



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CORAM: D. S. MAJANJA J.
CIVIL CASE NO. E193OF 2020

BETWEEN

WILFAK ENGINEERING LIMITED.....PLAINTIFF

AND

KENYA PORTS AUTHORITY.....DEFENDANT

RULING

1. The Plaintiff has moved the court by a Notice of Motion dated 5th June 2020, inter alia, under **sections 1A, 1B and 3A** of the **Civil Procedure Act** and **Order 40 rule 1** of the **Civil Procedure Rules**, seeking the following orders:

[1] Spent

[2] Spent

[3] *THAT the Honourable court be pleased to grant an order restraining the Defendant/Respondent, their servants, agents and or employees from re-advertising, awarding and/or otherwise howsoever from giving or re-awarding the tender NO.KPA/129/2018-19/PDM for works therein to other 3rd Parties pending the hearing and determination of the suit.*

[4] *THAT the Honourable Court be pleased to grant a compelling order against Defendant/Respondent to forthwith avail and or provide the contract document in relation to tender NO.KPA/129/2018-19/PDM for immediate signing and execution of the works therein by the Plaintiff/Applicant.*

[5] *THAT the Honourable court be pleased to order the Defendant/Respondent to pay to the Plaintiff/Applicant a total sum of Kshs. 905,000,000 (Nine Hundred and Five Million Only) being the amount due for securing the advance payment guarantee and performance bond, securing standby machinery, lost time and business and reservation of the idle land that had been secured through gazettelement for disposing asbestos which is hazardous in nature, towards preparation of preliminary works for the tender herein.*

[6] *THAT any other order that this court may deem just and expedient to grant.*

2. The application was supported by the affidavit and further affidavit of Engineer Sammy Maina Kamau, the Plaintiff's General Manager, sworn on 5th June 2020 and 10th August 2020 respectively. The application is opposed through the replying affidavit of Aza Dzenge, the Defendant's Acting Head of Procurement and Supplies, sworn on 24th July 2020. Both parties filed written submissions in support of their respective position which counsel's outlined briefly.

3. The facts upon which the Plaintiff's case is grounded are common ground. The Defendant ("KPA") advertised tender NO.KPA/129/2018-19/PDM for removal of asbestos, re-roofing, demolitions, rain water harvesting, solar back system and associated works at the Port of Mombasa on 16th April 2019. The Tender was opened on 16th July 2019 and the Plaintiff was declared the successful bidder having

complied with all mandatory requirements and being the lowest bidder at Kshs. 1, 217,499,220.34 inclusive of VAT and was so informed by a letter dated 11th October 2019 (“the Notification of Award”).

4. Under the Notification of Award, the Plaintiff was required to acknowledge receipt of the letter within 7 days of receipt. It also indicated that the contract would be signed within 30 days but not earlier than 14 days from the date of its receipt. In addition, the Plaintiff was expected to provide a performance security bond amounting to 10% of the total contract price from a reputable Kenyan Bank. The Plaintiff accepted the terms of the Notification of Award and proceeded to secure an advance payment guarantee of Kshs. 243,499,844.00 and performance bond of Kshs. 121,749,922.00 as guarantees for the works under the Tender.

5. On the understanding that the contract would be signed and the works would commence in November 2019 and be completed in May 2020, the Plaintiff case is that it proceeded to secure land, employees and machinery necessary to undertake the repair works. KPA wrote to the plaintiff a letter dated 18th February 2020 informing it that it was preparing the contract for execution. The Plaintiff responded by a letter dated 19th February 2020 seeking the contract. On 17th April 2020, KPA wrote to the Plaintiff informing it that it did not have funds for executing the works and that the same were suspended but would be commenced if funds became available.

6. The gravamen of the Plaintiff’s case is that KPA has deliberately delayed, avoided and refused to forward to it the contract documents in accordance with the Notification of Award until 17th April 2020, when it returned the two guarantees on account that it did not have money. The Plaintiff contended that KPA is a government corporation whose financial operations and budget for undertaking such works are approved and set aside before commencing the tender process.

7. KPA took the position that since it did not have the money to carry out the contract it was not obliged to execute the contract, a fact communicated to the Plaintiff on 17th April 2020 following a resolution by the KPA Board. In addition, KPA argued that the Notification of Award did not constitute a contract under the **section 68(3)** of the **Public Procurement and Disposal Act** (“the **PPDA**”).

8. Both parties agree that the controlling decision guiding the court’s discretion whether or not to grant an interim injunction such as the one sought by the Plaintiff is the case of **Giella v Cassman Brown [1973] EA 348**. In order to succeed, the applicant has to satisfy three requirements; establish that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in its favour. In **Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR**, the Court of Appeal explained that a prima facie case is, “a case in 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 to call for an explanation or rebuttal from the latter.”

