



**REPUBLIC OF KENYA**

**IN THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL CASE NO. 17 OF 2020**

**KING INVESTMENT MANAGEMENT CO. LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**RIVATEX EAST AFRICA LIMITED.....RESPONDENT/DEFENDANT**

**RULING**

1. The applicant has moved this court vide a notice of motion application dated 26.5.2020 for the following orders:-

i. Spent

ii. Spent

iii. A declaration that the letter of cancellation dated 26.3.2020 cancelling the contract for supply and delivery of polyester and viscose fibres-tender no. real/51/2019-2020 from the respondent/defendant to the applicant/plaintiff is unlawful, irregular, unprocedural and therefore null and void ab initio

iv. That this honorable court be pleased to grant an order for specific performance compelling the defendant to open an irrevocable letter of credit (LC) to the applicant's bank as provided in clause 6 of the contract.

v. General damages for breach of contract

vi. Special damages

vii. Costs of the suit be in the cause

2. The grounds in support of the application are that the defendant advertised for an open international tender on 17.12.2019 whose closing date was 15.1.2020 and the tender was awarded to them of USD.803,660.00/= after submission of their documents. The plaintiff was to acknowledge the receipt of the same by signing and stamping which was done vide a letter dated 23.1.2020. The letter of notification provided that the contract was to be signed by parties within 30 days and not 14 days. A draft agreement was signed by both parties on 4.2.2020. The plaintiff vide a letter dated 28.2.2020 promised that it would deliver the fibres within the stipulated time despite the Covid-19 pandemic.

3. Further the plaintiff on 5.3.2020 prepared a profoma invoice and sent it to the defendant to apply for Import Declaration Form (IDF) from the Kenya Revenue Authority and to also process the Irrevocable Letter of Credit (L.C). On 10.3.2020 the defendant opened a draft irrevocable letter of credit (L.C) through K.C.B Bank Ltd and sent it to the plaintiff for any amendments, which amendments were communicated to the defendant on 12.3.2020. On 16.3.2020 the defendant through its bank amended the draft irrevocable letter of credit (LC) as per the plaintiff's amendments. On 18.3.2020 the plaintiff proposed the final amendments and informed the defendant and waited for the Irrevocable Letter of Credit (LC) to be sent to their bank in China.

4. The defendant/respondent wrote a letter informing them of the cancellation of the contract without any justification and at that time they had already procured all the raw materials and the production of the polyester Staple Fibre was complete and the viscose staple fibre was almost complete.

5. In addition to the above the defendant went ahead and re-advertised the same tender which had already been awarded to them. This had caused irreparable loss and it was in the interest of justice that the application be allowed.

6. The grounds of the application were reiterated in the supporting affidavit sworn by Lucy Zhang on 26.5.2020.

### **Response**

7. In response to the application, Thomas Kipkurgat the Managing Director and Accounting Officer of the defendant swore an affidavit. He averred that if the application was allowed it would have granted the final orders of specific performance with an award of general and specific damages at an interlocutory stage.

8. The plaintiff was the only bidder who submitted its bid thus the tender was not competitive. The plaintiff's bid prices for polyester and viscose staple fibres were above and double the market prices and thus the contract had to be cancelled. This would have a direct impact on the pricing of the finished products and thus it would be unable to implement the Big 4 Agenda on Manufacturing and support, the "Buy Kenya, Build Kenya" initiative. The delivery of the products was to be done within 45 days as it was in the contract but by the plaintiff's letter dated 25.3.2020 the plaintiff confirmed it had not finalized the production of the products.

9. The plaintiff had filed for review before the Public Procurement & Administrative Review Board on 6.4.2020 seeking similar orders as in this application but the same was dismissed on 27.4.2020.

10. In regard to the injunctive orders being sought the plaintiff had failed to satisfy the requirements set in **Giella vs Cassman Brown[1973] E.A 358**. Lastly, he deposed that this application be dismissed with costs.

11. A supplementary affidavit was filed by Lucy Zhang on 12.6.2020. She deposed that the respondent had on 27.5.2020 posted a tender document in its website indicating closure on 26.6.2020. Further the company had incurred huge expenses on procuring the raw materials and in processing the goods specified under the contract.

