



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 29 OF 2016

EPCO BUILDERS LTDPLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KILIFI..... DEFENDANT

RULING

The defendant advertised a tender for the construction of a hospital complex sometimes in January, 2016. The applicant participated in the tender and emerged as the best evaluated bidder. On 24th February, 2016 the defendant notified the applicant in writing that it has been awarded the tender for its tender sum of Kshs.299,793,880/= . Before the parties entered into a contract on the project the respondent cancelled the tender. On 2nd November, 2016, a fresh tender was advertised. This triggered the filing of the current suit.

The application dated 10th November, 2016 seeks the following orders: -

3. That this Honourable Court be pleased to grant a temporary injunction restraining the defendant/respondent either by itself, its servants, employees, agents officers or any person, body or authority from calling for, receiving, opening, considering, evaluating or dealing in any manner with any bids submitted in respect of the project for erection and completion of emergency and casualty unit, I.C.I. and H.D.U unit, twin operation theatre and offices at Kilifi County and Referral Hospital already awarded to the applicant pending the hearing and determination of this suit;

5. That this Honourable Court be pleased to grant a temporary injunction restraining the defendant/respondent either by itself, its servants, employees, agents, offices or any person, body or authority from placing any other advertisements in print, radio, on the internet or through any other medium calling for bids in respect of the project for erection and completion of emergency and casualty unit, I.C.U and H.D.U unit, twin operation theatre and offices at Kilifi County and Referral Hospital already awarded to the applicant pending the hearing and determination of this suit;

6. That this Honourable Court be pleased to grant a mandatory injunction compelling the respondent to furnish the applicant with the contract and all relevant documents necessary for commencement of the project for erection and completion of emergency and casualty unit, I.C.U and H.D.U unit, twin operation theatre and offices at Kilifi County and Referral hospital;

7. That this Honourable Court be pleased to grant a mandatory injunction compelling the respondent to give and enable the applicant to take possession of the site for commencement of the

project for erection and completion of emergency and casualty unit, I.C.U. and H.D.U unit, twin operation theatre and offices at Kilifi County and Referral hospital;

The application is supported by the affidavit of Ramji Devji Varsani sworn on 10th November, 2016. The respondent filed a replying affidavit sworn by Michelle Bibi Fondo on 17th November, 2016. The respondent also filed a preliminary objection to the application. The objection and the application were determined together.

Counsel for the applicant submit that the application raises issues as to whether the applicant has fulfilled the conditions for the granting of temporary and mandatory injunctions and whether the court has jurisdictions to determine this case. It is submitted that the applicant participated in the tender process and emerged the winner. The applicant received a letter dated 24th February 2016 being a notification of the award. Although there was no formal agreement between the parties, the notification by the respondent and the acceptance by the applicant constituted a binding contract. The award and acceptance were preliminary agreements and are binding on the parties. Counsel relies on the case of **ELDO CITY LIMITED VS CORN PRODUCTS KENYA LIMITED AND ANOTHER [2013] eKLR**. In that case the court stated as follows: -

“..... Preliminary agreements are referred to by a number of descriptions including letters of intent, heads of agreement, memorandum of understanding or commitment letters. A preliminary agreement is utilized where for one reason or another it is desirable to enter into an interim or initial agreement or understanding pending the parties’ mutual rights and obligations being set out in a formal contract. It is thus a useful tool in commercial transactions. As to the question as to whether MOU’s are legally binding, I would state that the same is partly a matter of construction of the particular document and partly a question of legal analysis It is trite law that in deciding disputes it is the court’s duty to give effect to the intention of the parties. The parties’ intention is discernible from the documents and conduct of the parties. However onerous a document or contract maybe, the court’s duty is to give effect to it.”

It is submitted that on 7th April, 2016 the defendant wrote a letter to the applicants indicating that it intended to cancel the tender. Section 63 (1) of the Public Procurement and Asset Disposal Act gives the condition under which an award can be canceled. The respondent is only allowed to cancel the tender before the notification of the award. In the current case there was an award and acceptance and therefore the respondent had no power to cancel the tender. The cancellation is purportedly based on some anomalies on the bid but the said anomalies are not specified.

