



**Wilfak Engineering Limited v Kenya Ports Authority (Civil Case E193 of 2020)
[2025] KEHC 2420 (KLR) (Commercial and Tax) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2420 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E193 OF 2020
F GIKONYO, J
MARCH 6, 2025**

BETWEEN

WILFAK ENGINEERING LIMITED PLAINTIFF

AND

KENYA PORTS AUTHORITY DEFENDANT

RULING

1. Before me is the Notice of Motion dated 10th January, 2025, seeking, among others the following orders:-
 - a. That pending inter-partes hearing of this suit the Honourable Court be pleased to issue an order of permanent injunction to restrain the Defendant from terminating the contract dated 9th September, 2022 in respect of the Award dated 11th October, 2019 arising from the Tender Ref: KPA/129/2018-2019/PDM- Removal of asbestos, re-roofing, demolitions, rain water harvesting, solar backup systems and associated works at the Port of Mombasa.
 - b. That the Honourable court be pleased to issue an order of mandatory injunction to compel the Defendant/Respondent to facilitate the amendment of the Consent Order dated 9th September, 2022 to permit variation of subject contract in accordance with the legal advice of the Hon. Attorney General contained in the letter dated 13th July, 2023.
 - c. That the Honourable Court be pleased to review the Consent Order dated 9th September, 2022 to permit variation of the contract based on the current prevailing market prices.
 - d. That the Honourable Court be pleased to give the Plaintiff/ Applicant leave to amend the Plaint dated 5th June, 2020.



2. The application is supported by affidavits sworn by the plaintiff's director Sammy Maina Kamau on 10th January 2025 and 11th February 2025. The plaintiff also filed primary and supplementary written submissions dated 31st January 2025 and 11th February 2025, respectively.
3. The plaintiff's case is that on 9th September, 2022, the court adopted as order of court the parties consent dated 8th September, 2022, on, inter-alia, the following terms:-
 1. That the award dated 11th October arising from the Tender Ref JPA/129/2018- 19/PDM- Removal of Asbestos Re-roofing, Demolitions, Rain water Harvesting, back-up system and Associated works at the port of Mombasa and accepted by the plaintiff vide a letter dated 10th October 2019 be progressed to contract signing stage.
 2. That the date of the new contract to be dated of the consent herein.
 3. That the contract sum shall to be as per the award.
 4. That the defendant /Employer will be remitting to the plaintiff contractor 10% of the sums being disbursed at any given time, (spread over three (3) financial years commencing 2022/23, 2023/24 and 2024/25) as advance payment upon the defendant/employer receiving and advance payment guarantee from a reputable insurance company, which remittances will eventually sum up to the contract sum. After every disbursement, any balance sum will be disbursed in phases spread over three (3) financial years commencing 2022/23, 2023/24 and 2024/25.
4. Subsequently, the plaintiff claimed that it was unable to execute the contract under the terms of the consent order due to the significantly increased costs of materials and labour stemming from the lapse of time, which rendered the contract unfeasible. The plaintiff communicated its grievances and concerns to the defendant concerning the execution of the contract on the terms of the award dated 11th October 2019. Through a letter dated 31st May 2022, the defendant sought legal advice from the Attorney General (AG) on the way forward.
5. In a letter dated 13th July, 2023, the AG advised the defendant that the consent could be reviewed as proposed by the plaintiff by amending the main contract to incorporate the variations on material and labour prices.
6. Thereafter, the plaintiff filed an application dated 15th August, 2024 seeking to set aside the consent of 9th September, 2022. Through a Ruling dated 13th December, 2024, the court dismissed the application because the AG's consent could not be a basis for setting aside the consent order but for review of the same under Order 45 of the Civil Procedure Rules.

Grounds

7. The plaintiff is apprehensive that since the subject contract is set to lapse in September, 2025, and there has been a stoppage of work, the defendant might terminate the contract occasioning substantial and/ or irreparable loss. It contended that given the nature of the subject contract, it is in the public interest that the AG's advisory opinion be complied with for it to execute the works in the shortest period practicable. It also contended that since it cannot be possible for any other contractor to complete the subject works at a cost lower than the plaintiff requires to complete the same, public interest will be best served through amendment of the consent order. In support, it relied on Article 227 of *the Constitution* which requires that procurement laws should be fair.



