REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

COMMERCIAL DIVISION

MISC. APPLICATION NO.11 OF 2016

AND

IN THE MATTER OF SECTIONS 7 & 8 OF THE FAIR

ADMINISTRATION ACTION ACT NO.4 OF 2015

AND

IN THE MATTER OF THE ARBITRATION DISPUTE

BETWEEN

SMATT CONSTRUCTION CO. LTD. ……..APPLICANT

AND

THE COUNTRY GOVERNMENT OF KAKAMEGA …RESPONDENT

R U L I N G

The Application

1. On 02/03/2016, the applicant herein filed the Notice of Motion of even date seeking ORDERS:-
    1. THAT for the reasons to be recorded this matter be certified as urgent and service be dispensed with.
    2. THAT this Honourable court do issue an order against the Respondent restraining the Respondent from terminating Contract No.CGKK/14/15/011 for the construction of Posta-MOCCO Phase II awarded to the Claimant/Applicant on the 27th March 2015.
    3. THAT this Honourable court do issue an order against the Respondent retraining the Respondent from awarding Contract No.CGKK/14/15/011 for the construction of Posta-MOCCO Phase II to any party pending the hearing and determination of this application.
    4. THAT this Honourable court do issue a conservatory allowing the Claimant/Applicant to continue with the execution of Contract No.CGKK/14/15/011 for the construction of Posta-MOCCO Phase II pending reference of any dispute under the Contract to arbitration as provided under the Contract.
    5. THAT costs of this application be provided for.

Which application is supported by the affidavit sworn by Mathias Odhiambo Oliech on 02/03/2016 and is also anchored on grounds:-

a. THAT the applicant is aggrieved by the administrative action taken by the Respondent regarding Contract No.CGKK/14/15/011 for the construction of Posta-MOCCO Phase II.
b. THAT the Respondent has unilaterally and unprocedurally purported to terminate Contract No.CGKK/14/15/011 for the construction of Posta-MOCCO Phase II entered into between the Applicant and the Respondent on the 20th April 2015.
c. THAT the Respondent has purported to terminate the contract on the basis of unfounded grounds.
d. THAT the Applicant has reliably learnt that the Respondent is in the process of awarding the contract to another contractor.
e. THAT Contract No.CGKK/14/15/011 provides for dispute resolution through arbitration hence any dispute between the Respondent and Applicant regarding any issue should be subjected to arbitration. No such dispute has been raised hence it is premature and unlawful for the Respondent to purport to terminate the contract.
f. THAT the Respondent now threatens to take further adverse actions against the Applicant in pursuit of its unilateral and unlawful decision.
g. THAT for the end of justice to be met, interim measures of protection from this Honourable court are necessary.

2. The main arguments put forth by the applicant are that the Respondent has not followed the laid down procedures when purporting to terminate contract No.CGKK/14/15/011 entered into between the parties on 20/04/2015, and that such action on the part of the Respondent has aggrieved the applicant hence the instant application. The applicant prays that in order to meet the ends of justice, interim measures of protection be given by this Honourable Court.
3. Once served the Respondent instructed the firm of Ong'anda & Associates, Advocates who entered appearance on 08/03/2016 and thereafter filed a replying affidavit sworn by Joseph Sweta the respondents Chief officer, Ministry of Transport Infrastructure, Public Works and Energy. The affidavit is sworn and filed in Court on 11/03/2016. The Respondent contends that the applicant is guilty of material non-disclosure concerning the facts surrounding the impugned contract and in particular the fact that the impugned contract expired on 20/10/2015 before the applicant completed his part of the bargain, hence the decision to terminate the contract. The respondent thus alleges breach of contract on the part of the applicant as a consequence of which the respondent was forced to invoke clause 15.2 of the FIDIC conditions of the contract, which clause was incorporated into the contract. The deponent of the replying affidavit states that because of the alleged breach of contract, the respondent had no other option but to terminate the contract vide its letter dated 04/02/2016 as the applicant had totally failed to meet its obligations under the contract.

