



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. CIVIL APPLICATION NO. 59 OF 2018

KISHAN BUILDERS.....APPLICANT

VERSUS

CHEBARA BOYS SEC. SCHOOL.....1ST RESPONDENT

LAKE VICTORIA NORTH WATER SERVICES BOARD....2ND RESPONDENT

RULING

1. The application dated 7th June 2014 seeks that this court determines whether pending arbitration, a conservatory order should issue in the form of a temporary injunction restraining the 2nd Respondent and/or the 1st Respondent either jointly or severally through their agents and/or servants or any person claiming under or through them, from conducting, facilitating, approving, ratifying, endorsing, and/or in any manner participating in negotiating, signing, executing or conceding on agreement and/or an agreement as regards Tender No. **LVNWSB/GOK/EMC/2017-2018**.

(2) Whether pending arbitration, an order be issued suspending the said tender.

2. **Miss LUMALASI** who appeared for the applicant explained to this court that although the document prepared in prosecuting this matter is titled originating summons, it is actually a chamber summons and should be treated as such – never mind the manner in which the orders sought are couched.

3. The background to this matter is that the applicant is a limited liability company which was contracted but the 1st Respondent for the construction and completion of several blocks at the **Chebara Boys Secondary School** (1st Respondent). The contract was not terminated by the works at the site were suspended by the applicant in the year 2013 pending payments by 1st Respondent for work done.

4. The 1st Respondent failed to provide the monies and the applicant in accordance with the contract declared that there being a dispute notified 1st Respondent and then referred the matter to arbitration. Meanwhile, the 2nd Respondent (**Lake Victoria North Water Services Board**) advertised in the **Daily Nation of 5th June 2018** inviting tenders from contractors to complete the work that the applicant had begun at the school.

5. The applicant's contention is that since the contract was not terminated, it has the right to perform it, it never having surrendered the same and has its employees guarding the site and materials. It deems the invitation for tenders as being prejudicial to its labour rights yet it is willing to complete the works.

6. The applicant prays that pending arbitration, orders of injunction do issue restraining the Respondents from pursuing the tender process.

7. In the affidavit supporting this application, the applicant's Managing Director deposes that the applicant had been performing its assignment diligently until around the year 2013 when it could no longer work due to the Respondent's inability to meet its fees. Attempts to re-negotiate so as to enable the applicant resume the works failed, and the 1st Respondent ordered the applicant to deliver the materials it had stored off site and on-site.

Subsequently the applicant invited the Respondent vide a letter dated 11.11.2017 to arbitration in compliance with clause 37 of the contract works states:

"Settlement of Disputes"

37.1. in case of any dispute or difference shall arise between the Employer or the Project Manager on his behalf and the

contractor, either during the progress or after the completion or termination of the works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration, and to concur in the appointment of an Arbitration within thirty days of notice ... agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman or vice Chairman of any of the following proposed institutions....

8. The applicant maintains that since the contract has never been terminated, then it remains in force, and interim measures must be issued so that no other tender is invited before the dispute is resolved by the arbitration. Allowing for the tender process to continue is described as being prejudicial and will lead to the applicant suffering irreparable harm and prejudice as the applicant invested a lot in the works it was contracted to perform. The applicant sees a sinister motive in the advertising invitation for tenders especially because it has expressed a willingness to complete the work.

9. In opposing the prayers, the 1st Respondent argues that the application offended Order 4 Rule 1 of the Civil Procedure Rules as no resolution or authority has been filed. The application is termed as frivolous and devoid of substance as the applicant's claim that the matter has been referred for arbitration is defeated by Section 3(2) of the Public Authorities Act (Cap 39) which provides that:

No proceedings found on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.

That in any case an order of injunction cannot issue against the Government as that is expressly provided under Section 16 of the Government proceedings Act.

The 1st Respondent claims to have been discharged from the contract by frustration, and effluxion of time and breach of a fundamental terms of the contract by both parties, so an injunction will not serve any purpose.

