



Transnational Computer Technology (Kenya) Limited v ADK Technologies Limited (Civil Suit E811 of 2021) [2024] KEHC 1479 (KLR) (Commercial and Tax) (12 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E811 OF 2021
JWW MONG'ARE, J
FEBRUARY 12, 2024**

BETWEEN

**TRANSNATIONAL COMPUTER TECHNOLOGY (KENYA)
LIMITED PLAINTIFF**

AND

ADK TECHNOLOGIES LIMITED DEFENDANT

RULING

1. By a plaint dated 20th September 2021 the Plaintiff filed the present suit against the Defendant seeking for judgment for breach of a consortium agreement dated 5th July 2020. The consortium agreement was for purposes of collaborating and responding to Lot 1 of the Tender for Provision of Onsite Support for IFMIS Applications and Enhancement of IFMIS E-Procurement published by the National Treasury and Planning in July 2020.
2. On 25th January 2021 National Treasury and Planning Ministry, the procuring entity, issued a letter to the Defendant notifying the consortium that its bid was unsuccessful and that the bid by Kingsway Business Systems Limited was successful. The Plaintiff claims that without involving it, by a letter dated 5th February 2021, the Defendant accepted the National Treasury's decision and requested return of the original bid bond submitted as part of its bid.
3. The Plaintiff filed an application for review challenging the decision before the Public Procurement Administrative Review Board in PPARB Application No. 18 of 2021: ADK Technologies Limited in Consortium with Transnational Computer Technology Limited v The Principal Secretary, The National Treasury and Planning & 2 others. However, the Defendant filed a Notice of Withdrawal and a Replying Affidavit sworn on 8th February 2021 in opposition to the Plaintiff's request for review. Consequently, the Review Board, through its decision dated 1st March 2021, determined that the



Plaintiff's Request for Review was not properly filed and was fatally defective having been filed without the Defendant's authorization.

4. Dissatisfied, the Plaintiff filed Judicial Review No. E027 of 2021; ADK Technologies Limited in consortium with Transnational Computer Technology Limited vs The Public Procurement Administrative Review Board & 4 others. The Defendant applied to be enjoined as an interested party and took the same position. Through the judgment dated 9th April 2021, the Court dismissed the Plaintiff's case with costs upon finding that the suit was bad in law and an abuse of the process of the court for lack of authorization by the Defendant to file the suit in its name or plead or swear affidavits on its behalf.
5. The Defendant filed a Preliminary Objection (PO) dated 9th February 2023 against the Plaintiff's suit, on the grounds that:-
 1. The Plaintiff is an unknown entity in law, not party to the consortium agreement with the Defendant as purported in the Plaint or at all and therefore lacks capacity and requisite locus standi to institute this suit.
 2. The matter is sub judice since there is Nairobi Court of Appeal Civil Application No. E078 of 2022 - ADK Technologies Limited In Consortium With Transnational Computer Technologies Limited And Public Procurement And Administrative Review Board & 4 Others which is pending ruling on certification as involving a matter of general public importance.
 3. In The Alternative to ground 2 above, the matter is res judicata the issues raised in the plaint having been decided against the Plaintiff in Review Application No. 18 Of 2021; ADK Technology Limited in Consortium With Transnational Computer Technology Limited Vs The Principal Secretary, The National Treasury And Planning And 2 OTHERS referred to in paragraph 15 of the Plaint) which was appealed to the High Court in Judicial Review No. E027 of 2021; ADK Technologies Limited In Consortium With Transnational Computer Technology Limited vs The Public Procurement Administrative Review Board & 4 Others referred to in paragraph 20 of the Plaint and further appealed to the Court of Appeal in E078 of 2022 ADK Technologies Limited In Consortium With Transnational Computer Technology Limited Vs The Public Procurement Administrative Review Board & 4 others, which the Plaintiff seeks to have the matter certified as that raising issues of general public importance.
 4. The subject matter of the suit arising out of procurement process under the Public Procurement and Assets Disposal Act which he has already pursued by way of Review Proceedings which decision is appealable to the High Court and if necessary to the Court of Appeal, the appellant having appealed to the Court of Appeal which is now seized of the matter. The Plaintiff cannot have the subject matter determined at the first instance through this suit.
6. The Preliminary Objection was disposed of by way of written submissions. The Defendant filed written submissions dated 28th September 2023 while the Plaintiff filed written submissions dated 31st July 2023.
7. The Defendant's position is that the consortium agreement died a natural death after the bidding by the consortium was unsuccessful. The High Court in Judicial Review No. e027 of 2021; Adk Technologies Limited In Consortium With Transnational Computer Technology Limited V The Public Procurement Administrative Review Board & 4 Others was preliminarily dismissed the