Background to the Application and Applicant's Case

4. From the pleadings, comprised in the Notice of Motion, the Supporting affidavit and the annextures thereto the applicant and the respondent entered into an agreement dated 20/04/2015 after due tendering process carried out by the respondent for the construction of Posta-MOCCOPhase II at Kshs.47087636.40 (Fourty seven Million and Eighty Seven Thousand six hundred thirty six shillings and forty cents). A copy of the Form of Agreement is attached to the Supporting Affidavit and marked MOO-4.
5. Mathias Odhiambo Oliech depones that the Applicant was to commence work within 28 days upon receipt of a notice to that effect from the Engineer and the works were to be completed within six (6) months from date of commencement. On 15/05/2015 the ground breaking ceremony was conducted by the respondent's Governor though by this time, the letter from the Engineer had not been issued as anticipated. The first site meeting then followed on 05/06/2015 and it was after the said site meeting that the applicant was allowed to move on site and in accordance with clause 41.1 of the conditions of contract Part II – Conditions of Particular Application – the applicant commenced actual works 28 days after the site meeting held on 05/06/2015. The applicant was expected to complete the work within six (6) months from date of commencement.
6. The applicant states that he proceeded diligently with his works and payments were made based on Engineers approval but on 04/12/2015, the applicant was surprised to receive a letter from the

Respondent – see annexture MOO-7 – purporting to give a notice to the applicant of its (Respondents) intention to terminate the contract on the basis that the applicant had abandoned the works and breached the contract and that no extension of time would be granted. The applicant wrote back to the respondent – annexture MOO – 8 –explaining that any delay in proceeding with the works had been caused by unfavourable weather.

7. After the above named exchanges between the parties, the respondent paid the applicant the 1st interim payment certificate for kshs.5190795.85 in respect of various works that had been executed on the instructions of the Engineer. Annexture MOO – 9a, b and c are copies of the payment certificates. Then on 04/02/2016, the respondent wrote another letter to the applicant – annexture MOO – 9 – indicating that the contract had been terminated. The applicant states further that the termination letter of 04/02/2016 was anchored in the Notice of Intention to terminate contract given vide the respondent's letter of 04/12/2015. The deponent contends that in its letter of Notice of Intention to terminate, the respondent referred to clause 15.2 of the FIDIC conditions of contract, which condition according to the applicant does not exist. The said clause 15.2 reads as follows:-

> "15.2 The Contractors agent or representative on site shall be an Engineer registered by the Engineer's Registration Board of Kenya in accordance with the laws of Kenya Cap 530 or have equivalent status approved by the Engineer and shall be able to read, write and speak English fluently."

8. It is the applicant's contention that at no time did an issue arise touching on clause 15.2 (supra) and that even if such an issue had arisen, it would not lead to termination of the contract. In essence the applicant contends that purported termination of contract based on a wrong clause of the FIDIC conditions cannot stand and that in any event, the Respondent could not purport to terminate the contract retrospectively. For the above reasons, the applicant prays for the orders sought as an interim measure of protection pending referral of the dispute to arbitration.

The Response to the Application

9. The response to the application is found in the Replying Affidavit of Joseph Sweta dated 11/03/2016. While admitting that the applicant was awarded the contract for the construction of Posta-MOCCO Phase II after successfully tendering for the project, the deponent of the Replying Affidavit contends that the applicant did not diligently perform the contract and had by 20/10/2015, abandoned the site after doing only 15% of the project hence the notice of 04/12/2015. That even after having been served with the notice of intention to terminate the contract the applicant never made any meaningful effort to carry out the works but instead remained at large and deserted the site hence the respondent's letter dated 04/02/2016 terminating the contract. According to the respondent, the applicant's letter dated 10/12/2015 was only received by the respondent on 01/03/2016. That in any event, the applicant in his said letter of 10/12/2015 never demonstrated that it had the financial capacity to complete the contract, which contract had in any event been terminated. The respondent's case is that the applicant is in total breach of the contract and that in the circumstances, there are no technical issues to warrant referral of this dispute to arbitration. The respondent prays that the application be dismissed.

The Applicant's Submissions

10. The applicant's skeleton submissions are dated and filed in Court on 14/03/2016. After setting out only the history of this case, the applicant has framed the following issues for determination:-

    i) Whether or not the contract lapsed on 20/10/2015

    ii) Whether or not the applicant has breached the agreement.

    iii) whether or not there were valid grounds to terminate the contract

iv) whether or not the termination was done in line with procedure.

v) whether or not the termination is final before arbitration of the dispute.

vi) whether or not there is a dispute for referral to arbitration.

