REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL SUIT NO 1 OF 2020

MWAMBU CONSTRUCTION LIMTED….....PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF SIAYA.....DEFENDANT/RESPONDENT

RULING

1. Vide a chamber summons dated 2nd March 2020 filed under certificate of urgency on 16th March 2020, and brought under section 7 of the Arbitration Act, Rule 2 of the Arbitration Rules, 1997, Sections 1A, 1B, 3A and 63 (c) and (e) of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law, the Plaintiff/Applicant **Mwambu Construction Company Limited** seeks the following orders:

> *1. THAT this Honourable Court be pleased to certify this Application as urgent and service thereof be dispensed with in the first instance.*
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> *2. THAT pending the hearing and determination of this Application, this Honourable Court be pleased to issue a temporary injunction restraining the Defendant/Respondent by itself, agents or any other person claiming through or under it from terminating contract number CGS/SCM/RT/EDUCATION/2016-17/008 for the construction of Migwena Sports Stadium in South Sakwa Bondo Sub-County awarded to the Plaintiff/Applicant on 28th November, 2016.*
>
> *3. THAT pending the hearing and determination of this Suit, this Honourable Court be pleased to issue a temporary injunction restraining the Defendant/Respondent by itself, agents or any other person claiming through or under it from terminating contract number CGS/SCM/RT/EDUCATION/2016-17/008 for the construction of Migwena Sports Stadium in South Sakwa Bondo Sub-County awarded to the Plaintiff/Applicant on 28th November, 2016.*
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> *4. THAT pending the hearing and determination of this Application, this Honourable Court be pleased to issue a temporary injunction restraining the Defendant/Respondent by itself, agents or any other person claiming through or under it from awarding contract number CGS/SCM/RT/EDUCATION/2016-17/008 for the construction of Migwena Sports Stadium in South Sakwa Bondo Sub-County to any party.*
>
> *5 THAT pending the hearing and determination of this Suit, this Honourable Court be pleased to issue a temporary injunction restraining the Defendant/Respondent by itself, agents or any other person claiming through or under it from awarding contract number CGS/SCM/RT/EDUCATION/2016-17/008 for the construction of Migwena Sports Stadium in South Sakwa Bondo Sub-County to any party.*
>
> *6. THAT this Honourable Court be pleased to issue a Conservatory Order allowing the Plaintiff/Applicant to continue with the execution of contract number CGS/SCM/RT/EDUCATION/2016-17/008 for the construction of Migwena Sports Stadium in South Sakwa Bondo Sub-County pending reference of any dispute under the contract to arbitration as provided under the contract.*
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> *7. THAT costs of this Application be provided for.*

2. The application is predicated on the grounds that in the year 2016, the Defendant/Respondent advertised for a tender for the Proposed Construction of Migeuna Sports Stadium in South Sakwa Sub-County, being Tender No. CGS/SCM/RT/EDUCATION/2016-17/008 and that the plaintiff/ Applicant was one of the tenderers who were successfully evaluated and awarded the said tender on 28th November, 2016.

3. That **o**n the 5th January, 2017, the Plaintiff/Applicant duly accepted the offer and thereafter commenced execution of the works as per the contract which contract is now executed up to 60% of the construction works and has materials and equipment on the site for completion of the remaining 40%.

4. It is averred that so far, the Defendant/Respondent has only paid the Plaintiff/Applicant Kshs One Million, Eight Hundred and Eighty Eight Thousand, Five Hundred and Twenty One and Twenty Five Cents (Kshs 1,888,521.25.

5. Further, it is alleged that on 24th February, 2020, the Defendant/Respondent unilaterally and unprocedurally purported to terminate the contract and on the same date, the Defendant/Respondent purported to award the contract to another contractor who attempted to forcefully drive the Plaintiff/Applicant from the site thereby threatening to cause a breach of peace.

6. The plaintiff further claims that the sais Contract No. CGS/SCM/RT/EDUCATION/2016-17/008 provides for dispute resolution through arbitration hence any dispute between the Defendant/Respondent and Plaintiff/Applicant regarding any issue should be subjected to arbitration; but that in the instant case, no such dispute has been raised hence it is premature and unlawful for the Defendant/Respondent to purport to terminate the contract.

7. The plaintiff asserts that for the end of justice to be met, interim measures of protection from this Honourable Court are necessary.

