



**Meta Med Suppliers Limited & 3 others v Habaswein Sub-Couty
Hospital Project Management Committee & 3 others (Civil Suit
E001 of 2023) [2024] KEHC 2612 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2612 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL SUIT E001 OF 2023
JN ONYIEGO, J
MARCH 8, 2024**

BETWEEN

**META MED SUPPLIERS LIMITED 1ST PLAINTIFF
LIBANA CONSTRUCTION AND SUPPLIERS LIMITED 2ND PLAINTIFF
AL-QAYAR INVESTMENT LIMITED 3RD PLAINTIFF
SALWA MEDICAL SUPPLIERS COMPANY LIMITED 4TH PLAINTIFF**

AND

**HABASWEIN SUB-COUTY HOSPITAL PROJECT MANAGEMENT
COMMITTEE 1ST DEFENDANT
COUNTY PROJECT COORDINATOR – COUNTY INTEGRATED PROJECT
IMPLEMENTATION UNIT (CIPIU) KENYA DEVELOPMENT RESPONSE TO
DISPLACEMENT IMPACTS PROJECT 2ND DEFENDANT
COUNTY EXECUTIVE COMMITTEE MEMBER FOR HEALTH SERVICES,
WAJIR COUNTY 3RD DEFENDANT
NATIONAL PROJECT COORDINATOR, NATIONAL PROJECT
IMPLEMENTATION MANAGEMENT UNIT KENYA DEVELOPMENT
RESPONSE TO DISPLACEMENT IMPACTS PROJECT (KDRDIP) 4TH
DEFENDANT**

RULING

1. The plaintiffs/applicants filed an application and suit of even dates dated 11.10.2023 through the Firm of Duwane & Wethow Advocates seeking for orders that:



- i. Spent.
 - ii. Pending the hearing and determination of this application, this Honourable Court do issue an injunction suspending the re-advertisement dated 03.10.2023 and any other re-advertisement by the 1st defendant for the tenders previously awarded by the Habaswein Sub County Hospital Community Project Management Committee.
 - iii. Pending the hearing and determination of the main suit, this Honourable Court do issue an injunction suspending the re-advertisement dated 03.10.2023 and any other re-advertisement by the 1st defendant for the tenders previously awarded by the Habaswein Sub County Hospital Community Project Management Committee.
 - iv. Pending the hearing and determination of this application and the main suit, this Honourable Court do issue an order for the preservation of the total contractual sum of Kes.44,000,000/- held in the bank accounts of the 1st defendant.
 - v. Pending the hearing and determination of this application, this Honourable Court do issue a temporary injunction restraining the defendants from interfering with the implementation of the subject projects awarded to the applicants.
 - vi. Pending the hearing and determination of the main suit, this Honourable Court do issue a temporary injunction restraining the defendants from interfering with the implementation of the subject projects awarded to the applicants.
 - vii. Pending the hearing and determination of the application and main suit, this Honourable Court be pleased to issue an order restraining the defendants from interfering with the performance of the plaintiffs' contractual obligations.
 - viii. This Honourable Court be pleased to issue any other order it may deem fit to grant in the interest of justice.
 - ix. Costs be provided for.
2. The application was supported by the supporting affidavit of Yusuf Salat Adan sworn on 11.10.2023 wherein he deponed that the genesis of this suit arose in the year 2017 when the Government of Kenya entered into an agreement with International Development Association (IDA) for financing Kenya as a participating country to assist with projects in respect of Developing Response for a Displacement Impacts Projects. That the Government of Kenya signed the financing agreement with IDA and proceeded to sign an Intergovernmental Participation Project Agreement with the County Government of Wajir as a participating County in what is now known as Kenya Development Response to Displacement Impacts Projects, hereinafter KDRDIP.
 3. The objective of the project was to improve access to social basic services, expand economic opportunities and enhance environmental management for communities' refugees in the target areas of Kenya. That Habaswein Sub-County Referral Hospital, a level 4 government facility located in Wajir South Constituency is one of the beneficiaries of KDRDIP fund. That in the financial year 2021/2022, it received funding worth Kes. 44,000,000 for implementation of eight sub projects identified by the community.
 4. It was stated that on 02.09.2022, the 1st defendant advertised eight tenders and the Bill of Quantities and tender documents were distributed to prospective contractors. That in response, the plaintiffs submitted their respective bids which were subjected to competitive and transparent tendering process



