**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Civil Case 660 of 2012**

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**HILLTOP ENGINEERING &**

**TECHNICAL SERVICES LIMITED …….. PLAINTIFF**

**VERSUS**

**SELEX SYSTEMS INTEGRATION INC …….. DEFENDANT**

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**R U L I N G**

1.The Plaintiff brought a Notice of Motion dated 14 November 2012 under the provisions of **Order 40 Rules 1 (b), 2 (1), 3 (3)** and **4** of the *Civil Procedure Rules, 2010*. The Application sought orders restraining the Defendant, its servants, agents and/or nominees detailed as Adwest Communication Ltd from proceeding with the implementation of works at the Kenya Air Force base at Laikipia Airbase, Nanyuki. Such was pending the hearing and determination of firstly this Application and secondly the suit. It also sought, in the alternative, that the Defendant be ordered to deposit the equivalent sum of US Dollars 110,000 in court. The Application was supported by the Affidavit of a director of the Plaintiff Company **Mr**. **Jude Kimutai** sworn on 14 November 2012.

2.The Application was supported by the grounds as hereunder:

**"1.THAT in February 2012 the Respondent engaged the Plaintiff to carry out certain works relating to Navigation Aids on the Defendant's behalf at Kenya Airforce Laikipia Airbase.**

**2.THAT the Plaintiff has faithfully carried out the works in accordance with Statement of Works sent to it by the Defendant.3.THAT in September 2012 the Defendant without notice of justifiable cause terminated the Plaintiff's engagement without payment and contracted a nominee by the name Adwest Communication Limited to complete the remaining works occasioning the Plaintiff loss and damage.**

**4.THAT the applicant subsequently sent a demand for USD 100,000 to the respondent for payment of work conducted up to the time the respondent terminated the engagement to the applicant which sum the respondent has ignored/failed to pay.**

**5.THAT the plaintiff/applicant has an arguable case with an excellent degree of success.**

**6.THAT though the plaintiff's claim against the respondent can be satisfied monetarily, it will be difficult for the Applicant to enforce any judgment entered in its favour as the Defendant/Respondent is a foreign company based Kansas in the United States of America which is outside the jurisdiction of the court.**

**7.THAT unless restrained by an order of this court, the respondent will through its said agent/nominee proceed to complete the said works to the detriment of the Applicant rendering this suit nugatory.**

**8. THAT the balance of probability tilts in favour of the applicant/plaintiff.**

9. THAT the respondent will not suffer any prejudice or at all if the orders sought are granted.

**10. THAT this application has been brought without undue delay.**

**11. THAT it is in the interest of justice that this application be allowed".**

3. In the said Supporting Affidavit, Mr. Kimutai detailed that in or around the month of February 2012, the Defendant had engaged the Plaintiff to carry out specific works in relation to a contract for the production and delivery of ground-based navigation aids which the Defendant was securing from the Kenya Air Force. Those works were detailed in a Statement of Work (hereinafter "the Statement of Work") which the deponent annexed to the said Supporting Affidavit. The deponent noted that the works were to be conducted in phases, the first of which involved work done prior to the award of the contract to the Defendant and thereafter, post award work. The Affidavit then set out the main tasks involved in the Statement of Work which involved carrying out consultancy services for an on behalf of the Defendant as well as liaison with Kenya Air Force personnel on site. The Affidavit also set out the post contract award phase of work including the designation of a Project Manager, the provision of a technical point of contact for the Defendant, an updated project schedule and, as the project progressed, the provision of weekly progress reports to the Defendant. The significant paragraphs in the Supporting Affidavit were paragraphs 8 and 9 which, basically, detailed the cause of action as maintained by the Plaintiff against the Defendant. The same read as follows:

**"8.THAT the Defendant in utter breach of protocol between the Applicant and itself and without notice, payment for work undertaken and/or any explanation at all, and in total disregard to the works already carried out by out by the Applicant proceeded to engage and or sub-contract a company by the name of Adwest Communication Limited as its agents and or nominee to carry out the rest of the Works that the Applicant had been by virtue of the Statement of Work engaged to undertake as a result of which action the Applicant has suffered loss and damages.**

**9.THAT the Applicant has suffered loss and damages as a result of carrying out extensive work by itself and in conjunction with other consultants on behalf of the Respondent for which it is yet to be paid or financially remunerated and therefore lays claim for the payment of works done and craves damages for irregular termination".**