8. The plaintiff submitted that there are compelling reasons and justification for the review of the terms of contract contained in the Consent Order dated 9th September, 2022. It relied on Section 80 of the Civil Procedure Act as read with Order 45 Rule 1 of the Civil Procedure Rules.
9. The plaintiff also submitted that it has established sufficient reasons to warrant the court to exercise its unfettered discretion to review the subject consent order. It relied on *Wangechi Kimitu v Wakibiru Mutahi* [1985] eKLR and *The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & others*.
10. The plaintiff further relied on *Eldo City Ltd v Corn Products Kenya Ltd & Another* [2013] eKLR where Mabeya J. held that it would not be commercially prudent for a party to opt out of contract when all terms had been agreed and settled.
11. The plaintiff argued that it is entitled to the injunctive reliefs as its inability to execute the contract is not due to any negligence, mala fides or delay of the Applicant, but entirely due to the market forces in pricing of goods and services. It also argued that it is highly probable that the defendant will be terminating this contract since the subject contract is set to lapse in September, 2025 and there have been stoppage of work whose completion thereof cannot be achieved in the remaining period of time and without the review of the contract. It thus submitted that the impugned termination will occasion it substantial and/or irreparable loss based on the financial exposition and loss of goodwill thereof. It relied on *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR, *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR and *Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma* [2020] eKLR

Response

12. The defendant filed a replying affidavit sworn by its Manager Projects Development, Eng. G. Nyaga, on 23rd January 2025 and written submissions dated 4th February 2025.
13. It was deposed that the plaintiff has not met the threshold in law to warrant this court review the consent order; that the parties negotiated the terms before adoption of the consent as an order of the court; that the AG's opinion was issued in July 2023 after the consent was recorded and could not form part of the negotiations and consent; that the plaintiff has not performed its obligations under the contract awarded and cannot impute their failure to perform on the review of the terms of the consent as per the AG's opinion.
14. The defendant further deposed that the plaintiff was aware of the terms agreed before the consent, which it willingly agreed to and that reliance on the AG's opinion will lead to a loss of funds, exacerbating its suffering due to the plaintiff's failure to remove the asbestos as agreed.
15. The defendant relied on *Flora N. Wasike v Destimo Wamboko* (1982-88) I KAR 625 to the effect that a consent order can only be set aside on grounds which would justify setting a contract aside or if certain conditions remain to be fulfilled, which are not carried out. It also relied on *Paul Kiplangat Keter v John Koech* [2021] eKLR, *Brooke Bond Liebig v. Mallya* 1975 E.A. 266, *Hirani v Kassam* (1952), 19 EACA 131, *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* (1982) KLR P. 485.
16. The defendant submitted that should the court allow the current application before it and review consent order it will be tantamount to rewriting the contract between the parties as the plaintiff's application seeks to review the value of the contract which can only be done by consent of the parties.



Reply

17. In its reply, the plaintiff asserted that after the consent order, it embarked on the contracted works and reached 40% but the costs of building materials and labour escalated necessitating a review of the terms of the contract; that the defendant sought and obtained the advice of the AG on the legality of the proposed changes to the consent order and that however, the defendant has not justified its inaction as regards the proposal to vary the terms of the contract.

Analysis and Determination

18. From the outset, I do note that the application is essentially made under Order 45 of the Civil Procedure Rules seeking review of the consent adopted as an order of the court on 9th September, 2022. However, I also do note that the application seeks amendment of the plaint and injunctive reliefs against the defendant. Nevertheless, Review is the foundational relief.
19. Thus, there are three issues for determination: -
1. Whether review of the consent of 9th September 2022 is merited.
 2. Whether the plaintiff deserves the grant of injunctive reliefs sought; temporary and mandatory injunction.
 3. Whether the plaintiff should be granted leave to amend the plaint.

Review of consent

20. The remedy of review of court decisions is provided under Section 80 of the *Civil Procedure Act*. The discretion remedy is guided by reasons or grounds set out in Order 45 Rule 1 of the Civil Procedure Rules.
21. The plaintiff appears to base its application for review on sufficient reason; the AG's report of 13th July 2023 which advised the defendant to vary the terms of the consent, and the court's ruling of 13th December 2024, where the court observed that: -
- “13. While the advisory by the Attorney General may have been important, the same came after the recording of the consent. It could not be a basis for setting aside but for review under Order 45 of the *Civil Procedure Act*. The application before court was not under that provision and the Court could not therefore consider it on that basis. In any event, it was not shown that the advisory fits the grounds or circumstances of setting aside a consent order as stated in the case law set out above.”[Underlining mine]
22. The plaintiff relied on *Wangechi Kimitu v Wakibiru Mutahi* [1985] eKLR where the Court of Appeal held that: - “any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to court...”
23. The plaintiff also relied on *The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & others* on the application of a liberal construction to ‘sufficient cause’ to advance substantial justice when no negligence, or inaction or want of bona fides is imputed.
24. On its part, the defendant argued that the AG's opinion was issued on 13th July 2023 after the consent was recorded and could not form part of the negotiations and consent. It also argued that granting this



application is tantamount to re-writing the contract for the parties. To them, the plaintiff has not met the threshold for review or setting aside the consent as set out in *Flora N. Wasike v Destimo Wamboko* (1982-88) I KAR 625.

