furnish 25% of the total project being USD175,000 and that balance of 75% being USD700,000 be settled at the completion of the task.

That he Plaintiff furnished the 1<sup>st</sup> Defendant the above items as per the agreement.

That despite the Plaintiff satisfying its obligation by completing and delivering all the subject project materials, the 1<sup>st</sup> Defendant proceeded to fraudulently collect the bank guarantee totaling USD 175,000 and refused or neglected to settle the balance of the project costs due and owing of USD 205,000 including supervision costs of USD 30,000.

That the 1<sup>st</sup> Defendant illegally and unlawfully collected the advanced guarantee despite being a contributor to the delay which clause 2 of the agreement provide for a penalty.

That the 1<sup>st</sup> and 2<sup>nd</sup> Defendant both continue to enjoy continued use of the subject project materials to the detriment of the Plaintiff; that they have made illegal profits by way of unjust enrichment; by making fraudulent increase in the costs owed by Plaintiff by inflating invoice from USD 700,000 to USD 814,800 as shown by invoice dated 14<sup>th</sup> November 2016 and 27<sup>th</sup> April 2016.

That the 1<sup>st</sup> Defendant will not suffer any prejudice as it has already benefited from illegally collected guarantee; and that they continue to use and enjoy the materials produced and installed by the Plaintiff.

That the Plaintiff continues to suffer from the acts of the Defendants who have failed to settle the outstanding cost of USD 235,000 owed to the Plaintiff.

In response the 1<sup>st</sup> Defendant filed Replying Affidavit dated 24<sup>th</sup> April 2014 sworn by its Administrative and Accounts Manager.

He confirmed that on 18<sup>th</sup> February 2016, the 1<sup>st</sup> Defendant ordered the Plaintiff to supply and install the items listed above at a total cost of USD 700,000 vide purchase order dated 18<sup>th</sup> February 2016.

He averred that according to the purchase order time was of essence and that designs were to be done within one week, shipment 4 weeks, balance of 2 domes and IFR 7 weeks.

He confirmed that an advance payment of 25% was to be made upon approval of design against bank guarantee and 75% upon completion of inspection before delivery.

He averred that the Plaintiff acted in breach of the obligations under the purchase order by delaying in supply of 2 domes and that the said dome did not contain critical node plates required for commencing the installation of the Domes; that 2<sup>nd</sup> batch of delivery of the Domes was also done late and were also incomplete.

He further submitted that the Plaintiff did not provide 2 floating roofs (IFR) within 7 weeks of approval of design as agreed.

That following failure by the Plaintiff to rectify the problems, the 1<sup>st</sup> Defendant procured the manufacture and/or fabrication of the missing and/or misfitting components from 3<sup>rd</sup> parties to enable the 1<sup>st</sup> complete the project without undue delay.

That the 1<sup>st</sup> Defendant called the bank guarantee on 29<sup>th</sup> May 2017 as a last resort to mitigate the failure by the Plaintiff to carry out its part of the agreement.

That the 1<sup>st</sup> Defendant incurred costs by procuring missing parts from other suppliers as listed in paragraph 23 of the Replying Affidavit.

That failed to complete its part of the agreement and instead its director resorted to issuing death threats to the Project Manager and one of the 1<sup>st</sup> Defendant's Directors.

#### **ANALYSIS AND DETERMINATION**

I have considered written submissions filed by the parties herein. Averments in the affidavits and perused documents attached.

I wish to consider whether the applicant has established prerequisites for grant of orders sought.

I first wish to consider the prayer seeking to compel the Defendants to remove the subject materials from site.

From the averments herein the materials supplied by the Plaintiff have already been installed. 1<sup>st</sup> Defendant averred that it had to procure from 3<sup>rd</sup> parties additional materials which were missing to enable installations to take place. Defendant contends that engaging the 3<sup>rd</sup> parties to supply the missing materials was aimed at avoiding further delay after the Plaintiff failed to supply them; it is evident that there may not be any materials lying idle at the site and that what has been installed may include materials belonging to 3<sup>rd</sup> parties. Removal of material will amount to demolishing the fittings already done. The balance of convenience to the side of the Defendants that order cannot therefore issue.

In so far prayer for deposit is concerned, it has not been established that the 1<sup>st</sup> Defendant will not be able to compensate the Plaintiff in the event that the Plaintiff is not in breach of the contract. What is being claimed is quantifiable and there is no indication that the Defendants are unlikely to satisfy decree in the event that the Plaintiff succeeds in this litigation.

#### **FINAL ORDER**

1. The application herein is dismissed. Costs in the cause.

**Ruling Dated and Delivered at Nairobi this 31<sup>st</sup> day of July, 2018**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

**CATHERINE: COURT ASSISTANT**

**MS KAMAU H/B FOR MARIANGA: COUNSEL FOR PLAINTIFF/APPLICANT**

**MR. OGARI H/B FOR OMWEGA: COUNSEL FOR 2<sup>ND</sup> DEFENDANT/RESPONDENT**