



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. E420 OF 2019**

**BETWEEN**

**STANSHA LIMITED.....PLAINTIFF**

**AND**

**ATHI WATER WORKS DEVELOPMENT AGENCY.....DEFENDANT**

**R U L I N G**

1. The plaintiff in the Notice of Motion dated 25<sup>th</sup> November 2019 invokes the provisions of **section 7** of the **Arbitration Act** and it seeks orders in the nature of interim measures of protection pending arbitration or reference to arbitration of the dispute between the parties as follows:

1. That this application be certified as urgent and service thereof on the Defendant be dispensed with in the first instance.
2. That this Honourable court be pleased to issue an injunction restraining the defendant, its servants, agents or any of them from taking over the contract of Construction of Kiserian Sewerage Works, Contract No. AWSB/GoK/KSP/01/14 by evicting the plaintiff therefrom or in any way interfering with the works and constructions carried therein, being thereon or erected therein and from re-tendering the said project or awarding the same to any other party pending the hearing and determination of this application.
3. That this Honourable court be pleased to issue an injunction restraining the defendant, its servants, agents or any of them from taking over the contract of Construction of Kiserian Sewerage Works, Contract No. AWSB/GoK/KSP/01/14 by evicting the Plaintiff therefrom or in any way interfering with the works and constructions carried therein, being thereon or erected therein and from re-tendering the said project or awarding the same to any other party pending the appointment of an Arbitrator, commencement of the arbitration and/or finalization of the intended Arbitration.
4. That the Honourable court do restraining the defendant whether by itself or otherwise howsoever from committing any breach of the contract of Construction of Kiserian Sewerage Works, Contract No. AWSB/GoK/KSP/01/14 awarded to the plaintiff on 17<sup>th</sup> November, 2014, by either evicting the plaintiff, terminating the said contract or interfering with the plaintiff's right of Egress and Ingress to the said premises pending the hearing and determination of this application.
5. That the Honourable court do restraining the defendant whether by itself or otherwise howsoever from committing any breach of the contract of Construction of Kiserian Sewerage Works, Contract No. AWSB/GoK/KSP/01/14 awarded to the plaintiff on 17<sup>th</sup> November, 2014, by either evicting the plaintiff, terminating the said contract or interfering with the plaintiff's right of Egress and Ingress to the said premises pending the initiation, adoption and conclusion of the intended arbitration proceedings.
6. That the Honourable court do grant an interim measure of protection by way of injunction restraining the defendant whether by itself or through its directors, servants or agents from acting further on its notice of termination of the contract issued on 13<sup>th</sup> November, 2019 pending the hearing and determination of this application.
7. That the Honourable court do grant an interim measure of protection by way of injunction restraining the defendant whether by itself or through its directors, servants or agents from acting further on its notice of termination of the contract issued on 13<sup>th</sup> November, 2019 pending the initiation, adoption and conclusion of the intended arbitration process.

8. That the Honourable court do issue a conservatory order allowing the plaintiff to continue with the execution of Contract No. AWSB/GoK/KSP/01/14 for the Construction of Kiserian Sewerage Works, pending reference of any dispute under the contract to arbitration as provided under Clause 67.3 of the contract agreement pending the hearing and determination of this application.

9. That the Honourable court do issue a conservatory order allowing the plaintiff to continue with the execution of Contract No. AWSB/GoK/KSP/01/14 for the Construction of Kiserian Sewerage Works, pending reference of any dispute under the contract to arbitration as provided under Clause 67.3 of the contract agreement pending the initiation, adoption and conclusion of the intended arbitration proceedings.

10. That the Honourable court do issue an order restraining the defendants from recalling the performance bond and advance payment guarantee as per the defendant's letter dated 13<sup>th</sup> November, 2019 sent to the Cooperative Bank of Kenya Limited pending the hearing and determination of this application.

11. That the Honourable court do issue an order restraining the defendants from recalling the performance bond and advance payment guarantee as per the defendant's letter dated 13<sup>th</sup> November, 2019 sent to the Cooperative Bank of Kenya Limited pending the initiation, adoption and conclusion of the intended arbitration proceedings.

12. That this Honourable court do grant any further directions it will deem fit to grant.

13. That costs of this application be provided for.

2. The application was supported by the affidavit of Sharon Gathoni Muiruri, a director of the plaintiff. It was opposed through the affidavit of Martha Wanjiku, the Defendant's Legal Officer. As is evident from the prayers outlined above, the dispute between the parties concerns a contract for construction of Kiserian Sewerage Works Contract No. AWSB/GoK/KSP/01/14 for the contract sum of Kshs. 709,380,957.98.

3. Having heard the parties, I do not entertain any doubt that the relationship between them has collapsed. The prayers I have outlined above show that the defendant has issued a notice of termination. I do not have any doubt that this is a case where damages would be an adequate remedy. The defendant cannot be forced or directed by an order of this court to maintain the plaintiff at the work site or require the court to supervise the construction works which the plaintiff states it wants to complete despite the defendant clearly stating that it had terminated the contract. Since the rights of the parties will be the subject of arbitration, I restrain myself from commenting on the merits or otherwise of the claim.

4. At the hearing, I heard the plaintiff's concern to be that it would be denied the opportunity to value of work done on site so far in order to claim its fees or lodge its claim. In my view, this exercise would time limited and in the interests of justice and in order to facilitate the process, I direct as follows:

**a. The defendant shall permit and/or facilitate the plaintiff to conduct a valuation of its works done at the construction site so far.**

**b. The parties to agree on a suitable timeframe and terms thereof and in any event on or before 19<sup>th</sup> December 2019.**

**c. Mention on 19<sup>th</sup> December 2019 for further orders. In the meantime, the status quo to be maintained.**

**DATED and DELIVERED at NAIROBI this 10<sup>th</sup> day of DECEMBER 2019.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr. M. Onyango

Mr. Lakicha instructed by Hassan K. Lakicha and Company Advocates for the Plaintiff

Mr. Muchemi instructed Muchemi and Company Advocates for. the Defendant