Plaintiff's appeal because the appeal was incompetent as two companies could not jointly sue in their names for reason that they were two separate and distinct legal entities.

8. The Plaintiff further appealed to the Court of Appeal in Civil Appeal No. E078 Of 2022 ADK Technologies Limited in Consortium With Transnational Computer Technology Limited Vs The Public Procurement Administrative Review Board & 4 others and the court dismissed the appeal on the premise that the appeal was time barred under Section 175(4) of the Public Procurement and Disposal Act, 2015. The Plaintiff herein intends to appeal the said Court of Appeal decision to the Supreme Court and the matter is pending certification as a matter of general public importance by the Court of Appeal.
9. The Defendant submitted that the Plaintiff lacked the locus standi to sue under the consortium agreement because it was not a party to the said agreement which is the backbone of this suit. The Defendant entered into the agreement with a foreign company called Transnational Computer Technologies Limited, a company registered in California, United States of America while the Plaintiff, Transnational Computer Technology (Kenya) Limited, is a locally registered company under the [*Companies Act*](#).
10. The sole purpose for which the consortium came to life was that Transnational Computer Technologies Limited lacked the capacity to tender on its own for the sole reason that it was a foreign company. The Defendant relied on the decision in the case of [*Hannab Maina T/a Taa Flower v Rift Valley Bottlers Limited \[2016\]*](#) ECLR where the Court of Appeal held that since the Appellant had contracted with Riva and not the Respondent, the Respondent could not be held liable for the debts if its subsidiary company, the two being separate and independent legal entities. The Plaintiff company was incorporated after the date of the consortium agreement. The Plaintiff lacks locus for instituting its case in the name of the Defendant and which was the reason for suits before the Review Board, High Court and Court of Appeal to be struck out or dismissed.
11. The Defendant submitted that the present suit is sub judice since there exists another intended appeal arising out of Civil Appeal No. E078 of 2022. To buttress this point, the Defendant urged the Court to be guided by the Supreme Court decision in *Sonko v County Assembly Of Nairobi & 11 Others* (petition 11 (E008) of 2022) [2022] Kesc 76 (klr) (5 December 2022) (reasons) where the Supreme Court found that the effect that "a suit over a subject matter is considered pending until the appeal is exhausted" on the issue of when a suit is said to be sub-judice.
12. The Plaintiff argued that the objections raised by the Defendant are not based on pure points of law but require factual interrogation. Nonetheless, relying on the copy of its certificate of incorporation and consortium agreement, the Plaintiff submitted that being a company incorporated in Kenya, it has the locus standi to sue. The Plaintiff also argued that the Defendant has not met the threshold to prove sub judice and res judicata.

Analysis and Determination

13. I have considered the pleadings and the rival submissions herein. To my mind, arising from the Preliminary Objection, the issues for determination by this court are as follows:-
 1. Whether the Plaintiff herein has locus standi to prosecute the instant case;
 2. Whether the instant suit is a subject of sub judice;
 3. Whether the instant suit is res judicata; and
 4. Whether this Court has jurisdiction to entertain the instant suit.



14. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, cited in the parties' submissions, the predecessor to the Court of Appeal observed as follows: -

“so far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.....

