REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 372 OF 2017

HUMANIST INSTITUTE FOR COOPERATION

WITH DEVELOPING COUNTRIES (HIVOS).....PLAINTIFF

VERSUS

KENYA NATIONAL FARMERS FEDERATION (KENAFF)

(Being sued through its Registered Officials namely Hon. Nduati Kariuki (Chairman),

Prof. Kaburu M'Ribu (Secretary)And Grace Ngambi(Treasurer).....DEFENDANT

RULING

By Certificate of Urgency application dated and filed on 7th September 2017 the Advocate for the Plaintiff/Applicant, urged the court to hear the application on priority basis for reasons;

a) That the Plaintiff in its capacity as Overall Programme Coordinator of ABPP conducted an expenditure verification exercise on the activities of the Defendant with regard to the **KENDBIP** for the period of 1st January 2013 to 31st December 2014. The exercise was carried out and findings were made among other issues on payment procedures, internal procurement and financial budget control for the period of 1st January 2013 to 31st December 2014. In view of the findings the Plaintiff on 22nd October 2015 proceeded to immediately terminate the agreement with the Defendant and invoked the termination procedures outlined in Article 22.3 of the Agreement.

b) That the Plaintiff in view of the above proceeded to compute and demand a total of Euros 658,069/- from the Defendant as grant funds disbursed to the Defendant which are now due and owing noting the commercial nature of the Agreement of 3rd April 2014.

c) That the situation is aggravated further as the Defendant herein filed a petition **(Petition No. 27 of 2017)** before the Employment and Labour Relations Court at Nairobi against the Plaintiff and SNV- Netherlands Development Organization in Kenya which is set for highlighting of submissions on 2nd October 2017, seeking a colossal amount of Kenya Shillings One Hundred and Four Million, Six Hundred and Thirty Five Thousand, One hundred and Thirty Seven (Ksh 104,635,137/-) to be paid by the Plaintiff herein as alleged unpaid salaries and emoluments. There exists no employer–employee relationship between the Parties in the Petition at the Employment & Labour Relations Court as the dispute if any exists is purely commercial in nature which this Court (High Court, Specifically the Commercial & Admiralty Division) has jurisdiction to deal.

d) That the Defendant has willfully ignored, neglected and/or refused to comply with the termination procedures as set out in the Agreement and as consequence;

(1) The Plaintiff is placed in apposition where it is unable to balance its books of account as per the agreement and report the position to the Directorate-general for internal cooperation-Ministry of Foreign Affairs-Netherlands (hereinafter referred to as DGIS) who centrally fund the ABPP; (2) The Plaintiff without the audit is unable to meet certain pre-conditions related to its target with regards to biogas digester and cannot therefore discuss the same with DGIS; and

(3) The Plaintiff is not able to strengthen and increase its demand and supply for biogas digester in the Kenyan market as it is unable to establish what the Defendant had managed to complete and what was outstanding by the time the Plaintiff

terminated the Agreement.

e) That the Supreme Court of Kenya in ***Petition No. 5 of 2015 - Republic -vs- Karisa Chengo, Jefferson Kalama Kenga & Kitsao Charo Ngati*** returned a finding that status and jurisdiction are two different concepts. **Status** denotes hierarchy while **jurisdiction** covers the sphere of the court's operation. Courts can therefore be of the same status, but exercise different jurisdiction. This clearly supports the Plaintiff/Applicant's position that this court is the proper court to determine the issues in dispute between the parties herein.

By Notice of Motion Application dated 7th September 2017annexed and brought under the provisions of **Articles 165(3)(a) and (e) of the Constitution of Kenya, the Judicature Act, Cap 8, Laws of Kenya, the High Court (Practice & Procedure Rules Part 1, Rule 3), sections 1, 1A, 1B, 3 and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, Order 40, Rule 2** and any other applicable provisions of the law; the Applicant sought orders;

a) A mandatory injunction to be issued directing the Defendant to submit itself to, provide information and documents and participate in the final audit of **KENDBIP** to be conducted by Price water house Coopers Limited at the cost of the Plaintiff. The resultant audit report submitted to the court within a period of thirty (30) days from the date of the order or such shorter or other period as the court may direct.

b) A mandatory injunction be issued restraining the Defendant from further breach of the agreement signed on 3rd April 2014 and directing the Defendant to commence and complete the termination procedure as outlined in **Clause 22.3** of the Agreement signed on 3rd April 2014.

c) Pending the hearing and determination of this suit, an injunction be and is hereby issued restraining the Defendant either through itself, it's employees, agents, assigns or any other party acting for and/or on their behalf from any or any further breach of the agreement signed on 3rd April 2014 and in particular;

i) From selling transferring or in any other way disposing of to third parties carbon credits accrued in the course of its participation with the **KENDBIP** program.

ii) Publishing, uttering, communicating in any media or 3rd parties whatsoever any defamatory statements or words with reference to the plaintiff and/or employees as regards KENDIP program and agreement.

