



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVILSUIT NO. 351 OF 2011

USHIRIKA TILES & BUILDERS LTD.....PLAINTIFF

VERSUS

MULTIMEDIA UNIVERSITY COLLEGE OF KENYADEFENDANT

Coram : Mwera J.

Nyangau for Plaintiff/applicant

Non appearance for Defendant/respondent

Njoroge court clerk

RULING

The plaintiff company filed a notice of motion dated 22.4.11 under Order 40 rules 1, 2, 3, 4, 5 of Civil Procedure Rules and sections 1A, 1B, 3A, 63 (c) (e) of Civil Procedure Act for orders:

- i) that the construction work done by the applicant for the defendant under contract be quantified/valued before any other contractor takes over the site; and
- ii) the defendant be restrained from demanding, receiving and utilizing any funds payable under the performance bond issued by M/s Equity Bank at the instance of the plaintiff in connection with the said construction work.

The grounds relied on stated that the plaintiff company won a contract to build a perimeter wall for the defendant. There followed malicious and false allegations that it won that job on a forged Ministry of Public Works letter. The plaintiff piled up building material and executed some of the approved works. Then the contract was cancelled. It did not desire to retender for the job but only payment for the work done and the material delivered. The defendant frustrated the continuation of the works and yet wants to benefit from the performance bond stated above.

Benardette Wangare Muriu, a director of the plaintiff company swore the supporting affidavit in that the works contracted for were worth sh. 59,243,390/=. While work was in progress, the defendant alleged, in collusion with those who lost tenders for the job, that the plaintiff got the tender by presenting a forged letter from the relevant ministry, and that led to the cancellation of the tender. A performance bond of sh. 3m had since been issued and so if orders sought are not granted the defendant may award the job to another contractor. The plaintiff left material on site, which the defendant has refused to be carried away

or cause valuation of the material delivered to be done. The defendant may also proceed to make a demand under the performance bond.

In the replying affidavit of Prof. Gitile Naituli, it was admitted that the plaintiff was awarded the tender to carry out the works. An unsuccessful tenderer, M/s Daje Enterprises Ltd, complained to the Public Procurement Oversight Committee about the status of the plaintiff with the Ministry of Public Works to the effect that as at 27.10.10, the plaintiff was not a registered contractor with that ministry (ann GJNI - 1 to 6) And that the plaintiff had presented a false letter of registration when applying for the tender. Another letter from the same ministry dated 19.10.10 said a similar thing. Even the CID recommended that that letter the plaintiff presented be investigated for forgery. Such investigations resulted in charges against the plaintiffs directors (ann GJN1 – 1 to 10). With that the respondent cancelled the contract. The job was retendered. The plaintiff's suit to challenge cancellation of the contract (HCJR 33/11) was thrown out. The plaintiff has now come up with the present proceedings. Then the affidavit went into other aspects of this suit including the validity or otherwise of the verifying affidavit to the suit; the prayer for the value of work done – sh. 10,138,645/= etc.

Directed to submit the plaintiff went over the history of the matter stressing that it had left behind building material it had ferried to the site which it was not allowed to take away. It had also spent over sh. 10m carrying out the works before the contract was cancelled and that the court proceedings it instituted following the saga, were thrown out or withdrawn. That the plaintiff's present case was not impeached in any way by way of replying affidavit. It had put forth a prima facie case to warrant the orders sought. Further that:

“ The performance Bond was not in our view, issued, and the same was not pegged on the probity, honesty, competence, or otherwise of the plaintiff.”

And all the time the plaintiff was willing and ready to proceed with the contract to the end, but the defendant frustrated all that.
The defendant's submissions titled:

“Respondent's skeletal submissions

(Notice of motion dated 22.8.11)”

filed in court on 19.9.11 were **not dated** or **signed**! So they were left at that.

In the light of the material placed before this court, the orders sought are refused. Here is a plaintiff using forged papers to win a contract. The falsity and forgery is unearthed and so certified. Its contract is cancelled on that basis. The plaintiff does not deny the forged/false papers purportedly issued by the Ministry of Public Works. It sues to challenge the cancellation of the contract and loses. It does not appeal. The use of the forged letter from the Ministry of Public Works was contrary to **the law**. It constituted a criminal act that was subjected to police investigation and even charges (ann GJN1 – 8 to 9). But still the plaintiff approaches this court to be granted **equitable** orders of injunction and stay. That cannot be. The plaintiff has no respect for the law; it cannot move and be granted orders in equity in the courts. Such is really an affront to administration of justice. The court was even further astounded to be told in submission that the plaintiff did not need to go about procuring the performance bond with probity, honesty, competence or otherwise when applying for the job. If such should be a reflection of the Kenyan approach to things, then we definitely have gone as low as any society can go morality-wise. We

must pull ourselves out of such at the fastest speed or we are done.

In sum this motion is dismissed with costs.

Delivered on 5.10.11

J. W. MWERA
JUDGE