4.The concluding paragraphs of the Supporting Affidavit emphasised that the Defendant herein was a company incorporated in the United States of America. For this reason, the Plaintiff felt apprehensive that unless the Defendant was restrained from proceeding to undertake the project, its rights would be prejudiced. It maintained that the Defendant's conduct leading to the irregular termination of the engagement of the Applicant was prejudicial against it and amounted to subjecting the Defendant to provide labour without pay. To this, the Defendant chose not to file a Replying Affidavit but instead, Grounds of Opposition dated 28 November 2012. Those Grounds noted that none of the orders sought in the Application before court arose from the pleadings. Further, the Defendant had failed to establish a *prima facie* case with a probability of success and, if at all, the Plaintiff had a cause of action as against the Defendant, its remedy lay in damages.

5. Both parties filed written submissions in relation to the Plaintiff's Application. The Plaintiff's submissions were filed on 19 December 2012 and after setting out the prayers sought in the Application, it wished the court to note that it was abandoning prayer (d) which sought an Order for the Defendant to deposit an equivalent of US Dollars 100,000 in court. Thereafter, the Plaintiff set out the principles with regard to the granting of interlocutory injunctions as set out in the well-settled case of **Giella versus Cassman Brown (1973) EA 358**. The Plaintiff maintained that it had established a *prima facie* case as the documents attached to the Supporting Affidavit quite clearly showed what works it had carried out for and on behalf of the Defendant. To this end, it referred to the Statement of Work to which had been attached a responsibility matrix drafted by the Defendant in which the Plaintiff's duties/roles were clearly spelt out. It also attached copies of e-mails passing between the parties in which the Defendant had given instructions to the Plaintiff on what it was to do and who it was to see as regards the Works. Interestingly, the Plaintiff submitted that the Defendant had terminated its engagement arbitrarily, without notice and without payment for work done on the Defendant's behalf. The Plaintiff submitted that through its advocates, it had demanded the sum of US dollars 100,000 being what it claimed was its entitlement to work done up to the date of the termination. It also commented that the Defence herein contained mere denials without any substance of thereto. As regards irreparable loss, the Plaintiff submitted that it could not be compensated by an award of damages for firstly, the Defendant was a company incorporated in the United States of America and secondly, that it was not disputed that the Defendant had no office in Kenya. Consequently, the Plaintiff submitted that it would be very difficult to enforce any money judgement that this Court may award to it, as the Defendant was situate outside the jurisdiction of the Court. The Defendant had no assets in Kenya capable of satisfying the Plaintiff's claim. Finally, the Plaintiff submitted that the balance of convenience tilted in its favour for the reasons that its claim was made in good faith and was not a sham. In its opinion, the claim had a reasonably good prospect of success and the Application had been brought not to oppress the Defendant but rather to protect the Plaintiff's interests of justice. It had also brought the Application without undue delay.

6. The Defendant's submissions filed on the 22 January 2013 were fairly brief in content. The Defendant maintained that the case as made out by the Plaintiff did not meet the threshold as set out in **Giella versus Cassman Brown** (supra). The Defendant maintained that the plain reading of the Plaint did not reveal the true nature of the cause of action as against the Defendant. It submitted that if the claim was for a breach of contract, then the law required the Plaintiff to specifically plead such and detail the damages that it claimed from the Defendant. It maintained that a claim in damages would fail. With regard to the Plaintiff's abandonment of prayer (d) of the Application, such raised several issues in that it demonstrated that the Plaintiff had a figure for damages in mind but did not wish to plead the same and as a consequence, be asked to explain how it arose. The Defendant submitted that the Plaintiff obviously intended to get around the law that a quantifiable claim does not fall within the principles of granting an injunction. Further, the Defendant stressed that the Orders sought by the Application were inconsistent with the prayers laid out in the Plaint. The Plaintiff had not demonstrated how damages would not be an adequate remedy and appeared to maintain the demand for US dollars 100,000 as per paragraph 5 (iii) of its submissions. Perhaps more telling was the Defendant's submission that none of the documents relied upon by the Plaintiff in support of its suit, indicated that a contract had been entered into and under what terms and conditions. More significant perhaps was the fact that the Plaintiff had not specified as to what was the consideration under the contract? Two other points raised by the Defendant are worthy of mention which were that firstly, the fact that the Defendant is a foreign company did not mean that the Plaintiff would suffer irreparable loss. Secondly, the court would need to look at the effect that an injunction would have as regards the project at the Kenya Air Force Base at Laikipia. The project was clearly a security sensitive one involving installation of ground navigation aids. Any injunction granted by the court would have serious and extremely adverse consequences as regards third parties who have not been enjoined in the suit and in the Defendant's opinion would cause far more damage and loss than the non-quantified and grey claim of the Plaintiff.

7. To succeed in an application for interlocutory injunction, the Plaintiff must satisfy this court in relation to the principles of granting interlocutory injunctions as per **Giella v Cassman Brown** (supra)as exemplified in **Mrao Ltd. versus First American Bank of Kenya Ltd & 2 Ors (2003) KLR 125.** That case detailed the principles of granting an interlocutory injunction as follows:

**"a) The applicant must show a *prima facie* case with a probability of success;**
**b) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;**
**c) If the court is in doubt, it will decide an application on the balance of convenience."**
**Mrao**alsoestablished that:

**"A *prima facie* case in a civil application includes but is not confined to a 'genuine an arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

8. With all due respect to the Plaintiff, I do not consider that it has demonstrated that there exists a right which has been infringed by the Defendant. As the Defendant has, most clearly, set out in its submissions, there is no contract as between Plaintiff and Defendant. I concur with the Plaintiff that there was pre-award (of the Kenya Air Force ground navigational aids contract) work to be carried out by the Plaintiff. The e-mail correspondence annexed to the Supporting Affidavit is evidence of this. However, it seems to me that such pre-award work was a pre-requisite to the Defendant being awarded the Kenya Air Force contract. Under that contract, there would have been specific and paying work for the Plaintiff to do as a sub-contractor. I am sure that it was very well aware that it was in its best interest to secure the said contract on behalf on the Defendant and its work thereunder would have been recompensed. Unfortunately for the Defendant, as it turned out, the sub-contracting work was not awarded to it. In my opinion, from my brief perusal of the e-mail documentation, it was the Kenya Air Force that chose an alternate sub-contractor to the Plaintiff being Adwest Communication Ltd. I don't consider that the Defendant had any choice in the matter.

9.As a consequence of the above facts, I find that no contract existed as between the parties hereto as at the time of "termination" of the arrangement by the Defendant. There were no basic essentials of contract such as offer and acceptance and, most importantly, there was no consideration agreed between the parties. Indeed, the Plaint as drawn makes no reference to a contract between the parties merely to say that the Defendant engaged the Plaintiff pursuant to carrying out specific works presumably as per the Statement of Work to which the Plaintiff refers in its Supporting Affidavit. The Plaintiff does not mention any monies to be paid by the Defendant for the Plaintiff's services. The prayers in the Plaint call for a declaration that the Defendant's "termination of the Plaintiff's engagement" was irregular, unconscionable and oppressive. Prayer b) seeks an Order that the Defendant do pay the Plaintiff for the work of the Plaintiff had already undertaken on its behalf. It is only at prayer c) that the Plaintiff seeks the injunction restraining the Defendant and its nominees from the implementation of the works at the said Kenya Air Force base.

10. In conclusion, I am not satisfied that the Plaintiff has established a *prima facie* case as it maintains. I don't really understand from the Plaint what its real cause of action against the Defendant is. Simply put, I think it's seeking monies from the Defendant for what it says was the work carried out on its behalf. It is the Plaintiff who has put a figure for the consideration for that work namely US dollars 100,000. This clearly indicates to me that this is a claim for damages and it is entirely inappropriate that this court should grant the Defendant any interlocutory injunction. If the Plaintiff considers that it has a claim in damages, then it would be as well to allow the Defendant to carry out the Contract to provide ground-based navigation aids to the Kenya Air Force as the monies that the Defendant may earn therefrom could be attached if this court finds that the Plaintiff has any sort of claim for damages. In consequence, the Plaintiff's Notice of Motion dated 14 November 2012 is dismissed with costs to the Defendant.

**DATED and delivered at Nairobi this 28th day of March 2013**

**J. B.HAVELOCK**
**JUDGE**