REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Miscellaneous 11 of 2009

M/S BEDROCK HOLDINGS LTD …… PLAINTIFF/RESP

-VERSUS-

CHEMELIL SUGAR CO. LTD ..….. DEFENDANT/APPL

Coram

Mwera J.

Onyango for the plaintiff/respondent

Ragot for the defendant/applicant

Diang'a Court Clerk.

R U L I N G

In a chamber summons dated 8.4.2009 and brought under O6 r. 13 (1) (b) (c) (d) of the CPC the defendant company prays that:

i) the plaintiff's suit herein be struck out.

The grounds upon which the above prayer is predicated were said to be contained in the plaint including:

(i) a) an allegation that the defendant on 6.01.2009 terminated the tendering process for procuring security services without any justification or explanation contrary to the Public Procurement & Disposal Act No. 3 of 2005 (the Act);

b) an allegation that the defendant awarded the tender for the provision of security to M/s Riley – Falcom Security Services and M/s Patriotic Guards Ltd without complying with the said Act and

c) allegations that the defendant denied the plaintiff opportunity to participate in the tendering process.

(ii) that the plaintiff's tender having been rejected, it lacked locus standi having accepted the tender conditions providing that no liability would accrue to the defendant for rejecting, accepting or annulling the entire tender(s) at any time prior to awarding the contract without any obligation or the part of the defendant to inform the affected tenderers of the grounds for the defendant's action;

(iii) the plaintiff having opted to pursue review of the defendant's actions complained of in the tendering process through the Public Procurement Oversight Authority as per ss. 93, 94, 95, 96, 97 as read with ss. 3, 8, 25 of the Act, the court lacked jurisdiction to determine the matter concurrently in the view of s. 100 of the Act, and

(iv) that the reliefs sought are misconceived and frivolous.

An affidavit in support was sworn by one Esther Ngetuny, the Employment Manager of the defendant annexing exhibits that will be referred to as and when necessary. Mr. Ragot argued the application.

Mr. Onyango relying on the replying affidavit of Stephen Ayugi, a director of the plaintiff company, opposed the application.

From the pleadings, affidavits and arguments presented, the defendant company, a parastatal, advertised for tenders of any party interested to supply to it security services. It proceeded to consider the tenders and awarded contracts to M/s Riley – Falcon and M/s Patriotic, and not the plaintiff company which had been the supplier prior to the said tenders. The plaintiff felt aggrieved and filed the suit herein.

In a nutshell Mr. Ragot submitted that the suit herein should be struck out because the complaints contained therein fell under s. 93 (1) of the Act. That the respondent company on 19.1.2009 (Ann. EN 4(a)) wrote a letter to the applicant firm stating the same. That letter was copied to the Public Procurement Oversight Authority (PPOA) – a body under the Act mandated to entertain such disputes. Then on 20.1.2009 the plaintiff/respondent addressed the Public Procurement Oversight Authority on the same complaints (ann. 4 (b)). On 22.1.2009 Public Procurement Oversight Authority acknowledged receipt of the letter by the plaintiff and added:

"We are reviewing your complaints and will revert to you in due course."

The plaintiff/respondent wrote a further letter to Public Procurement Oversight Authority on 2.2.2009. On 22/1/2009 (ann. EN 5 (a)) the Public Procurement Oversight Authority required from the defendant/applicant all material documents relating to the complaint by the plaintiff. The applicant availed them on 2.2.2009. While the review before the Public Procurement Oversight Authority was pending the plaintiff brought this suit on 5.2.2009.

While conceding that under S. 99 of the Act the respondent could resort to any other course to obtain a remedy in a matter like this, Mr. Ragot was of the view that it should pursue one course at a time and not go for review as well as coming to court. That can only result in an absurdity e.g. in case the decision of the review board is brought to the High Court for judicial review orders (S. 100 of the Act), while the same court has been approached under S. 99 also. To this end the case of Standard Chartered Bank Ltd & Anor –vs- Peter Abok & Anor, CIVIL APPL. NO. 265/04 was cited as setting out situation analogous to the present dispute. Without going into the facts of that case, the court was told that where two separate fora have concurrent and equal power to entertain a given matter, once that matter is in one forum, the complainant should not at the same time litigate it in the other forum. Here the plaintiff went for review of his dispute with the applicant. That process is on and determination is awaited. There could be delay before that determination but that is no cause why the plaintiff should in the meantime come to this court on the same complaints.

