Agrigreen Consulting Corp Limited v National Irrigation Board (Civil Suit E252 of 2019) [2023] KEHC 22580 (KLR) (Commercial and Tax) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22580 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E252 OF 2019

EC MWITA, J

SEPTEMBER 22, 2023

BETWEEN

AGRIGREEN CONSULTING CORP LIMITED ..... PLAINTIFF

AND

NATIONAL IRRIGATION BOARD ..... DEFENDANT

JUDGMENT

1. In September 2013, the National Irrigation Board (NIB), now the National Irrigation Authority, advertised a Tender for Consultancy Services for Pre-Investment, Pre-Feasibility and Planning Study for the Galana Kulalu Food Security Project, within Tana-River and Kilifi Counties in Tender No. NIB/T/154/2012-2013.

2. Agrigreen Consulting Corp Limited (Agrigreen), a private company incorporated in Kenya, bid for the tender as a consortium with Enviroplan & Management Consultant Ltd and Amiran (K) Ltd. The consortium won and was awarded the tender through a notification of award dated 17th October 2013. The consortium accepted the tender by letter dated 21st October 2013. The parties executed the contract (number NIB/T/154/2012-2013) on 6th November 2013.

3. Under clause 6.2 (b) of the contract, NIB would pay the contract price to Agrigreen in series of 40%, 15%, 20%, 15% and 10% upon acceptance of the Inception Report, Water Resources Survey and Land Use Plan Report; Pre-feasibility Study Report, Final Pre-Feasibility Study Report and EPC Tender Documents, respectively.

4. Clause 6.5 of the contract provided that a simple interest would be paid to Agrigreen at a rate of 3% above the prevailing CBK average rate for base lending on any outstanding payments delayed beyond thirty days from receipt of the invoice.

5. Despite Agrigreen's submission and NIB's acceptance of the Final Report- Detailed Design of the Model Farm, NIB refused to pay Kshs. 40,868,075.45 out of Kshs. 66,996,845, in respect of invoice No. 10 submitted on 16th October 2014 for EPC Tender Report and Kshs. 10,683,840.12 out of Kshs. 17,415,492.00, in respect of invoice No. 11 submitted on 5th October 2015 for the detailed design report and ESIA.

6. The two invoices remained unpaid for over 3 years despite numerous demands. Agrigreen however learnt from Kenya Revenue Authority (KRA), that NIB had filed false tax returns purporting to have paid the outstanding invoices and went on to generate a withholding certificate, exposing Agrigreen to unfair demands from KRA for taxes that were not due.

7. Agrigreen filed this suit against NIB, seeking Kshs. 51,551,915.75 for the unpaid invoices; interest from the date the invoices became due until payment in full at the rate of 3% above the prevailing CBK average lending rate a, plus costs of the suit.

Defence

8. In its defence, NIB admitting entering into the contract and that proper process was followed. NIB contended, however, that Agrigreen did not honour the terms of the contract in terms of the specific deliverables as per the contract. According to NIB, the work carried out did not meet required standards. NIB also contended that the consortium failed to disclose conflict of interest in breach of clause 3.2 of the contract.

9. NIB denied owing the amount claimed. NIB averred that it would, at the earliest time, raise a preliminary objection on the jurisdiction of the court to hear the suit because it had been brought without following the contractual procedure for resolving the dispute under clause 7 of the contract.

10. NIB stated that Agrigreen was required to engage in amicable resolution of the dispute and if this did not succeed, refer the matter to arbitration under clause 7.2.

Agrigreen's Evidence

11. Yariv Kedar (Mr. Yariv), the Agrigreen's managing director, adopted his witness statement and produced Agrigreen's bundles of documents as exhibits. Mr. Yariv testified that Agrigreen is a subsidiary of Agrigreen Consulting Corp, a leading global irrigation solutions provider, based in the UK. The consortium performed its work and Agrigreen as the lead consultant, submitted the reports as was required.

12. Mr. Yariv asserted that the consortium raised eleven invoices and although nine of the invoices were paid in accordance with the instructions on payment contained in Table IV of the contract, two invoices were left outstanding. Thereafter, Enviroplan, one of the parties in the consortium, was paid its 39% of invoices 10 and 11, but Agrigreen and Amiran, the other members of the consortium, were not paid the 61% and NIB did not give an explanation.

