



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 255 OF 2015

QUINTECH CONSTRUCTION LIMITED.....PLAINTIFF

- V E R S U S -

MIMOS CONSORTIUM LIMITED.....DEFENDANT

RULING

1. Quintech Construction Ltd, the plaintiff/applicant herein took out the motion dated 1st July 2016 whereof it sought for the following orders:

- 1. THAT this application be certified as urgent and service of the same be dispensed with in the first instance.***
- 2. THAT the defendants by themselves, their servants, agents and/or employees be and are hereby restrained by way of interim protection order from assigning, handing over or transferring the construction site to any party known or unknown before taking of accounts and assessment of works completed by the plaintiff as at 1st February 2016 pending the hearing and determination of this application.***
- 3. THAT the defendants be ordered to pay the plaintiff and/or deposit in court the total sums outstanding of kshs.59,128,171.00 as interim payment of work done as and up to 12th June 2014.***
- 4. THAT the honourable court do subsequently confirm the interim orders sought in paragraph (2) hereinabove whereupon the defendants by themselves, their servants, agents and/or employees be and are hereby restrained by way of interim protection order from entering the construction site pending the hearing and determination of this suit.***
- 5. THAT this honourable court do issue any other orders it deems fit to grant in the interest of justice.***
- 6. THAT costs of application be borne by the defendant/respondent.***

The motion is supported by the affidavit of Jotham Gitonga Kuria sworn on 1st July 2016.

2. When served with the motion, Mimos Consortium Ltd, the defendant herein, filed the preliminary objection dated 8th July 2016 to oppose the application. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the Notice of Preliminary Objection disposed of by written submissions.

3. I have considered the grounds stated on the face of the Notice of Preliminary Objection and the rival written submissions. The main issue raised and substantively argued is to the effect that the motion is res subjudice the motion dated 19th June 2015 and another dated 22nd June 2016. It was pointed out that the orders sought in both motions were similar in content. The plaintiff/applicant did not deny the assertion that the two applications were similar.

4. However the plaintiff/applicant is of the view that the current motion cannot be regarded as res subjudice because the applicant's motion dated 19th July 2015 was spent immediately the matter was referred to arbitration. It is further argued that when the applicant filed the motion dated 19th July 2015, the defendant/ respondent filed a preliminary objection dated 8th July 2016 and the substance of the preliminary objection was that the matter is an arbitration matter vide an arbitration clause in the parties agreement signed on 4.2.2014. It is said that the parties herein subsequently by mutual consent referred the matter to arbitration therefore any other application became automatically spent. The plaintiff pointed out that unlike the motion dated 19th July 2015 which is brought pursuant to the provisions of Order 40 of the Civil Procedure Rules, the motion dated 1.7.2016 is brought under Section 7(1) of the Arbitration Act. I find this submission rather curious because on the face of it, the motion dated 1.7.2016 is actually brought under Section 7(1) of the Arbitration act and under Orders 39 and 40 of the Civil Procedure Rules. The two motions simply put, are brought under Order 40 of the Civil Procedure rules. It was not open to the plaintiff to file a separate application similar to the one on record. If the plaintiff wanted to obtain interim orders as provided for under the Arbitration Act, the motion dated 19th July 2015 should have been amended instead. I am convinced that the motion dated 1st July 2016 is res-subjudice the motion dated 19th July 2015. The provisions of Section 6 of the Civil Procedure Act is explicit on the consequence of an action or an application which is res subjudice. Under the aforesaid provision the court was enjoined to stay further proceeding on the matter which is res subjudice. Consequently I issue an order staying the motion dated 1st July 2016 until the notice of motion dated 19.7.2015 is heard and determined. In short, the preliminary objection is upheld with costs to the defendants.

Dated, Signed and Delivered in open court this 25th day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant