Strathmore Research & Consultancy Centre Limited v County Government of Kiambu (Miscellaneous Application E965 of 2023) [2024] KEHC 6943 (KLR) (Commercial and Tax) (7 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6943 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E965 OF 2023

FG MUGAMBI, J

JUNE 7, 2024

BETWEEN

STRATHMORE RESEARCH & CONSULTANCY CENTRE LIMITED ..... APPLICANT

AND

COUNTY GOVERNMENT OF KIAMBU ..... RESPONDENT

RULING

Background

1. The parties before this court entered into 2 Agreements on separate occasions. The Agreement of 7th November 2014 was for the provision of an electronic revenue collection solution and payment services for the respondent (herein Kiambu County) which was renewed for a further period of five years from 7th November 2016 (hereinafter the first Agreement).

2. The second Agreement was entered into on 4th November 2021 for the development and deployment of an integrated revenue management system for Kiambu County.

3. The applicant (hereinafter Strathmore) claims an amount of Kshs. 427,272,524.10 as at 11th October 2022, for goods supplied and services rendered pursuant to the 2 agreements. Strathmore contends that the amount remains due notwithstanding the fact that Kiambu County continues to use the systems provided by Strathmore.

4. Another aspect of the dispute arises from Kiambu County's decision to invite bids for a tender similar to the agreement with Strathmore, for the provision of an integrated revenue management system. According to Strathmore, this tender was advertised in breach of the second agreement between the parties.

5. These brief facts are the genesis of the applications currently before court:

The first application dated 2nd November 2023:

6. The application was filed by Strathmore under the provisions of Order 40 Rule 2 of the Civil Procedure Rules, Section 1A and 1B of the *Civil Procedure Act* and Section 7 of the *Arbitration Act*.

7. It seeks injunctive orders prohibiting Kiambu County from entering into a contract with the successful bidder pursuant to an Invitation to Tender Negotiation Number 1223215 issued on 30th March 2023. It further seeks to compel the County to deposit in court, the full contractual sum of Kshs. 427,272,524.10 owed to Strathmore in performance of the 1st and the 2nd Agreements to date.

8. Kiambu County responded to the application by raising a point of preliminary objection on the grounds that the application was res judicata as a similar application, HCCOMM MISC APP E338 OF 2023 had already been determined and dismissed by this Court (Prof. Sifuna, J).

The second application dated 16th November 2023:

9. The application was filed by Kiambu County under Section 6 of the *Civil Procedure Act* Cap 21, Sections 167, 170 and 174 of the *Public Procurement and Asset Disposal Act* No 33 of 2015, Section 6 of the *Arbitration Act* Cap 49, Regulations 203, 204, 221 and 222 of the Public Procurement and Asset Disposal Regulations 2020 and Order 26 of the Civil Procedure Rules. The application seeks to strike out the first application and further challenges the jurisdiction of this Honorable Court.

The third application dated 7th May 2024:

10. This application was filed by Kiambu County under Articles 26, 28, 40, 43 of *the Constitution*, Section 6 of the *Arbitration Act* Cap 49, and Orders 26 and 50 of the Civil Procedure Rules. The County seeks to have Strathmore injuncted from switching off, discontinuing or in any other way interfering with the electronic revenue collection and payment services. In the alternative the County wants Strathmore compelled to switch on or restore the system pending the hearing and determination of the dispute.

11. The applications present a number of legal issues which I shall deal with progressively. Since the preliminary objection and the application of 16th November 2023 both raise issues that go to the root of this court's jurisdiction, it will be imperative to begin by determining the two issues.

Issue I: Whether the application dated 2nd November 2023 is res judicata:

12. Kiambu County has asked this court to strike out the said application for being res judicata, a position that is vehemently denied by Strathmore.

13. Section 7 of the *Civil Procedure Act* exemplifies the doctrine and provides as follows:

> " 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."

14. These elements of res judicata have been a subject of wide judicial interrogation. For instance, in the decision of the Independent Electoral and Boundaries Commission V Maina Kiai & 5 Others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR the Court of Appeal stated as follows:

> " ...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:
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> i. The suit or issue was directly and substantially in issue in the former suit.
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> ii. That former suit was between the same parties or parties under whom they or any of them claim.
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> iii. Those parties were litigating under the same title.
>
> iv. The issue was heard and finally determined in the former suit.
>
> v. 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."

