



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT NO.403 OF 2018

CASA COMPANY LIMITED.....APPLICANT

VERSUS

CENTER FOR HIV/AIDS EDUCATION KENYA SOCIETY.....RESPONDENT

RULING

1. Before this Court is the Notice of Motion dated **9th November 2018**, by which **CASA COMPANY LIMITED** (the Plaintiff/Applicant) sought the following Orders:-

“1. SPENT

2. THAT pending the hearing and determination of this Application, this Honourable Court be pleased to order that the Respondent be restrained from re-advertising the tender known as CKS/01/ W4A/2018-19 and/or issuing the same to any other party.

3. THAT by the order of this Court the Respondent be compelled to reinstate the award as envisaged in the letter of award dated 14/08/2018.

4. THAT the Respondent shall pay the costs of this application.

5. Any other and further relief the Honourable Court may deem just and fit to grant in the circumstances.”

2. The application which was premised upon **Article 159** of the **Constitution of Kenya 2010**, **Sections 3 and 3A of the Civil Procedure Act, Cap 21 laws of Kenya** and all enabling provisions of law, was supported by the Affidavit dated **9th November 2018**, sworn by **WILSON SAGEKA** a Director of the Applicant.

3. The Defendant/Respondent, the **CENTRE FOR HIV/AIDS EDUCATION KENYA SOCIETY** despite being served did not enter appearance and did not file any Reply to the application. The Court gave directions that the application be canvassed by way of written submissions. The Applicants filed their written submissions on **1st March 2019**. The Respondents despite being properly notified of the directions made by the Court and despite being served with a hearing notice vide the Affidavit of Service dated **22nd March 2019** failed to file any written submissions and did not appear in Court for the hearing.

BACKGROUND

4. Sometime in **May 2018** the Respondent placed an advert in the newspaper calling for quotations for services of drilling and equipping of boreholes and construction of elevated plastic tanks vide tender number **CKS/01/WGA/2018-19**. The Applicant bid for the tender and prepared a quotation form which they submitted to the Respondent.

5. Thereafter through a letter dated **14th August 2018**, the Applicants were informed that their bid had been successful and that they had been awarded the tender for borehole drilling. The applicant claims that at this point agents and employees of the Respondent began to make demands for payments (bribes) before a contract would be issued for the tender.

6. On **26th October 2018** the Respondent sent to the Applicant an e-mail communication informing the latter that the tender had been cancelled. No reasons for the withdrawal were given. The Applicant then filed the present application seeking to prevent any re-advertising or re-issue of the tender. The application was not opposed.

ANALYSIS AND DETERMINATION

7. I have carefully considered the material before me. The only question is whether the Applicant is entitled to the injunctive orders it is seeking. In any application seeking an interlocutory injunction the burden lies on the Applicant to satisfy the Court of the merit of its application. The often cited case of **GIELLA –Vs- CASMAN BROWN [1973] E.A 385** set out the principles to be applied when considering whether or not to grant an interlocutory injunction. In that case it was held as follows:-

“...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 the application on the balance of convenience.”

8. In the case of **MRAO –VS FIRST AMERICAN BANK** ...a prima facie case was defined as:-

“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.”

PRIMA FACIE CASE

9. The Applicant put in a bid following the advertisement of the tender. There is evidence that the Applicants bid was successful and they were awarded the tender as evidenced by the Respondents letter dated **14th August 2018**. The Applicant claims that they mobilized and utilized time, manpower and resources in preparation to fulfil the tender. To their utter shock the Applicants received an e-mail communication on **26th October 2018** headed **“Withdrawal of Award”**. No reasons were given for the cancellation of the tender. The Applicants had a legitimate expectation that they would proceed to perform the contract and be paid for work done. This **“Withdrawal of Award”** effectively amounted to a breach of the terms of the letter of **14th August 2018**. I find that the Applicants have established a prima facie case.

10. The Respondents failed to put in any reply to the application therefore the Court is unable to assess whether they have the financial means to compensate the Applicant with damages. The Respondent is a Non-Governmental Organization. Its financial health is not known. The Court takes judicial notice of the fact that Non-Governmental Organizations are normally reliant on donor funding which funds tend to fluctuate. There is every possibility that the Respondents may not be in a position to satisfy an award of damages if made in favour of the Applicants. I find that the balance of convenience favours the Applicant.

11. Accordingly I find that the present application is merited. I do grant an interlocutory injunction in terms of Prayer (2) of the application. Prayer (3) will await the full hearing of the suit.

12. Costs are awarded to the Applicant.

Dated in Nairobi this 8th day of October 2019.

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Justice Maureen A. Odera