



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

HCC NO. 85 OF 2014

DACC GLOBAL LLC.....PLAINTIFF

-VS-

BOLA ASSOCIATES LIMITED.....1ST DEFENDANT

MALEI NTHIWA2ND DEFENDANT

RULING

1. The application before the court is a Notice of Motion dated 25th February 2014 and filed in court on 7th March 2014. It is expressed filed Under Order 40 Rule 2 (l), Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 3A of the Civil Procedure Act.
2. The application seeks the following Orders:
 - a. That this application is certified as urgent and service thereof dispenses with in the first instance.
 - b. That a temporary injunction do issue restraining the Respondents herein through themselves or their servants or agents from interfering with or in any manner howsoever intermeddling with the Applicant's project sites and equipment at Mutuini, Gotani, Kieni, Moticho, Mutituni, Saboti, Keringet and Galileo pending the *inter partes* hearing and determination of this application.
 - c. That a temporary injunction do issue restraining the Respondents herein through themselves or their servants or agents from holding themselves out to be agents or owners of the Applicant's equipment and project sites at Mutuini, Gotani, Kieni, Moticho, Mutituni, Saboti, Keringet and Galileo pending the *inter partes* hearing and determination of this application.
 - d. That a temporary injunction do issue restraining the Respondents through themselves or their servants or agents from sending communication to third parties purporting the same to be at the behest or on behalf of the Applicant pending the *inter partes* hearing and determination of this application.
 - e. That a temporary injunction do issue restraining the Respondents herein through themselves or their servants or agents from interfering with or in any manner howsoever intermeddling with the Applicant's project sites and equipment at Mutuini, Gotani, Kieni, Moticho, Mutituni, Saboti, Keringet and Galileo pending the hearing and determination of this suit.
 - f. That a temporary injunction do issue restraining the Respondents herein through themselves or their servants or agents from holding themselves out to be agents or owners of the Applicant's equipment and project sites at Mutuini, Gotani, Kieni, Moticho, Mutituni, Saboti, Keringet and Galileo pending the hearing and determination of this suit.
 - g. That the cost of this application be borne by the Respondents herein.
3. The application is premised on the grounds set out therein, and is supported by the Affidavit of

DOUGLAS MELVIN sworn on 25th February 2014 at **BOISE, IDAHO, USA**. The application has several annexures to it.

4. The applicant's thesis is that it won the tender to supply off grid solar powered water systems to health facilities run by the government of Kenya. The applicant being a foreign entity required a local contact for purposes of logistical requirements and therefore appointed the Respondents. However, the Applicant alleges that there is no contract between the parties regarding that appointment. It is now alleged by the Applicant that the Respondents despite being required to work in the best interest of the Applicant and the procuring authority, has interfered with the project and caused delay and loss of funds through peddling false information and interfering with the completion of the installation and handover of the project. Despite the Applicant revoking the collaboration between it and the Respondents the Respondents have continued to hold themselves out to be agents of the Applicant and to communicate with third parties and the procuring agency thereby furthering the misrepresentation. This continued interference by the Respondents has caused the Applicant to suffer loss of USD 200,000 and for the payments for the completed project sites to be delayed. The applicant states that the 1st Respondent continues to make damaging and false allegations against the Applicant, and will not desist unless stopped by this court, hence this application.
5. The application is opposed by both Respondents through a Replying Affidavit sworn by **MALEI NTHIWA** dated 2nd April 2014. This Affidavit is sworn on his own behalf and on the behalf of the 1st Respondent company in which he is the Chief Executive Officer. In paragraph 5 to 34 of the said Replying Affidavit Mr. NTHIWA gives the genesis of the dispute between the parties and affirms their position that they are legitimate partners in the projects and that they have put massive time and resources to the projects and so they cannot just be thrown out. Mr. NTHIWA gives the details of how he secured the projects for the Plaintiff and how he was the face of the projects in Kenya and acted as the go between the Plaintiff and the Government. To support this contention annexure 'DMI' to affidavit of **Mr. DOUGLAS MELVIN**, is the Agreement Contract between the Government of Kenya and the Plaintiff. In that agreement the 1st Defendant **BOLA ASSOCIATES LIMITED** is specifically mentioned as a collaborating agency. The 1st Defendant company through its Managing Director the 2nd Defendant herein executed that agreement at page 6. The Respondents therefore assert that they are the local collaborating agents of the Plaintiff and that this position is contractually secured, and the procuring authority is in the knowledge thereof. On this ground, the Defendants believe that they have the right to oversee the projects in Kenya and to communicate with the third parties and to report to the procuring authority as authorised under the said Agreement.
6. Further, the Defendants state that by a letter dated 15th February 2013 the 2nd Defendant represented the Plaintiff and used the Plaintiff's letterheads while negotiating the budget for the projects on the behalf of the Plaintiff. Further, it was the 2nd Defendant who provided the warranty of the information given to the procuring entity, and had to provide his own identity and passport numbers.
7. Parties with the leave of the court filed written submissions to the application and left the matter for the court to decide.
8. I have very carefully considered the application and the submissions of the parties. In my view, the issues necessary for a determination of this issue at this stage are:
 - Whether the Defendants/Respondents are part of the said project and;
 - Whether the injunction Orders sought herein can be granted.
9. To answer to first issue, it is clear to me, going through the pleadings in this matter, that the Defendants were introduced to the Plaintiff by a third party who is named in the pleadings. The Defendants then worked very hard and helped in no small way to secure the tender for the Plaintiff. This led to the execution of the Tender agreement 'DMI' which identifies the Defendants are the local collaborators of the Plaintiff. The procuring authority is aware of this position. As local collaborators the 2nd Defendant did everything possible to ensure that the projects kicked off in the eight regions of the Republic where the projects were to be initiated. I believe that the Defendants worked extremely hard for the Plaintiff because they had an interest in the profits of the tender. The fact that there is no appointment letter or a contract detailing the exact interests of the Defendants is, in my view, immaterial. Contracts can be verbal, and in many