15. While I may not have had sight of the ruling delivered by this court in HCCOMM MISC APP E338 OF 2023, I do however note that the parties equally admit in their respective affidavits that the application for injunctive relief was not determined on merit. It is not in dispute that the same was dismissed for failure by Strathmore to file their submissions on time. For that reason, it is my finding that the 1st application is not res judicata having not been heard and finally determined.

Issue 2: Whether this dispute should be referred to arbitration:

16. The County raises the issue that this court lacks jurisdiction to entertain the claim as the dispute ought to be resolved in arbitration. Worthy of note is that both parties have in their separate applications referred to the *Arbitration Act* and particularly sections 6 and 7 thereof. Indeed, this Court has emphasized time and again that where there is a clear intention by parties to have their dispute settled by arbitration, the options of intervention available before this Court are very limited.

17. I note that clauses 24 in the 1st Agreement and 21 in the 2nd Agreement have elaborate dispute resolution processes including arbitration. This fact is not denied. Be that as it may, parties have not followed the procedures laid out in these clauses whether deliberately or otherwise.

18. I align myself with the sentiments expressed in Blue Limited V Jaribu Credit Traders Limited, HCCS No. 157 of 2008 where Kimaru, J (as he then was) stated inter alia as follows:

> " It is now settled law that where parties have agreed to resolve any issue arising out of a commercial agreement, the courts are obliged to give effect to the said agreement of the parties by staying proceedings and referring the dispute for resolution by arbitration."

19. The jurisprudence on the mandatory requirements of section 6 of the *Arbitration Act* and the process for referral of a matter to arbitration is now well crystalized. In Adrec Limited V Nation Media Group Limited, [2017] eKLR the court further stated that:

> " Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration" (emphasis mine)

20. In balancing between the autonomy of parties vis-à-vis the mandatory requirement under section 6, the court is bound to ensure that parties demonstrate their choice of arbitration by filing an application for referral to arbitration at the earliest instance being "not later than the time when that party enters appearance or otherwise acknowledges the claim".

21. This requirement is designed to prevent parties from engaging in court proceedings while simultaneously claiming the right to arbitrate. It ensures that the intent to arbitrate is clear and unambiguous from the outset. None of the parties in these proceedings has made an application as required under section 6. Instead, they have chosen to engage in court proceedings. This action is interpreted by this court as a submission to its jurisdiction and waiver of the right to arbitration. As such, this point of argument falls apart.

Issue 3: Whether Strathmore is in breach of the doctrine of exhaustion by having failed to refer part of the dispute to the Public Procurement and Asset Disposal Review Board:

22. Kiambu County argues that Strathmore is in breach of the doctrine of exhaustion by referring the dispute relating to the advertisement of Tender Negotiation Number 1223215 issued on 30th March 2023 to this court. They argue that the same ought to have been heard following the administrative procedures established by law before approaching this Honorable Court.

23. The doctrine of exhaustion is now of esteemed juridical lineage in Kenya. In Geoffrey Muthiga Kabiru & 2 Others V Samuel Munga Henry & 1756 Others, [2015] eKLR the Court of Appeal had this to say on this doctrine:

> " It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

24. Turning to the present circumstances, I agree with the County that section 167(1) of the *Public Procurement and Asset Disposal Act* (hereinafter the PPAD) provides a mechanism for review of disputes arising out of the process of public procurement.

25. Section 167(1) is clear on these instructions as follows:

> " Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."

26. I further agree with the County that this aspect falls squarely within the jurisdiction of the Review Board as established under the PPADA. The County has however raised the issue of timelines which Strathmore failed to meet and which therefore possibly locks Strathmore out of the administrative process under that Act. The jurisprudence on the subject is clear that this Court lacks jurisdiction in a matter where a party fails to exhaust administrative processes laid out by law.

Issue 4: Whether Strathmore is entitled to the order for deposit of security against Kiambu County:

27. Strathmore prays that this court compels the County to deposit the amount of Kshs. 427,272,524.10 pending the hearing and determination of this application and the pending suit, to which the County objects.