Counsel for the applicant further submit that the suit seeks an order of specific performance. The contract between the parties has not been cancelled and is binding. Counsel relies on the case of **KENYA INSTITUTE OF MANAGEMENT VS KENYA REINSURANCE CORPORATION [2008] eKLR** where the court held as follows: -

“On proof of the existence of ingredients for sustaining a claim to a relief of specific performance, as a prerequisite to the earning of an interim relief of an injunction, the requirements is that one has to demonstrate that there exists a clear and undisputed contract firstly, and secondly, satisfaction the plaintiff can comply and is ready and willing to comply. Thirdly, that the contract is one that is not impossible to perform. Whether existence of these ingredients are to be upheld is not for the trial court to determine. For now it is sufficient for this court to demonstrate that these ingredients do exist.”

It is further submitted that if the application is not granted the applicant will suffer irreparable damage. The cancellation of the tender violated the applicants’ constitutional right to fair administrative action under Article 47. It was alleged that the applicant’s tender of Kshs.299,793,880/= was below the estimated cost of Kshs.335,306,702/=. It is the applicant’s position that its tender sum is sufficient to complete the project and the defendant’s explanation is irrational. The balance of convenience is in favour of the applicant. The bid by the applicant is within the provisions of section 86 (1) of the Public

Procurement and Assets Disposal Act.

It is also contended that the applicant deserves an order of mandatory injunction. The respondent should be compelled to give possession of the site to the applicant. Counsel relies on the case of **KENYA BREWERIES LIMITED VS WASHINGTON OKEYO (2002) EA 109** where it was held that: -

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”

Counsel for the applicant submit that the court has jurisdiction to determine this dispute. The preliminary objection is based on the contention that the dispute ought to have been referred to the Public Procurement Administrative Review Board. Section 173 of the Public Procurement and Assets Disposal Act gives the powers of the Board. Those powers do not include an order of specific performance, temporary or mandatory injunction. It is submitted that the right to request a review to the Board is in addition to any other legal remedy available to any party. The applicant is seeking an order of specific performance of the tender for the erection and completion of emergency and casualty unit, ICU and HDU unit, twin operation theatre and offices at the Kilifi County and Referral hospital. The applicant is also seeking an order of mandatory injunction to compel the respondent to furnish the applicant with a contract and all relevant documents necessary for the commencement of the project as well as an order of mandatory injunction to compel the defendant to give possession of the site to the applicant so that the project can start.

Mr. Bwire, counsel for the respondent, opposed the application. It is submitted that the application is premature. The applicant ought to have referred its complaint to the Public Procurement Review Board. Under section 175 of the Public Procurement and Asset Disposal Act, 2015, a decision of the Board can be the subject of an appeal before the High Court. The applicant opted to quickly file the application without complaining to the Board. It is further submitted that the applicant has not fulfilled the ingredients for the granting of injunction. The applicant is seeking both temporary and mandatory injunctions. The requirements for a mandatory injunction are more stringent than those of conventional injunctions. Counsel relies on the case of Kenya Breweries (supra) which has been cited by the applicant. It is submitted that the plaintiff's case is based on the contention that there was a tender that was awarded. Under section 87 of the Public Procurement Act, the accounting officer of the procuring entity is supposed to notify in writing the person whose bid is successful. The notification must be done before the expiry of the validity period of the tender and it must be done by the accounting officer. The respondent maintains that there was notification in writing within the tender period but the person who signed the letter dated 24th February 2016 purporting to award the tender to the plaintiff is not the accounting officer but the county secretary and head of Public Service. Section 2 of the Public Finance Management Act 2012 defines account officer. Under section 148 of the Act. The County Executive Committee member is supposed to designate an accounting officer. Therefore the person who signed the letter of award is not an accounting officer. Section 135 (5) of the Act invalidates an award/contract signed without the authority of the accounting officer. Apart from that, the award was terminated and the plaintiff was immediately informed of the cancellation.