13. According to Mr. Yariv, the reports in respect of the outstanding invoices were submitted on 7th April 2015 and 17th October 2014. Subsequently, NIB issued withholding tax certificates to imply that Agrigeen and Amiran had been paid for invoice Nos. 10 and 11.

14. In cross-examination, Mr. Yariv confirmed that under clause 3.2 of the contract, the consultant and affiliates were disqualified from providing services resulting from or closely related to the services during the term of the contract and after its termination. He also admitted that he had been a chairperson of Green Arava Limited; that Green Arava was contracted to construct the model farm at

Galana and that Agrigreen's contract was related to the construction of the model farm. At the same time, Mr. Yariv denied knowledge of the claim by Green Arava against NIB for payment. He stated that the claim by Green Arava had nothing to do with Agrigreen's claim.

15. Regarding the withholding certificates, Yariv stated that NIB was better placed to expound since it issued them.

NIB's evidence

16. NIB called Eng. Henry Ochiere, (Chief Engineer, Special Programs), as its witness. Engineer Ochiere adopted his witness statement as his evidence and produced NIB's bundle of documents as an exhibit.

17. Eng. Ochire testified that Agrigreen did not deliver some of the deliverables in Table 1-Reporting Schedule, in particular, the EPC tender documents and that the EPC report received was not accepted by NIB. He also testified that there were other deliverables in two addendums included in the contract which were, however, not produced.

18. Eng. Ochiere asserted that out of the contract amount of Kshs. 739,968,453, NIB withheld the amount claimed (Kshs. 51,551,915.57), being a portion of the amount payable for the EPC deliverables and the detailed design report and ESIA.

19. Eng. Ochiere clarified that invoice No. 11 for Kshs. 9,210,201,000, was for the design of the model farm which was in the addendum and not the initial contract. He also stated that the meeting of 23rd July 2014 had nothing to do with EPC deliverable. The purpose of the meeting was for Agrigreen to present the final draft feasibility report of the model farm.

20. According to Eng. Ochiere the contract with the consortium was signed on 6th November 2013, while the contract with Green Arava was signed on 28th August 2014 and that both contracts were signed by Eng. Barak Tamir as the CEO of both companies.

21. On being cross examined, Eng. Ochiere could not confirm whether the final report was submitted by Agrigreen since he was not in Nairobi at the time. He admitted that NIB had no evidence to show that the work done by the consortium was inadequate, or that NIB communicated to the consortium the reason for withholding payment.

22. NIB did not also adduce evidence that the work fell short of the standards required. Eng. Ochiere again admitted that there was no evidence to show that experts were engaged and found the design of the farm faulty.

    Eng. Ochiere again admitted that Eng. Barak Tamir was not listed as a director of Agrigreen in the CR12; that there was no evidence that Eng. Barak Tamir, was also a director of Green Arava Ltd; and that it was Green Avara that should have disclosed any conflict of interest and not Agrigreen since the contract between Agrigreen and NIB preceded the contract between Green Arava and NIB.

Agrigreen's Submissions

23. Agrigreen filed written submissions and argued that NIB's challenge to the jurisdiction of the Court to hear this suit because parties had agreed to resolve disputes through arbitration was not addressed at the appropriate stage of the proceedings. Agrigreen argued that NIB having filed its defence, went on to participate in the proceedings, thus the issue of jurisdiction was lost.

24. Reliance was placed on Lofty v Bedouin Enterprises Limited [2005] eKLR for the proposition that an application for stay of proceedings under section 6(1) of the *Arbitration Act* cannot be made after a party has taken any other steps in the proceedings.

25. Agrigreen submitted that there is no evidence that NIB ever raised the issue of "non-performance" as required by clause 14 (vii) of the contract. According to Agrigreen, although the final report was submitted the final report Volumes I and II which NIB received on 19th September 2014 and 17th October 2014, respectively, NIB did not raise any queries or reservations about quality of work.

26. NIB cannot argue that the consultancy work was unsatisfactory yet its subsequent engagement of Green Arava Ltd to undertake the construction of the farm was pegged on the successful completion of the feasibility studies the consortium had conducted.

27. Agrigreen asserted that the partial settlement of the invoice Nos. 10 and 11 by NIB to Enviroplan & Management Consultant Ltd, was discriminatory and evidence of bad faith on the part of NIB. Agrigreen maintained that since the contract between Green Arava and NIB was entered into after the contract with the consortium, it was Green Arava's duty to disclose conflict of interest, if any.

