REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLENOUS APPLICATION NO. 56 OF 2018

IN THE MATTER OF SECTION 7 OF THE ARBITRATION ACT

AND

IN THE MATTER OF RULE 2 OF THE ARBITRATION RULES

AND

IN THE MATER OF ORDER 37 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF ORDER 40 RULE 2 OF THE CIVIL PROCEDURE

RULES

M/S BLAXTON CONSTRUCTION LIMITED.....APPLICANT

VERSUS

THE PRINCIPAL CHEBARA BOYS SECONDARY SCHOOL.....1ST RESPONDENT

THE PRINCIPAL CHEBARA GIRLS SECONDARY SCHOOL....2ND RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF EDUCATION.....3RD RESPONDENT

THE PRINCIPAL SECRETARY,MINISTRY OF ROADS

AND PUBLIC WORKS.....4TH RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF WATER.....5TH RESPONDENT

LAKE VICTORIA NORTH WATERSERVICES BOARD.....6TH RESPONDENT

ATTORNEY GENERAL.....7TH RESPONDENT

RULING

The Applicant, *Ms. Blaxton Construction Limited* brought up this application under *Section 7* of the *Arbitration Act*, *Rule 2* of the *Arbitration Rules*, *Order 40* of the *Civil Procedure Rules*, *Sections 3A* and *63(e) of Civil Procedure Act Cap 21 Laws of Kenya*, *Article 159* of the *Constitution of Kenya* and all other enabling provisions of the law. The pending order sought as of now is that pending the hearing and determination of the reference by an arbitrator, interim measure of prosecution by way of a temporary injunction be issued, prohibiting the respondents either by themselves or agents/servants from entering into or signing any contracts that touch on the tender number CGS/1R.2012 and to specifically cease all and/or any construction at Chebara Girls Secondary School.

Briefly, the applicant's case is that it entered into an agreement with the 1st, 3rd and 4th respondents whereby it was to erect and complete an administration block, Principal House, 2 no. dormitory type 2 blocks, kitchen/Dining hall, 2 no. abulition blocks, 4 no. classrooms and external works. The 1st Respondent which was to manage the funds in the project, ran out of funds and as a result the project stalled after it failed to honour the certificates raised by the applicant. The 6th Respondent which currently has the management of the funds to facilitate the completion of the projects, the subject of the agreement, has not only moved to the site and utilized the Applicant's material on the site in a bid to complete the project in blatant violation of the Applicants rights under Clause 31:1 of the

Agreement but has also caused to be advertised in the Daily Nation Newspaper an invitation for tender for completion of the said project. This has given rise to a dispute between the parties, that the respondent breached its obligations under *Clause 24.1(b)* of the *Agreement.* Pursuant to *Arbitration Clause 378.1,* the applicant referred the dispute for arbitration but the Arbitral Tribunal is yet to be established. The Applicant is apprehensive that the evidence and the material necessary for the arbitrator's assessment shall be lost to the detriment of the Applicant unless one orders sought herein are granted. The Applicant lastly avers that it has established a prima facie case with a probability of success and unless the application is granted it stands to suffer irreparable loss.

Mr. Tororei in arguing the application averred that by the time the works stalled it had progressed to 35% and the Respondent ran out of funds due to variations in the contract. He relied on a High Court decision by *Justice Ruth Sitati,* ***Misc. Application No. 11 of 2016, of Smatt Construction Co. Ltd -vs- The County Government of Kakamega.*** The court was of the view that where the court seeks to preserve evidence pending the outcome of the arbitral proceedings, it should not be restricted by the preconditions for grant of interlocutory injunctions as laid down in the celebrated case of ***Geilla -vs- Cassman Brown (1973) EA 358.***

Mr. Odongo for the 1st, 5th and 7th Respondent opposed the application. He averred that it is fundamentally defective as it was brought by way of Notice of Motion rather than by way of Summons, of which is a mandatory requirement under *Rule 2* of the *Arbitration Act, Section 7*. He said the said defect is incurable even under *Article 159 (2) (d)* of the *Constitution*.