8. The application is further supported by the sworn by JACK WAMBOKA the Director of the plaintiff company and reiterating the grounds in his depositions while annexing the following exhibits: Invitation to Tender, Form of Tender filled by the plaintiff, Notification of award dated 28th November 2016, Acceptance letter dated 5th January 2017, Arbitration Clause 37 of the Contract.

9. Opposing the application, the Defendant/Respondent filed a replying affidavit sworn by John Achieng Angawa the Assistant Director of Sports and Talent Development contending that the application by the plaintiff/ applicant is grossly incompetent and an abuse of the court process and that it fails to meet the standard set in the law to warrant grant of an injunction. That the allegations by the plaintiff are unfounded and that there is no evidence to support the claim before the court**.**

10. Further, it was deposed on behalf of the Respondent that no irreparable damage has been demonstrated before this court by the applicant to warrant the issue of injunctive orders against the respondent; that this application is frivolous, malicious, baseless and completely unfounded and an attempt to procure some benefit from the County Government of Siaya without any justification whatsoever; that the plaintiff did not perform his obligations under the contract and that as a result the defendant lawfully and procedurally terminated the said contract. The respondent also contended in deposition on its behalf that the plaintiff had not adduced any evidence to show that the termination of the said contract was unlawful and or unprocedural.

11. According to the defendant, the allegation by the plaintiff that the defendant had awarded the subject contract to another person who is allegedly harassing the plaintiff on site is strange and devoid of any evidence. It was further deposed in contention that it was the plaintiff/applicant herein who abandoned the construction site and withdrew his services without notice and that the plaintiff was issued with two default notices but never returned to the site despite the timelines given. The defendant urged the court to dismiss the applicant's application with costs.

12. The parties' respective advocates filed written submissions to canvass the application.

13. In its written submissions dated 16th April 2020, the plaintiff applicant reiterated the averments in the plaint and grounds in support of the Chamber Summons as well l as the depositions in the supporting affidavit and submitted that at this stage, the Court ought not to delve into the merits of the case. Further, that, any order to be issued in a case of this nature only serves the purpose of **holding the status quo** pending the the principles of injunction. Reliance was placed on **Safaricom Limited –vs- Ocean View Beach Hotel Ltd & 2 others Nairobi Civil Appeal No.327 OF 2009 (unreported), where Nyamu JA stated:**

> ***"With great respect to the High Court, although the right of intervention was specified in Section 7 and the limit of intervention defined in the section, what happened is that the Court misapprehended its role, declined to grant the interim measure by applying line, hook and sinker the Civil Procedure preconditions for grant of interlocutory injunctions as laid down in the celebrated Geilla –vs- Cassman Brown (1973) EA 358....By determining the matters on the basis of the Geilla principles the Superior Court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such order take different forms and go under different names….Whatever their description however, they are intended in principle to operate as "holding" orders pending the outcome of the arbitral proceedings."***

14. It was further submitted that were the Plaintiff/Applicant to establish all the principles of injunction before being granted the reliefs, that could easily be interpreted as if the Court had already reached a finding on the merits or demerits of the dispute in question, a jurisdiction which this Honourable Court does not have. Reliance was placed on **Talewa Road Contractors Ltd. –vs- Kenya National Highways Authority [2014] e KLR** where the court stated:

> ***"The injunction herein was granted on a balance of convenience as granting it on the grounds that the Plaintiff has established a prima facie case with probability of success could be misinterpreted to mean that the Court has considered the merits or demerits of the dispute between it and the Defendant and which this Court found it has no power jurisdiction to do."***

15. On the arguments by the Defendant Respondent that the Contract was terminated because the Plaintiff/Applicant failed to perform its work, it was submitted on behalf of the plaintiff that the argument is intended to push this Honourable Court into a corner with a view to making it determine the merits of the dispute between the parties herein. According to the plaintiff/applicant, this Court ought not to even proceed to consider whether the purported termination of the contract was fair or not or even whether the Plaintiff/Applicant is in breach of the contract. That what is critical at this point is that there is a complaint by the Plaintiff/Aapplicant arising from an agreement that provides that in the case of a dispute the parties will subject themselves to an arbitration process. However, the applicant argues that before that

happens, the Plaintiff/Aapplicant has been asked to vacate the site, in spite of the fact that there are materials and machinery on site and work done by the Plaintiff/Aapplicant but not yet valued and paid for.