28. Relying on section 107 of the *Evidence Act*, Agrigreen argued that NIB failed to prove that Eng. Barak Tamir had ever been its director or that he worked for Green Arava in any capacity. Agrigreen faulted NIB for working with Eng. Barak Tamir during the feasibility studies but failed to identify him while undertaking its due diligence before engaging Green Arava Ltd.

29. Agrigreen further asserted that NIB could not withhold payments because of its grievances with Green Arava, Agrigreen and Green Arava were separate and distinct entities in law and the contracts between the parties were different. Reliance was placed on Savings & Loan (K) Ltd v Kanyenje Karangatia Gakombe & another (Civil Appeal No. 272 of 2006) [2015] eKLR, for the argument that a contract cannot impose obligations on any person, except parties to such contract. Agrigreen urged the Court to allow the suit with costs.

NIB's submissions

30. NIB submitted through written submissions, that the contract contained an arbitration clause. NIB relied on Kenya Alliance Insurance Co. Ltd v Annabel Muthoki Muteti (Civil Appeal No. 144 of 2019) [2020] eKLR, that since the contract provided that all disputes would be resolved through arbitration, the Court is obliged to give effect to the agreement by staying proceedings and referring the dispute for resolution through arbitration.

31. NIB asserted that it received the final design report of the model farm but did not approve it despite accepting the final draft design report presented at the Project Technical Committee Meeting of 23rd July 2014. NIB further asserted that Agrigreen had not demonstrate that the final design of the model farm had been approved.

32. NIB contended that Agrigreen breached clause 3.2 on conflict of interest in that there was significant affiliation between Agrigreen and Green Arava. This was because Agrigreen's representative, Eng. Barak Tamir who signed the contract on behalf of the consortium also signed the contract between NIB and Green Arava's representative and CEO.

33. NIB argued that it was wrong for Agrigreen to let its affiliate participate in and win a tender for constructing to firm when Agrigreen had designed the project as well as the model farm. NIB maintained that Agrigreen had a duty to disclose that relationship to enable NIB make an informed decision. NIB took the view, that the conflict of interest could have potentially led to a situation where Green Arava's interests could have prevailed over NIB's interests.

34. NIB urged the Court to dismiss this suit with costs.

Determination

35. Upon considering the pleadings, evidence, submissions and decisions relied on by parties, I have distilled two issues for determination; whether the court has jurisdiction to decide this case, and whether the plaintiff has proved its case against the defendant.

Jurisdiction

36. NIB argued that this court had no jurisdiction to determine this case because the contract between the parties contained an arbitration clause that required disputes arising from the terms of the contract to be resolved through arbitration. Agrigreen took the view, that the issue of jurisdiction ought to have been raised at the earliest opportunity and, in any case, at the time of entering appearance but before filing of the defence. Once the defence was filed, NIB subjected itself to the jurisdiction of this court to determine the dispute before it.

37. I have perused the contract and in particular clause 7 on settlement of disputes arising from the terms of the contract. Clause 7.1 required parties to use their best efforts to amicably resolve all disputes out of or in connection with the contract.

38. Any dispute between the parties that could not be amicably resolved within 30 days after issuance of a dispute notice by one party to the other party, could be referred to arbitration by either party for resolution by a person agreed between the parties. Failing agreement on the arbitrator, the Chairperson of the Chartered Institute of Arbitrators, Kenya Branch was to appoint an arbitrator on the request by either party.

39. In that regard, section 6(1) of the *Arbitration Act* provides:

> A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds— (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

40. The law requires that in a case where there is an arbitration agreement, the party desiring to have the dispute referred to arbitration, should apply for stay and reference to arbitration at the time of entering appearance, and without taking any other step towards prosecuting the matter.

41. In Charles Njogu Lofty v Bedouin Enterprises Ltd [2005] eKLR, the court of Appeal stated:

> On the plain reading of that section, before the court can consider the issues raised in paragraphs (a) and (b of section 6 (1) of the Act, the court has to satisfy itself that the party applying for reference to arbitration has applied to the court:- "not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings.

42. The Court went on to observe that:

> [E]ven if the conditions set out in paragraphs (a) and (b) of section 6 (1) are satisfied the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering an appearance, or

if no appearance is entered, at the time of filing any pleading or at the time of taking any step in the proceedings.

