



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL & TAX DIVISION

HIGH COURT CIVIL CASE NO E143 OF 2019

LYNA G. VENTURES LTD.....PLAINTIFF

VERSUS

NORTHERN CONSTRUCTION (K) LTD.....DEFENDANT

RULING

APPLICATION

By an application filed on 12th November 2019 the Applicant sought that the Court to hear the Notice of Motion filed on 27th May 2019 listed to be heard on 4th December 2019 as soon as is practicable.

The Applicant deponed that it came across information and knowledge of the Defendant's handing over the project to the World Bank as from 12th November 2019, on 7th November 2019 after the Court gave a hearing date of 4th December 2019.

The Applicant reliably learnt that the World Bank was about to clear on outstanding amount of Ksh 276,444,911/-. The World Bank had already paid Ksh 954,946,605/- and there was a balance of Ksh 276,444,911 to be paid.

The Applicant deponed that the contract sum of the project was Ksh 1,232,391,516.08/-

So if the Defendant Company was not ordered to pay into Court as security Ksh 54,299,715/-, they would disappear, with all payments and the entire suit would be an academic exercise.

Therefore, the Plaintiff/Applicant sought that the hearing of the application was on priority basis, and sought conservatory orders against the Defendants herein to preserve the subject matter as the Plaintiff stands to suffer irreparable damage if the entire contract amount is released to the Respondents.

The Applicant attached documents that exhibit the Project(s) Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works /State Department of Housing, Urban Development & Public Works /Kenya Informal Settlements Improvement Project (KISIP)- Naivasha Town Settlements Infrastructure Works/World bank Mission- KISIP NAIVASHA as at 5th November 2019.

RESPONSE

By Replying Affidavit filed on 21st June 2019, the Respondent deponed;

That the application lacked merit, was misconceived, was brought in bad faith and an abuse of the Court process. The application was incompetent as it did not disclose any cause of action in law against the Defendant as there is no privity of contract between Plaintiff and Employer. Therefore, the defendant lacks *locus standi* to sue.

The Defendant is a limited liability Company incorporated under the Laws of Kenya with registered offices in Nairobi and duly licensed as Contractors with various ongoing projects/contracts in Kenya. The Defendants are citizens and permanent residents in Kenya with no intent to relocate at any time.

The Defendant no longer has control over the site or the contract and has handed over the site. The Plaintiff ought to sue the Government of Kenya.

The Defendant deponed that subsequent to filing the suit, the Defendant discovered that the Plaintiff was not registered or licensed by the National Construction Authority as a Contractor for the period (2016-2018) for the works or services forming basis of the claim.

It is a crime under the National Construction Authority Act for one not so registered to provide services as a Contractor.

The Defendant denied in *toto* that the Defendant owes or is entitled to the amounts claimed in the Plaintiff's Complaint and Application.

The Defendant is a Tax agent obligated by law to remit taxes to relevant authorities. The Defendant made provision to deduct and retain 6% withholding tax and 3% VAT from the gross price quoted by the Plaintiff to be remitted to KRA. The amounts were Ksh 7,852,829.65 and Ksh 3,926,414.83 respectively.

The Defendant raised various claims that formed the basis of deductions from the Plaintiff's dues. These arose from security and storage charges of hired equipment and machinery, labour charges, various claims arising from defaults and damage of 3rd party properties and claims from the Plaintiff's dumping on properties belonging to KENGEN & Londiani & Kasarani Schools.

DETERMINATION

The Court considered the pleadings and submissions by Counsel and issues for determination are;

a) Should an Interlocutory/Interim Injunction issue?

b) Should the Defendant deposit the claimed amount in Court as security for costs

c) Should the Plaintiff Company Directors be restrained from leaving or relocating from the country or otherwise doing anything prejudicial regarding construction of Naivasha Road until the suit is heard and determined?

ANALYSIS

The Plaintiff/Applicant relied on the cases of;

Giella vs Casmann Brown(1973) EA 358

Paul Gitonga Wanjau vs Gathuthi Tea Factory Co Ltd [2016] eKLR Nation Media Group & 2 Others vs John Harun Mwau [2014] eKLR;

To fortify the position that they have established a *prima facie* case. They demonstrated exceptional and special circumstances that warrant conservatory orders in form of injunction to preserve the subject matter pending hearing and determination of the suit.