11. As rightly submitted by applicant's Counsel the above stated issues are not for determination at this stage of the proceedings since the only issue for determination is whether the preservatory orders sought ought to be granted. See **Safaricom Limited –vs- Ocean View Beach Hotel Ltd & 2 others Nairobi Civil Appeal No.327 OF 2009 (unreported).** Counsel for the Applicant has submitted at length on why it thinks this honurable Court should grant the interim measures sought. I shall return to these shortly.

The Respondent's Submissions

The respondent's submissions filed on 14/03/2016 raise the following issues against the instant application.

a. The instant application is incompetent and defective for lack of form, namely that this miscellaneous application does not meet the threshold of a suit as understood in law and that a miscellaneous application is not the proper way of commencing a suit. Reliance is placed on Section 2 of the Civil Procedure Act which provides that "all civil proceedings are commenced in any manner prescribed by the rules", such manner being by way of a plaint, originating summons and a petition. In other words, that the orders sought by the applicant are made in a vacuum.
b. That the respondent being a County Government no injunctive orders in the nature sought by the applicant can be issued against it, especially in light of Section 16 of the Government Proceedings Act, Cap 40 of the Laws of Kenya.
c. That the applicant's prayer for redress under Article 47 of the Constitution cannot be granted without the applicant seeking a judicial review of the offending administrative action on the part of the respondent.
d. That in any event the respondent was justified in terminating the agreement because the applicant abandoned the construction works and did not comply with the notice to terminate the contract by making good its failures.
e. That the applicant has misapprehended the applicable FIDIC conditions of contract by reading from the FIDIC conditions of contract for construction represented in 1992. The respondent prays that the applicant's application be dismissed with costs to the respondent.

The Law

12. Apart from various provisions of the Civil Procedure Act, Cap 21 Laws of Kenya, the instant application is brought under sections 7 and 8 of the Arbitration Act Cap 49 of the Laws of Kenya as well as Rule 2 of the Arbitration Rules 1997. Section 7 of the Arbitration Act provides as follows:

> "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."

13. Section 8 of the Arbitration Act on the other hand provides as follows:

> "8. (1) An arbitration agreement is not discharged by the death of any party thereto, either as

respects the deceased or any other party, but in such event is enforceable by or against the personal representative of the deceased.

(2) The authority of an arbitrator is not revoked by the death of any party by whom he was appointed.

(3) Nothing in this section affects the operation of any law by virtue of which any right of action is extinguished by the death of a person."

14. Counsel for the applicant has also referred this Court to a number of authorities which are relevant to the matter in hand. I shall refer to some of the authorities during my analysis and determination.

Analysis and Determination

15. From the foregoing two major issues arise for determination:-

1. Whether this application is properly before this honourable Court and
2. Whether the interim measure sought by the applicant is merited.

16. On the first issue, the respondent has contended that this application is not properly before me because there is no suit in which the application is anchored. Relying on the **Safaricom case** (supra) the applicant contends that the applicant is properly before me since the applicant is not seeking orders in any action being tried. That all that the applicant prays for are holding orders pending reference of this dispute to arbitration. In the **Safaricom case**, (supra) the High Court declined to grant orders of interim protection on the grounds that the applicant had failed to meet the threshold for the granting of injunctions. On appeal Mr. Justice Nyamu J.A had the following to say on the issue:-

> "***With great respect to the Supreme Court, although the right of intervention was specified in Section 7 and the limit of intervention defined in the section, what happened is that the Court misapprehended its role, declined to grant the interim measure by applying line, hook and sinker the Civil Procedure preconditions for grant of interlocutory injunctions as laid down in the celebrated Geilla –vs- Cassman Brown (1973) EA 358 and also delved into the rights of parties whereas under the provisions of Section, there was not suit pending before it for determination because the interim measures of protection was being sought before the commencement of an intended arbitration.***
>
> ***By determining the matters on the basis of the Geilla principles the Superior Court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such order take different forms and go under different names….Whatever their description however, they are intended in principle to perate as :holding" orders pending the outcome of the arbitral proceedings" (emphasis mine)***

