



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 284 OF 2016**

**HYDROPOWER INTERNATIONAL (PVI) LIMITED.....PLAINTIFF**

**- V E R S U S -**

**KENYA TEA DEVELOPMENT AGENCY**

**(HOLDINGS) LTD.....1<sup>ST</sup> DEFENDANT**

**KENYA TEA DEVELOPMENT**

**AGENCY POWER CO. LTD.....2<sup>ND</sup> DEFENDANT**

**SETTET POWER COMPANY LIMITED.....3<sup>RD</sup> DEFENDANT**

**THUCHI POWER COMPANY LIMITED.....4<sup>TH</sup> DEFENDANT**

**BOON SYSTEMS (PVI) LIMITED..... 5<sup>TH</sup> DEFENDANT**

**VS HYDRO (PVI) LIMITED.....6<sup>TH</sup> DEFENDANT**

**RULING**

1) Hydropower International (PVI) Ltd, the plaintiff herein, took out the motion dated 1<sup>st</sup> November 2016 in which it sought for *inter alia*:

***1. THAT pending the hearing and determination of this suit, the defendants/respondents, their agents, servants, employees, assigns and/or any other person whomsoever and howsoever acting on their instructions be and are hereby restrained by an injunction order of this honourable court from entering into and/or signing and contract over and/or concerning tender reference KTDA/PRO/093/2015 for engineering, procurement and construction (EPC) of the proposed chemosit, Kipsionii 1 and Rupingazi small hydropower projects in Kenya as set out in the tender reference KTDA/PRO/093/2015 or in any other manner and/or style whatsoever on the same subject matter.***

***2. THAT pending the hearing and determination of this suit, the defendants/respondents, their agents, servants, employees, assigns and/or any other person whomsoever and howsoever acting on their instructions be and are hereby restrained by an injunction order of this honourable***

***court from re-advertising, requesting for and/or receiving any proposals, bids and tender applications for, over and/or concerning the engineering, procurement and construction (EPC) of the proposed Chemosit, Kpsionio I and Rupingaxi small hydropower projects in Kenya as set out in the tender reference KTDA/PRO/093/2015 or any other manner and/or style whatsoever on the same subject matter.***

***3. THAT costs of this application be provided for.***

2) The motion is supported by the affidavit of Ben Mutai. When served, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed the replying affidavit of John Kennedy Omanga to oppose the application while the 5<sup>th</sup> respondent filed the replying affidavit of Rekha Shah to resist the motion.

3) When the motion came up for inter partes hearing, learned counsels appearing in this matter recorded a consent order to have the application disposed of by written submissions.

4) I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have also taken into account the rival submissions and the authorities cited.

5) It is the submission of the applicant that through an advertisement published on national newspapers on 11.8.2015, the 2<sup>nd</sup> respondent in its capacity as the project manager and managing agent of the 3<sup>rd</sup> and 4<sup>th</sup> respondents and with the concurrence of the 1<sup>st</sup> respondent's procurement department, invited eligible contractors to submit proposals for pre-qualification with respect to a tender for engineering procurement and construction of the proposed Chemosit, Kipsomoi I and Rupingazi small hydropower projects under Tender Reference KTDA/PRO/093/2015. The applicant stated that it applied for pre-qualification in respect of all the three aforementioned projects on 29/9/2015 and was among the 14 other eligible contractors who submitted their proposals for pre-qualification process. It is said that the 1<sup>st</sup> and 2<sup>nd</sup> respondents reviewed the proposals tendered by the respective eligible contractors and eventually the applicant and the 5<sup>th</sup> respondent were among the 9 eligible contractors who successfully prequalified and invited to submit their technical proposals and financial bids for evaluation by the 2<sup>nd</sup> respondents tender Evaluation Committee. It is the submission of the applicant that during the pre-qualification stage the 5<sup>th</sup> respondent submitted its proposal for consideration while partnering with Hadish Engineering Co. Ltd which company was not a shortlisted electromechanical equipment (water-to-wire equipment) supplier as per the requirements for requested proposals published in the newspaper advertisement by the 2<sup>nd</sup> respondent. The applicant was therefore of the opinion that the act by the 5<sup>th</sup> respondent in itself was an irregularity and a breach of the terms and conditions set out in the advertisement. The applicant further argued that from the beginning, there was a well-organised and orchestrated scheme by the respondents which was meant to ensure that the three contracts were awarded to a specific bidder and particularly the 5<sup>th</sup> and 6<sup>th</sup> respondents.

6) The applicant accused the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents of committing fraud in respect of the tender to its utter detriment. It is argued that the respondents colluded and conspired to manipulate the tender in favour of the 5<sup>th</sup> and 6<sup>th</sup> respondents thus subjecting the applicant to substantial financial loss therefore this court should intervene by issuing appropriate orders in the interest of justice to both the applicant and the tea farmers that the projects are intended to benefit. The plaintiff/applicant further complained that the decision by the Board committee of the 2<sup>nd</sup> respondent to adopt the joint venture agreement between the 5<sup>th</sup> and 6<sup>th</sup> respondents whereby the 6<sup>th</sup> respondent was cited as the lead partner whereas it was the 5<sup>th</sup> respondent which was pre-qualified after the proposals, is a clear case of fraud, conspiracy and corruption. It is said that the decision is contrary to the advertisement notice on the pre-qualification criteria. It is also pointed out that the 6<sup>th</sup> respondent did not apply for pre-qualification and was not therefore qualified at all to be engaged as a sub-contractor for electromechanical engineering works as it was done here.