16. The applicant therefore urged the court to find that the plaintiff had met the threshold for the granting of the orders sought in the Application.

17. The plaintiff also submitted that it is nonetheless ready and willing to vacate the site once the Defendant/Respondent complies with the provisions of **Clauses 33.4** and **34.1** of the Contract by arranging a Site meeting for the purpose of taking record of works executed and materials, goods, equipment, temporary buildings and issue a certificate for the Work done and materials on Site.

18. The Defendant's counsel filed written submissions dated 21st April 2020 framing two main issues for determination:

1. Whether the plaintiff has satisfied the conditions upon which a temporary injunction can be granted

2. Is a form of contract a valid contract?

3. Who is entitled to cost of the suit?

19. On the law and application, on whether the plaintiff has satisfied the conditions upon which a temporary injunction can be granted, the Defendant relied on the case of **EPCO Builders Ltd v County Government of Kilifi [2017] e KLR** where the court held:

> ***"The conditions for consideration further in granting an injunction is now well settled in the case of Giella vs Cassman Brown & Company Limited (1973) E A 358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction:***
>
> > ***"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."***
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> ***In Mrao Ltd vs Ltd vs First American Bank of Kenya and 2 others, (2003) KLR 125 which was cited with approval in Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi and 5 others, (2014) eKLR, the Court of Appeal defined a prima facie case as:***
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> > ***"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later."***

20. The Respondent contended that even if an injunction is not granted, the Plaintiff/Applicant will not suffer any substantial loss as there is no irreparable harm that will be or has been suffered by the Plaintiff when the contract was terminated, the Plaintiff/Applicant having allegedly abandoned the site and withdrew his services without any notice.

21. It was submitted reiterating the depositions in the Defendant's Replying affidavit that the Defendant/Respondent gave the Applicant/ Plaintiff two default notices one dated 18th September 2017 and 27th September 2018, which the Plaintiff acknowledged receipt thereof and blamed it on logistical issues, but that it never resumed work. It was submitted that subsequently, the Department of Public Works assessed the works done by the Plaintiff/ Applicant raised an interim payment certificate, that the contactor was paid Kshs 1,607,864.75 and that it never raised any complaint.

22. According to the Defendant/Respondent, this suit is frivolous, vexatious and an abuse of court because the plaintiff was coming back to claim the total contract sum in a suit after the contract was terminated, the amount equivalent to what had been done paid. It was submitted that the project in question is a stadium, which has been stalled by a Plaintiff/Applicant who could not finish the work in time and now wants to use the courts to stall it once more, which is against public interest.

23. Further, it was submitted that the decision to re-advertise the tender was to complete the pending works, which decision is in the best interest of the public and should not be stopped and or stalled by an individual's selfish interest. Counsel submitted that in fact, the plaintiff is free to bid for the said tender.

24. On whether a form of contact is a valid contract? the Defendant relied on **EPCO Builders Ltd v County Government of Kilifi [2017]e KLR** where the court stated:

> ***"Section 134(4) of the PPAD Act …. No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties. The above section further confirms that there is no contract between the procuring entity and the successful bidder until a formal contract is signed. In my finding, I do hold that there is no binding contract between the parties herein. The award letter, the form of tender and the entire tender documents do not constitute a binding contract.***

25. In this case the Defendant/Respondent contended that the Plaintiff/Applicant cannot use a clause in the form of tender to subject the dispute to arbitration because the same does not amount to a binding agreement between the parties.

26. On who is to bear costs of the suit, the defendant/Respondent cited section 27 of the Civil Procedure Act and urged the court to order that the plaintiff/ applicant do bear costs of the suit.

DETERMINATION

27. I have considered the application by the plaintiff/applicant and the grounds thereof as well as the supporting affidavit and annextures. I have given equal consideration to the Response by the Defendant/Respondent and the respective parties 'written submissions and the authorities relied on. In my humble view, the main issue for determination in this application is whether the applicant is deserving of the orders sought. The main order sought by the applicant/ Plaintiff in this interlocutory application for a conservatory order.