REPLYING AFFIDAVIT

The application is opposed by an affidavit dated 14th September 2017, sworn by Daniel M. M'Mailutha Chief Executive officer of the Defendants herein. He deposed that the Plaintiff and the Defendant entered into a tripartite agreement signed on 3rd April 2014, within the framework of the Africa Biogas Partnership Programme (hereinafter "ABPP") for the implementation of the Kenya National Domestic Biogas programme (Hereafter "KENDBIP")

He stated that KENDBIP as a programme was not incorporated and therefore it was/is not a legal person. It was not capable of contracting, holding property or suing and being sued. Hence, the Defendant's (KENAFF's) responsibility under the tripartite agreement was to host (provide office space) and manage KENDBIP in Kenya by establishing an organizational and administrative set up as provided for in the KENDBIP Programme Implementation document.

That the Plaintiff was the Fund and Programme Manager for the Africa Biogas Partnership programme (ABPP). In a letter dated 22nd October 2015 the Plaintiff notified the Defendant of the termination of the agreement with the Defendant for the implementation of both **KENDBIP** and **4S@Scale** programmes, giving a one month notice and invoked **Clause 22.2(b)** of the programme implementation agreement as the basis for the termination. However, the Plaintiff did not even provide for staff costs and other operating costs for the notice period issued.

He averred that the meeting resolved that the Defendant be given a chance to respond to the issue raised by Deloitte in their report and provide documentary evidence supporting the same. The Defendant presented all the documents requested by the Audit Firm between 8th – 11th December 2015. All the outstanding issues were cleared as confirmed in the final Deloitte report shared on 16th February 2017 which confirmed that there was no case of misappropriation identified. A copy of Audit Report is annexed to the Replying affidavit.

That the final batch of the files was collected on 21st October 2015 a day before the contract termination notice was served on Defendant. The exercise was scheduled to commence on the same day but it was postponed without any reasons being given by the Plaintiff. The biogas contract files were an integral part of the programme's financial records. Further, no financial audit or reporting could be undertaken without them. Later on, the Defendant's auditors H.W. Gichohi & Company requested for the files in order to commence the programme statutory audit for 2015.

A copy of Auditor's letter of request is annexed.

That during an interparty meeting between both parties in presence of their lawyers on record at Monarch Hotel on 20th May 2016, both parties amicably discussed and agreed on road map to conclude the disengagement process.

He averred that it was agreed in the said meeting that the Defendant was to contact their auditor to raise an audit fee note. The Defendant was to submit a budget to facilitate programme staff participation in the audit. The timelines for the process and scope of the audit were also

agreed upon.

That thereafter the required documentation was lodged by the Plaintiff as acknowledged by Mr. Absilom Wanjala (the Plaintiff's Finance Manager) in his mail dated 27th May 2017 and in which he was inviting the Defendant to a follow up meeting on 30th May 2017.

That the last interparty meeting was held on the 8th September 2016 at the Hotel Monarch, Nairobi whereby the parties agreed on the specific timelines on the disengagement process. A copy of Terms of Reference is annexed.

That the biogas client files held by the Plaintiff were returned on 16th September 2016. The draft audit terms of reference were shared on 21st October 2016 of which the Defendant gave its feedback on them on 24th October 2016 and also submitted all the documents agreed upon to the Plaintiff. The Plaintiff has not responded to the feedback submitted to them by the Defendant to date.

That there was no further communication from the Plaintiff after the files were returned. The Defendant had been waiting for confirmation of approval of the audit budget submitted to mobilize its staff and its auditor to commence the statutory audit.