The pleadings disclose that the Applicant was engaged by the Defendant to undertake excavation of earthworks at Naivasha IPC. They entered into a contract and created a framework of collaboration and engagement with the Defendant until completion of the project.

The Defendant relied on the expertise of the Plaintiff/Applicant to obtain various technical and administrative support that led to successful completion of the project.

The defendant agreed to pay Ksh 54,299,715.83 on or before 25th July 2018 to enable the plaintiff pay VAT amount.

The Plaintiff implemented the agreement professionally and there were no defaults or defects and was never informed of payments to 3rd Parties.

These facts disclose a *prima facie* case subject to evidence being adduced at the hearing of the suit.

The Defendant submitted that in reliance to the following cases;

Mary Ngaru vs Family Bank Ltd & 2 Others [2014] eKLR held that a prayer for interlocutory injunction without subsequent prayer for permanent injunction is defective and hence the interlocutory injunction cannot be granted.

The Defendant asserted that an injunction could not issue as the Plaintiff had no *locus standi* to sue for reliefs or legal interest in the subject matter. The Plaintiff had no privity of contract between Employer and the Employer/Owner of the Project and cited **Board of Governors Afraha High School & Anor vs KCB [2004] eKLR** to fortify the point.

The Defendant reiterated that the Court cannot enforce an illegal contract as the Plaintiff was not licensed and/or registered as Contractor by virtue of **Section 15 19 20 & 21 of NCA Act**. To reinforce the point the Defendant cited the case of **Mapis Investment (K) Ltd vs Kenya Railways Corporation [2005]eKLR**, that a court cannot enforce an illegal transaction.

The Defendant stated that the matter was overtaken by events and therefore the relief sought of interlocutory injunction would not apply at this stage. The Defendant submitted that the project was completed and handed over to the Government. The Defendant has no control over

the site. The action or contract sought to be restrained has already been completed and the Court cannot injunct an action that is already past.

There is no basis to curtail the Defendant's directors & management right of movement as there is no evidence that they intend to flee. The Company is a going concern, the Plaintiff has no claim directly against the Directors.

The Defendant contends that the plaintiff failed to demonstrate irreparable loss or grounds for balance of convenience titling in its favour.

The Court finds as follows;

The Plaintiff filed a claim against the Defendant arising out of an agreement between them for work done. The work included excavation works in return for payment. The amount has been outstanding for almost 2 years. The Plaintiff made several attempts to resolve issues but failed out of false promises made by the Defendant.

The Plaintiff has suffered irreparable damage due to Defendant 's non payment of the amount due and owing and is at risk of being auctioned by Creditors for failure to clear loans and is pursued by several workers now rendered destitute. The damage and loss cannot be compensated by damages. This is a *prima facie* case that warrants grant of injunction.

On the other hand the Defendant's claims may be legitimate but can only be fully canvassed during hearing and determination of the suit.

Of importance, the Defendant claimed the Plaintiff had no *locus standi* to file suit nor was it privy to the Contract that brought about the Project. This Court differs with the position, either the Plaintiff had been assigned work for pay by the Defendant, or not; otherwise why would the Defendant in its Replying Affidavit admit part payment to Plaintiff and withholding taxes for remittance to KRA if there was no agreement or contract between the parties and work done by the Plaintiff that necessitated payment?

Secondly, it may be true that the Plaintiff has no privity of contract with the main project contractors, but, the Plaintiff and Defendant certainly had a contractual arrangement/Agreement either that the Plaintiff was sub contracted on the main contract to carry out, excavation works, or a joint venture with the Defendant or agreed to work as a consortium in the main Project. Either any or all these shall be considered during hearing and determination of the suit. The fact that the Plaintiff was/is not one of the contracting parties in the Naivasha Town Settlements Infrastructure Works which project was completed and handed over to the Government does not extinguish the Plaintiff's legal rights arising out of the Agreement/Arrangement/Contract the Plaintiff had with Defendant and for work proved to have been done and/or paid or not paid.