28. In Kuria Kanyoko T/A Amigos Bar and Restaurant V Francis Kinuthia Nderu, Helen Njeru Nderu & Andrew Kinuthia Nderu (1988) 2KAR 126, at p.127 the court pronounced the position with respect to security before judgment thus:

> " The power to attach before Judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Ord.38, r.5, namely that the defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him."

29. I also align myself with the findings of the court in Shiva Enterprises Limited V Jivaykumar Tulsidas Patel T/A Hytech Investment, (2006) eKLR, where the following was stated:

> " That a party would need to meet that high standard of proof before a party is ordered to supply security for the amount claimed. The jurisdiction that the plaintiff invoked has to be appropriately exercised to ensure that a party meets the aforestated high standards. It ought to always be remembered that the purpose of that jurisdiction is to secure the plaintiff against the defendant's act aimed at defeating judgment that may be entered. It is however not the intention of that jurisdiction to harass or to punish the defendant before judgment is entered against him."

30. It is clear that the purpose of the procedure for deposit of security before judgment is to secure a plaintiff against any attempt on the part of a defendant to defeat the execution of any decree that may be passed or to delay the proceedings in the plaintiff's case. The court is forewarned that having not had the opportunity to try a case, there is need to carefully examine the circumstances so as not to hamper the equal protection to the law that both parties are entitled to. The application must not rest on an apprehension that has no practical or evidentiary basis.

31. Having considered the circumstances before me, I am inclined to agree with the County that, as a government office, it has no possibility of moving its assets out of the jurisdiction. The county offices have a permanent address and are funded by the exchequer, making them capable of satisfying any decree of this court. For these reasons, I am convinced that Strathmore has not made out a case for this prayer and as such I decline to grant the request for the deposit of security.

Issue 5: Whether Strathmore is entitled to the injunctive reliefs against Kiambu County:

32. The conditions for granting interlocutory injunctions are set out in Order 40 rule (1) (a) and (b) of the Civil Procedure Rules 2010. These conditions have been interpreted and given effect through numerous judicial pronouncements. Amongst the most celebrated of these is the case of Giella V Cassman Brown & Co Ltd, (1973) EA 385.

33. Following the 3-prong test established, this court is required to consider first whether Strathmore has established that it has a prima facie claim against the County. Strathmore's claim is with respect to Kshs. 427,272,524.10 for work carried out and not paid for by the County. I have not come across any specific denial by the County of the allegations by Strathmore in terms of the work that has been done. In fact, this point is not controverted at all.

34. The County only alleges that the amounts due and owing are disputed and need to be determined. The county has not laid out any evidence to prove how much of this amount has been paid by them. The only amounts conceded is the amount of Kshs. 21,553,885/= by Strathmore as a payment made under the 1st Agreement. The County does not state how much of the balance it concedes as outstanding and why that portion of the money has not been paid to date.

35. Strathmore further seeks to injunct the County against awarding a tender to any other party while the 2nd Agreement still remains unpaid for. It is not in dispute that the County advertised for the award of tender. The County on its part submits that the tender advertised is not of a similar scope as the tender awarded to Strathmore.

36. I have seen the advertisement of 30th March 2023. It relates to a tender for the supply, delivery, installation, testing, training, commissioning and support services of an Enterprise Resource Planning System for the county. The 2nd Agreement between the parties relates to the development and deployment of an integrated revenue management system for Kiambu County.

37. On the face of it, the system under development whose tender has been floated, is intended to integrate various core business processes and modules of the County. As such, it is not possible to rule out the complete existence of any similarity or interphases with the work already done in the 2nd Agreement by Strathmore. That explains Strathmore's apprehension.

38. Strathmore's case is that it stands to suffer loses by way of revenue, expenses related to maintenance, losses and costs related to the supply of the goods in the project if the County awards the tender to another party.

39. For these reasons I am convinced that Strathmore has made a case for the grant of injunctive orders sought against Kiambu County. Despite the earlier observations on the tender advertised by Kiambu County, this court takes the view that the injunction ought to be allowed for purposes of preserving the status quo and substratum of the dispute, pending the determination of this suit.