The said application is not supported by a competent affidavit as required by *Order 4 rule 1* of the *Civil Procedure Rules*. Further to this it was averred that the applicant being a corporation there needed be attached to the application a resolution to institute the suit and the application.

The court was also told that *Mr. Blaxton Construction Limited* is a stranger in this matter. It's *Blaxton General Building Constractors* who bid for the work and signed the agreement. The change of name happened on 22nd October, 2012. On this point they relied on the case of ***Kenya Association of Travel Agents (KATA) -vs- International Air Transport Association (IATA).*** Here the court found that "KATA" of which according to its constitution was mandated to institute or defend all legal proceedings by or on behalf of KATA (itself), had no mandate to institute or defend suit on behalf of its members jointly or severally and was therefore not the appropriate party to seek for review.

All the Respondents were said to be public entities. *Section 3(2)* of the *Public Authorities Limitation Act*, *Cap 39 Laws of Kenya*, limits any claim based on contract to a period of three years from the date the cause of action arose. *Mr. Odongo* argued that the cause of action in this matter arose when the 1st Respondent was unable to meet its obligation under the contract. From 27th August, 2013 the 1st Respondent was unable to settle valuation No. 9 for 4,116,000/-. It's argued the cause of action arose then and lapsed three years after on 27th August, 2016. Under the agreement, the contractor was required to submit a notice of dispute within 90 days of which thereafter no such notice could issue. It is contended that the first notice was issued on 30th May, 2018 well beyond ninety days from 27th August, 2013. The cause of action could not have rose on 5th June, 2018 when the 6th Respondent re-advertised for completion of the works which's the subject mater of this suit as the notice was issued on 30th May, 2018.

It is argued by the respondents that the contract terminated when the project manager gave notice to correct a defect which was fundamental breach of contract. In the letter dated 5th October, 2017 the project manager sought from the contractor whether they were ready to resume and complete the works assigned to them. Their response was by a letter dated 7th October, 2017 where the constructor gave a different condition, stating they were willing to continue subject to review of their rates. Rates was a fundamental element in the contract and the project then would be deemed to have terminated.

It was further submitted by the respondents that the issue in this case are not unique and the holdings in ***Giella -vs- Cassman Brown*** applies. The case of ***Infocard Holdings Ltd -vs- The Hon. Attorney General and another, Civil Case No. 361 of 2012 (o.s)*** was relied on. In it *Justice Gikonyo* held that before orders under *Section 7* of *Arbitration Act* are granted, the applicant must demonstrate that he is a party to the Arbitration Clause and that he's likely to suffer irreparable loss. It was alleged that the applicant has not shown any loss he is going to suffer. Work done as well as the remaining works are documented. The materials on the site will be documented in site hand over report. The certificates shows the work he had done and can be adequately compensated by way of damages. No irreparable loss is at risk. Respondents also argued that the balance of convenience tilts in favour of respondents as completion of the project is for public good.

Mr. Oundo for the 6th Respondent argued that the contract was for a period of twelve months and was not extended. When the 6th respondent made the advert there was no contract in existence between the Applicant and the 6th Respondent.

Mr. Tororei for the applicant, in reply argued that whether the proceedings were instituted by way of Notice of Motion or summons the respondents suffer no prejudice. *Article 159* of the *Constitution* calls the courts to consider substantive justice over procedural justice.

Section 35(1) (b) of the *Company Act* says a company can act by way of a person having authority, implied or assigned. *Kiprop Kipkech* had signed various correspondences prior to this matter on behalf of Braxton Construction limited. He was therefore an authorized person to act for the applicant. He is the director and had authority to depone on behalf of the company.

The change of name occurred after the contract was executed and works commenced. *Section 66 (1)* of the *Companies Act* is to the effect

that the change of name takes effect after the certificate is issued. *Subsection (3)* indicates that subsisting legal proceedings could continue or fresh proceedings be instituted under the new name.

The correspondence of 5th October 2017 (KK4) shows the contract was on going. The letter was responded to on 7th October, 2017. The cause of action could not have risen in the year 2013. On 30th May, 2018 the principal complaint was the use of applicant's materials on the site. Cause of action arose when there was advertisement of the project later on 5th June, 2018.

