



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 575 OF 2014

WIL DEVELOPERS & CONSTRUCTION LTD. ::::::::::::::: PLAINTIFF

VERSUS

KEC INTERNATIONAL LIMITED ::::::::::::::: DEFENDANT

RULING

INTRODUCTION

1. The application before the court is a **Notice of Motion** dated **27th November 2014** filed by the Plaintiff/Applicant under Orders 51, Rule 1, Order 40 1 (a) 2 (1) (2) 3 (1) and 4 (1) of the Civil Procedure Rules and Section 31 of the Civil Procedure Act. The application seeks the following orders:-
 1. *That this application be heard ex-parte in the first instance due to reasons of urgency.*
 2. *That a temporary injunction be granted restraining the Defendant from committing a breach of contract and further restraining the Defendants, its contractors, servants and/or their agents from interfering and taking possession of the Dagoretti site until this application is heard and determined.*
3. *A temporary injunction restraining the Defendant from committing a breach of contract and further restraining the Defendants, its contractors, servants and/or their agents from interfering and taking possession of the Dagoretti site until this application is heard and determined.*
4. *That the costs of this application be provided for.*
2. The application is premised on the grounds set out therein and is supported by affidavit of **Johnson Mwanzia Wambua** dated **27th November 2014**, and a supplementary affidavit filed in court on 6th February 2015.
3. The application is opposed vide a replying affidavit of S.A. Ramachandra filed in court on 29th January 2015.
4. The brief history of the application is that the Plaintiff/Applicant and the Defendant/Respondent entered into a sub contract on the 13th day of July 2013 being Agreement No. KEC 1813 LPO for Foundation and Civil Works for Dagoretti substation at a value of Kshs.27,000,000/= plus VAT. The Plaintiff/Applicant as part of its obligations under the contract carried out the following:-
 - a. *Duly paid for the approval of the building plans, occupation certificate infrastructure levy fees and construction site board fees at Kshs.30,130.*
 - b. *Obtained a Performance Bond for Kshs.2,700,000/= as part of its obligations at a cost of*

Kshs.118,000.

- c. ***Paid for the testing of sand, cement and steel at a cost of Kshs.15,100/= at a Ministry of Transport and Infrastructre as part of its obligations in the contract.***
 - d. ***Picked out the beacons at the site at a cost of Kshs.20,000/= as part of its obligations in the contract.***
 - e. ***Paid for insurance at a total cost of Kshs.75,015.89 for:- workmen compensation Insurance, Insurance on Works, and Equipment Cover.***
 - f. ***Purchased uniform and safety gear for the workers.***
5. The Plaintiff alleges that the ground works at the site could not start until the plans were approved by the county council. The plans to date have not been approved. However on 11th April 2014, the Defendant/Respondent sent an email purporting to terminate the contract and sent another email dated 23rd may 2014 terminating the contract.
 6. Being annoyed by the action of the Defendant, the Plaintiffs filed the suit herein and together with this application seeking injunctive orders restraining the alleged breach of contract. However, under Articles 12 of the Agreement between the parties, all disputes relating to the same are subject to arbitration. In realization of this fact the Defendant vide a chamber summons dated 8th December 2014 sought a stay of these proceedings to enable the matter be referred for arbitration pursuant to the said Clause 12. On 13th February 2015 parties consented to that application sending this matter for arbitration and staying these proceedings except that this application for injunction would be heard and determined.
 7. It is the Applicant's contention that the said alleged termination was in breach of contract, null and void, and that pending the said arbitration a temporary injunction under Section 7 of the Arbitration Act is necessary to preserve the suit premises.
 8. The Applicant submitted that in the said Notice of a termination the Defendant/Respondent purports to terminate the contract under Article 9 of the contract which Article sets out the sub contractor's default yet the Plaintiff has not breached any conditions under this article as the works have never started. The Applicant alleges that the Defendant's/Respondent's termination is based on alleged Plaintiff's performance in another contract at Uplands substation which works are ongoing and are 70% complete but not on the Plaintiff/Applicant's performance of the Dagoretti site. The contract for the Dagoretti station and Uplands Station are completely independent from each other and the alleged performance in Uplands Station cannot be used to terminate the contract for Dagoretti Station. The Applicant alleges that the Defendant's/Respondent's termination is also based on alleged instructions from KPLC who is the owner as per the contract between KEC International Limited but KPLC is not a part to the subcontract between the Plaintiff and Defendant. Prior to the Plaintiff/Applicant being awarded the contract, due diligence had been performed by KPLC and the Defendant/Respondent and the Plaintiff/Applicant was confirmed to be a good company for engagement and also as classified by National Construction Authority.
 9. The Applicant alleges that it has not breached any terms of the contract as alleged by the Defendant/Respondent and that the Notice of Termination is illegal as it can only be issued upon the subcontractors default as stipulated in Article 9 of the sub-contract. In any event, the Plaintiff could not start the civil and foundation works at Dagoretti substation as the building plans had not yet been approved by the Nairobi City County. The Plaintiff/Applicant having fulfilled all its obligations under the contract the Defendant/Respondent purported termination is illegal and without any justification, and unless the orders sought herein are granted the Plaintiff will suffer loss of which damages will not be sufficient compensation.
 10. On their part, the Defendant/Respondents submitted that Kenya Power and Lighting Company Limited (Kenya Power) has contracted the Respondent/Defendant to inter alia construct two substations at Dagoretti and Uplands under Kenya Electricity Expansion Project (KEEP). That KEEP is a World Bank sponsored project where a lot of funds are already committed to increase capacity, efficiency and quality of electricity supply and expand access to electricity to all Kenyans, and it is in the national interest and security that all projects being undertaken within KEEP including Dagoretti are completed in time, of good quality and within budget. Any action that delays the completion of the Dagoretti sub-stations poses irreparable damage to the Respondent/Defendant, Kenya Power and Kenyans in general. The Respondent states that the parties herein entered into two sub-contract agreements on 13th July 2013 for sub-station