It was added that the plaintiff when applying to participate in the tender now under question, bound itself by signature to the tender document (ann. EN 2) that where a tender was rejected, there was no liability accruing against the defendant/applicant. After accepting that term, no action therefore lies against the defendant as per the present suit.

Mr. Onyango on his part maintained that even as the review was pending before the relevant body under the Act, the provisions of the Act had been breached even by the Public Procurement Oversight Authority who had delayed in determining the dispute. That accordingly S. 99 of the Act afforded another avenue to the plaintiff to seek a remedy – by filing the present suit. It was an additional venue under the Act and not an alternative one. His client, though, bound itself by signing the tender document.

On perusing the pleadings, affidavits with annextures thereto and the Act applicable in this matter, this court do proceed in its determination as follows: The plaintiff had complaints about how the tenders it was interested in with the defendant company were adjudicated upon. It placed the same before the Public Procurement Oversight Authority for review and the same is pending. The plaintiff then filed this suit and as per its Counsel, pursuant to S. 99 of the Act:

" 99. The right to request a review under this part is in addition to any other legal remedy a person may have."

The review is provided for under S. 93 of the Act. And the Review Board as under S. 97 (1):

" --- shall complete its review within thirty days after receiving the request for review."

At this point this court is not asked to determine whether or not the Review Board has done its work in 30 days since the plaintiff company complained, and sought a review. What nonetheless is here is that there is determination pending

through the review process under S. 93 and at the same time the plaintiff has filed this suit invoking the provisions of S. 100 of the Act. Yes, under S. 99 the plaintiff may seek any other legal remedy in addition to the review. And the decision of the Review Board may either be subject to judicial review proceedings S. 100 (1) or an appeal to the High Court (S. 100 (2)). With such provisions in the law it shall be anomalous and open to absurd consequences if the plaintiff should seek a review and at the same time and on the same complaints, sue in the High Court. Suppose the review board decision becomes a matter for judicial review or appeal in the High Court? And suppose the two fora mandated under the Act to give relief arrive at different decisions at different times? Even as the legislature mandated those two courses to seek remedy under the Act, consistency, good order and interest of justice command that an aggrieved party as the plaintiff company feels it is, should take one course at a time. In that regard Waki J. A delivered himself in the Standard Chartered Bank case (above), regarding a matter where a litigant desiring to go to the Court of Appeal would seek extension of time to appeal both in the High Court and in the Court of Appeal, thus:

"Can a party validly pursue both procedures concurrently or successively? I think not.

It seems to me, and I agree with Mr. Kasamani for the respondents, that a party who exercises the option of proceeding under Section 7 of Appellate Jurisdiction Act must pursue that remedy to its conclusion. The application filed before the superior court on 10th August 2007 was validly made and it is not argued otherwise. It was heard and determined by a competent court. Leave to appeal was granted but not pursued. The selfsame application is made before this court not on facts not known to the applicants at the time they made the first application, but on the same grounds and I am asked to exercise parallel discretion. With respect, that course would lead to undesirable even absurd, consequences."

So it is with this case. Granted the Standard Chartered Bank (quotation above) can rightly be seen as simply analogous to what is before us. And it is different on facts and circumstances. But the principle enunciated is sound: Do not pursue one and the same remedy from two fora with concurrent powers to grant or refuse that remedy whether at the same time or different times. The consequences could be undesirable or even absurd.

In the present matter the plaintiff chose the review course. It should follow it through. It left it pending and came here seeking the same remedy on the same grounds. That may as well pass as an abuse of the court process which must be stopped.

The defendant/applicant argued that the plaintiff having bound itself not to hold the defendant liable for any out-come of the tendering process, asked this court to find that no cause of action was made out against the defendant and so on that basis this should be struck out.

The relevant clause in the tender documents reads as follows under the sub-heading: Company's **Right** to Accept or Reject Any or All Tenders:

"29. 1 The Company reserves the right to accept or reject any tender, and to annul the tendering process and reject all tenders at any time prior to contract award, without thereby incurring any liability to the affected tender or tenderers or any obligation to inform the affected tenderer or tenders of the grounds for the Company's action."

This clear condition was read, understood and accepted by the plaintiff who duly signed the tender document. Mr. Onyango readily admitted this. Then why sue as the plaintiff did? Not much to answer.

Well, all in all this suit is struck out with costs following the reasoning above. But all is not lost. The plaintiff is still on course by way of review.

Ruling delivered on 19.6.2009.

J. W. MWERA

JUDGE

JWM/hao