The Defendant on the one hand declares no contractual and/or any other legal arrangement with the Plaintiff. The Defendant avers the Plaintiff illegally carried out construction work while not licensed registered or gazetted. Yet in the same breath the Defendant concedes that the Plaintiff carried out works and the Defendant made part payment Withholding Tax remittances. The Defendant claims that the statements of Account show statutory and legal deductions to account for the difference in what was/is due to the Plaintiff/Applicant. The Defendant cannot logically and reasonably sustain both arguments at the same time.

I am satisfied from pleadings filed the Plaintiff and Defendant had an arrangement/Agreement as admitted in paragraph 4 of the Defendant's Defence. The Plaintiff carried out excavation works, the Defendant made part payment and the outstanding amount is the substance of the claim. The Plaintiff claims it is Ksh 54,299,715.83/-The Defendant denies any amount due and owing as tax remittances were deducted and 3rd Party claims were paid. These are the issues to be canvassed and ventilated at the hearing of the suit. To do so, the subject matter ought to be preserved.

An Interlocutory injunction even where a *prima facie* case is established cannot be granted at this stage because as both parties pleaded the main project was successfully completed and handed over to the Government as from 12th November 2019. The Plaintiff/Applicant deponed that World bank would clear outstanding amount of Ksh 276,444,911/- This is in fact what jumpstarted the instant application to be heard on priority basis so as to seek the Court to grant injunction in form of conservatory orders of the subject matter.

Since the subject matter the World Bank /Kenya Government Naivasha Settlement Scheme project was completed an injunction will not issue at this stage as the grant of the order is overtaken by events. Courts do not act in vain, issuing orders that cannot possibly be complied with as the subject matter is no longer available or in place.

Secondly, the Plaintiff has no claim against the World Bank or Government of Kenya, and is not privy to the major contract that facilitated the Project. The Plaintiff's claim is in relation to and with the Defendant with whom there seems to have been agreed that the Plaintiff would carry out excavation works and would be paid.

The subject matter is the contested claim of Ksh 54,299,715.83. To ensure that the Plaintiff's interest, benefit, claim is payable if proved after the hearing and determination of the suit, the Court grants orders that the claimed amount be held in a joint interest earning account by the respective parties' advocates on record within 60 days from date of delivery of Ruling if hearing of the suit has not commenced. That way, if the claim succeeds in full, the Plaintiff retains the funds, if the counterclaim succeeds part of the amount remains with the Defendant. The Court took into account that the Main Project was completed and handed over, the monies were fully paid by World Bank , the Defendant moved from the site and the Plaintiff has no other recourse that in the event the claim is successful it shall be settled as full payments have already been made to the Defendant.

The order sought to restrain the Directors of the Defendant Company from leaving the jurisdiction of the Court is untenable because the Plaintiff did not disclose who the Directors of the Defendant Company are. Secondly, no circumstances, reasons or explanation was given to the Court to consider in granting such drastic measures in the absence of any alleged conduct of adverse commission or omission by the Defendant Company. The Court shall not grant the order.

DISPOSITION

- 1. The Plaintiff/Applicant's application of 11th November 2019 & 27th May 2019 are granted with costs in the following terms;**
- 2. The amount of Ksh 54,299.715.83 shall be deposited in a joint interest earning account held by the parties' respective advocates on record within 60 days until hearing and determination of the suit.**
- 3. The Parties to pursue Case Management Conference (CMC) before DR Commercial & Tax Division within 60 days from date of delivery of Ruling and thereafter take a hearing date.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 2ND JULY 2020 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

ONDIEKI & ONDIEKI ADVOCATES- APPLICANT – N/A

LITORO & OMWEBU ADVOCATES- RESPONDENT – N/A

COURT ASSISTANT: TUPET

LATER

Mr. Litoro: I wish to make an application to have leave to appeal and certified copies of the proceedings and Ruling.

Court: The application is granted.

M.W. MUIGAI

JUDGE