foundation works at Dagoretti site and Uplands within the KEEP. The two contracts are materially similar in the nature and scope of work, the parties involved, the contract amount and environment under which the work is performed as the two sub-contracts were executed for the same Project. The Applicant/Plaintiff did not perform the contract for construction of a sub-station at Uplands to the satisfaction of both the Respondent/Defendant and Kenya Power as represented in the Sub-contract Agreement despite numerous delay notices. The poor performance by the Applicant/Plaintiff at Uplands demonstrated that the Applicant/Plaintiff did not have the requisite financial and technical capabilities to perform a similar nature of project at Dagoretti Contract. The Kenya Power in several meetings advised Respondent/Defendant to terminate the Contract for Dagoretti site given the poor performance of the Applicant/Plaintiff. (The Respondent annexed the Minutes of Meeting dated 27th March 2014, 24th April 2014 and the letter dated 7th April 2014 marked 'SAR 2 A, B and C'). The Respondent stated that in view of the national interest and security, the Applicant/Plaintiff and Respondent/Defendant herein held a meeting in which they agreed to terminate the Contract. (See the Minutes of Meeting dated 15th April 2014 marked 'SAR 3'). Thereafter the Respondent/Defendant proceeded to issue a termination notice based on the agreement to terminate and within the terms of the contract. Therefore, Respondent/Defendant did not breach any terms of the contract and the termination of the contract was lawful and procedural. The Respondent stated that since the Respondent/Defendant terminated the Contract on the 31st May 2014, the Applicant/Plaintiff never raised any objection to the termination until it filed this suit on the 3rd December 2014 after the Respondent/Defendant had already committed the works to another sub-contractor for the construction of the sub-station at Dagoretti site. (See a Contract Agreement with the new subcontractor dated 24th October 2014 marked 'SAR 5'). It was alleged that the new sub-contractor has already taken possession of the site and made substantial progress with the works (See photos taken end of November 2014 from site showing progress of the works marked 'SAR 6'). The Respondent now alleges that the Applicant/Plaintiff poorly performed the contract and does not have capacity to continue to perform the contract and the orders sought that he continues to perform the remaining work is therefore unwarranted. In any event the Applicant/Plaintiff herein has never taken possession or started any construction works at Dagoretti site at the time of termination of the contract, the same is confirmed in the Applicant/Plaintiff's supporting affidavit in paragraph 4. Further, the Dagoretti site was ready for any construction works to be started by the Respondent/Defendant after the 26th June 2014 upon Kenya Power and Lighting Company Limited obtaining the Nairobi City County Approval (See the Nairobi City County Approval dated 26th June 2014 marked 'SAR 7'). The Respondent states that since the Applicant/Plaintiff had not started performing any work at site, the request for injunction is not warranted because there is nothing at site to be preserved until the suit is fully determined. In any event any services offered by the Applicant/Plaintiff by the time of termination have no direct link to the site at Dagoretti and can be quantified and paid by the Respondent/Defendant if determined to be due to the Applicant/Plaintiff. Therefore, it was submitted, any loss suffered by the Applicant/Plaintiff, which is denied, shall adequately and sufficiently be compensated by an award of damages. If an order of injunction is allowed, then the Respondent/Defendant will suffer irreparable damage and jeopardize public interest, area development and security. The Respondent submitted that continued progress of works at Dagoretti site even as the suit continues shall not in any way impede on the just and fair determination of the suit or even in the enforcement of any outcome of the suit. The award of injunction orders as sought shall cause irreparable loss, damage, injury and be oppressive to the Respondent/Defendant since the project has strict completion timelines and another sub-contractor has already been contracted.