It is further contended that the issues raised here do not satisfy the test well stated in the celebrated case of **Giella V Cassman Brown Co. Ltd (1930) E.A 338** as no prima facie case has been established. It is also stated that no irreparable loss has been demonstrated because if the applicant is successful the loss can be quantified and is capable of monetary assessment and compensation. The balance of convenience is said not to tilt in favour of applicant, who is also accused of non disclosure.

10. The 2nd Respondent in opposing the application states that the contract was to be completed within 12 months and there was no provision for extension.

11. The outstanding work is described as urgent taking into consideration that it relates to a learning institution. The 2nd Respondent suggests that whatever issue can be addressed, ought not to stall the initial intention, and clause 37 is not a relief because the arbitration is barred by operation of limitation.

The applicant is said not to have established a prima facie case with probability of success. Further that this being a school if the orders sought are granted, the same will not only affect the 1st Respondent but also the entire public – so the scales of justice tilt in favour of Respondent.

12. Miss Lumalasi submits on behalf of the applicant that the interim measures would preserve the status quo so that the dispute between the parties is addressed at arbitration before inviting other parties to take over the contract. It is her contention that this is the only way in which the applicant's commercial interest can be protected. As far as the applicants are concerned, the contract remains in force and has never been formally terminated despite the fact that for almost 4 years nothing in terms of work has been going on – and this is part of what the arbitration would address.

13. Counsel urged this court not to be confined by Giella (supra) principles of granting injunction and be guided by the case of **SMATT CONSTRUCTION LTD V COUNTY GOVERNMENT OF KAKAMEGA [2016] eKLR** where the court stated inter alia that:

“... By determining the matters on the basis of the Giella principles the Superior Court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the co.... of arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such order take different forms and go under different names ... whatever their description however, they are intended in principle to operate as holding orders pending the outcome of the arbitral proceedings.

14. The Respondent's position is that once the applicant suspended the works then the contract stood terminated and there is no valid consent capable of being enforced by this court.

That is made clear by the letter dated 5th October 2017 where the Respondent demanded that the applicant delivers all materials in its possession, and which the Respondent had actually paid for via certificate No.16 in the sum of 23,024,576/-.

It is also contended that the applicant is time barred in his claim as this matter offends section 3 (2) of the public Authorities Limitation Act (Cap 390) which provides that:

“3(2) no proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date when the cause of action accrued.”

It is further submitted that the applicant being a limited liability company ordinarily makes decisions through its directors or via resolutions and there is no valid resolution for the company authorizing filing of this suit, this offending order 4 Rule 1 (4) of the Civil Procedure Rules. It is pointed out that there is no resolution exhibited by the applicant to confirm that the company resolved to institute this suit against the respondents or even for the deponent of the applicant's supporting affidavit to make the averments thereto. Further, there is no resolution exhibited to confirm that the company appointed the firm representing it in this matter to file the suit – so the firm ought to be deemed to be improperly on record as it has no legal authority to prosecute this application. Counsel referred to the case of **AFFORDABLE HOMES AFRICA LTD Vs IAN HENDERSON & OTHER HCC NO 524 of 2004** where the court found that the Board of Directors of the company had not passed a resolution to authorize the institution of the suit.

15. Counsel argues, that in any event the applicant has failed to meet the threshold set in **Giella Vs Cassman Brown** as;

a) No prima facie case has been made out,

b) Applicant has not demonstrated that the kind of loss it would suffer cannot be adequately compensated by way of damages,

c) The balance of convenience tilts in favour of the Respondents because even though the dispute has been referred to arbitration, it is likely to be a non-starter as the contract term provides that at clause 37:3 that any dispute must be done within 90 days from the date when the dispute arose – in this instance there is a 4 year lapse.

It is argued that if there is any payment done, then the same can easily be documented and there is no damages that the 1st Respondent will not be able to compensate the applicant by way of damages.