9. The Plaintiff also seeks orders that are mandatory in nature. The general principle is that the while the court may grant a mandatory injunction at an interlocutory stage, it will not normally be granted unless there are special or exceptional circumstances. These special circumstances include a case that is clear and one which the court thinks it ought to be decided at once by a simple and summary act that can be easily remedied, or if the defendant attempted to steal a march on the plaintiff (see **Kenya Breweries Limited and Another v Washington Okeyo NRB CA Civil Appeal No. 332 of 2000 [2002] eKLR** citing **Vol. 24 Halsbury’s Laws of England 4th Edn. para 948** and **Locabail International Finance Ltd v Agroexport and others [1986] 1 ALL ER 901**).

10. Has the Plaintiff established a prima facie case with probability of success or made out a case for mandatory orders? Resolution of this issue turns on the nature and effect of the Notification of Award issued by KPA. The Plaintiff contends that it had complied with all the requirements set out in the Notification of Award and all that was remaining was the signing of the contract. The Plaintiff argued that the basis for KPA suspending the works was not tenable as it was not supported by Board resolutions and there was evidence that KPA had set aside three-quarters of the contract sum during the financial year which would support the contract while the balance would be provided for and paid in the next financial year. The Plaintiff submitted that it had a legitimate expectation that the tender would be carried out and implemented and that KPA was out to frustrate it.

11. KPA took a different view and its case is that no contract has been signed and in the absence of an executed contract, the Plaintiff has not established a prima facie case with a probability of success. The Defendant contended that the Notification of Award was clear that the Contract was to be signed within 30 days and since it was not signed, no enforceable legal obligations were created. The Defendant hinged its case on the provisions of **PPDA** which it submitted envisions the creation of a Procurement Contract when the person who submitted the successful tender and the accounting officer of a procuring entity have signed the contract.

12. As I understand, the Plaintiff’s case is based on the expectation of a contract from KPA following a successful tendering process. This process is governed by the **PPDA**. Under **section 2(1)**, a procurement contract is defined as, “an agreement concluded between the procuring entity and a contractor (or contractors) resulting from a tendering process.” **Section 135** thereof deals with the manner in which procurement contracts are created and it provides as follows:

135(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

(4) 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

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

13. The tenor of the provisions I have cited show that despite a Notification of Award, the agreement between the contractor, in this case the Plaintiff, and the Procuring entity, KPA, must be consummated in a written agreement signed by or with the authority of the accounting officer. Both parties agree that the contract contemplated under **section 135** aforesaid has not been executed. Since the legal relations and expectation of the parties are underpinned by statute, the Notification of Award gives the contractor a right to expect a contract as **section 63** of the **PPDA** does not permit the accounting officer to terminate the tender after notification of the tender award. It provides as follows:

63(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement have been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.

14. After the Notification of Award, KPA did communicate to the Plaintiff by the letter dated 17th April 2020 that it did not have funds to execute the works and advised that the works had been suspended without finality or conclusion and without regard to **section 63(1)** of the **PPDA**. It is clear at any rate, that KPA has not terminated the tender in the manner contemplated by the law. The Plaintiff, at para. 22 of the further affidavit, has however stated that its claim, “*is not for enforcement of tender award but rather for enforcement and or availing of the tender contract document.*” Since the Plaintiff has disclaimed the fact that it seeks to enforce the tender award, no purpose will be served by granting prayer [3] restraining KPA from in any way re-advertising the tender.

15. Prayer [4] seeks an order compelling KPA to deliver the contract for execution. This prayer is fraught with some difficulty as delivery of the contract for execution by the Plaintiff would not necessarily lead to a contractual bond as it too has to be executed by the accounting officer in terms of **section 135** of the **PPDA** to create binding legal relations. The court would be acting in vain by, without more, granting the order as prayed. Second, even assuming that the contract is executed under the compulsion or direction of the court, KPA would still be in a position to terminate the contract for whatever reason in which case the Plaintiff would be entitled to claim damages.

16. Even if I accept, and without necessarily deciding, that KPA has breached its statutory obligation to execute a contract in favour of the Plaintiff, this is a case where damages are an adequate remedy. If there is any evidence of this, it is to be found in the nature of loss so clearly set out by the Plaintiff in prayer [5] of the application. I find that the losses incurred by the Plaintiff are quantifiable and it has not been demonstrated that KPA will not be in a position to make good that loss. Finally, prayer [5] cannot be granted at an interlocutory stage as special damages of the nature sought must be proved by evidence, to the required standard, at the trial.

17. The Plaintiff has not met the threshold for the grant orders sought and for the reasons I have set out above, I dismiss the Notice of Motion dated 5th June 2020.

DATED and DELIVERED at NAIROBI this 14th day of SEPTEMBER 2020.

D. S. MAJANJA

JUDGE

Ms Njoroge instructed by P. W. Njoroge and Company Advocates for the Plaintiff

Ms Kaguri with her Mr Chege instructed Miller and Company Advocates for the Defendant.