11. I have carefully considered the application and opposition to it. It is clear that since the matter has been submitted to arbitration, the issue as to the legality or validity of the alleged termination will be determined by the arbitrator. The duty of this court at this stage is merely to establish if there are good grounds for granting an injunction pending that arbitration. So the issues for consideration in this court will be:-

- i. ***Whether on the face of it, the alleged termination was justified.***
- ii. ***Whether there is a new sub contract on the suit site.***

12. To answer the first issue, I will go directly to Articles 8 and 9 of the Contract Agreement No.

KEC 813/LPO/0713 (herein referred to as the Agreement). Those Articles provide valid grounds for the termination of the Agreement. Article 8 is clearly not applicable, for it deals with circumstances where there is no default from the parties, but the owner for various reasons, terminates the original contract, then this sub contract also automatically terminates.

13. However Article 9 details circumstances under which the sub contract can be terminated, and states, *inter-a-lia* Article 9:-

i. The Contractor may, after having given 7 days notice to the sub contract expel sub-contractor from the site and/or terminate the sub contract if the sub-contractor.

1.5. fails to fulfill its obligation or commits a breach of its obligations specified in the agreement.

1.6 in the event of repetitive failure on flouting specific aspect of the agreement. . . like continuous delays in meeting commitments related to the agreement

14. In regard to Article 9, we can now scrutinize the alleged termination notices issued by the Defendant. The first termination notice is issued on 11th April 2014. This notice relates to the two sites the civil works for Dagoretti Station and civil works for Uplands Station. The Notice purported to terminate both contracts by merely stating that the Defendant was “utterly dissatisfied and disappointed with repeated failure of keeping promises.” This Notice was to take effect as from 18th April 2014.

15. Pursuant to that Notice nothing appears to have happened, but on 15th April 2014 in a convened meeting, a Mr. Wambua from the Plaintiff Company explained his reason for the delay in the works. He also indicated that the company was in the process of obtaining funds from one of the banks to continue with the works. (See annexure ‘SAR 3’ of the Replying Affidavit of S A Ramanchandra). It has been submitted by the Defendant that the Applicants consented to the said termination. However, I do not see evidence of such a consent. At the end of the meeting, it was concluded as follows:-

“KEC has expressed their wish to terminate the above contract (the contract) for Dagoretti sub-station stating that they will compensate Will Developers of any loss and breach of contract. Will Developers have agreed to give their feedback by 23rd of April 2014.”

16. On 23rd May 2014, the Defendant sent the Second Termination Notice allegedly under Article 9 of the Contract. The reasons given for termination were that:-

- ***“That so far your performance of another similar kind of contract pertaining to the civil works of Uplands substation has been deplorable.***
- ***That we are instructed by our Customer KPLC (who earlier approved you as their sub-contractor) not to offload you the civil contract for any other substation other than the Uplands where you have started working since 12th August 2013. . .”***

With the above notice, the Defendant declared that the contract would expire on 31st May 2014.