25. I have considered the arguments presented.
26. Para. 13 of the court's ruling of 13th December 2024 cited above, especially the part which stated that the advisory opinion could be a basis for review was merely obiter; a judge's statement said in passing, but does not affect the judgement or found a cause of action. *Black's Law Dictionary*, 2nd Edition.
27. In essence, the said statement was neither an order of the court nor a binding direction.
28. Be that as it may, the subject of the ruling of 13th December 2024 was the plaintiff's earlier application dated 15th August 2024 seeking review, varying or setting aside of the consent orders of 9th September 2022. The plaintiff had also relied on the AG's report of 13th July 2023. The court found that "it was not shown that the advisory fits in the grounds or circumstances of setting aside a consent order..."
29. The foregoing notwithstanding, a court cannot re-write a contract for the parties. A review of the consent order herein is an invitation for the court to re-writing the contract for the parties. Thus, there is no sufficient cause to review the consent.

Injunctive reliefs: Mandatory and temporary

30. Are the injunctive reliefs feasible?

Temporary injunction

31. The plaintiff has sought a temporary injunction to restrain the defendant from terminating the contract dated 9th September 2022. The applicant ought to establish a prima facie case with a probability of success, that the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages and that the balance of convenience tilts in its favour. *Giella v Cassman Brown & Co Ltd*, (1973) EA 385
32. The plaintiff anticipates a breach on its part, and a cancellation of the contract in September, 2025. In addition, Review of the consent herein has been refused. In these circumstances, the plaintiff has not established a prima facie case with a probability of success. With this finding, it may be difficult to show he will suffer irreparable damage incapable of remedy by damages. Similarly, convenience would fall on refusing the remedy.

Mandatory injunction

33. The plaintiff has also sought a mandatory injunction to compel the defendant to facilitate the amendment of the consent order dated 9th September, 2022 to permit variation of subject contract as per the legal advice of the Hon. Attorney General contained in the letter dated 13th July, 2023.
34. In *Kenya Breweries Limited & another v Washington O. Okeyo* [2002] KECA 284 (KLR) the Court of Appeal observed that: -

"The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edn. para 948 which reads:

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or



if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application”

....

“It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party.”

35. The legal threshold for a mandatory injunction is that there should be a clear case with special circumstances prompting for immediate resolution. The applicant should also not be in breach of the contract it is seeking the other party to uphold or perform.
36. In this case, the plaintiff admits that it has not fully performed its obligations under the contract awarded even after a consent which was recorded in court, but, attributing the non-performance to the escalation of the costs of building materials and labour and failure by the defendant to vary the consent of 9th September 2022 following the AG’s report of 13th July 2023.
37. The Mandatory injunction sought is to compel variation of contract whose effect is rewriting the contract for the parties. The court has declined review of the consent for because such review is tantamount to re-writing the contract for the parties. It cannot be, in such scenario that this is a clear case of which a mandatory injunction should issue.
38. Therefore, I am not persuaded that the plaintiff has satisfied the conditions for the grant of the injunctive reliefs sought.

Amendment

39. The last issue is leave amend the plaint. The prayer was not opposed by the defendant. In *George Gikubu Mbutia v Consolidated Bank of Kenya (Civil Appeal No. 72 of 2014) [2016] eKLR* the Court of Appeal pronounced that: -

“... the court has unfettered discretion to allow amendment of pleadings, which discretion must be exercised judiciously. It accepted too as a general proposition that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that courts should liberally allow such amendments. However, he also noted situations when the court will refuse to exercise its discretion to allow amendments. Such cases include where a new or inconsistent cause of action is introduced; where vested interests or accrued legal rights will be adversely affected; where prejudice or injustice which cannot be properly compensated in costs is occasioned to the other party; and where the applicant is guilty of inordinate delay. The court cited a number of authorities as the foundation of those principles, among them *Motokov v. Auto Garage Ltd & Others [1971] EA 353*; *Barclays Bank DCO v. Shamsudin [1973] EA 451* and *Central Kenya Ltd v. Trust Bank Ltd & 5 Others, CA. No. 222 of 1998*.

40. I have read the draft amended plaint. It has not been shown any prejudice the defendant will suffer by the amendments as it will have an opportunity to respond to the amendments through an amended defence, and join issues.

Disposition

41. In conclusion, the plaintiff’s application 10th January, 2025 partially succeeds to the extent that: -



1. Leave is granted to the plaintiff to amend its plaint.
2. The draft amended plaint annexed to the application be properly filed and paid for, and be served upon the defendant within 14 days of this ruling
3. All other prayers are declined.
4. No order as to costs.

DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 6TH DAY OF MARCH, 2025

F. GIKONYO M

JUDGE

In the presence of: -

Ms. Taank for defendant

Mwathe for Kibe for Plaintiff

CA Kinyua

