REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 87 OF 2011

KNOTS CONSTRUCTION LIMITED.....PLAINTIFF/APPLICANT

VERSUS

THE BOARD OF GOVERNORS MICHUKI TECHNICAL TRAINING INSTITUTE.....1ST DEFENDANT/ RESPONDENT

CORBAN CONSTRUCTION LIMITED.....2ND DEFENDANT/ RESPONDENT

RULING

The subject matter of this ruling is the notice of preliminary objection dated 15th July 2011, in which Corban Construction Ltd., the 2nd Defendant herein, raised the following grounds against the Summons dated.....and the whole suit:

1. ***The applicant has not invoked the jurisdiction of the court properly having failed to exercise its rights to a review as stipulated under regulation 73 as read together with section 106 of the Public Procurement and Disposal Act No. 3 of 2005.***
2. ***The suit by the plaintiff/applicant does not lie as a contract has already been signed by the successful tenderer and therefore the Honorable court is not seized with the jurisdiction to relook and or re-open the tendering process by virtue of the provisions of section 93 91) as read together with Section 100(1) of the Public procurement and Disposal Act No. 3 of 2005 in these proceedings.***
3. ***The suit and the application is only meant to perpetrate a breach of contract between the 1st and 2nd Respondent without any lawful justification and contrary to greater public interest.***
4. ***The plaintiff/applicant has absolutely no cause of action against the 2nd defendant/respondent and the suit and the application should be dismissed in limine and with costs to the 2nd defendant/respondent.***

The substantive matter in this dispute is Plaint dated 4th July 2011 in which Knots Construction Ltd., the plaintiff herein, has sued, the Board of Governors, Michuki Technical Training Institute and Corban Cosntruction Ltd., the 1st and 2nd Defendant herein, whereof it sought for judgment in the following terms:

(a) An order of permanent injunction to restrain the Defendants, their agents and or servants from handing over and/or receiving the site, commencing and/or continuing with the construction works at the site or in any manner howsoever performing all that contract executed as between the Defendants pursuant to Tender No. MOHEST/ESP/6/2010-2011 for the proposed construction of Electrical/Electronics Workshops at Michuki Technical Training Institute.

(b) A declaration that the bid submitted by the plaintiff for Tender No. MOHEST/ESP/6/2010-2011 for the proposed construction of electrical/Electronics Workshops at Michuki Technical Training Institute was the successful bid.

(c) Costs of the suit.

(d) Any other or further relief that this honourable court may deem just and fit to grant.

The Defendants each filed a defence to deny the Plaintiff's claim.

Pending the hearing and determination of this suit the Plaintiff has taken out the Notice of Motion dated 4th July 2011 in which it sought for the following orders:

(1) That the matter be certified urgent and heard ex-parte in the first instance.

(2) That there be an order of temporary injunction to restrain the Respondents, their agents and or servants from handing over and/or receiving the site, commencing and/or continuing with the construction works at the site or in any manner however performing all that contract executed as between the Respondents pursuant to Tender No. MOHEST/ESP/6/2010-2011 for the proposed construction of Electrical/Electronics Workshops at Michuki Technical Training Institute, pending the hearing and determination of this application.

(3) That there be an order of temporary injunction to restrain the respondents, their agents and or servants from handing over and/or receiving the site, commencing and/or continuing with the construction works at the site or in any manner however performing all that contract executed as between the Respondents pursuant to Tender No. MOHEST/ESP/6/2010-2011 for the proposed construction of Electrical/Electronics Workshops at Michuki Technical Training Institute, pending the hearing and determination of this suit.

(4) That costs be provided for.

When the aforesaid Motion came up for hearing, the 2nd Defendant successfully sought for leave to argue its preliminary objection dated 15th July 2011. Mr. Muturi, learned advocate for the 2nd Defendant, urged this court to strike out the Motion and the entire suit on the ground that the jurisdiction of this court has not been properly invoked under regulation 73 of the Public procurement and Disposal Regulations, 2006 as read with Section 106 of the Public procurement and Disposal Act No. 3 of 2005. the learned advocate further argued that the suit does not lie since a contract has already been signed by the successful tenderer hence the court no longer has jurisdiction to re-open the process by virtue of the provisions of section 93 (1) as read with section 100 (1) of the Public procurement and Disposal Act No. 3 of 2005. Mr. Wachira, learned advocate for the 1st Defendant, adopted the submissions of Mr. Muturi.

Mr. Kiprono, learned advocate for the Plaintiff, was of the view that Motion plus the suit is properly before this court by virtue of regulation 73 (1) (c) (ii) of the Public Procurement and Disposal regulations, 2006. Mr. Kiprono was of the firm view that this jurisdiction was not ousted by virtue of regulation 93 (1) which gave this court a wide discretion to entertain any dispute. The learned advocate admitted a contract was executed between the 1st and 2nd Defendants on 5th July 2011 hence the Public Procurement review board no longer has jurisdiction to hear and determine the dispute.

I think the serious question raised is whether or not this court has jurisdiction to hear and determine this dispute. It is not in dispute that the Plaintiff is complaining that its tender was rejected unfairly by the 1st Defendant. The Plaintiff was required to file a request for review within 14 days under regulation 73 (1) (c) but it did not until the time allowed lapsed. The Plaintiff's complaint does not fall within the exceptions given under Section 93 of the Act, where this court may have the original

jurisdiction. In the matter before this court, it was a prerequisite for the Plaintiff to approach the review board. If the Plaintiff was aggrieved with the decision of the review Board, then that is when it would have aright of appeal to this court under Section 100(2) of the Act. With respect, I find the preliminary objection to be well founded. It is upheld. Consequently the suit and the Motion are hereby ordered struck out with costs to the Defendants.

Dated and delivered at Nyeri this 29th day of July 2011.

J. K. SERGON
JUDGE