43. In this respect, NIB was to have filed an application for stay and referral of the dispute to arbitration, at the time of entering appearance, which did not happen. NIB went ahead and filed a defence and actively participated in the proceedings, thus deprived itself of the right to have the matter referred to arbitration.

44. Having taken steps to prosecute the suit, NIB subjected itself to the jurisdiction of this court and could not raise the issue, either in the defence, evidence or submissions. I find and hold that this court has jurisdiction to determine this suit.

Whether the claim has been proved

45. The fundamental issue in this suit, is whether Agrigreen is entitled to the relief sought in the plaint. Agrigreen's case is that the consortium discharged its obligations under the contract and delivered the reports as was required. Eleven Invoices were raised but only nine were settled, leaving two invoices for the amount claimed outstanding.

46. According to Agrigreen, NIB paid Enviroplan (a member of the consortium) its 39% of invoice Nos. 10 and 11, leaving the portion of 61% due to Agrigreen and Amiran unpaid without any explanation. NIB even issued withholding tax certificates to KRA to imply that Agrigeen and Amiran had been paid for the two invoice which was, however, not the case.

47. NIB on its part, argued that Agrigreen did not honour the terms of the contract on specific deliverables in that the work carried out did not meet the required standards. NIB further argued that the consortium failed to disclose conflict of interest as was required by clause 3.2 of the contract. According to NIB, Agrigreen had a relationship with Green Arava, the company that won a tender to construct the firm.

48. I have considered the rival arguments on this issue. NIB admitted that the contract was properly entered into; that the consortium delivered the reports as required and that most of the invoices were indeed paid. NIB, did not adduce evidence to show that the work was substandard and how. There was no evidence that NIB raised the issue of substandard works with the consortium.

49. Despite NIB's claim that works were substandard, it still went ahead to pay Enviroplan, a member of the consortium, its portion of 39% in the two outstanding invoices, but not Agrigreen and Amiran, the two other members of that consortium.

50. It is also inconceivable that NIB could argue that the works were substandard yet reports from the works were used for award the subsequent contract for constructing the firm. NIB's argument is, at best, self-defeating and escapist.

51. Regarding conflict of interest, NIB's argument was that Agrigreen was related to Green Arava, the company that won the tender to construct the firm, thus breached clause 3.2 of the contract on conflict of interest.

52 The law is that he who alleges must prove. NIB's argument that Agrigreen was related to Green Arava and, therefore, breached the clause on conflict of interest was not supported by evidence. In any case, the contract with the consortium was executed 6th November 2013, while the contract with Green Arava was signed on 28th August 2014 and after the consortium had finalised the feasibility study and submitted the reports which were basis of the subsequent contract.

53. It would have been the duty of Green Arava, as the new party, to disclose any relationship it may have had with Agrigreen, but not the the other way, because Agrigreen would not have known that Green Arava was to win the next tender for construction of the model farm.

54. The evidence on record is obviously against NIB, which failed to justify non-payment of the outstanding invoices despite completion of the works. Parties are bound by the terms of their contract and must respect them. Any party that desires to walk away from the terms of a binding contract, must do so in accordance with the terms of that contract but not at whims.

55. In the same vein, a contract cannot be interpreted in favour of, or against a person who was not party to that contract. (See Savings & Loan (K) Ltd v Kanyenje Karangatia Gakombe & another Supra).

56. In the premise, I am persuaded that Agrigreen has proved its case on a balance of probability.

57. Regarding interest, the agreement stated that the delay would attract interest of 3% above the Central Bank base lending rate. However, during the hearing parties did not address the court on that aspect. In other words, what the Central Bank base lending rate was at the time of the hearing or is the rate now, was not addressed.

Conclusion

58. Having considered the pleadings evidence and arguments, the conclusion I come to is that this court has jurisdiction to determine this suit. NIB did not apply to stay the proceedings and refer the dispute as required by section 6 of the *Arbitration Act*.

59. NIB did not adduce evidence to show that the works executed by the consortium ere substandard or that the consortium did not discharge their obligations in accordance with the terms of the contract.

60. NIB did not also prove breach of conflict of interest by Agrigreen.

61. On the other hand, Agrigreen proved its case on the balance of probabilities.

Disposal

1. The suit succeeds and is allowed.

2. Judgment is entered for the plaintiff for Kshs. 51, 551,915.75.

3. The amount shall attract interest at court rates from the date of filing suit until payment in full.

4. The plaintiff shall also have costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2023

E C MWITA

JUDGE