APPLICANT'S SUBMISSIONS

The Plaintiff contended that the Defendant willfully ignored, neglected and/or refused to comply with termination procedures and as a consequence, the Plaintiff is unable to balance its books of account and do a closure audit. The plaintiff cannot report to Directorate-General for Internal Cooperation-Ministry of Foreign Affairs-Netherlands. Without the Audit, the Plaintiff is unable to meet pre conditions for biogas digesters and increase demand and supply of biogas.

In **Mureithi vs City Council of Nairobi [1976-1985] EA 331** Madan JJA referred to **L Diplock in American Cynamid Co vs Ethicon Ltd [1975] 1All ER 504** as follows;

> ***"The object of Interlocutory injunction is to protect the plaintiff against injury by violation of his right of which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the Trial……***

With regard to issuance of a mandatory injunction, the plaintiff submitted by reference to **Vol 24 Halsbury's Laws of England 4th Ed** paragraph 948 on mandatory injunction and in **Mucuha vs Ripples Ltd (Civil App No 186 of 1992) Nairobi unreported** where Cockar JJA stated;

> ***"A mandatory injunction need not be given at the Interlocutory stage. It could be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it would not normally be granted. However, it would be granted if the case was; (a) clear and one which the Court [determined] to be decided at once, or (b) if the act done was a simple and summary one which could easily [be] remedied or (c) if the Defendant attempted to steal a match on the Plaintiff."***

DEFENDANT'S SUBMISSIONS

It was the Defendant's submission that the Plaintiff irregularly and unlawfully terminated the Tripartite Agreement on 22nd October 2015 after conducting an 'expenditure verification audit'. The illegality and irregularity arose from the fact that the said expenditure verification audit report was not shared with the Plaintiff before the Plaintiff's decision to terminate the contract. Secondly, the termination was based on financial expenditure that the Plaintiff had already approved. The expenditure verification audit was also not based on the terms of the Agreement since it was not one of the approved audit exercise under Clause 10 of the Agreement. Further, the termination was based on several unsubstantiated allegations and was without any basis since the alleged fraud and embezzlement was not proved. It is uncontroverted that Deloitte, which conducted the expenditure verification audit, cleared the Defendant of any such allegation in its report shared on 16th February 2017.

The Defendant submitted that the Plaintiff, however, refused to adhere to its end of the bargain in the disengagement talks. The disengagement conclusion negotiations collapsed. Instead of honoring its part of the bargain and completing and implementing the negotiations, the Plaintiff jumped the gun and filed the suit herein.

That the applicable test for the grant of restraining injunctive orders such as the ones sought herein was established in the case of ***Giella -vs- Cassman [1973] EA 358.*** *The Court in* ***Joel Kipkurui Arap Koech -vs- Alice Wambui Magandu & 3 others [2018] EKLR;*** upheld the *Giella Case* wherein it was stated that the grant off injunctive reliefs can only be made where the Applicant shows the following;

i. There is a prima facie case with a possibility of success.

ii. Occurrence of an irreparable loss if the order is not granted.

iii. The Court shall decide the application on the balance of convenience.

The Defendant submitted that in view of the lack of evidence on any actual or threatened sale of carbon credits and alleged defamatory statement, the Plaintiff's case for restraining injunctive relief must fail for lack of cogency. The High court in ***Alwalaa Construction Company Limited -vs- Synergy Industrial Credit Limited & Another [2014]eKLR***, held that an application for interlocutory reliefs must be based on tangible evidence. At page 36 of his ruling, Kamau J. stated as follows;

> ***"The court requires tangible evidence when considering an application for an interlocutory injunction pending the hearing and determination of the suit. It is therefore incumbent upon an applicant to submit a cogent case during the interlocutory stage to show that it has an arguable case. This is important because, at his juncture, the court would not have had an opportunity to listen to the evidence in support of each party's case. This is a burden that lies on the applicant." [emphasis added]***

That the Court of Appeal (Kwach, Bosire & O'Kubasu JJ A) determined the test of what is a *prima facie* case in ***Mrao Limited -vs- First American Bank Limited & 2 Others [2003] eKLR.*** Bosire J.A expressed his mind as follows;

> ***"So what is a prima facie case" I would say that in civil cases it is a case which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter." [emphasis added]***

It was Defendant's submissions that there was no basis for the Plaintiff's apprehension for defamation and breach of the terms of the Tripartite Agreement. Filing of the case; **ELRC Petition No. 27 of 2017** by the programme employees cannot be said to be defamation or a threatened one for that matter (as alleged at paragraph 18 of the Plaintiff's submissions) under the Defamation Act. The case raised weighty issues and the court found in favour of the claimants. The Defendant relied on the case ***Kenya National Farmers Federation & 23 others -vs- Humanist Institute for Cooperation with Developing Countries (HIVOS)& another [2018]eKLR***.

