



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Suit 1102 of 2002**

§ *Order XVI rule 5D Order L rule 1*

§ *Section 3A of the Civil Procedure Rules*

§ *Payment of costs in a fully compromised case*

**ENGINEERING & SUPPORT SERVICES LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**RECCHI S.A.P..... 1<sup>ST</sup> DEFENDANT**

**ASTALDI S.P.A.....2<sup>ND</sup> DEFENDANT**

**NATIONAL WATER CONSERVATION**

**& PIPELINE CORPORATION.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**R U L I N G**

The Plaintiff and the 3<sup>rd</sup> Defendants Advocate have filed submissions on the issue of costs. Each counsel has filed two sets of submissions. The Plaintiff filed the first set of submissions on 11<sup>th</sup> July 2008 followed by further submission dated 23<sup>rd</sup> October, 2008.

The 2<sup>nd</sup> Defendant filed its first set of submissions on 18<sup>th</sup> July 2008 and the final set of submissions dated 23<sup>rd</sup> October, 2008.

The brief facts of the case are that the Plaintiff filed the instant suit seeking to restrain the 3<sup>rd</sup> Defendant from making payments to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant until provision and payment was made to the Plaintiff of sums due to it from the 1<sup>st</sup> and 2<sup>nd</sup> Defenants. Alternatively it sought injunction until the issue of liability pending in an Arbitration between the Plaintiff on one hand and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the other was determined. That pending Arbitration was a second one. There had been an earlier Arbitration between the 3<sup>rd</sup> Defendant on one hand and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant on the other, which was heard and determined.

**BACKGROUND**

It is necessary to give a little background of the case, which background is not in dispute as can be discerned from the affidavits sworn by both parties to this suit, in support of their respective positions on the issue of costs.

The 1<sup>st</sup> Defendant, Recchi S.A.P. and the 2<sup>nd</sup> Defendant Astaldi S.P.A. appointed the Plaintiff, Engineering and Support Services Limited, to be their Consultant and Commercial and Technical Advisor to both companies for the Kirandich Dam Project. The terms of the appointment included a requirement that the Plaintiff gives all necessary support for the finalizing of the contract, and to give assistance to the two Defendants up to the final acceptance of the work during the implementation of the contract.

The Plaintiff did complete its part of the contract resulting in the execution of the contract between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the one hand and the 3<sup>rd</sup> Defendant on the other.

From the pleadings and affidavits filed herein, the Kirandich Dam Project contract failed. It resulted in Arbitration proceedings between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the one hand and the 3<sup>rd</sup> Defendant on the other. An award was made in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff, apprehensive that it may not recover its dues from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, filed this suit against all three Defendants. At the same time the Plaintiff filed an application seeking to injunct the 3<sup>rd</sup> Defendant from paying the 1<sup>st</sup> and 2<sup>nd</sup> Defendants until provision was made for payment of its dues. That application was dismissed by the court.

Subsequently the Plaintiff on the one hand, and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant on the other, took their dispute for arbitration resulting in an Award entered in favour of the Plaintiff, which also provided for the Plaintiff's costs. The Plaintiff then withdrew the case against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant.

The Plaintiff now seeks an order of costs to be paid to it by the 3<sup>rd</sup> Defendant, which the 3<sup>rd</sup> Defendant has resisted.

I have considered issues raised by both parties in their affidavits filed in regard to the issue of costs. I have also considered submissions by both counsels to the two parties.

Having carefully considered the matter, it is my view that the Plaintiff cannot recover any costs from the 3<sup>rd</sup> Defendant, for the simple reason that there was no privity of contract between them. Secondly, the Award made against the 3<sup>rd</sup> Defendant did not make any provision for any payment to the Plaintiff, so that there is no privity of contract, even remotely, between the Plaintiff and the 3<sup>rd</sup> Defendant. Since the disputes between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the one hand and the Plaintiff and 3<sup>rd</sup> Defendant each separately have been resolved to completion this matter is concluded. This case is considered concluded with no further orders from this court.

Dated at Nairobi this 19<sup>th</sup> day of June, 2009.

LESIIT, J.

JUDGE

*Read, delivered and signed in presence of:*

N/A for Mr. Ochieng' for the Applicant

N/A for Mr. Athuok for the Respondent

LESIIT, J.

JUDGE