28. The plaintiff/applicant having obtained interim orders of injunction at the exparte stage, which orders were extended pending the consideration of this application interpartes, the only prayer that remains for consideration is prayer number 6 which stipulates:

> ***"THAT this Honourable Court be pleased to issue a Conservatory Order allowing the Plaintiff/Applicant to continue with the execution of contract number CGS/SCM/RT/EDUCATION/2016-17/008 for the construction of Migwena Sports Stadium in South Sakwa Bondo Sub-County pending reference of any dispute under the contract to arbitration as provided under the contract."***

29. It is important to appreciate that conditions for grant of a conservatory order pending referral of a dispute to Arbitration as stipulated in section 7 of the Arbitration Act are different from the conditions for grant of interlocutory injunction as spelt of in the **Giella v Cassman Brown** (supra) case. This difference was brought out very succinctly in the case of **Safaricom Limited -vs- Ocean View Beach Hotel Limited & 2 Others (2010) e KLR,** where the Court of Appeal held that the principles enunciated in **Giella -vs- Cassman Brown (1973) EA 358** should not be the basis for granting the interim measures of protection pursuant to the provisions of section 7 of the Arbitration Act. The Court of Appeal interpreted interim measures in the following terms:

> ***"By determining the matters on the basis of the Giella principles, the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names... whatever their description, however, they are intended in principle to operate as "holding" orders, pending the outcome of the arbitral proceedings."***

30. It is also trite that the interim measures of protection by whatever description ought to be granted in light of the peculiar circumstances of each case. **Blacks' Law Dictionary, 8th edition** defines "***Interim Measure of protection"*** as:

> ***"An Intentional tribunal order to prevent a litigant from prejudicing the final outcome of a law suit by arbitrating action before judgment has been reached. This measure is comparable to a temporary injunction in national law."***

31. The same **Black's Law Dictionary** defines an injunction as:

> ***"A court order commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate and complete remedy at law and that an irreparable injury will result unless the relief is granted."***

32. For an injunction or interim measure of protection or conservatory order to be granted, the court must be convinced, as was held in the **Talewa Road Contractors Limited v Kenya National Highway Authority** Case(supra), that such an injunctive order is essential and that It esteems that the act being restrained is contrary to equity and good conscience. It is a remedial writ which a court issues for purposes of enforcing its equitable jurisdiction.

33. **Section 7(1) of the Arbitration Act** provides:

> ***"it is not incompatible with an arbitration agreement for a party to request from the High Court before or during the arbitral proceedings, an interim measure of protection and for the High Court to grant the same."***

34. In **CMC Holdings Ltd. & Another -Vs- Jaquar Land Rover Exports Ltd. (2013) eKLR** the court held:

> ***"The Measures are intended to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral. The court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection."***

35. In **Seven Twenty Investments Limited -Vs- Sandhoe Investment Kenya Limited, (2013) e KLR,** the court further held:

> ***"Perusal of section 7 of the Arbitration Act clearly shows that the issue of whether or not there is a dispute or whether or not there would be losses by either side would not be a factor for a court to take into consideration when deciding whether or not it should grant an order of interim measure of protection or injunction to safeguard the subject matter of the arbitral proceedings. All that a court would be interested in is whether or not there was a valid arbitration agreement and if indeed the subject matter***

of the arbitral proceedings was in danger of being wasted or dissipated so as to preserve the same pending the hearing and determination of the arbitral reference."

36. I am persuaded by those decisions considering that the same are **in consonant** with the decision of the Court of Appeal in the ***Safaricom Limited v Ocean Beach Hotel Limited & 2 others*** case (*supra)* and the definition of what interim measure of protection or conservatory order entails. The interim measure of protection is only meant to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings.

37. I must however mention that the defendant's contention that there was only a form of contract and not a binding contract is neither here nor there as its pleadings and submissions and depositions are contradictory, approbating and reprobating. If there was no binding contract then this court does not understand why the defendant/Respondent herein purported to terminate a non-existent contract and why it issued default notices annexed to the affidavit in reply to the application herein. It also beats logic for the defendant to have paid the plaintiff/applicant for work done if there was no binding contract between the two parties. There are documents annexed to the pleadings and affidavits that show that a tender was awarded to the plaintiff on 28/11/2016 and which award was accepted by the plaintiff/applicant vide a letter dated 5/01/2017 and the plaintiff moved on site.

38. On 21/12/2017 the Procuring entity through its Project Manager inspected the work done that far and agreed to pay the contractor the percentage of works done.

39. Furthermore, the **Form of Tender** document signed by the defendant on 20th November 2016 at Paragraph 4 thereof it stipulates that:

"4. Unless and until a formal Agreement is prepared and executed this tender together with your written acceptance thereof, shall constitute a binding contract between us."