That the Plaintiff's failure to discharge the burden is fatal in light of the finding by the High Court(Komingoi) in ***Tecno Holdings Limited & 4 Others -vs- National Social Security Fund Board of Trustees [2018] EKLR***. In this case, the learned Judge while relying on the case of ***Paul Gitonga Wanjau -vs- Gathuti Tea Factory Co. Ltd and 2 others [2016]eKLR*** held that;

> ***"The burden of proof that the inconvenience which the Applicant will suffer if the injunction is refused is greater than that which the Respondent will suffer if it is granted lies on the applicant."***

It submitted that the applicable test for grant of mandatory injunction was stated by the High Court (Mwita J.) in ***Robai Kadili Agufa & Another -vs- Kenya Power & Lighting Co. Ltd [2015] eKLR***, when it noted that a mandatory injunction cannot be granted in absence of the existence of special circumstances. The rationale by the court was that the standards for grant of mandatory injunction are higher than those of the grant of restraining injunction.

That all along the Plaintiff was not willing to cooperate and to meet the emoluments of KENDBIP staff necessary for the conduct of the final audited financial reporting. There is a judgment entered in favour of the Defendant's staff which was yet to be satisfied since the Plaintiff sought stay pending appeal. The judgment by Maureen Onyango and Justice Nduma Nderi in ***Karen National Farmers Federation & 23 Others -vs- Humanist Institute for Cooperation with Developing Countries (HIVOs) & another [2018] eKLR***.

DETERMINATION

After considering the pleadings and submissions of Counsel for all parties, what emerges for determination is whether at this stage the Court based on the circumstances outlined by each party an interim/Interlocutory and mandatory injunction are granted.

> ***In Joel Kipkurui Arap Koech -vs- Alice Wambui Magandu & 3 others [2018] EKLR;*** upheld the ***Giella –vs- Cassman Brown and Co. Ltd [1973] [EA 358]*** wherein it was stated that the grant off injunctive reliefs can only be made where the Applicant shows the following;
>
> i) ***There is a prima facie case with a possibility of success.***
>
> ii) ***Occurrence of an irreparable loss if the order is not granted.***
>
> iii) ***The Court shall decide the application on the balance of convenience.***

In the case of ***Mrao Limited –vs- First American Bank of Kenya Limited [2003] KLR 125***, the court stated as follows;

> ***"A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher that an arguable case."***

See also: ***American Cynamid Co vs Ethicon Ltd [1975] 1All ER 504 supra*** on Interlocutory injunction.

The gist of Plaintiff's claims is by the tripartite Agreement between plaintiff Hivos and Defendant Kenaff and 3d party SNV- Netherlands Development Organization of Kenya, the Defendant was the implementing Agency, the plaintiff the Coordinator of the Program and 3rd party provided technical assistance. The Agreement provided for Audit in **Clause 10.2** and 2nd Audit upon termination **Clause 22.3** of the Agreement. The Plaintiff terminated the Project contract on 22nd October 2015 and the Defendant failed to complete its obligations under the termination Clause of the Agreement.

The Defendant's claim that the Tripartite Agreement was unlawfully and irregularly terminated. The Defendant was not informed or made part of the Audit or given the Audit Report that necessitated termination to comment, explain and/or raise any issues.

The Plaintiff claims from Defendant **658,069 Euros** as grant funds disbursed to the Defendant and are due and owing. The Plaintiff contends that the Defendant failed to adhere to termination procedures and therefore, the Plaintiff is unable to balance books of account and closure of audit.

The Defendant claims **Ksh 104,635,137** as salaries and emoluments and is the subject of **ELRC Petition 27 of 2017.**

The Defendant is willing to complete audit but objects to the appointment of the Auditor. The Defendant claims that after exchange of files and return thereof, the Plaintiff went quiet on the way forward.

The Plaintiff raises the issue of who owns the Carbon Credits amongst the 3 partners whereas the Defendant claims it's the custodian of the Carbon Credits. The Defendant engaged with Plaintiff in negotiations which failed.

