



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

CIVIL CASE NO.E143 OF 2019

LYNA G VENTURES LTDPLAINTIFF

VERSUS

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

RULING

BACKGROUND OF THE APPLICATION

The Defendant filed a preliminary objection dated 12th June 2019 against the Notice of Motion dated 27th May 2019 on the following grounds;

- 1. That the application and suit disclosed no reasonable cause of action against the Defendant as the Plaintiff was not registered as required by Sections 15,16, 17(5),20 and 21 of the National Construction Authority Act No. 41 of 2011, to perform the services for the period of the amounts claimed hence the suit purports to recover proceeds of illegality or crime;**
- 2. The suit and application is an abuse of court process and is fatally defective as it offends the provisions of Section 3(1) of the Law of Contract Act.**

NOTICE OF MOTION DATED 27TH MAY 2019

The Plaintiff/Applicant approached the court through an application for the orders;

- a. The court issues conservatory orders and/or an injunction restraining the Defendants from doing anything prejudicial regarding the construction of Naivasha Road until the suit is heard;**
- b. The court issues an order directing the OCS Naivasha Police Station, to oversee the enforcement of the orders granted.**

The application which was supported by the affidavit of Naftaly Maina Mugo was based on the grounds that;

- a. The Applicant entered into a contract with the Defendant where the Applicant had been engaged to undertake excavation of earth works at Naivasha I.P.C at a sum of **Kshs 162,300.753/-**(VAT exclusive)
- b. The excavation work attracted **Kshs 25,968,120.30** VAT being **16%** of the contract sum and the initial contract for the construction of Naivasha Town Settlement's infrastructure improvement works Lot 1 for **Kshs 1,231,391,516.08** included the 16% of VAT.
- c. The Defendant relied on the expertise of the Plaintiff to obtain various technical and administrative support
- d. The Defendant had also agreed to pay **Kshs 54,299,715.83** on or before 25th July 2018 to the Plaintiff to settle the VAT amount.
- e. The Plaintiffs amount has been outstanding for **2 Years** as the Defendants breach of contract has affected the cash flow of the Plaintiff and paralyzed its operations
- f. The Plaintiff has made several attempts to resolve the issues but efforts have been futile since 25th July 2018

g. The Plaintiff risks to be auctioned by its creditors due to the failure to clear its arrears from the advanced loan and an additional **Kshs 432,315**.

h. The Plaintiff is apprehensive that it might suffer irreparable damage and be deprived of its rights under **Articles 20, 21, 23, 25, 27, 28, 29, 40, 47, 50 and 159 of the Constitution of Kenya**.

i. The Plaintiff has weighty reasons to believe that the contract with the Respondent is still binding as per **LPO** and that the Applicant will suffer irreparable damage if the said contract is not adhered to.

j. Several workers have been rendered destitute as they cannot buy food and shelter or fees for their children.

REPLY TO THE PRELIMINARY OBJECTION

The Plaintiff replied to the preliminary objection raised by the Defendant through an affidavit dated 18th July 2019 stating as follows;

The Plaintiff claimed to be duly registered under the **National Construction Authority Act No. 41 of 2011**. The Plaintiff also stated that the suit raised substantial points of law under **Section 1A ,1B** of the **Civil Procedure Act** as read with **Article 45 (c),50(1) and 159(2)(a)(b)(c) (d) of the Constitution of Kenya**.

The Plaintiff claimed that the Defendant was estopped by law since he had partly performed the contract by signing an LPO dated 19th October 2016 and has not paid the outstanding amount of **Kshs 53,449,767.25**.

The Plaintiff also claimed that the Defendant was estopped from invoking the provision of **Section 3(1)** of the **Law of Contract Act 1990** since it had already agreed to the works done and had signed the Certificate of completion of works dated 20th July 2018. The Defendant had also admitted to having owed the Plaintiff **Kshs 162,300,753.30**.

The Plaintiff pleaded that the Defendant had not provided evidence to the general allegations that it made and should categorically state who was to pay the **VAT** in the quotations signed on 30th May 2017, 22nd June 2016 and 4th January 2017.

