Granes Construction Company Ltd v World Vision Kenya & 2 others (Civil Case E416 of 2020) [2022] KEHC 101 (KLR) (Commercial and Tax) (11 February 2022) (Ruling)

Neutral citation: [2022] KEHC 101 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E416 OF 2020

A MABEYA, J

FEBRUARY 11, 2022

BETWEEN

GRANES CONSTRUCTION COMPANY LTD .... PLAINTIFF

AND

WORLD VISION KENYA .... 1ST DEFENDANT

TECHSAME BUILDING & GENERAL ENTERPRISES LTD .... 2ND DEFENDANT

CREDIT BANK LIMITED .... 3RD DEFENDANT

RULING

1. Before Court is an application dated 14/10/2020. It was brought under order 51 rule 1 and order 40 rule 1, 2, 4(2), 9 & 10 of the *Civil Procedure Rules* and section 1A, 1B & 3A of the *Civil Procedure Act*.

2. The application sought several orders including an order restraining the 1st respondent and all its representatives from awarding a contract to a third party, from ordering cessation of the works on the ground, from terminating, breaching or in any way interfering with the Contract No/c0160/FY20 signed on 19/5/2020 between the applicant and 1st respondent pending the commencement and determination of arbitral proceedings between the applicant and 1st respondent.

3. There was also a prayer to restrain the 1st respondent from demanding, recalling, and also to restrain the 3rd respondent from releasing the performance bond of Kshs. 1,900,000/= to the 1s respondent pending the commencement and determination of arbitral proceedings between the applicant and 1st respondent.

4. The application was supported by the affidavit of Kimeli Tanui Kirwa, sworn on 14/10/2020. The grounds upon which thye application was predicated upon were that vide a contract dated 19/5/2020,

the applicant and 1st respondent entered into a contract for the rehabilitation of three community water pans namely Charamonje, Fudumulo and Mapotea projecs at Kilifi area program.

5. That the contract had an 8 weeks' completion period ending on 18/7/2020. However, the site was only handed over on 18/6/2020 in contravention of clause 4.2 wherein the site was to be handed over on 19/5/2020.

6. The applicant was unable to commence the contract immediately as it needed government clearances, including the fulfillment of Covid-19 protocols. This was communicated to the 1st respondent vide letter dated 11/6/2020. The applicant also explained vide a letter dated 24/6/2020 that it was experiencing delays in obtaining clearance from KeNHA. Consequently, the applicant sought a non-cost extension on 21/7/2020 but received no response from the 1st respondent.

7. It was contended that the applicant had commenced performance of the contract and completed it when the 1st respondent vide a letter dated 24/8/2020 and in contravention of clause 13.1 terminated the contract on grounds of material breach of the contract. Clause 15.2 provided for negotiation and arbitration of disputes and vide a letter dated 16/9/2020 to the 1st respondent, the applicant declared a dispute and invited the 1st respondent to jointly appoint an arbitrator.

8. That it was fundamental that the 1st respondent did not award the contract to a third party. It was alleged that the 1st respondent had recalled a performance bond of Kshs. 1,900,000 from the 3rd respondent. The applicant was apprehensive that its machinery and materials on site would be demobilized or disbanded. It was thus contested that the application had met the threshold for grant of the orders sought.

9. The 1st respondent opposed the application vide the replying affidavit of Eunice Muturi sworn on 17/3/2021 and grounds of opposition dated 23/2/2021. The grounds were that the application was an abuse of court process as the orders sought had already been overtaken by events. That the contract had already been terminated and reassigned to a different party being the 2nd respondent and two other contractors before the filing of this suit.

10. That the application ought to be dismissed as it was based on a plaint filed on 2/12/2020 whereas the orders sought were based on an arbitration initiated by the applicant in another forum, hence the application was an abuse of court process. That the actions sought to be restrained had already occurred prior to the filing of the suit.

11. The 3rd respondent opposed the application vide an affidavit sworn by Wainaina Francis Ngaruiya on 22/2/2021. He stated that the 3rd respondent issued a performance bond to the 1st respondent on 4/6/2020 at the behest of the applicant. That it was clear that the 3rd respondent was to pay the 1st respondent Kshs. 1,923,148/= upon written demand by the 1st defendant declaring the applicant to be in default under the contract without cavil or argument.

12. That the 1st respondent issued the demand on 24/8/2020 and the bond was released on 29/9/2020. That in the circumstances, the action sought to be restrained had already occurred and the application overtaken by events.

13. The 3rd respondent filed an application dated 22/2/2021 under section 1A, 1B and 3A of the *Civil Procedure Act*, Order 2 (Rule 15(1) and (2), and order 51 rule 1 of the Civil Procedure Rules.