7) It is the contention of the respondents that this court has no jurisdiction to review, supervise or

otherwise intervene with procurement process by private entities since the Public Procurement and Disposal Act 2015 does not apply to private entities. It is also the argument of the respondents that the plaintiff/applicant unlawfully acquired documents in support of its application hence the applicant is before this court with unclean hands hence undeserving this courts' equitable discretion. This court was urged to expunge those documents from record. The respondents further argued that since there is no privity of contract between the applicant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents, an order of injunction cannot issue.

8) Having considered the material placed before this court, it must be appreciated that what the court is dealing with is an interlocutory application for injunction and not the substantive suit. The following issues commend themselves for determination.

*i. Whether or not this court has jurisdiction to entertain an application which seeks to interfere with the tender process of the 1<sup>st</sup> defendant.*

*ii. Whether or not the application meets the requirements for a grant of injunction.*

9) On the first issue touching on jurisdiction, I have already set out the arguments of the parties. There is no dispute that the tender process in question is a procurement by a private company. This court had the occasion to determine such an argument **in Mary Njogu =vs= Ndima Tea Factory Co. Ltd & 2 others (2015) eK.L.R** in which the court expressed itself in part as follows:

**“The process in question is procurement by a private company. It called for sealed bids, and was to be confidential. Whereas the plaintiff argued that the public Procurement and Disposal Act did not apply to private tenders, the principles therein apply Mutatis mutandis to tenders issued by private persons. The parties to such process and contracts arising there from are bound to respect and play by the known or agreed rules in the process.”**

10) I share the sentiments expressed in the above excerpt. In other words the principles set out under Section 3 of the Public Procurement and Disposal Act are embraced in private procurement processes. For this reason I am convinced that this court has jurisdiction to entertain this application.

11) Having disposed of the question of jurisdiction, I now turn my attention to determine the question as to whether or not the motion meets the requirements for the grant of an order for injunction. The respondents submitted that the plaintiff/ applicant is not entitled to the equitable order of injunction because it relied on documents unlawfully obtained. The applicant is of the contrary view. The applicant has submitted that the documents marked as “B.M3” and “B.M4” attached to the affidavit of Ben Mutai are properly on record since their authenticity has not been challenged by the respondents. It is also argued that the method by which the said documents were obtained is irrelevant so long as they are confirmed by the respondents to be genuine and not a forgery. With respect, I agree with the submissions of the applicant. I have already stated that this court is dealing with an interlocutory application and the question of admissibility of the documents in question cannot be exhaustively dealt with at this stage but at the stage when the matter comes up for substantive hearing. In **Karuma s/o Kaniu =vs= Regina 1955 ALL E.R 49** it was held *inter alia*:

**“That test to be applied, both in civil and in criminal cases, in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how it was obtained.**

In **American Cyanamid Co. =vs= Ethicon Ltd (1975) 1 ALL E.R 504** it was held *inter alia*:

**“It is not part of the court’s function at this stage of litigation to try to resolve conflicts of evidence of affidavits as to facts on which the claims of either party may ultimately depend nor decide difficult questions of law which call for detailed argument and mature consideration. These are matters to be dealt with at the trial.”**

12) The question now is whether or not the application meets the conditions for the grant of orders of injunction. The first principle to be considered is whether the applicant has shown that it has a prima facie case with a probability of success. The applicant has complained that the respondents conspired and colluded to frustrate its bid to succeed in the tender process. It has relied on some disputed documents to establish those allegations. I am satisfied that the plaintiff's motion meets this requirement. The veracity or otherwise of the documents relied upon will be determined by the trial judge.

13) The second principle to be considered is whether the plaintiff will suffer irreparable loss if the order for injunction is denied. The plaintiff/applicant has argued that it has invested substantially in time, effort and finances during the entire process of tendering. I think the most plausible explanation given by the plaintiff to satisfy this principle is that the substratum of the case will collapse if the order of injunction is not given since the 2<sup>nd</sup> respondent which has already awarded the tender on the three projects to the 5<sup>th</sup> and 6<sup>th</sup> respondent will immediately execute the tender contracts thus extinguishing the plaintiff's claim hence rendering the plaintiff's suit nugatory. The effect of lack of integrity in the procurement process to participants cannot be quantified in monetary terms. I am convinced that the applicant has shown that it would suffer irreparable loss unless the order is granted.

14) The third principle is to the effect that if the court is in doubt, it should determine the application of a balance of convenience. In this case, this court is not in doubt, therefore I will not apply the doctrine.

15) In the end and on the basis of the above reasons I allow the motion dated 1<sup>st</sup> November 2016 in terms of prayers 5 and 6 with costs to the plaintiff/applicant.

**Dated, Signed and Delivered in open court this 24<sup>th</sup> day of February, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant