



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**

**CIVIL CASE 530 OF 2011**

**KENSETSU KAIHATSU LIMITED.....PLAINTIFF**

**VS**

**KENYA AIRPORTS AUTHORITY.....DEFENDANT**

**RULING**

1. The application before me is Chamber Summons dated 24<sup>th</sup> November 2011 and taken out by the Plaintiff/Applicant under Sections 1A, 1B and 3A of the Civil Procedure Act and Order XL Rules 2,3,4, 5 and 8 of the Civil Procedure Rules. The application seeks orders to restrain the Defendant by way of a temporary injunction from continuing with the construction of Isiolo Airport Project until hearing and determination of the suit filed contemporaneously with the application.
2. The application is based on grounds set out on the face of the application and is further supported by the affidavit of Dr. John NgayaMukabi sworn on 24<sup>th</sup> November 2011.
3. The Applicant's case is that the Defendant engaged it to undertake Basic Design (BD) and Detailed Design (DD) studies for purposes of designing, and developing specifications for the construction of 1.4 Kilometre runway pavements, taxiway, apron and parking bays for Isiolo Airport. The Detailed Design was undertaken between 8<sup>th</sup> January 2010 and 11<sup>th</sup> March 2011 and was submitted to the Defendant on 17<sup>th</sup> March 2011 together with a schedule of actual implementation. The Applicant further submitted a Client/Consultant Model Services Agreement to the Defendant on 21<sup>st</sup> March 2011, receipt of which was duly acknowledged by the Defendant. Thereafter, the Defendant went quiet on the progress of the project. However, it thereafter came to the knowledge of the Plaintiff that the Defendant was proceeding with implementation of the project using the designs developed by the Plaintiff through another contractor and without payment of the Plaintiff's consultancy fees. The Plaintiff contends that it stands to suffer irreparable damage if the Plaintiff is not restrained through the orders sought.
4. The application is opposed through a Replying Affidavit of Joy Nyagathe Defendant/Respondent's Acting Corporation Secretary and Chief Legal Officer sworn on 14<sup>th</sup> December 2011. Through the affidavit, the Respondent states that the contract for the restoration of the original aircraft pavements and associated facilities was upon tender evaluation awarded to a company called Kundan Singh Construction Limited. This company is the only contractor in the Project. At no point did the Respondent instruct the Plaintiff/Applicant to undertake any work on its behalf in connection with the Project. The contract annexed in the supporting affidavit of the Applicant as JNM 2 was not executed by the Respondent and

the demand letter for payment of consultancy fees issued by the Applicant to the Respondent on 7<sup>th</sup> June 2011 came as a surprise. The Contractor had however confirmed in a letter dated 28<sup>th</sup> June 2011 that it had engaged the Applicant's services during the tendering stage but that the Respondent had never done so. The claim by the Applicant does not therefore lie. On the other hand, the purpose of the Project is for public good and, in any case, the Defendant is able to pay damages should the suit eventually be determined in favour of the Applicant.

5. Counsel for both parties put in written submissions to buttress the rival positions of the parties.

6. I have carefully evaluated the application on the basis of the material placed before me. I have also considered the submissions by counsel as well as the authorities cited before me.

7. The question that I need to answer is whether the Applicant has made out a *prima facie* case meriting grant of injunction orders restraining the Defendant/Respondent from undertaking the upgrade of Isiolo Airport.

8. The main question that I feel will substantially resolve the application before me is whether the Applicant was engaged by the Defendant to provide consultancy services in connection with the project as claimed. To this question, my review of the affidavit evidence placed before me generates the position that Tender No. KAA/ES/Isiolo/683/C was a Tender for restoration of Original Pavements and Associated Facilities at Isiolo Airport. This is the Tender that was awarded to Kundan Singh Construction Limited. At the same time, this is the very tender the Applicant claims to have participated in. The document annexed in the supporting affidavit as JNM-2 headed "Financial Costing and Contract Agreement for Engineering Consultancy Services" which the Applicant states to have submitted to the Applicant in response to the Tender does not appear to be anchored in the Tender Document annexed in the replying affidavit as JN 1(b) and neither does the Contract Agreement annexed in the supporting affidavit as JNM 2(b). These two documents are, in any event not executed by the Respondent. Other than these two documents, is no document evidencing any contract for the design consultancy services as between the Applicant and the Defendant.

9. On the other hand, it is not disputed that the Respondent awarded the contract to Kundan Singh Construction Company Limited and that a contract agreement executed by the parties on 24<sup>th</sup> January 2011. It does further appear that following the award Kundan Singh engaged or intended to engage the Applicant to provide consultancy services. This intention appears to have come to the attention of the Defendant through its head of the project Engineer Kamau as it discernible in the email communication between him and the Plaintiff's CEO and Project Director Dr. John Mukabi. However, the engagement of the Plaintiff as a consultant is still not firmed up in any documentary evidence, either between the Plaintiff and the Contractor or between the Plaintiff and the Defendant. Without a valid contract, the claim based on consultancy services is *prima facie* difficult to prove.

10. In the premises, and although the Plaintiff may have indeed carried out detailed design work as indicated in the report annexed in the supporting affidavit as "JNM 8", the limited evidence placed before this court does not confirm if the work, if any, was duly commissioned and authorized by either the Plaintiff or the Contractor as a sub-contract. The Plaintiff/Applicant has therefore failed to make a *prima facie* case that it has a valid claim against the Defendant/Respondent.

11. With regard to the concern that the Applicant's intellectual property is being applied by the Plaintiff without authorization or compensation, the court is unable at this stage to establish whether or not the Isiolo Airport restoration project is being implemented with reliance of the Plaintiff's Detailed Design report. I am however of the view that in any event, such unauthorized use can be substantially compensated by way of damages.

12. Further, the sum claimed of Kshs. 87 Million is again not in any substantive manner backed by supporting documentation and is an issue that would require proof within the context of a full trial. In any event, the figure is not one that the Defendant would be incapable of settling the claim should the Plaintiff succeed in its claim after full hearing of the matter.

13. For the above reasons, the Plaintiff's Notice of Motion dated 24<sup>th</sup> November 2011 fails and is hereby dismissed with costs.

14. I further direct that the parties do prepare the case for trial within 30 days from today and that the matter be fixed for pre-trial conferencing within 14 days thereafter.

**IT IS SO ORDERED.**

**DATED, SIGNED and DELIVERED in Nairobi this 29<sup>th</sup> Day of May 2012.**

**J.M.MUTAVA  
JUDGE**