DEFENDANTS SUBMISSIONS

The Defendant filed written submissions dated 1st July 2019 in support of the preliminary objection. The Defendant submitted that the Plaintiff was not in Kenya Gazette published by the **National Construction Authority** for the year 2016 and 2017 as required by **Section 20 of the National Construction Authority Act** to signify that it was a registered contractor duly authorized to engage in business. The Defendant therefore submitted that the Plaintiff carried out business contrary to **section 15(3) of the National Construction Authority Act** and hence the court should not enforce the illegality.

The Defendants relied on the case of *Trisquare Ltd & another vs Christian Lau Larsen & another [2018]eKLR* where the court reiterated the decision in *Kenya Pipeline Company Ltd vs Glencore Energy Ltd [2015]Eklr* where the courts held that once an issue of illegality or breach of statute by any party is brought to the attention of the court, the Court must consider the issue in the interest of justice and uphold the fundamental law.

The Defendant also submitted that there was prima facie evidence that the Plaintiff engaged in business in the furtherance of crimes and hence the suit was fatally incompetent for seeking to benefit from illegality.

PLAINTIFF SUBMISSIONS

In the Plaintiff's written submissions dated 22nd July 2019, the Plaintiff submitted that the suit was not an illegality as it was duly registered as per **Section 15(1)(2) of National Construction Authority Act** and that the issue of registration was factual and not a point of law to be raised as a preliminary objection.

The Plaintiff also submitted that the Defendant had never raised any objection to the works performed by the Plaintiff as it had already paid the Plaintiff part payment of **Kshs 126,802,000/-** and hence duly owed the Plaintiffs the remaining **Kshs 53,449,767.25**.

DETERMINATION

The issues to be determined from the preliminary objection by this court are as follows;

1. Whether the Plaintiff is a duly registered contractor under the **National Construction Authority Act** and hence has the *locus standi* to institute a suit against the Defendant.
2. Whether the alleged fact that the Plaintiff was not registered by **National Construction Authority Act** prevents the plaintiff lodging the instant claim and therefore the Court should dismiss the claim as it is tainted by illegality.
3. Whether the suit and application by the Plaintiff is an abuse of court process and is fatally defective as it offends the provisions of **Section 3(1) of the Law of Contract Act**.

The Defendant claimed that the Plaintiff was not a registered contractor under the **National Construction Authority Act**. The Plaintiff has furnished to the court, a valid Contractors Annual practicing license and a valid Certificate of Registration at pages 6,7 and 8 respectively in the Plaintiff's replying affidavit as per **Section 17(5) of the National Construction Authority Act** which provides that;

“ Upon registration, the person shall be issued with a certificate of registration indicating the registration number, the class of works for which registered, the date of registration and duration of registration.”

The Defendant had also submitted that the Plaintiff's name was not gazetted by the **National Construction Authority** for the year 2016 and 2017 as required by **Section 20 of the National Construction Authority Act** which states that;

“ The Registrar shall by notice published in the Gazette, as soon as practicable after registration, publish the names and particulars of all persons registered by the Board, and shall, as soon as practicable after the 1st January and the 1st June in each year, publish in the Gazette the names and particulars of all contractors whose names remain on the register as at those dates.”

The court notes that indeed the Plaintiff has not produced evidence to show that the Registrar had published the name of the Plaintiff in the Gazette.

The Defendant submitted that the Plaintiff's suit and application was an abuse of the court process that offended the provisions of **Section 3(1) of the Law of Contract Act**.

In *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696*, it was held;

“..... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

The court notes that the issues raised of Plaintiff's registration and gazettelement in 2016-2017, whether there was/is a written contract between the parties on which the claim is based on are all contested facts to be determined at the *inter partes* hearing of the instant application.

At the hearing the Plaintiff shall confirm through evidence the contested facts by the Defendant and the Defendant shall establish the facts as deposed in their Defense.

Since this is a matter of fact, the issues before this court have to be determined during the hearing of the suit as parties ought to furnish the court with evidence as discussed above. The court therefore opines that the preliminary objection raised factual issues and it is dismissed with costs to the Plaintiff. The application of 27th May 2019 shall be set down for hearing *inter partes* on a date agreeable to parties within 30 days from today and mode of canvassing the said application.

DELIVERED DATED & SIGNED IN OPEN COURT ON 4TH OCTOBER 2019

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. LITORO FOR THE DEFENDANT

N/A FOR PLAINTIFF

COURT ASSISTANT – MS JASMINE