It is further submitted that mandatory injunctions cannot be granted where the issues are strongly contested. Counsel relies on the case of **DESPINA PONTIKOS [1975] EA 38**. In that case the East African Court of Appeal set out the requirement for an order of mandatory injunction as follows: -

- a) The order will issue if there is likely to be irreparable damage caused to the applicant. That is, irreparable damage that may not be atoned for by an award of damages.**

- b) The right to be protected must be obvious and the respondent must have no defence to the claim;**

c) The respondent must have no lawful claim, and

d) A mandatory injunction can be granted for the release of goods even if it has the effect of resolving the main prayer in the suit.

According to the respondent, the applicant has not demonstrated an unusual strong and clear case to warrant a mandatory injunction. The defendant has a proper defence to the plaintiff's case. No irreparable damage will be suffered. The applicant has already assessed its damage as 30% of the tender award meaning that its claim is for Kshs.89,938,164/=. That loss can be remedied by an award of damages. The defendant is capable of meeting the expected damages. An irreparable damage is one that cannot be quantified in monetary terms. The expected loss is quantifiable and capable of compensation. The tender has been re-advertised and the applicant stands a chance to be awarded if its tender is found to be responsive. If the orders being sought are awarded, the project which is intended to provide affordable health to millions of Kenyans would be stalled and the implications will be devastating. Public interest is in favour of the respondent. The decision to re-advertise the tender was to build a modern hospital other than to build only the specific areas identified in the initial tender. The decision was made in the best interest of the public and cannot be stopped because of individual interest.

The application dated 10th November, 2016 raises the following issues: -

- 1) Whether the court has jurisdiction to hear and determine the application.
- 2) Whether there is a binding contract between the parties herein.
- 3) Whether the applicant has fulfilled the conditions necessary for the granting of both temporary and mandatory injunctions.

It is submitted by the respondent that the applicant ought to have filed its complaint before the Public Procurement Review Board. Reference has been made to section 167 of the PPAD Act. Section 167 (1) of the Act states as follows: -

“Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be proscribed.”

The provisions of section 167 empowers an offended tender to seek administrative review within 14 days. The term used under section 167 is the word **“may”**. Reference to the Review Board is not mandatory. Under section 167 (4) certain issues cannot be referred to the Review Board. These include circumstances where a contract has already been signed, the choice of a procurement method and where the procurement has been terminated under section 62 of the Act.

In this case, the applicant participated in the tender and emerged as the best bidder. A letter of award was sent by the respondent. The award was later cancelled not for reasons under section 62 of the Act. The applicant had the option of seeking administrative review proceedings or court intervention. The court could have still referred the matter to the review Board. The preliminary objection indicate that the orders being sought could be issued by the procurement Administrative Review Board under section 168 of the Act. There is no specific provision which makes it mandatory for tenders to first seek administrative review proceedings before calling upon the courts to intervene. I do find that there is no bar to filing a suit in court. Further, section 174 of the PPAD Act clearly states that the right to review under part XV of the Act is additional to any other legal remedy a person may have.

The Review Board is not an exclusive entity whereby all complaints relating to tenders must first be presented before the board first. As provided under section 174, the Review board is simply an additional remedy. I do find that this court has jurisdiction to hear the application.

The next issue is whether there is a binding agreement between the parties. According to the applicant, there is a binding agreement. This is derived from the tender form and the letter of award. Counsel for the applicant maintains that the preliminary correspondence in form of letter of award and the tender documents constitute a binding contract. On its part, the respondent maintains that the letter of award was not signed by an accounting officer and that no valid contract exists.

The letter dated 24th February, 2016 from the defendant's County Secretary reads as follows: -

To: M/s Epc Builders Limited

P.O. Box 55628

Nairobi

RE: TENDER NO. KCG/HOSP/774/2015-2016

Item Description: Proposed erection and Completion of Emergency and Casualty Unit, I.C.U, H.D.U Unit, twin Operation Theatres and Offices at Kilifi County Referral Hospital

Total Amount: Kshs.299,793,880.00

This is to notify that the contract stated above has been awarded to you.