- and won the bid for the proposed construction of the pediatric ward for Habaswein Sub-County Referral Hospital and subsequently awarded its L.P.O. /L.S.O.
5. That the supremacy battles between the 1st and 2nd defendants have led to a stalemate to date and as a result, the implementation of the project is yet to commence. As a result of the same, the contractors who won different sub projects in regards to improvement and expansion of Habaswein Sub County Referral Hospital, including the 1st and 2nd plaintiffs have continuously received verbal warnings not to commence the project from the 2nd defendant thus frustrating the plaintiffs who were ready and willing to commence work. It was further averred that the defendants had already began putting up structures relevant in fulfilling their responsibilities and obligations.
 6. It was deposed that without any colour or right, on 03.10.2023, the 1st defendant re-advertised the eight tenders that were already awarded to the plaintiffs despite the plaintiffs being in possession of written and duly executed agreements hence breach of contract.
 7. Upon being served, the respondents through the Hon. Attorney General filed a notice of preliminary objection dated 27.10.2023 on the grounds that:
 - i. This court lacks jurisdiction to adjudicate the issues raised in the plaint as provided under article 47(3)(a) of the constitution of Kenya and Section 9(2) & (3) of the Fair Administrative Actions Act by dint of:
 - a. Section 8 of the Public Procurement and Assets Disposal Act, 2015 establishes the Public Procurement Regulatory Authority with powers to investigate and act on complaints lodged against a public entity by tenderers, contractors or the general public.
 - b. Section 27 of the PPDA, 2015 which establishes the Public Procurement Administrative Review Board whose main mandate under section 28 is to hear and determine disputes relating to public procurement or as referred to by the Authority.
 - c. Section 4 of Public Procurement and Asset Disposal Act provides that the provisions of the act shall apply to all state organs and public entities with respect to procurement planning, procurement processing, inventory and asset management, disposal of assets and the contract management.
 - ii. The issues raised in the plaint are to be dealt by statutory bodies established under the Act of Public Procurement and Asset Disposal No. 33 of 2015 at the first instant, in furtherance of objectives of article 47(3) of the constitution of Kenya.
 - iii. The suit in its entirety is otherwise premature, incompetent, misconceived, misplaced and an abuse of the process of this Honourable Court.
 - iv. That from the foregoing, the application and suit herein should be dismissed with costs.
 8. The court directed that the notice of preliminary objection be canvassed by way of written submissions and that parties file and exchange the same.
 9. The respondent submitted on three issues as follows: whether the preliminary objection is sustainable in law; whether the plaintiffs had exhausted mechanism provided for under the community operational manual and whether the prayers sought herein can be granted.
 10. On the first issue, it is submitted that the suit is majorly based on the community operational manual which ought to be followed during the advertisement, procurement and tendering process all the way



leading up to the award of a contract. That the manual sets out a clear structure for implementation of KDRDIP project.

11. It was stated that the manual under chapter 11 provides for a mechanism that is supposed to be followed for any redress or in solving any dispute that arises in regards to the project. Additionally, that the plaintiffs did not consider the doctrine of constitutional avoidance and as a result did not exhaust the mechanism provided for under the Chapter 11 of Kenya Development Response to Displacement Impact Projects (KDRDIP). Further, reliance was placed on the case of *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* Petition 14A,14B & 14C of 2014 where the said constitutional doctrine was emphasized.
12. On whether the preliminary objection is sustainable in the law, the respondent submitted that the same is founded on the doctrine of exhaustion. That except in instances where the exceptions to the doctrine apply to a matter, the doctrine of exhaustion states that a party should exhaust all the avenues available to it before coming to court. It was averred that the doctrine exhaustion does not oust the jurisdiction of the court but only sounds a warning that there are other avenues to adjudicate the dispute.
13. That section 33 of the *Public Procurement and Assets Disposal Act*, 2015 which establishes the Public Procurement Regulatory Authority which under section 9 functions of the Authority are provided, the suit herein ought to have been presented before the Authority prior to it being filed before this court. To that end, the respondents relied on the case of *Speaker of National Assembly v Karume* [1992] KLR21 where the court held that: ‘where there is a clear procedure for redress of any particular grievance prescribed by the *constitution* or an Act of Parliament, the same should be strictly followed’.
14. That the prayers ought not to issue for the reason that the question of nepotism and favoritism is merely an accusation which the petitioner is supposed to prove with clarity. It was urged that the conservatory orders sought therefore are mainly meant to derail the execution of the project.
15. On the other hand, the plaintiffs submitted that this court is endowed with jurisdiction to determine the matter herein as their case revolves around compensation for alleged breach of contract. Reliance was placed on the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR where it was held that a court’s jurisdiction flows from either the *constitution* or legislation or both.
16. On whether the subject project is a subject under the jurisdiction of Public Procurement Administrative Review Board, it was urged that section 27 and 167 (1) of the *Public Procurement and Asset Disposal Act* 2015, only make provision on the jurisdiction of the Public Procurement Administrative Review Board. That therefore, this matter does not fall under the said provisions as the plaintiffs are not seeking for review of the procurement process nor any aspects listed in the said provisions. It was urged that the plaintiffs filed this suit to get reliefs against the respondents for interfering with the project and orders mandating the 1st respondent to commence the implementation of the project to enable them discharge their duties as contractors in the project who legally won their tenders.
17. That in the alternative, the plaintiffs seek remedy for breach of contract against the respondents as they have incurred financial and other related costs towards part performance of their various contracts. They relied on the cases of *Njroge Kironyo & 3 Others v Koronyo Njoroge* [1976] eKLR and *Jasbir Singh Rai & 3 Others v Tarcholan Singh Rai Estate & 4 Others* [2013] eKLR where it was held that section 3A of the *Civil Procedure Act* provides that nothing in the Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice. In the end, this court was urged to dismiss the notice of preliminary object as the same was not only misconceived but also was an abuse of court process.