cases, contracts and the terms thereof can be inferred or implied from the conduct of the parties. The attempt by the Plaintiff to paint the Defendants as intruders into the contract is not only unfair, but is mischievous and an act in bad faith considering the effort the Defendants have put in the projects. In my view, and to answer issue number one above, the Defendants are, as the local collaborators, of the Plaintiff, and in consideration of their efforts into the projects, part and parcel of the tender projects. The terms under which they serve may not be clear as at now, but that is a subject of another determination. It suffices to say that the Defendants have established an interest in the suit tender projects which enables them to keep in sight those projects, even if they are not in control thereof.

10. The second issue is whether or not the injunction prayed for can issue. To answer this I go to the Supporting and Replying Affidavits filed by both parties. It is clear that the Plaintiff can no longer work together with the Defendants. Their inability to work together is compromising the tender projects and the ultimate loser will be the people of Kenya who have through their hard earned taxes paid for this project. It is therefore the duty of this court to ensure that the tender projects are not frustrated by either the Plaintiff or by the Defendants. Annexure 'DM3' to the Supporting Affidavit of **DOUGLAS MELVIN** is a purported contract between the parties stating their entitlements. However, the Plaintiff states that this is a forged document and blames the 2nd Defendant for the forgery. However, even if the document were accepted, it does not donate to the Defendants any supervisory roles in the projects, and does not make 1st Defendant an agent of the Plaintiff. Since there is no agreed formal agreement detailing the roles of the parties, it is the duty of this court to ensure that the tender projects continue with as minimal hindrance as possible. This brings me to the issue: - ***Who is the principal in this matter, and who has the ultimate responsibility for the success of the project?*** I firmly believe that the Plaintiff is the Principal of the Tender Projects. I also believe that the Plaintiff has the final responsibility for the success or failure of the tender projects. The Defendants are simply the Plaintiff's local collaborators who must be content with the roles assigned to them by the Plaintiff. If the Plaintiff decides that the Defendants should not do any supervisory roles or communicate with third parties in any way concerning the projects, this may be annoying to the Defendants, but all that the Defendants can do or say is to ask for compensation for the work they have done in accordance with any existing contract or if there is none, in accordance with the terms which may be implied or inferred by any independent judicial forum. The Defendants cannot insist to want to work for the Plaintiff when they have been told not to. The Defendants have no final responsibility for the success or failure of the tender projects. Their interest is limited to financial gain arising from their collaboration. The role the Defendants play herein must be assigned to them by the Plaintiff. All administrative issues and roles must be apportioned by the Plaintiff. This is the only way a project of this magnitude can succeed. It is therefore safe that pending the determination of the 1st and 2nd Defendants' financial interest in the tender projects, the said Defendants be in the meantime excluded from any management, supervisory or oversight roles in the projects and that, the Plaintiff be given the exclusive control of the tender projects to enable it to deliver the same to the procuring authority as per the terms of the tender.
11. I have considered the many competent authorities provided to me by both parties. I am satisfied, however, that to secure the said tender projects from any further frustration in terms of administration, the Orders sought herein should be granted.
12. In the upshot the Plaintiff's/Applicant's application by way of Notice of Motion dated 25th February 2014 is herewith allowed as prayed with costs in the cause.

Orders accordingly.

Dated, Read and Delivered at NAIROBI this 26th Day of September 2014.

E.K.O OGOLA

JUDGE

PRESENT:

M/S. Nyagah holding brief Shaw for Plaintiff

Omukelmala for Defendants

Teresia – Court clerk