- 1. Please acknowledge receipt of the Letter of Notification signifying your acceptance within 7 days from the date of this letter.**
- 2. The contract shall be signed by the parties after 7 days from the date of this letter.**
- 3. You may seek further clarification from the officer whose particulars appear below on the subject matter.**

OWEN YAA BAYA

COUNTY SECRETARY AND

HEAD OF PUBLIC SERVICE

The applicant wrote back on 1st March, 2016 confirming acceptance of the award. Thereafter parties engaged in protracted communication and meetings. On 7th April, 2016, the County secretary wrote to the plaintiff indicating that the tender was to be cancelled within fourteen (14) days from that date. Parties continued to engage each other until 2nd November, 2016 when the respondent placed a fresh advertisement in the dailies. On 4th of July, 2016, the County Secretary wrote to the plaintiff making reference to a meeting he had had with the plaintiff's Managing Director. The letter indicate that parties had agreed to work towards an amicable way forward.

The PPAD Act defines a **“tender”** under section 2 in the following terms: -

“tender” means an offer in writing by a candidate to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an invitation to tender, request for quotation or proposal by a procuring entity.

The applicant herein tendered for the construction of the project as per the advertisement. The offer was accepted and an award letter was issued on 24th February, 2017. The Black's Law Dictionary defines the term **“award”** to mean **to grant by formal process or by judicial decree**. The same dictionary defines the term **“contract”** as **an agreement between two or more parties creating obligations that are**

enforceable or otherwise recognisable at law or the writing that sets forth such an agreement.

One of the terms indicated in the letter of offer was that a contract was to be signed by the parties after 7 days from the date of the letter. No such contract was signed.

Section 87 of the PPAD Act states as follows: -

- 1. Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.**
- 2. The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.**
- 3. When a person submitting, the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.**
- 4. For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.**

Two issues arise out of the above section. The first issue is that it is the accounting officer who is supposed to notify both the successful and unsuccessful bidders of the outcome of the tender. The respondent contends that the County Secretary is not the accounting officer. Section 2 of the PPAD Act defines the term “**accounting officer**” to have the meaning assigned to it under section 2 of the Public Finance Management Act. section 2 (1) (b) of the PFM Act, 2012 defines an accounting officer to mean an accounting officer of a County government entity referred to in section 148. Section 148 of the Act empowers the County Executive Committee member for finance to designate accounting officers for certain County Government entities. Section 44 of the County Governments Act No. 17 of 2012 provide for the office of the County Secretary. The functions of the County Secretary are provided under section 44 (30) and do not include issues relating to tendering.

It is therefore clear that the County Secretary is not the accounting officer. However, the applicant is not expected to know the internal operations of the respondent. The County Secretary had no business writing the letter of award or engaging the applicant in lengthy correspondence. He is not the accounting officer. The award letter cannot be invalidated because it was signed by the County secretary.

The second issue raised under section 87 is that the notification to the successful bidder of the award does not form a contract. The plain meaning of section 87 (4) is that a notification for an award to the successful bidder cannot be taken to be a binding contract. The applicant made reference to the form of tender. The form of tender letter dated 21st January, 2016 from the applicant to the respondent indicate that the tender together with the respondent’s written acceptance constitute a binding contract between the parties. My view is that the form of tender cannot replace statutory provisions. The form of tender is part of the tender documents being presented to the procuring entity. The acceptance of the tender is subject to a formal contract being entered into by the parties.

Section 134 of the PPAD Act empowers the accounting officer to be the one responsible for preparation of contracts in line with the award decisions. Section 135 of the PPAD Act states as follows: -

- 1. The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.**
- 2. An accounting officer of a procuring entity shall enter into a written contract with the**

person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

3. The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provide that a contract shall be signed within the tender validity period.

