



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 11 OF 2011

DRAFT AND DEVELOP ENGINEERS LTD.....PLAINTIFF

VERSUS

**NATIONAL WATER CONSERVATION AND PIPELINE
CORPORATION.....DEFENDANT**

RULING

This Ruling is delivered in the Chamber Summons dated 21st January 2011, which is brought under **Section 7** of the **Arbitration Act 1995** and **Rule 2** of the **Arbitration Rules 1997**. In it, the Applicant seeks interlocutory orders of this court, inter alia, to restrain the Respondent from terminating, breaching or in any other way interfering with the contract entered between the Applicant (as contractor) and the Respondent (as Employer) on 4th December 2008, (being the contract referenced as No. **NWC/07/08-09**) for the construction, by the Applicant, of the Imaa Dam in Kitui District and the works associated therewith.

The Applicant also seeks to have the Respondent restrained from interfering with the execution of the works, appointing another contractor to complete the same and/or to use the material, plant and equipment currently on the site. Interim orders in respect of the above were issued at the exparte stage of this application and have been extended from time to time. The Applicant desires that the said orders be confirmed so as to remain in force pending the commencement and determination of any arbitration as may be entered between the parties, relating to the contract.

The main ground in support of the application is that the Respondent has, by a letter to the Applicant dated 12th October 2010, threatened to breach the contract in that, while agreeing to the Applicant's request for an extension of the completion period, the Respondent has included terms which are unacceptable to the Applicant for reasons that the same are unfair, inadequate and arbitrary. The Applicant is particularly aggrieved by the Respondent's threat (contained in the letter of extension) to terminate the contract and enter into the site in the event that the conditions set out in the letter are not complied with by the Applicant.

The Applicant had, on 18th September 2010 and again on 30th September 2010 requested an extension of the contract term citing certain difficulties, none of which the Applicant attributes to itself. Vide the letter dated 12th January 2011, the Respondent agreed to extend the contract by ten (10) weeks only, conditional upon the Applicant fulfilling nine (9) requirements, which the Applicant considers to be

unreasonable and unfair, thereby giving rise to a dispute, in respect of which, the Applicant has invoked the dispute resolution mechanism agreed upon under the contract. Among other things, the Respondent's letter specifically provided that:

“...the approval of the extension is final determination of the contractor's request and upon the expiry of the same, the works are expected to have been completed.”

And that:

“...failure or refusal to comply (with the 9 conditions) will be grounds for invoking remedy under the contract, enter into the site and have the works completed by others while holding (the contractor) liable for the costs of completion of the works (additions and variations by the court)”.

In reply to the application, the Respondent filed a Replying Affidavit sworn by its Managing Director (who is also the Contracts Engineer) Petronilla A. Ogut, to which the Applicant replied under a Supplementary Affidavit filed on 15th February 2011. I find that the bulk of the depositions contained in the Replying Affidavit go to the dispute itself, and are for determination not by this court but through the dispute resolution mechanism as provided in the contract. However, the direct response to the application before me is that the action by the Respondent is justified on the basis that the Respondent considers it to be within the engineer's sole discretion to determine the duration of the contract under the provisions of Clause 44.1 of the contract.

The Respondent's position is that the application is prematurely brought under **Section 7 of the Arbitration Act**, in that, all the Applicants have as a basis for seeking interlocutory orders is a presumption or apprehension that the Respondent intends to breach the contract, when in fact the latter's sole intent is to pursue their legal remedies under the contract as the Employer. The Respondent agrees that a dispute has arisen under the contract but states that the arbitration clause has not yet come into effect, given the provisions of Clause 67.1 and that the purpose of arbitration clause is to ouster the jurisdiction of the court.

The dispute resolution mechanism as agreed under Clause 67.1 to 67.4 of the contract is set out as follows:

“67.1. If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of the contract or execution of the works whether during the execution of the works or after their completion, and whether before or after repudiation or other termination of the contract including any dispute as to any opinion, instruction determination, certificate or valuation of the Engineer the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party.No later than the eighty fourth day after the day on which he received such reference, the engineer shall give notice of his decision to the Employer and the Contractor---

Unless the contract has already been repudiated or terminated, the contractor shall in every case continue to proceed with the works with all due diligence and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised as hereinafter provided, in an amicable settlement or an arbitral award.

If either the Employer or the Contractor be dissatisfied with any decision of the Engineer or if the Engineer fails to give notice of his decision on or before the eighty-fourth day ----- then either the Employer or the Contractor may, on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration as hereinafter provided -----and subject to sub-clause 67.4, no arbitration in respect thereof maybe commenced unless such notice is

given.”

Further to the above, parties have contracted under Clause 67.2 that prior to arbitration proper being gone into, attempts to resolve the dispute by amicable settlement be made.

Submitting in support of the Applicant, learned counsel, Mr. Mwaniki told the court that the interlocutory injunction sought is for the preservation of the contract and the Applicant’s rights thereunder, pending the determination of the dispute, the notice of which has been issued to the engineer in accordance with terms of the contract, arguing that the Respondent, having already acceded to the extension of the contract, cannot at the same time invoke the provisions of Clause 56.1 which empowers the Engineer to give notice to the Contractor to take such steps as would speed up the progress of the execution of the contract at no extra cost to the Employer.

Both parties herein agree that the terms of the contract are binding on them and also that a dispute has arisen in relation to the same, to be resolved in the manner provided under Clause 67 of the contract. The question presenting itself in the circumstances is whether in those circumstances, the Applicant has properly moved the court under **Section 7** of the **Arbitration Act** and **Rule 3** of the **Arbitration Rules**, which respectively, provide as follows:

“S.7 (1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application”.

Considering the provisions of Clause 67.1 of the contract which allows the Contractor to, unless the contract has been repudiated or terminated prior to the issuance of a notice of dispute, to continue with the works, even after the invocation of the dispute resolution mechanism, I am of the considered view that the Applicant is properly before court to challenge the threat by the Respondent to enter into the site and take over the construction and the works, the contract having been neither repudiated nor terminated but instead extended, albeit conditionally. The issue of fairness, reasonableness and arbitrariness of the Respondent in issuing the ultimatums contained in the letter of extension is itself not for this court’s determination but for resolution by the Engineer, the parties themselves or the arbitrator.

I accept the Applicant’s submission that, not to allow the injunction sought herein would defeat the whole purpose of the elaborate dispute resolution mechanism agreed upon, the spirit of which the Respondent’s threat to take over the construction and works clearly negates. I find that a prima facie case has been established and the Applicant is entitled to the orders sought to allow for the continuation of the contract as allowed under Clause 67, particularly since under Clause 47.1, the Respondent remains entitled to liquidated damages for any delay. Considering the value of the contract, I am persuaded that the likelihood of irreparable loss, not capable of compensation in damages is clearly demonstrated.

For the above reasons I find that the application herein succeeds and the same is allowed with costs to the Applicant. I grant the orders as sought.

DATED, SIGNED and DELIVERED at NAIROBI this 1ST day of SEPTEMBER, 2011.

M. G. MUGO

JUDGE

In the presence of:

Mr. Mwaniki

For the Applicant

Mr. Ligunya

For the Respondent