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of Preliminary Objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”

15. On the first ground, I note that the Plaintiff exhibited a copy of the Technical Proposal dated 22nd July 2020 which contains a copy of its Certificate of Incorporation showing that it is a company incorporated under the *Companies Act* (Cap 486) on 8th September 2015 and a copy of the Official Search (CR12) reflecting the company records as at 3rd December 2019. The Plaintiff also exhibited the consortium agreement dated 5th July 2020 which states that the Plaintiff is a company registered in Kenya. Consequently, I find that the contention that the Plaintiff has no locus to file this suit is without merit and therefore fails.
16. As regards the second and third grounds on sub judice and res judicata, the pertinent provisions lie under sections 6 and 7 of the *Civil Procedure Act* which read thus:-

“6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

[Act No. 10 of 1969, Sch.]

7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.



Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

17. The Court of Appeal in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)*, relied on by the both sides, set out the guidelines for res judicata as follows:-

“ Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:-

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

18. With the above in mind, I have perused the pleadings as against the decisions of the Public Procurement Administrative Review Board in PPARB Application No. 18 of 2021, the High Court in Judicial Review No. E027 of 2021 and the Court of Appeal in Civil Application No. E078 of 2022. I note that the factual background leading to this suit and the review application are similar.

19. However, in this suit, the Plaintiff’s claim as against the Defendant is for breach of the consortium agreement. In contrast, in the review application, the Defendant (in consortium with the Plaintiff) was the applicant while the Principal Secretary and the Accounting Officer of National Treasury and Planning were the 1st and 2nd Respondents. In addition, the matter concerned the review against the decision of the National Treasury and Planning with respect to tender No. TNT/049/2019-2020



for Provision of Onsite Support for IFMIS Applications, Enhancement of IFMIS E-Procurement and Independent Integrated Financial Management Information System for Semi-Autonomous Government Agency (SAGA). Irrespective, I am persuaded that the issues that the plaintiff seeks the court to determine in the present case were properly adjudicated in the case before the Public Procurement Administrative Review Board and the High Court and the Court of Appeal. The same are therefore res judicata.

20. As to sub-judice, I note that the Plaintiff filed a notice of appeal dated March 7, 2022, intending to appeal to the Supreme Court against the decision of the Court of Appeal in *The Consortium of TSK Electronica Y Electricidad S A & Ansaldoenergia Vs Pparb & 3 Others*, Civil Appeal No E012 of 2022 That its appeal was time barred under section 175 (4) of the *Public Procurement and Asset Disposal Act*. Through a ruling dated 6th October 2023 in *ADK Technologies Ltd In Consortium With Transnational Computer Technologies Ltd V Public Procurement Administrative Review Board & 4 Others* (Civil Application E078 of 2022) [2023] KECA 1182 (KLR) (6 October 2023) (Ruling), the Court of Appeal found that the Plaintiff had not met the threshold for the matter to be certified as of general public importance.
21. For these reasons, I am persuaded that the Defendant has satisfied the elements of both sub judice and res judicata. The issues that the Plaintiff seeks to have this court determine relate to public procurement which has been extensively litigated both at the Public Procurement Review Board, the High Court Judicial Review Division and the Court of Appeal. The Applicant has plans to move the matter to the Supreme Court on a second Appeal. I am therefore satisfied that the matter before this court is res judicata and sub judice as held in the *Sonko case* (supra) by the Supreme Court of Kenya. The challenge by the Defendant to the jurisdiction of this Court is found to be merited. Consequently, as held in the locus classica case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR where Nyarangi J held as follows:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

22. Having satisfied myself that the Preliminary Objection has merit, I find and hold that this court lacks the requisite jurisdiction to entertain the suit before it. In the words of Nyarangi J, this court will down its tools and take no further step. The application herein is therefore dismissed and the suit herein is struck out in its entirety with costs to the Defendants. The plaintiff is directed to pursue the matters pending before the Court of Appeal to their logical conclusion in the previous suits.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF FEBRUARY, 2024.

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Alubi holding brief for Mr. Kibungei for the Defendant/Applicant.
2. Mr. Kiprono for the Plaintiff/Respondent.



3. Amos - Court Assistant