17. The Plaintiff/Applicant objected to the said termination by their letter dated 26th May 2014.

18. What the court notes from the foregoing, and which is very clear, is that the purported termination of the contract had nothing to do with Article 9. The reasons given were *ultra vires* the contract, and were influenced by KPLC or the alleged public interest. The termination was also in consideration of the so called Uplands contract, to which the current application had no relation, even if they were being executed by the same person. Indeed, paragraphs 13 to 18 of the Replying Affidavit reveals the true reasons for termination: that the two contracts are materially similar in the nature and scope of work, the parties involved, the contract amount and environment under which the work is performed, as the two sub-contracts were executed for the same Project; that Applicant/Plaintiff did not perform the contract for construction of a sub-station at Uplands to the

- satisfaction of both the Respondent/Defendant and Kenya Power as represented in the Sub-contract Agreement despite numerous delay notices; that poor performance by the Applicant/Plaintiff at Uplands demonstrated that the Applicant/Plaintiff did not have the requisite financial and technical capabilities to perform a similar nature of project at Dagoretti Contract; that Kenya Power in several meetings advised Respondent/Defendant to terminate the Contract for Dagoretti site given the poor performance of the Applicant/Plaintiff. (See the Minutes of Meeting dated 27th March 2014, 24th April 2014 and the letter dated 7th April 2014 marked 'SAR 2 A, B and C'); that in view of the national interest and security, the Applicant and Respondent herein held a meeting in which they agreed to terminate the Contract (See the Minutes of Meeting dated 15th April 2014 marked 'SAR 3'); that the Respondent proceeded to issue a termination notice based on the agreement to terminate and within the terms of the contract.
19. On those accounts, therefore the Respondents submitted that they did not breach any terms of the contract and the termination of the contract was lawful and procedural.
 20. In my view extra contractual allegations of breaches cannot be used to terminate a contract in which there are clear termination clauses and factors founding the termination. The Defendant cannot hide under the concept of public interest without explaining how or why it is necessary in the performance of a purely private contract. Also the allegation that the parties agreed to the termination is not supported by any evidence, and I reject the same. It is therefore the finding of this court on issued number one herein, that the alleged termination of contract was prima facie unjustified and contrary to the contract.
 21. The second issue is whether or not there is a sub contract between the Defendant and a Third Party over the suit site. In answer to this, the Plaintiff/Applicant submitted that they are still the site holders and that indeed no third party or sub-contractor has been given the site. The billboard at the site, it was submitted, still reads that the site belongs to the Plaintiff. On their part the Defendant submitted that a Third Party has taken over the site vide a new sub contract, and that any injunction issued will delay the works and increase the costs of doing the works. To prove that there was indeed a Third party at the site the Defendant annexed 'SAR 6' to the affidavit of S A Ramachandra. The annexure is a plain paper on which is printed the alleged completed works by 8th December 2014. The said Third Party sub contractor is said to be M/s H. K. Builders for the period 24th October to 8th December 2014. The paper has no official seal of any party.
 22. To my mind the proof of any contract or sub contract of this nature cannot be a mere plain paper which has no signatures or seal. If there was a Third Party sub-contractor in the suit site, nothing would be easier than for the Defendant to submit an authoritative sub contract document in much the same way as they have displayed the sub contract between the parties herein. I am not satisfied that there is any Third Party sub-contractor in relation to the suit site.
 23. Having answered the two issues I raised herein in the above manner, I am satisfied that the Plaintiff/Applicant has satisfied the principles laid down in the **Giella – Vs – Cassman Brown 1973 358** for the grant of a temporary injunction pending the determination of the dispute through Arbitration.
 24. It was also submitted that since the Applicant did cite the applicable provisions of the Arbitration Act in the preamble to the application, the orders should not be available. My answer is that substantive justice required that the matter be determined not at the alter of technicalities, but on its merit.
 25. In the upshot, I allow the application in the following terms:-
 - a. ***A temporary injunction is hereby issued restraining the Defendant and its agents howsoever described from interfering with and/or taking possession of the Dagoretti site (the suit property) until the dispute herein is determined by the arbitration process underway.***
 - b. ***The costs of this application shall be in the cause.***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 29TH DAY OF MAY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for the Plaintiff

Mr. Ogeto for the Defendant

Teresia – Court Clerk