17. What Nyamu J. was saying is that a Court, like t his one, hearing an application for an order for interim protection does not and must not go into the merits of the case. Further, that there need not be a suit in the sense understood by the respondent herein. Any order to be issued in a case of this nature serves the purpose of holding the status quo pending the outcome of the arbitral proceedings. This was also the position held by Kamau J. in the case of **Talewa Road Contractors Ltd. –vs- Kenya National Highways Authority [2014] e KLR** where the learned Judge said the following:-

> "The injunction herein was granted on a balance of convenience as granting it on the grounds that the Plaintiff has established a prima facie case with probability of success could be misinterpreted to mean that the Court has considered the merits or demerits of the dispute between it and the Defendant and which this Court found it has no power jurisdiction to do."

18. In the present case, the arguments by the respondent are intended to push this Court into a corner with a view to making it determine the merits of the dispute between the applicant and the respondent. This Court will not bow to that pressure. It will not even proceed to consider whether the growing of the notice of termination of the contract was fair or not or even whether the applicant is in breach of the contract. What is important to this Court at this point is that there is a complaint by the applicant arising from an agreement that provides that in the case of a dispute the parties will subject themselves to an arbitration process. However, before that happens, the applicant has been asked to vacate the site, inspite of the fact that there is machinery on site and work done by the applicant but not yet valued. The arbitral machinery is yet to be set into motion and it is not clear when that machinery may be set into motion. This Court therefore has a duty to consider the application by the applicant regardless of the fact that there is no suit pending before this Court. The application is therefore properly before this Court.
19. The second issue for determination is whether the preservatory orders sought by the applicant ought to be granted in this regard. I am guided by the persuasive authority cited to me by the applicant in the case of **Joseph Kibowen Chemjor –vs- William C. Kisera [2013]** as applied in the case of **Stoic Company Ltd –vs- Scope Telematics International Sales Ltd & Another [2015] e KLR** in which the Court held, inter alia, that :

> "…….there are times when all that a person wants is an order of Court where the rights of the parties are not going to be determined. There is no "action" being enforced or tried. In many such instances, it is the discretion of the Court being sought or a procedural issue sought to be endorsed. The Court in such a case is not being asked to determine any rights of the parties. Now the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no "action". In such instances, I think it is permissible for such a person to file a miscellaneous application because the Court is not asked to determine any issues between the parties. This is common and permissible where all that the party wants is a mere order from the Court which does not settle any rights of the parties ……"

20. I entirely agree with the above statements and add that in the instant case all that the applicant is asking this Court for is an order which does not settle or determine the issues that have arisen between the parties. The order sought is one which is intended to maintain the status quo until the dispute between the parties is referred to arbitration. I am also satisfied that the applicant is perfectly in order to have moved the Court by way of a miscellaneous application as the issue in hand between the parties is a procedural one which needs endorsement by this Honorable Court.

Conclusion

21. In conclusion and for the reasons above stated, I make a finding that this application is properly before this Court and that the same has merit. Accordingly, I allow the same and make the following orders:

> 1. THAT pending the reference of this dispute the respondent by itself, its officers, employees, servants and/or agents or otherwise however be restrained:-

a. From terminating contract No.CGKK/14/15/011 signed on the 20th April 2015 between the County Government of Kakamega and SMATT Construction Company Ltd for the construction of Posta –MOCCO Phase II pending arbitration.
b. From awarding contract No.CGKK/14/15/011 for the completion of construction of Posta-MOCCO Phase Ii pending arbitration.
c. From evicting the applicant from the project construction site or removing the applicants

machinery, equipment and tools from the site pending arbitration.

2. THAT a conservatory order maintaining the status quo ante the Respondent's letter of 4th February 2016 by allowing the applicant to continue with execution of the works under the contract pending the reference of the dispute to arbitration.

3. THAT each party bears its own costs for this application.

Ruling delivered, dated and signed in open Court at Kakamega this 23rd day of March 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Miss Kadenyi (present) for Applicant

Mr. Onganda (absent) for Respondent

Mr. Lagat - Court Assistant