

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 468 OF 2009

EZEMAK REFRIGERATION & CONTRACTORS LTD.....PLAINTIFF

VERSUS

NATION MEDIA GROUP.....DEFENDANT

RULING

Before me is an application by the plaintiff made under the provisions of **Sections 3A and 63(e)** of the **Civil Procedure Act** and **Order XXXIX** of the **Civil Procedure Rules** seeking orders of the court to injunct the defendant, either by itself or through its agents, by temporary injunction, from awarding the tender for installation of variable refrigeration flow/volume air conditioning system at the defendant's TV and Radio Studios at Nation Centre, Nairobi pending the hearing and determination of the suit. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Dr. Ezekiel Macharia Kiama, a director of the plaintiff. The application is opposed. Sekou Owino, the legal officer of the defendant, swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard rival arguments made by Mr. Omangi for the plaintiff and Mr. Kamau for the defendant. I have carefully considered the said submissions. I have also read the pleadings filed by the parties in support of their respective opposing positions. The undisputed facts of this case is that in 2006, the defendant invited bids from qualified contractors for the installation of variable refrigerant flow/air conditioning system to its TV and Radio Studios at Nation Centre, Nairobi. The plaintiff was successful in its bid for the project. The plaintiff was commissioned by the defendant to undertake the installation of the said air conditioning system. In its bid, the plaintiff indicated *inter alia*, that it would install chiller plants manufactured by 'Carrier.' It was on the basis of this bid that the defendant awarded the plaintiff the tender to install the said air conditioning system. Upon installing the system, differences arose between the plaintiff and the defendant. The differences were such that the defendant terminated the said contract for the installation of the air conditioning system. The defendant was aggrieved that the plaintiff, instead of installing the 'Carrier' chiller system, had installed a different chiller system (*being the 'Dric' System*) which was not specified or provided for in the bid documents. In a bid to resolve the dispute, after negotiation between the plaintiff and the defendant, it was agreed that a consultant be appointed to evaluate the works that had been undertaken by the plaintiff with a view to determining whether the plaintiff had performed the contract in terms of what was agreed would be the scope of the works to be undertaken.

In his report, the consultant noted that although the plaintiff had bid to supply to the defendant the "Carrier" cooling system, in the course of the contract, without seeking the defendant's approval, the plaintiff changed the cooling system to the 'Dric' cooling system. At page 13 of his report, the consultant noted as follows:

"In general, as detailed, the contract between the parties were not executed fully as stipulated, though the system as installed once commissioned we believe will offer good service. The value however, due to the change of specification of makes of the Chillers and the Fan coils that were assumed to be CARRIER we have attempted to offer an opinion on the value of the lesser quality items that were installed."

The consultant made certain recommendations, which among *inter alia*, advised the defendant to pay the plaintiff on the basis of work done as at the time the consultant was appointed. The consultant noted that, on the basis of his evaluation of the work done by the plaintiff, the plaintiff had completed works of the value of Kshs.9,653,955.69 excluding VAT. According to the defendant, it had already paid to the plaintiff the said sum of Kshs.9,653,955.69 before terminating the contract.

The plaintiff was aggrieved by the defendant's decision to terminate the contract, because in its view, it ought to have been given a chance to complete the contract in accordance with the recommendation of the consultant. The defendant is however of a contrary opinion. The defendant was unimpressed that the plaintiff had unilaterally changed the technical specifications of the air conditioning system without seeking its approval. It was in light of this development, that the defendant re-advertised the contract with a view to securing a contractor who would install an air conditioning system that fitted its specification.

The advertisement of the new tender provoked the plaintiff to file the present suit. The thrust of the plaintiff's complaint as is contained in the averment made in its plaint is that the defendant should be compelled by an order of specific performance to allow the plaintiff to complete the contract as recommended by the consultant. In the alternative, the plaintiff prayed that the court orders the defendant to pay it damages for breach of contract and a further specific sum of Kshs.3,272,313.81. Pending the hearing of this suit, the plaintiff sought orders of this court to restrain the defendant from re-advertising the tender. The principles to be considered by this court in determining whether or not to grant the application of interlocutory injunction sought by the plaintiff are well settled. This court must be satisfied that the plaintiff has established a *prima facie* case with a probability of success. The plaintiff must further establish that he would suffer irreparable loss that cannot be compensated by an award of damages. In the event that the court would be in doubt, it would determine the application on a balance of convenience (**see Giella vs Cassman Brown [1973] EA 358**). Has the plaintiff established a case to entitle this court grant it the interlocutory injunction sought? I do not think so. It was apparent to the court that the plaintiff wishes to stop the defendant from awarding the newly advertised tender to another firm other than the plaintiff. This court lacks jurisdiction to direct the defendant to award the new tender to the plaintiff or any other firm. The basis of the plaintiff's application for injunction is that the defendant should be restrained from advertising the new tender on the ground that in doing so, it would be in breach of the agreement it had previously entered with the plaintiff. I am of the view that breach of contract *per se* cannot entitle a party to a grant of orders of interlocutory injunction.

In the present application, it was evident that the basis of the plaintiff's suit is a dispute over a sum that is allegedly owed to it by the defendant. On its part, the defendant insists that it had paid the full amount that was due to the plaintiff. A disputed amount cannot be sufficient ground for the grant of an order of injunction. The plaintiff has already quantified the damages that it craves the court to be paid. This court is of the opinion that damages would be an adequate remedy in the circumstances. Even if this court were to find in favour of the plaintiff after full hearing of the suit, it is unlikely that it would grant the prayer sought by the plaintiff that the defendant be ordered to specifically perform the contract that it had terminated.

It was apparent that the defendant was dissatisfied with the services rendered by the plaintiff in the terminated contract. This court cannot impose the plaintiff on the defendant by directing that the defendant allows the plaintiff to complete the contract. In the circumstances of this case, the plaintiff can only be compensated by an award of damages if the defendant is found to be in breach of the contract. The balance of convenience tilts in favour of the defendant whose operations would be disrupted if the injunction sought is granted. It would not be able to install a cooling system that is critical to its operations.

Taking into account the totality of the facts in this case, it is evident that the plaintiff has failed to establish a case to entitle this court grant it the orders of injunction sought. The plaintiff's application is dismissed with costs.

DATED AT NAIROBI THIS 24TH DAY OF JULY 2009

L. KIMARU

JUDGE