4. No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

The above section further confirms that there is no contract between the procuring entity and the successful bidder until a formal contract is signed. In my finding, I do hold that there is no binding contract between the parties herein. The award letter, the form of tender and the entire tender documents do not constitute a binding contract. Parties were to enter into a substantive contract within seven (7) days after the date of award on 24th February, 2016.

The last issue is whether the orders being sought should be granted. The fall back reference is the case of **GIELLA V CASMAN BROWN [1973] E.A. 358**. The applicant should establish the presence of a prime facie case with a probability of success as well as the possibility of suffering loss or damage that is not capable of being compensated by an award of damages. Should the court be in doubt then the balance of convenience comes into the court's assistance.

There is no doubt that the applicant was the successful bidder and that an award was made in its favour. Even if the award letter was not written by the accounting officer, it is still an award by the procuring entity. I have already found that there is no binding contract between the parties. The respondent's position is that the original project has been changed from specific units to a complete complex. The initial tender was for the construction of the intensive care unit (ICU), High Dependency Unit (HDU), twin operation theatre and offices. The new project as per the advertisement of 2nd November, 2016 is for the construction of the Kilifi County Hospital complex. According to the respondent, this is a bigger project than the original one. The applicant maintains that it is the same tender. None of the parties annexed the tender documents for the two separate tenders. This court is not in a position to know whether the second tender is for the same project or that the project scope has changed.

The suit herein was filed on 11th November, 2016. The initial tender was done in January 2016. The award letter is dated 24th February, 2016. Parties engaged each other from 24th February 2016 until 11th November, 2016, a period of over eight (8) months. The tender period lapsed without any formal contract being signed.

In its plaint dated 10th November, 2016, the plaintiff has particularized the loss and damage to include 30% of the tendered sum of Kshs.299,793,880/= . This makes a claim of Kshs.89,938,164/= . Other loss include cost of tender security and performance guarantee as well as loss of business opportunity. The loss can be quantified although the amount claimed is quite high. The fact that the respondent can compensate the applicant should be taken into account within the circumstances of the case. Capability to compensate a claimant in monetary terms cannot be an outright bar to a prayer for injunction. If the respondent is guilty of an unlawful act, the court can proceed to grant an order of injunction. See **AIKMAN V MUCHOKI [1984] KLR 353**.

In the case of **KEBASO V CHAIRMAN OF THE BOARD OF GOVERNORS MATONGO LUTHERAN THEOLOGICAL COLLEGE, [2000] KLR 389**, the plaintiff sought a mandatory injunction seeking to stop a graduation ceremony until his name is included in the list of graduands. Justice Nambuye held that a mandatory injunction should not be granted where innocent parties are likely to be affected.

The applicant is seeking a mandatory injunction to the effect that the respondent does give the applicant the construction site as well as furnish the applicant with the contract and all relevant documents. I am

alive to the fact that it has taken over one year from the time the award was made. Parties also tried to resolve their dispute amicably. There is no contract for the court to enforce. The respondent maintains that the new project is wider in scope than the original one. The project is for the interest of the residents of Kilifi County. Once the project as intended by the respondent is stopped, it is the Kilifi residents who will suffer. In view of the lack of a contract between the parties, this court cannot grant a mandatory injunction.

I do find that the court has jurisdiction to entertain the application. There is no binding contract between the parties. The plaintiff decided to wait for all this long before seeking remedy in court or before the Review Board. The plaintiff's damage is capable of being compensated. Since the defendant opted to review the project, the court should not force the respondent to give the project to the applicant. The court cannot create an agreement between the parties where none exists. I do find that it would not be prudent to grant the application. The balance of convenience is in favour of the defendant. The defendant is in place for the wider interest of the residents of Kilifi County.

In the end, I do find that the application dated 10th November, 2016 lacks merit and the same is hereby dismissed. Costs shall follow the outcome of the main suit.

Dated, signed and delivered in Malindi this 13th day of April, 2017.

S.J. CHITEMBWE

JUDGE