40. In the said Form of Tender Document duly executed by both parties, both parties agreed to be bound by instructions to Tenderers document which they agreed was binding on them.

41. Clause 33.1 of the Conditions of Contract document stipulates that the employer or the contractor may terminate the contract if the other party causes a fundamental breach of the contract. These fundamental breaches of contract shall include, but not limited to, the following;

(a) The contractor stops work for 30 days when no stoppage of work is shown on the current program and the stoppage has not been authorized by the project manager;

(b) The project manager instructs the contractor to delay the progress of the works, and the instruction is not withdrawn within 30 days;

(c) the contractor is declared bankrupt or goes into liquidation other than for a reconstruction or amalgamation;

(d) a payment certified by the Project Manager is not paid by the Employer;

(e) ……..;

(f) ;

42. Under Clause 33.2, when either party to the contract gives notice of a breach of contract to the Project Manager for a cause other than those listed under Clause 33.1 above, the Project Manager shall decide whether the breach is fundamental or not.

43. Under Clause 33.4, if the Contract is terminated, the Contractor shall stop work immediately, make the site safe and secure, and leave the site as soon as reasonably possible. The project manager shall immediately thereafter arrange for a meeting for the purpose of taking record of the works executed and materials, goods, equipment and temporary buildings on site.

44. What Clause 33.4 above stipulate is that in the event of the contract being terminated, the contractor shall forthwith vacate the site thereby relinquishing possession thereof and the responsibility and care of the site and the works shall henceforth pass to the Project Manager/ employer in this case the Defendant/Respondent herein.

45. Clause 34.3 further provides that upon termination of the contract, the Defendant herein may employ and pay other persons to carry out and complete the works and to rectify any defects and may enter upon the works and use all materials on the site, plant, equipment and temporary works.

46. The plaintiff applicant has made it clear in these pleadings and submissions and states:

"the Plaintiff/Applicant is ready and willing to vacate the site once the Defendant/Respondent complies with the provisions of Clauses 33.4 and 34.1 of the Contract by arranging a Site meeting for the purpose of taking record of works executed and materials, goods, equipment, temporary buildings and issue a certificate for the Work done and materials on Site."

47. One of the disputes that is supposed to be determined by the arbitrator, according Clause 37 of the Conditions of the Contract is whether indeed the defendant lawfully terminated the Contract.

48. In the pleadings, the plaintiff claims that:

> ***12. The Plaintiff avers that Contract No. CGS/SCM/RT/EDUCATION/2016-17/008 at Clause 37 provides for dispute resolution through arbitration hence any dispute between the Defendant and Plaintiff regarding any issue should be subjected to arbitration.***
>
> ***13. The Plaintiff avers further that no such dispute has been raised hence it is premature and unlawful for the Defendant to purport to terminate the contract.***
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> ***14. It is averred by the Plaintiff that the Contract provided at Clause 33.4 that if the Contract is terminated, the Contractor shall make the Site safe and secure and the Project Manager shall immediately thereafter arrange for a meeting for the purpose of taking record of the works executed and materials, goods, equipment and temporary buildings on Site.***
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> ***15. The Plaintiff avers that it has neither been asked to make the Site safe and secure, nor has the Project Manager arranged for any meeting for the purpose of taking record of the works executed and materials, goods, equipment and temporary buildings on Site which the Plaintiff has put on the Site.***
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> ***16. The Plaintiff avers further that Project Manager has not given it any certificate for the value of the Work done, materials ordered, reasonable cost of removal of equipment, repatriation of the Plaintiff's personnel employed on the Works, the Plaintiff's costs of protecting and securing the Works as provided at Clause 34.2 of the Contract, if at all the Defendant intends to terminate the contract.***
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> ***17. The Defendant is therefore in blatant breach of its contractual obligations by purporting to terminate the contract and further purporting to award the same to another contractor.***

49. The plaintiff in the final prayers seeks among other prayers,

> ***(a) A permanent injunction restraining the Defendant from terminating Contract No.CGS/SCM/RT/EDUCATION/2016-17/008 without following the procedures set out in the Contract.***
>
> ***(b) An Order allowing the Plaintiff to proceed with execution of the contract until the dispute is referred to and determined through arbitration.***
>
> ***(c) General Damages for breach of contract.***