14. The application sought for the striking out of the plaintiff's suit against the 3rd defendant. It was premised on grounds that the only prayer against the 3rd respondent was prayer (d) which sought to restrain the 3rd respondent from releasing the performance bond to the 1st respondent. That since the

bond had been released even before the suit was filed, the suit against the 3rd respondent had been overtaken by events. That there was no reasonable cause of action against the 3rd respondent hence the suit ought to have been struck ought.

15. I have considered the pleadings, evidence and submissions for both applications dated 14/10/2020 ("the first application") and 22/2/2021 "(the second application"). The first application sought injunctive orders against the 1st and 3rd respondent.

16. The principles applicable in granting an interlocutory injunction were settled in the case of *Giella vs Cassman Brown & Company Limited* (1973) E A 358. These are that first; an applicant must establish a prima facie 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; and thirdly, if the Court is in doubt, it will decide the application on the balance of convenience.

17. On whether prima facie case with a probability of success, the applicant's case was premised on the termination of the contract owing to its late completion of the contract/project. The reasons for the delay were that there were delays in acquiring clearances from KeNHA, the government, and compliance with Covid-19 guidelines.

18. On the other hand, the 1st respondent submitted that by the 12th week after commencement of the contract, the applicant had only completed 3% of the contract, despite being late by 4 weeks. This was established by a site visit and when called upon, the applicant did not give any sufficient explanation. In its replying affidavit, the 1st respondent attached evidence showing that the other parties who were awarded the contract in September 2020 had completed within the 8 weeks completion period, whereas others completed in roughly 4 weeks.

19. The explanation given by the applicant relating to government clearances were therefore unsatisfactory. Without prejudice to the ongoing arbitration between the applicant and 1st respondent, I find that the applicant failed to establish that it had a prima facie case against the 1st and 3rd respondents with a probability of success.

20. I need not consider the other considerations, however, I find it trite to mention that even if the application had survived the first test, it would not survive the second test of establishing substantial loss. The only ground that was submitted was that the applicant's machinery and material were still on site. It was however not pleaded, submitted or even proven that the 1st respondent had stopped the applicant from collecting the said machinery and materials.

21. Further, the applicant's claim is for breach of contract. Upon a successful claim, any harm suffered would be capable of being compensated monetarily. In any case, the water projects were for the benefit of the people of Kilifi, a contractual dispute ought not to hinder those people from enjoying their right to clean water, it would indeed be unnecessary to stop the continuation of such a beneficial project.

22. Further and in conclusion, the 1st and 3rd respondent established that the acts sought to be restrained had already been completed. The contract had already been assigned and completed, and the performance bond already paid out by the 3rd respondent to the 1st respondent.

23. In this regard, to grant the injunctive orders sought would be in vain. The upshot is that the application dated 14/10/2020 is unmerited and is dismissed with costs to the respondents. The parties can continue with the arbitral proceedings in terms of their contract.

24. As regards the second application, it sought to strike out the suit against the 3rd respondent for disclosing no reasonable cause of action. This was owing to the fact that the performance bond sought to be restrained had already been paid out to the 1st respondent prior to the filing of the suit.

25. The law for striking out of suits is found under Order 2 Rule 15 (1) and (2). Sub-rule (2) provides that no evidence is admissible on an application under sub rule (1) (a) and therefore, it should be evident from the pleading sought to be struck out that no reasonable cause of action has been disclosed without reference to further evidence.

26. It is settled law that the court's power to strike out pleadings is to be exercised sparingly and cautiously. This is so because the court exercises the power without being fully informed on the merits of the case through discovery and oral testimony. *See D.T. Dobie & Company (Kenya) Ltd. vs. Muchina* (1982) KLR 1.

27. The overriding principle to be considered in an application for striking out a pleading therefore is, whether triable issues have been raised. In the present case, the plaintiff sought to restrain the 3rd respondent from releasing the performance bond of Kshs. 1,900,000/= to the 1st respondent pending the commencement and determination of arbitral proceedings between the plaintiff and the 1st respondent.

28. It is not clear at this stage in what circumstances the bond was released to the 1st respondent. However, since the monies have already been released before the filing of the suit, I think the claim as against the 3rd respondent have been overtaken by event. There can be no reasonable cause of action in the circumstances against the 3rd respondent.

29. The upshot is that the application is merited and is allowed with costs to the 3rd respondent.

30. In the end, I make the following orders: -

    (a) The application dated 14/10/2020 is unmerited and the same is dismissed with costs.**

    (b) The application dated 22/2/2021 is merited and is allowed with costs to the 3rd defendant/applicant.

    (c) The plaintiff and 1st defendant do proceed to arbitration in accordance with the contract between them**

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF FEBRUARY, 2022.

A. MABEYA, FCI Arb

JUDGE