### **Submissions**

#### **Applicants/plaintiff's submissions**

12. It is their submission that the contract agreement was drafted by the respondent and the same did not include a clause on force majeure which could then lead to a non-performance of contractual obligations. The contract was entered to, long before the Covid -19 was announced in Kenya and therefore the defendant could not allege its effect on manufacturing operations. It was urged that where a party pleaded force majeure the situation should be the sole reason for the termination of the contract as was held in **Pankaj Transport PVT Ltd v. SDV Transami Kenya Ltd [2017] eklr.** The cancellation of the contract was therefore unprocedural, unlawful, irregular and the same should be declared null and void *ab initio*.

13. The plaintiff urged that they had established a prima facie case against the defendant. The plaintiff and defendant had entered into a contract and the same had been cancelled by the defendant against the terms and clauses in the contract. The plaintiff had satisfied the conditions set in **Giella v. Cassman Brown (supra).**

14. In addition the plaintiff urged that the defendant be compelled to open an irrevocable letter of credit to their bank as provided in clause 6 of the contract. They were seeking for this specific performance for the reason that they had completed the production of the goods and the same was ready for supply. The court was urged to grant the orders in the application.

#### **Defendants submission**

15. Nil

#### **Analysis and determination**

##### **Breach of contract**

16. The plaintiff avers that a tender was advertised by the defendant and the same was awarded to them. On record we have a tender document no. REAL/51/2019-2020 for the supply and delivery of polyester and viscose staple fibres. Clause 2.29 indicates that the plaintiff was to sign an acceptance within 30 days from being notified the award of the tender. Further Section IV indicates the delivery of all virgin polyester and viscose staple fibre was to be within a period of 4 weeks from the date of signing the contract or issuance of the local purchase order or indent. All the issues raised in the affidavit and the application itself are premised on the contract. The contract was cancelled by the defendant and they went ahead to re-advertise the same. These issues can be heard and determined after full hearing of the suit. This court cannot rewrite a contract for the parties, it will only interpret and enforce the intention of the parties. The court of appeal in **National Bank of Kenya Ltd v. Pipe Plastic Samkolit (K) Ltd & anor(2002) EA 503**, stated as follows:

***“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.”***

##### **Temporary injunction**

17. The plaintiff is seeking for an order for a temporary injunction against the defendant. Order 40 rule 1 and 2 provides for the following:

*“Where in any suit it is proved by affidavit or otherwise—*

*(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or*

*(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.*

*[Order 40, rule 2.] Injunction to restrain breach of contract or other injury. 2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.*

*(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.*

18. The plaintiff is aggrieved by the defendants acts of cancelling the contract and re-advertising the same. The plaintiff was already in the process of manufacturing the fabrics as stated in the contract between them. This court is guided by the principles in ***Giella v. Cassman Brown(supra)*** which include: whether the applicant has shown prima facie case with a probability of success; whether the applicant shall suffer irreparable injury which cannot be compensated by damages; and if the court is in doubt then it can decide the application on a balance of convenience.

19. The applicant has annexed various documents to prove to this court that they have a prima facie case. In ***Mrao Ltd v. First American Bank of Kenya Ltd & 2 ors Civil Appeal No. 39 of 2002***, the court described prima facie case as:

***“in civil case, it 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 been infringed by the opposite party as to call for an explanation or rebuttal from the latter”***

20. It is the applicant’s argument that they proposed certain amendment which were accepted and the same incorporated in the draft irrevocable letter of credit through K.C.B bank which they waited for so that they could forward the same to their bank, only to receive a letter dated 26.3.2020 cancelling the contract. They had already procured the fabrics and thus they suffered irreparable injury. This can however be quantified and compensated for by way of damages.

#### **Specific performance**

21. On whether this court could order the defendant to open the irrevocable letter of credit to the applicant’s bank, this is an equitable remedy and the same is based on an enforceable contract. There was a contract between the parties which had been cancelled by the defendant. The applicant has not demonstrated that they fully complied with the terms of the contract. The respondent averred in their replying affidavit that the plaintiff failed to deliver the fabrics within the 45 days stipulated in the contract. The contract at Section IV indicates delivery was to be done within 4 weeks from signing of the contract or issuance of the local purchase order. These are competing positions, which can be better deliberated and weighed in a full trial.

22. Allowing this application would amount to granting final orders of specific performance with an award of general and specific damages at an interlocutory stage. Such cannot be in the interest of justice, where there is even no plaint on record and therefore no subsisting suit.

The application lacks merit and is dismissed with costs to the Respondent.

**S.M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 4<sup>th</sup> day of November, 2020.**

**In the presence of:-**

**Mr. Kuria for the applicant**

**Miss Oloo for respondent**

**Ms Gladys - Court assistant**