



**Terracraft (K) Ltd v County Government of Tharaka Nithi (Civil Suit E216 of 2025)
[2025] KEHC 6842 (KLR) (Commercial and Tax) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6842 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E216 OF 2025**

F GIKONYO, J

MAY 8, 2025

**IN THE MATTER OF THE PROPOSED CONSTRUCTION OF
THARAKA NITHI COUNTY HEADQUARTERS AT KATHWANA**

AND

IN THE MATTER OF INTERIM MEASURES OF PROTECTION

BETWEEN

TERRACRAFT (K) LTD APPLICANT

AND

COUNTY GOVERNMENT OF THARAKA NITHI RESPONDENT

RULING

Interim Measure of Protection

1. Is the plaintiff entitled to interim measure of protection pending the hearing and determination of its motion dated 20th March 2025?
2. Prayers 2 to 7 of the said motion seek temporary injunctive reliefs pending inter partes hearing of the motion, to restrain the respondent from: -
 1. concluding the tendering process of Tender No. TNGC/25/2024-2025 for the completion of Tharaka Nithi County Headquarters, awarding the tender to a different contractor and signing a contract with a different contractor.
 2. ejecting or in any other manner removing the Applicant from the construction site of Tharaka Nithi County Headquarters and/or appointing another contractor to proceed with construction works.



3. During the mention of the matter on 25th March 2025, Mr. Mwendani for the respondent stated that the prayers sought have been overtaken by events since the contract was signed and the project handover done the previous day. He submitted that interim orders are not a right; that the applicant seeks to tie down the hands of the county; and that if the applicant's claim was successful, it could be compensated by damages.
4. Mwachoti for the applicant urged the court to grant interim orders which are merited. Intimated that the applicant learnt of the tender on 20th March 2025; that its contract is not terminated but the matter is under arbitration and that the gravamen is that payments are to be made under certificates. It was submitted that the interim orders sought are to facilitate the arbitration.
5. Has the applicant made a case for the grant of the interim measures of protection sought?
6. Section 7 of the Arbitration Act provides that: -

“7

- (1) It is not incompatible with an arbitration agreement for a party, to request from the High Court, before or during arbitral proceedings, an interim measure of protection for the high court to grant that measure.
- (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to this application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.”

7. It is not disputed that the dispute between the parties is under arbitration. Relevant consideration in such application include; whether the subject matter of the arbitration is under threat; the appropriate measure of protection in the special circumstances and the appropriate period for the interim measures of protection to avoid encroaching on the tribunal's decision-making power as intended by the parties. Safaricom Limited v Ocean View Beach Hotel Limited, Salim Sultan Moloo & Alsai (K) Limited (Civil Application 327 of 2009) [2010] KECA 346 (KLR)
8. In Isolux Ingeniera, S. A v Kenya Electricity Transmission Company Limited & 5 others [2017] KEHC 1472 (KLR), the late Onguto J elaborated that: -
 - “91. In considering the merits of the application for an interim measure of protection, the court must however be careful not to encroach on the substantive decision-making power of the arbitrators (appointed or to be appointed) by venturing into the merits of the dispute. The unfortunate reality, however, is that the encroachment may not be avoided where the court is urged to maintain a particular state of affairs.”
9. The dispute in this matter relates to the termination of a contract dated 18th May 2015 for the construction of Tharaka Nithi County Headquarters at Kathwaana via Tender No. TNC/01/BDG/2014-2015.
10. The applicant averred that an earlier dispute ensued from the purported un-procedural termination by the respondent through a letter dated 15th February 2019. After several mediation sessions, the parties



agreed to rescind the termination of the contract through a consent agreement dated 13th December 2019.