50. In view of the fact that it is only the arbitrator who can make a determination as to whether the defendant lawfully terminated the contract without following the laid down procedures as alleged by the plaintiff, who is nonetheless ready and willing to vacate the site, ***once the Defendant/Respondent complies with the provisions of Clauses 33.4 and 34.1 of the Contract by arranging a Site meeting for the purpose of taking record of works executed and materials, goods, equipment, temporary buildings and issue a certificate for the Work done and materials on Site;*** I agree with the plaintiff's submissions that the conservatory orders sought **herein is to maintain the status quo pending the outcome of the arbitration proceedings, or until this suit is heard and determined on its merits.**

51. In my humble view, the continued construction of the subject matter by a different contractor before ***Clauses 33.4 and 34.1 are complied with,*** has the effect of changing its nature to the extent that the arbitration proceedings may be compromised. And even if the matter is not referred to arbitration, it may not be possible for the parties to say how much work and for what value the plaintiff had worked on the site.

52. I say so because the plaintiff claims that it had undertaken 60% of the works prior to the termination of contract, while the defendant in the termination letter claims that the contractor had abandoned the work and had not undertaken the work with diligence. My humble view is that those issues have bearings on **Clause 34** of the Conditions of contract, on the rights of parties after such termination of the contract and which issues require resolution by the arbitrator such that if the works on the subject matter are allowed to go on by another contractor, the arbitrator will not confirm the alleged extend to which the plaintiff had undertaken the construction works, if another contractor takes over the project at this stage.

53. The most appropriate way of preserving evidence and maintaining a status quo pending arbitration is to grant the order that Construction works by any other contractor should not be undertaken until the referral and determination of the dispute by an arbitrator.

54. Having said all the above and considered the parties' positions, I do not entertain any doubt that the relationship between the two parties hereto has broken down irretrievably. The defendant has terminated the contract whether lawfully or otherwise, and therefore, no doubt, this is a case where at the very end, damages would be an adequate remedy. The defendant cannot be forced or be directed by an order of this court to maintain the plaintiff at the work site or require the court to supervise the construction works which the plaintiff states on the one hand in the plaint that it wants to continue undertaking to completion despite both parties pleading and submitting that the contract was terminated. Furthermore, the plaintiff has shown willingness to exit the site. Since the rights of the parties will be the subject of arbitration or adjudication, I shall not comment on the merits or otherwise of the claim.

55. All that said and done, I observe that the plaintiff's main concern is that it would be denied the opportunity to value the work so far done on site in order to claim its fees or lodge its claim for the value of the work done.

56. In my view, and as the plaintiff has clearly intimated that it is ready able and willing to vacate the site, it would be superfluous to order that the plaintiff continue to execute the contract which has been terminated.

57. What the plaintiff in my humble view is complaining about quite clearly is that a very simple procedure being performed by both parties as stipulated in Clause ***33.4 and 34.1 of the Conditions of Contract which is for the Defendant/Respondent to merely comply with the provisions of the said Clauses of the Contract by arranging a Site meeting for the purpose of taking record of works executed and materials, goods, equipment, temporary buildings and issue a certificate for the Work done and materials on Site; and which exercise can, in my humble view, be undertaken within a*** limited time and in the interests of justice taking into account the overriding objectives of the law as stipulated in sections 1, 1A, 3 and 3A of the Civil Procedure Act, bearing in mind the fact that this is a public funded project which should be undertaken and completed within reasonable period of time.

58. Therefore, in order to facilitate the process, I direct and order as follows:

a) The defendant shall permit and/or facilitate the plaintiff to conduct a valuation of its works done at the construction site so far, under contract number CGS/SCM/RT/EDUCATION/2016-17/008 for the construction of Migwena Sports Stadium in South Sakwa Bondo Sub-County as required by Clauses 33.4 and 34.1 of the Conditions of Contract which is for the Defendant/Respondent to merely comply with the provisions of the said Clauses of the Contract by arranging a Site meeting for the purpose of taking record of works executed and materials, goods, equipment, temporary buildings and issue a certificate for the Work done and materials on Site;

b) The parties to agree on a suitable timeframe and terms thereof and in any event on or before 22nd June 2020;

c) In the meantime, the status quo to be maintained. Mention on 22nd June 2020 for further orders.

d) Costs shall be in the cause.

Dated, signed and Delivered at Siaya this 21st day of May 2020 via skype due to the Covid -19 situation.

R.E. ABURILI

JUDGE