16. It is also pointed out that even in making the delicate balance of preserving competing interest, then the balance tilts in favour of the Respondents as this involves a public Institution and the project is for public good, and public interest oscillates towards competition of the project.

17. The court is urged not to grant the injunctive orders on grounds that the applicant has not come to court with clean hands, since the applicant was paid for materials it never delivered to date, and although there are claims of having requested for meetings over the years, the only evidence of a request to a meeting is one letter calling for arbitration, which was a knee jerk reaction to the Respondent's invitation for tenders.

It is also submitted that this court is being asked to issue orders in a vacuum as there is no evidence that a reference has been filed for arbitration, or that an arbitration has declared that a dispute exists.

18. To this, the 2nd Respondent adds that since the applicants failed to disclose that the contract which was only for 12 months had expired and that some payments had actually been made, then it is not entitled to any equitable remedies. The court is also urged to consider that endless litigation will result in stalling the school project and negatively impact on the students and staff of the school. Counsel pointed out that the proposal to complete the stalled work by inviting tenders is done in good faith and for public interest, urging the court to be guided by the orders expressed by **Nyamu 'J' in MUREITH & 2 OTHERS (for MBARI YA MURATHINI CLAN) VS AG & 5 OTHERS [2006] eKLR 443** that:

“Where national or public interest is denied, the gates of hell open wide to give way to...degradation, pouring insanity and instability...public interest ... as twinned to human rights...and we shall have empowered our people to create real worth for themselves.”

19. I must confess I get a very confused feeling about the manner in which this application is conducted. Whereas Miss Lumalasi maintains that it is a simple notice of motion, every other detail, the language, the manner in which the prayers are conducted, the arguments, bespeak an originating summons.

However what I decipher is the desire by the applicant to have conservatory orders in the form of an injunction to stop any further tendering of the contract for completion of the work which had begun at **Chebara Boys Secondary School** until the dispute between the applicant and the Respondent is resolved.

20. Prima facie there is a dispute which takes many angles – not just regarding whether payment has been made to applicant in terms of the contract, but also whether the applicant delivered the materials Respondent claims to have paid for, what was the period for the contract, was the contract frustrated or terminated, is there a contract still existing 4 years later. That is the dispute that ought to have been presented for arbitration, and applicant (although counsel has gone ahead to partially argue the substance of their dispute) saying it has invited the Respondent to attend arbitration and even proposed an arbitrator.

21. Yet is there a dispute already filed for arbitration? What is demonstrated is an intention to refer the same to arbitration. I can also not ignore the terms of the contract at Clause 37.7 which sets a period within which the matter ought to be referred for arbitration, it would thus appear that the applicant has only been jolted from its long slumber by the Respondent's action of inviting tenders to complete the unfinished work. The first limb of the principles set out in **Giella V Cassman Brown** has not been met.

(2) Would damages be inadequate to cushion whatever loss the applicant may suffer? I think not, applicant refers to expenses it has undergone in terms of delivery of materials from the ware house to the site, placing 3 guards at the site, conducting monthly site visits, using its own finances to purchase materials – all these are activities which can be quantified in monetary terms and adequately compensated and that would in fact cushion the applicant's financial interests, In fact even if the arbitrator was to find that the Respondents were in breach of the contract and that a valid contract still existed – even that can be adequately compensated.

Commercial disputes are a norm in the business world – failing to complete a project either due to lack of facilitation by the employer or due to other commercial conflicts is not something that would be described as causing irreparable damage to the applicant’s commercial reputation, and if the applicant perceives that to be the case, then it has not been demonstrated to this court.

22. As regards the balance of convenience – had the applicant actually presented a reference confirming that a dispute has already been referred for arbitration, then I would have found that the balance tilted in its favour. However since no such demonstration has been made, then I cannot ignore the fact that the works at the school which according to the parties involve inter alia construction of dormitories and sanitation issues tilts the matter in favour of the Respondents.

23. