



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 553 OF 2015

AFRICA NEUROTECH SYSTEMS LIMITED.....PLAINTIFF

VERSUS -

LINKSOFT COMMUNICATIONS SYSTEMS LIMITED.....1ST DEFENDANT

ANTHONY WAHOME GITHINJI.....2ND DEFENDANT

RULING

1. The plaintiff's application dated 6th January 2016 was for the following substantive reliefs;

“3. THAT pending the hearing and determination of this suit, orders of injunction do issue restraining the 1st and 2nd defendants from using, disposing of, alienating, interfering with the plaintiff's interest of Kshs. 150,901,033.45 received and or to be received from the contract between the 1st defendant and the Ministry of Devolution & Planning/Huduma Kenya for offering consultancy services for the Huduma Kenya Business Management Information System pursuant to a successful and competitive bid for the Request for Proposal, Tender No. MDP/DPSM/HK/T38/2014 -2015.

4. THAT in the alternative and pending the hearing and determination of this suit, an order of mandatory injunction do issue cancelling and or rescinding the contract awarded to the 1st defendant by the Ministry of Devolution & Planning and entered into between them pursuant to a Request For Proposal, Tender No. MDP/DPSM/HK/T38/2014 – 2015 for the Ministry of Devolution & Planning/Huduma Kenya, in the public interest, for having been entered into by misrepresentation of material fact.

5. THAT pending the hearing and determination of this suit, the defendants be and are hereby compelled to furnish security for the due performance of this suit equivalent to Kshs. 150,901,033.45, costs and interest.

6. THAT further too, the 1st and 2nd defendants' statement of defence be struck out and judgement entered for the plaintiff as the defendants have filed their defence out of time and failed to serve the same within the prescribed time, without any just cause whatsoever?.

2. In his written submissions, the plaintiff notified the court that it had abandoned prayers 4 and 6. Consequently, the plaintiff now sought only the reliefs in prayers 3 and 5.

3. According to the plaintiff, the consideration which formed the basis of its claims against the defendants was that it abandoned its own bid for the Tender in issue.
4. Having abandoned its own bid, the plaintiff asserts that had agreed with the 1st defendant to prime the latter's bid by offering technical and financial specifications of the Request for Proposal.
5. The plaintiff stated that it is the support which it gave to the 1st defendant which enabled the bid by the 1st defendant to be so competitive that it was eventually successful.
6. The plaintiff's case was that the 1st defendant lacked the requisite qualifications to enable it make a winning bid on its own.
7. Having won the bid, the 1st defendant was, (*according to the plaintiff's understanding*), legally bound to perform the contract on the plaintiff's qualifications. But the plaintiff's complaint is that;

“...upon getting the contract it (the 1st defendant) opted for a separate arrangement with Oracle to be licensed as an Oracle Distributor and to now provide that service?.
8. The defendants say that the only roles which the plaintiff played were to provide its price lists to the 1st defendant and to introduce the said defendant to **VESL TECHNOLOGIES**, an Oracle specialist based in Mauritius.
9. But even the prices which were provided by the plaintiff were said to have been so high that if the 1st defendant utilized them, their bid would have been uncompetitive.
10. I therefore understand the 1st defendant to be saying that they did not use the plaintiff's “*qualifications?*” in the bid.
11. Furthermore, the 1st defendant asserted that the plaintiff lacked 2 key licenses. If that is true, it would mean that the documents provided by the plaintiff could not have led to a successful bid.
12. Whereas the plaintiff considers itself to have been a part of the consortium comprising **LINKSOFT COMMUNICATIONS SYSTEMS LIMITED, VESL TECHNOLOGIES and AFRICA NEUROTECH SYSTEMS LIMITED**, the 1st defendant emphasized that the plaintiff cannot have been a part of the said consortium because the plaintiff actually put in its own bid. In effect, the plaintiff was said to have been in direct competition with the defendants.
13. On a *prima facie* basis I find that if indeed the plaintiff did put in its own bid, that would mean that the plaintiff and the 1st defendant were rivals, as opposed to partners.
14. The Ministry of Devolution and Planning wrote to the 1st defendant on 2nd April 2015, notifying it that it had been awarded the Consultancy for the establishment of Huduma Kenya Business Management Information Systems.
15. On 7th April 2015 the 1st defendant wrote to the Ministry, submitting its acceptance of the award letter together with the Terms and Conditions in the Bid document.
16. Thereafter, the 1st defendant and Ministry executed the contract on 30th April 2015.
17. That would imply that by the time the plaintiff was producing the “*Subcontract Agreement?*” dated 5th May 2015, there was already a contract in force: And the plaintiff was not a party to that contract.
18. On a *prima facie* basis, I find that if the plaintiff believed that there was already a contract between it

and the 1st defendant, it would not have been necessary for the plaintiff to thereafter prepare a Subcontract Agreement between it and the 1st defendant.

19. The plaintiff has not shown that he had entered into any contact with the Ministry of Devolution and Planning. Therefore, the plaintiff has no obligations to perform any part of the contract which the 1st defendant signed with the Ministry.

20. As a consequence, the plaintiff has not undertaken any of the responsibilities required to be addressed pursuant to the contract. On a *prima facie* basis, I therefore find that the plaintiff has not shown how it became entitled to earn profits arising from a contract that the plaintiff was not involved in carrying out.

21. In a nutshell, I find that the plaintiff has not proved a *prima facie* case with a probability of success.

22. I also find no reason in law or in fact for compelling the defendants to furnish security for “*the due performance of this suit?*”, as sought by the plaintiff.

23. Accordingly, the application dated 6th January 2016 is dismissed. The plaintiff is ordered to pay to the defendants, the costs of the said application.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff

Kamau for Thiga for the 1st Defendant

Kamau for Thiga for the 2nd Defendant

Collins Odhiambo – Court clerk.