11. According to the applicant, the parties also agreed on: -
 - a. a 52-week completion period after the date of resumption. The applicant would furnish the respondent with a completion program before resumption.
 - b. a completion cost of Kshs. 458,239,186.45 which included the costs of works already executed and paid for and the completion costs for Builder's works, procured electrical works, procured mechanical works, procured air conditioning works attendant claims of interest on delayed payments and fluctuations.
12. The applicant further averred that despite commencing and executing the works in full compliance with the terms and conditions of the contract, the respondent consistently failed to fulfil its obligations. The particulars of breach are that the respondent failed to give it full access to the full site; failed to pay interim certificates when they fell due; paid less than the certified amounts on various payment certificates; failed to make payments on time despite applications being done within the conditions of contract and the matter raised through several correspondences which were never addressed or responded to; failed to hold project management meetings and failed to pay the interest due on the unpaid amount for the period of default as required. As a result, the applicant invoked the Dispute Resolution Clause in the contract and commenced arbitral proceeding before Hon. Sen. Sylvia Kasanga.
13. The applicant's core contention is that the respondent wants to irregularly, illegally and un-contractually award the contract on the proposed construction of Tharaka Nithi County Headquarters at Kathwana to a different party while the current contract subsists and is yet to be terminated. The applicant indicated that it is reasonably apprehensive that the entire substratum of the dispute can be lost beyond recall, if the orders sought herein do not issue ex parte, at least in the interim. Substantial sums of money may be lost beyond recovery.
14. The interim measures sought by the applicant are to restrain the respondent from concluding the tendering process of Tender No. TNGC/25/2024-2025 for the completion of Tharaka Nithi County Headquarters ejecting or in any other manner removing the applicant from the construction site of Tharaka Nithi County Headquarters and/or appointing another contractor to proceed with construction works.
15. The subject matter for the arbitration is the contract and its termination. Courts have been reluctant to issue interim measures of protection regarding the termination of a contract because of the notion that a contract is not capable of being preserved under Section 7. *Associated Construction Company (K) Limited v Ministry of Transport, Infrastructure Housing Urban Development Public Works & another* [2021] KEHC 12765 (KLR) In addition, some courts have opined that the suspension of a suspension of a contract may encroach on the substantive decision-making power of the arbitrators. *Channel Tunnel Group Ltd v Balfour Beauty Construction Ltd* [1993] A C 334 cited in *Isolux Ingeniera, S. A v Kenya Electricity Transmission Company Limited & 5 others* [supra].
16. The applicant urged the court to grant interim orders, on the ground that its contract was not terminated and that payments are to be made under certificates.
17. As earlier indicated, during the mention, the respondent's counsel indicated that the contract was signed and the project handover done on 24th March 2025. According to the respondent's legal counsel, the interim measures sought by the applicant have already been overtaken by events.



18. The applicant indicated that it was not aware of the new contract until 20th March 2025. It also stated that, the applicant was not involved in or aware of the project handover.
19. However, it is clear that a segment of the subject matter of the arbitration, being the value of the works on the site thus far, may be under threat. And, there is no proof that the project was handed over. In any case, there was not to be any commencement of works in light of the interim orders issued on 25.3.25.

So offensive, so loathed

20. At this juncture, the court is constrained to state in passing that, some rogue public officers deliberately frustrate a public contract in order to be bribed or to award another tender to a new tenderpreneur who will be willing to pay a hefty bribe. The conduct is most offensive and expensive as it is a reapp- of the public resources and erodes national values and principles of governance enshrined in article 10 and chapter six of the *Constitution*. I hope this is not the case here. The greater urge is for that such public officers should be charged in court and also personally surcharged for the loss arising from their criminal conduct.

Conclusion

21. Accordingly, in the interests of justice, I order that:-
 1. The applicant shall conduct a valuation of its works done at the construction site so far. The respondent shall permit entry and facilitate the applicant to conduct the valuation of its works done at the construction site so far.
 2. The parties to agree on a suitable timeframe and terms for attainment of (1) above, but, in any event such time shall not exceed 45 days from today.
 3. In the meantime, stay of execution of the signed contract remain in force and no works shall commence in the project until (1) above is done.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 8TH DAY OF MAY, 2025.

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F. GIKONYO M

JUDGE

In the presence of: -

Mwachoti for the applicant

Frackline for the respondent

Kinyua C/A