Issue 6: Whether Kiambu County is entitled to the mandatory injunction sought against Strathmore:

40. The County wants Strathmore injuncted from switching off, or interfering with the electronic revenue collection and payment services and in the alternative, compelled to switch on or restore the system. It was confirmed at the hearing of the applications by Strathmore that the systems have in fact been switched off. That part of the prayers is therefore overtaken by events. What is before court for consideration is the alternative prayer, in the way of a mandatory injunction.

41. The Court of Appeal in the Case of Malier Unissa Karim V Edward Oluoch Odumbe, [2015] eKLR stated as follows with respect to mandatory injunctions:

> " The test for granting a mandatory injunction is different from that enunciated in the Giella V Cassman Brown case which is the locus classicus case of prohibitory injunctions. The threshold in mandatory is higher than the case of prohibitory injunction and the Court of Appeal in the case of "Kenya Breweries Limited V Washington Okeyo [2002] EA 109" had the occasion to discuss and consider the principles that govern the grant of a mandatory injunction. This was as in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:
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> 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, it the case is clear and one which the Court thinks ought to be decided at once

or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application". Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

42. I therefore proceed from a well guided position that the grant of a mandatory injunction on interlocutory relief is a very exceptional form of relief to grant, but it can be granted.

43. I have already stated that there are uncontroverted facts with respect to the work done and for which no payments have been made by the County. That is the claim on which this dispute rests. Having already stated that there is a prima facie case established by Strathmore which this court will need to interrogate, on the face of it, I do not feel such a high degree of assurance that this injunction will have been rightly been granted.

44. The County justifies its actions by claiming that its revenue services have been paralyzed. Strathmore confirms that it indeed shut down the system to avoid further operational costs. While this Court acknowledges that the system was intended to enhance public services, it is also incumbent upon the County to fulfill its contractual obligations if found liable.

45. Furthermore, granting a mandatory injunction would set a precedent for allowing parties to evade their contractual responsibilities through claims of operational hardship. It would also undermine the principles of contract law and equity by favoring one party's convenience over the legal rights of another. Therefore, I am not convinced that the County deserves a mandatory injunction.at this interlocutory stage.

Conclusion

46. It is evident that the dispute before this Court involves unique issues and circumstances. These include the urgent need for resolution, the multifaceted nature of the dispute, and the necessity to balance the rights and interests of a private entity against those of a government organ. Given that the parties have been engaged in this project for several years and may need to continue their collaboration, it is clear that this matter is well-suited for mediation in the first instance.

47. Section 59B of the *Civil Procedure Act* anchored on Article 159 of *the Constitution*, empowers this Court to make such orders. The said section is instructional that:

> " a. The Court may—
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> i. on the request of the parties concerned; or
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> ii. where it deems it appropriate to do so; or
>
> iii. where the law so requires direct that any dispute presented before it be referred to mediation." (emphasis mine)

48. I must remind the parties that the benefits of mediation far outweigh those of a court process in circumstances such as these. Mediation allows for party autonomy and enables the parties to resolve their dispute expeditiously, flexibly, and at minimal cost, all while preserving their relationships, which, as I have stated, are crucial in this scenario.

Disposition

49. For these reasons, the order that commends itself to me and which I hereby issue is that this suit is referred to court annexed mediation in the first instance, under section 59B (2) of the *Civil Procedure Act* at the earliest instance. For the avoidance of doubt the parties shall be at liberty to canvass all the issues raised in the suit. This court shall issue appropriate directions so as to ensure that the parties appraise court of the progress at the earliest instance.

50. In the meantime and for the avoidance of doubt, the application dated 2nd November 2023 succeeds in part to the extent that: a temporary injunction is hereby issued restraining the respondent whether by itself, its agents, servants, employees or anyone authorized by it or acting on its behalf from entering into contract with the successful bidder pursuant to an Invitation to Tender Negotiation Number 1223215 issued on 30th March 2023.

51. The application dated 16th November 2023 and the preliminary objection succeed in part. The application dated 7th May 2024 is not successful. The costs shall await the final outcome of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 7TH DAY OF JUNE 2024.

F. MUGAMBI

JUDGE