Determination

18. I have considered the application herein and the written submissions by both parties. The only issue for determination is whether the notice of preliminary objection has merit.
19. In the case of *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated that:

“ A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”
20. It is trite that if a preliminary objection is allowed, the same may dispose of the entire suit without giving parties the opportunity to be heard. Therefore, this has to be done with caution given that the court has a duty to hear all parties and determine the case on merit. In addition, this court has also a duty to safeguard itself against abuse of its process.
21. It was argued that this court has no jurisdiction to entertain the matter herein as the plaintiffs did not exhaust the mechanism provided under section 8,9 and 33 of the Public *Procurement and Assets Disposal Act*, 2015 which establishes the Public Procurement Regulatory Authority, a body vested with authority to hear complaints touching on public procurement issues.
22. The plaintiffs on the other hand submitted that they filed the suit herein to get reliefs against the respondents from interfering with the project and orders mandating the 1st respondent to commence the implementation of the project to enable them discharge their duties as contractors in the project legally won.
23. Therefore, I will embark to determine whether indeed, there existed a mechanism under which such a dispute ought to be determined at first instance instead of being filed before this court.
24. The court’s attention has been drawn to the provisions of the *Public Procurement and Disposal Act*, 2015 and specifically, Section 8(1) which creates the Public Procurement Regulatory Authority; whose functions are created under section 9. Section 9 (1) (h), states that:

“ to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review.”
25. My understanding of the functions reproduced above in regards to the process of procurement demands that any dispute related to the same ought to be presented and addressed by the said organ. However, it is incumbent upon any party or person aggrieved by the award or tendering process to lodge a complaint to the authority or the review board under section 27 and 167 of the *PP and ADA* 2015.
26. In the same breadth, this court’s attention has been drawn to a community manual allegedly providing a clear structure for implementation of KDRDIP project. That the same under chapter 11 provides for a mechanism that is supposed to be followed in solving disputes regarding the project in question. Unfortunately, the court was not favoured with a copy of the same and therefore, it would become unnecessary for this court to rely on a piece of evidence that its existence remains unknown and or unavailable. In any event, whoever was dissatisfied with the process should have lodged the complaint.



27. Upon reading the pleadings before me, what I glean from the same is that the plaintiffs herein participated in the Habaswein Sub – County Project Management Committee Tender Evaluation and won their bids. They were subsequently awarded Local Purchase Orders and Local Service Orders. Further to that, the plaintiffs averred that they have not been in a position to continue with their work despite the fact that they had started the same due to the alleged frustrations by the 2nd respondent.
28. As a result of the above, the plaintiffs filed this suit against the respondents to stop interference with the project so that they can proceed with their work. The same is brought due to the fact that there already exists a contract between the plaintiffs and the 1st respondents. As such, the plaintiffs seek for an opportunity to make good the contract entered or, seek for compensation to recover the amounts of money already spent by them.
29. As already stated above, the plaintiffs are satisfied with the tendering process and subsequent award of the contract. They cannot be forced to complain to the regulatory authority or review board. All they are asking this court is to be given an opportunity to work or be paid in commensurate to the work they have already done.
30. Having read sections 8,9 and 27 of the PP & ADA I do not find them relevant or applicable in the circumstances. Those provisions only deal with complaints raised by parties or persons dissatisfied with the tendering process or award. In this case, the plaintiffs were satisfied with the whole process. Whoever was dissatisfied should have approached the public procurement regulatory authority under sections 8 and 9 or the review board under section 27 and 28 of the said Act. The respondents cannot force the plaintiffs to lodge a complaint when they are happy with the award and the general tendering process.
31. For avoidance of doubt, I wish to reproduce the three provisions heavily relied on by the A.G (objector).
Section 8 of the PP&ADA provides as follows;
The Public Procurement Regulatory Authority
- (1) There is established an authority to be known as the Public Procurement Regulatory Authority which shall be a body corporate with perpetual succession and a common seal and shall in its corporate name, be capable of—
 - (a) suing and being sued;
 - (b) acquiring, safeguarding, holding, charging and disposing of moveable and immoveable property; and
 - (c) doing or performing all such other things or acts for the proper discharge of its functions under this Act, which may be lawfully done by a body corporate.
 - (2) The Authority may for the purposes of ensuring access to its services in accordance with Article 6 of the constitution establish such offices in regional locations as it may deem necessary for its operations.
32. Section 9 further provides.
Functions of Authority
- (1) The functions of the Authority shall be to—



- (a) monitor, assess and review the public procurement and asset disposal system to ensure that they respect the national values and other provisions of the constitution, including Article 227 and make recommendations for improvements;
- (b) monitor the public procurement system and report on the overall functioning of it and present to the Cabinet Secretary and the county executive member for finance in each county, such other reports and recommendations for improvements;
- (c) enforce any standards developed under this Act;
- (d) monitor classified procurement information, including that of specific items of security organs and make recommendations to the Cabinet Secretary;
- (e) monitor the implementation of the preference and reservation schemes by procuring entities;
- (f) prepare, issue and publicise standard public procurement and asset disposal documents and formats to be used by public entities and other stakeholders;
- (g) provide advice and technical support upon request;
- (h) to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review;
- (i) research on the public procurement and asset disposal system and any developments arising from the same;
- (j) advise the Cabinet Secretary on the setting of standards including international public procurement and asset disposal standards;
- (k) develop and manage the State portal on procurement and asset disposal and ensure that it is available and easily accessible;
- (l) monitor and evaluate the preference and reservations provided for under this Act and provide quarterly public reports;
- (m) create a central repository or database that includes—
 - (i) complaints made on procuring entities;
 - (ii) a record of those prohibited from participating in tenders or those debarred;
 - (iii) market prices of goods, services and works;
 - (iv) benchmarked prices;
 - (v) State organs and public entities that are non-compliant with procurement laws;
 - (vi) statistics related to public procurement and asset disposal;
 - (vii) price comparisons for goods, services and works; and
 - (viii) any information related to procurement that may be necessary for the public;
- (n) inform, as applicable, the Cabinet Secretary, Parliament, the relevant County Executive member for finance, the relevant County Assembly or Auditor-General on issues of



non-compliance with procurement laws once the relevant State organ or public entity ignores the written directives of the Authority, including material breaches of the measures established under this Act;

- (o) generally report to Parliament and the relevant county assembly;
 - (p) develop a code of ethics to guide procuring entities and winning bidders when undertaking public procurement and disposal with State organs and public entities;
 - (q) in undertaking its functions, cooperate with state and non-state actors with a view to obtaining recommendations on how public procurement and disposal can be improved;
 - (r) ensure the procurement entities implement the preference and reservations and provide data to the Authority disaggregated to indicate the number of disadvantaged groups that have benefitted;
 - (ra) develop, promote and support the training and capacity development of persons involved in procurement and asset disposal;
 - (s) perform such other functions and duties as are provided for under this Act and any other relevant law.
- (2) If in the course of monitoring in accordance with section 9(1)(a), the Authority is of the opinion that civil or criminal proceedings ought to be preferred against a State Organ, public entity, state officer or public officer, the Authority shall refer the matter to the relevant authorities.

33. Section 27 also does provide;

Establishment of the Public Procurement Administrative Review Board

- (1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.
- (2) The Review Board shall ensure reasonable access to its services in all parts of the Republic, as far as it is appropriate to do so.

34. Section 28 further provides;

Functions and powers of the Review Board

- (1) The functions of the Review Board shall be—
 - (a) reviewing, hearing and determining tendering and asset disposal disputes; and
 - (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.
- (2) In performance of its functions under subsection (1)(a) of this section, the Review Board shall have powers to develop rules and procedures to be gazetted by the Cabinet Secretary.
- (3) The Authority shall provide secretariat and administrative services to the Review Board.

35. The upshot of the above finding is that this court has jurisdiction to entertain the matter as it raises issues of breach of contract. Parties shall have an opportunity to ventilate their case hence no prejudice



to be suffered by any of them. I have no reason to down my tools. Accordingly, it is my finding that the objection herein is misplaced hence dismissed.

36. Having considered the objection herein, I will now turn to the substantive application for grant of injunction pending the hearing and determination of the main suit.

37. The law regarding grant of interlocutory injunctions is found in Order 40 Rule 1 of the Civil Procedure Rules which provides as follows:

“Where in any suit it is proved by affidavit or otherwise:

- (a) That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree;
- (b) That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further order.”

38. The applicant herein has sought for orders of temporary injunction. The conditions for the grant of interim injunctions are well settled in the case of *Giella v Cassman Brown & Co. Ltd* [1973] E.A 358 where it was held that: -

“The conditions for the grant of an interlocutory injunction are well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

39. The plaintiffs/applicants have alleged that on 02.09.2022, the 1st defendant advertised eight tenders and the Bill of Quantities and tender documents were distributed to prospective contractors. The plaintiffs submitted their respective bids which were subjected to competitive and transparent tendering process and won the bid for the proposed construction of the pediatric ward for Habaswein Sub-County Referral Hospital and was awarded its L.P.O. /L.S.O. They went further to state that after commencing the work, they were stopped by the respondents for no apparent reason.

40. The court is at this stage required to satisfy itself that; there is a prima facie case established with probability of success; that the applicant is likely to suffer irreparable damage not capable of monetary compensation or that on a balance of convenience the scales of justice tilt in favour of the applicant or for any other sufficient cause. In the case of *Silvester Momanyi Marube v Guizar Ahmed Motari & Another* [2012] eKLR, Odunga J. held that: -

“In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the court cannot find conclusively who is to be believed or not, the court is not excluded from expressing a prima facie view of the matter and the court is



entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.”

41. It is trite that at this stage this Court is not required to determine the merits of the plaintiffs/applicants' claim over the said contract. All that the Court is required to determine is whether a prima facie case has been established. The plaintiffs/applicants have complained that the supremacy battles between the 1st and 2nd defendants have led to a stalemate to the implementation of the contract. As a result of the same, the contractors who won different sub projects in regards to improvement and expansion of Habaswein Sub County Referral Hospital, including the 1st and 2nd plaintiffs have continuously received verbal warnings not to commence the project from the 2nd defendant and this has frustrated them yet they were ready and willing to commence work. In that regard, it is my view that a prima facie case with a probability of success has been established.
42. In regard to whether injury caused would be irreparable, in the case of [Pius Kipchirchir Kogo v Frank Kimeli Tenai](#) [2018] eKLR the court stated as follows;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.
43. In the instant case, the plaintiffs/applicants are apprehensive that if orders are not issued against the respondents and noting that they had already commenced work and had put up structures relevant in fulfilling their responsibilities as contractors, they are likely to lose out and therefore suffer enormous financial loss out of suits by subcontractors for breach of contract.
44. Additionally, that the 1st defendant has since re-advertised the eight tenders that were already awarded to the plaintiffs despite the plaintiffs being in possession of written and duly executed agreements. It therefore follows that the plaintiffs/applicants stand to suffer irreparably should the orders herein not be issued. I say so for the reason that they stand to lose an opportunity to satisfy the contracts that they already won and commenced work towards the fulfilment of the same.
45. Does justice on a balance of convenience tilt in favour of the applicants. In the case of [Pius Kipchirchir Kogo v Frank Kimeli Tenai](#) [2018] eKLR (*supra*), the court defined the concept of balance of convenience as follows:

‘The meaning of balance of convenience tilts favor of the plaintiff’ is that if an injunction is not granted and the Suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff’s’ to show that the inconvenience caused to them be greater than that which may be caused to the defendant’s inconvenience be equal, it is the plaintiff who suffer.
46. It is clear that the projects belong to the 1st respondent. However, the plaintiffs/applicants having won the bid for the proposed construction of the pediatric ward for Habaswein Sub-County Referral Hospital and having been awarded L.P.O. /L.S.O. and have put up structures relevant in fulfilling their responsibilities as contractors, it cannot be denied that the balance of convenience tilts in their favour.
47. The upshot of the above is that the application is hereby allowed in terms of prayer one pending hearing and determination of the main suit.



DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF MARCH 2024.

J. N. ONYIEGO

JUDGE