Paragraph 23(2) of the agreement is specific that the properties at the site shall become properties of the employer when the employer pays the constructor their value. It has not been valued and paid for.

Paragraph 17 has mandatory provision to the project manager to extend the intended completion date if a compensation event occurs. A compensation event occurred when they stated they had ran out of funds. They were the cause of delay which entitles the applicant to an extension. There are no violations applicable to the applicant.

Paragraph 33(1) of the contract says that the employer or the contractor may terminate the contract. The party who is not at fault has a choice to or not to terminate the contract. Neither party terminated the contract. Paragraph 34.2 of what should follow upon termination was not invoked as there was no termination. A party in violation cannot be allowed to continue with violation in the name of public interest.

In determining this application, I have considered that there is a dispute between the applicant and the Respondent which have been referred by the applicant for arbitration in accordance with the agreement between them. They are just before this court for conservatory orders, to conserve the site of which according to the applicant has relevant evidence for consideration by the arbitrator. It is not in dispute that before the project stalled the applicant had raised a claim of 4,116,000/- of which was not honored as the respondent had ran out of funds. There are also some materials at the site which were meant for use in the project. Looking at paragraphs 33 and 34 of the agreement, which are on termination and payment upon termination, it is clear that incase of termination of the contract there was to be clear communication to that effect to warrant effecting the procedure laid out in paragraph 33.4. There is no communication of whatever nature which shows that the contract had terminated. It's only so assumed by the respondent given that the construction had stalled for non payment of raised certificates.

Article 159 (d) of the *Constitution of Kenya 2010* in simple terms states that:-

> ***"Justice shall be administered without undue regard to procedural technicalities;"***

It does not therefore matter whether the application was brought by way of Notice of Motion rather than Summons; so long as the process does not prejudice the respondent in any way. Substantive justice takes precedence over procedural justice. The same would apply to the technical gaps exposed by the respondents in the application.

Blaxton General Building Constructors Limited changed its name after the agreement and while the construction was on going, to *Blaxton Construction Limited.* It's clear the respondents were dealing with one and the same entity even after the change of name. The Company Act is clear that once a name is changed the company can continue with the already filed proceedings or institute fresh proceedings under the new name. The applicant is therefore in order to proceed under the new name.

The cause of action did not arise when the project stalled. There are correspondences showing that the applicant was still willing to accomplish the project once the issues it had raised were sorted, and funds availed. It however arose when it was evident that the respondents were out to give out the project to another firm or company to complete. This is when they advertised for the project on 5th June, 2018.

Many of the concerns raised by the respondent in this application are issues for deliberation and consideration before the arbitration. This court concerns should be whether it's at interest of justice that the application should be allowed or not. If disallowed the applicant would stand to suffer irreparable loss given that proper valuation of the work done and materials at the site have not been done. The material also belongs to him till its value is paid for by the respondents, as per the agreement and it wouldn't therefore be proper to hand it to another constructor. The balance of convenience tilts in favour of the applicant; when the respondents ran short of funds it was mostly to the detriment of the applicant, but that now they have funds are inclined to run away from the applicant without following the laid down procedure in the agreement. The interests of the applicant and worries are valid and deserve protection under the law, more so if by not doing so, will prejudice its case referred for arbitration. While damages may fully compensate the applicant, assessment can be a headache if the respondents are allowed to handover the project to

another constructor before proper valuation. The principles laid down in the case of ***Giella -vs- Cassman Brown (1973) EA 358*** are not absolute as a court having its eye on justice maybe presented with unique issues which would invite other considerations, like the one in this case of preserving evidence. I for the reason find the application merited and is granted.

This court therefore orders that pending the hearing and determination of this reference to arbitration and conclusion of the arbitral proceedings, a temporary injunction do issue prohibiting the Respondents either by themselves or agents/servants from entering into or signing any contracts that touch on the tender number CGS/IR.2012 and to specifically cease all and/or any construction at Chebara Girls Secondary school.

Costs be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 4th day of July, 2018.

In the presence of:-

Mr. Tororei for the Applicant

No appearance for the Respondents

Mr. Mwelem – Court assistant