Clause 22.3 of the Tripartite Agreement provides in part that termination of the Agreement shall not affect any accrued rights or liabilities of each party.

The Parties dispute what rights, liabilities of each party are, and each party is entitled to post termination of the Tripartite Agreement. These outlines of claims and counterclaims by parties, strongly suggest that each party has compelling arguments on their claim. In the absence of these claims based on sworn affidavits, being tested in a full hearing where the credibility of witnesses and veracity of the evidence is determined it all boils down to one party's word against the other party's word. In other words, at the preliminary stage, it is not possible to finally determine a *prima facie* case for either of the parties.

This Court has also taken into account the various issues raised with regard to the dispute, the colossal amounts involved, parties in the suit and interested parties involved (impact on employees) and it is incumbent for the Court to preserve the subject-matter pending full hearing and determination of various rights and liabilities of parties. This Court is inclined to issue/grant temporary injunction maintaining status quo pending hearing and determination of the matter after full hearing. This Court is persuaded by the specific circumstances of the case and the following authorities;

Assanand –vs- Pettitt (1989)eKLR, where the court stated that;

> ***"the object of Temporary Injunction is to keep things in status quo so that if at the hearing the Plaintiffs obtain a judgment in their favour the Defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual."***

Pius Kipchirchir Kogo –vs- Frank Kimeli Tenai [2018]eKLR;

> ***"Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience cause to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from granting it."***

With regard to the grant of mandatory injunction, the Plaintiff/Applicant sought the said order directing the Defendant to submit to and provide information and documents and participate in the final Audit of KenDip to be conducted by Price Waterhouse. A mandatory injunction is also sought to restrain the Defendant from further breach of the terminated Tripartite Agreement and instead commence and complete the termination procedures housed in Clause 22.3 of the Agreement.

In Robai Kadili Agufa & Anor Vs Kenya Power & Lighting Co Ltd [2015] eKLR which referred to ***Kenya Breweries & Anor vs Washington Okeyo 2002 Eklr***; it was held that mandatory injunction cannot be granted in the absence of the existence of special circumstances.

In ***Kenya Airports Authority vs Paul Njogu Mungai & 2 Others [1997] e KLR*** referred to ***Shepherd Homes Ltd vs Shadahu 1971 1 Ch 34*** Megarry J held***;***

> ***"It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the Trial of the action the Court will of course grant such injunction as the justice of the case requires; but at the Interlocutory stage, when final result of the case cannot be known and the Court does the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is to enforce a contractual obligation."***

In the instant case, the parties raised contested issues and compelling rival arguments that the Court at this stage cannot make an informed decision on the *prima facie* case. The circumstances depicted do not disclose the clearest of cases, or special circumstances to warrant grant of mandatory injunction. The circumstances do not meet the threshold in ***Mucuha vs Ripples Ltd (Civil App No 186 of 1992) Nairobi unreported supra***

Secondly, the mandatory injunctions sought would amount to grant of final orders before hearing and determination of the suit. They are preemptory of the *inter partes* hearing as the orders are to compel compliance of contested issues that can only be determined during the hearing.

DISPOSITION

1. The application filed on 7th September 2017 is granted only to the following extent;

2. Interim/Temporary injunction to maintain status quo in terms of restraining the Defendant either through itself, it's employees, agents, assigns or any other party acting for and/or on their behalf from any or any further breach of the agreement signed on 3rd April 2014 and in particular;

i) From selling transferring or in any other way disposing of to third parties carbon credits accrued in the course of its participation with the KENDBIP program.

ii) Publishing, uttering, communicating in any media or 3rd parties whatsoever any defamatory statements or words with reference to the plaintiff and/or employees as regards KENDIP program and agreement.

3. The parties/Counsel to pursue Case Management Conference (CMC) through DR Commercial & Tax Division within 90days from date of Ruling and thereafter take hearing date for *inter partes* hearing. Parties to consider next term for case management

4. During the Corvid19 pandemic lockdown period there shall be no precipitate action/execution of parties during the said period until official announcement of resumption of normalcy.

5. Each party to bear own costs

DELIVERED SIGNED & DATED IN OPEN COURT ON 5TH JUNE 2020. (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MUTHAURA MUGAMBI AYUGI& NJONJO ADVOCATES- PLAINTIFF

MUNYAO MUTHAMA& KASHINDI ADVOCATES- DEFENDANT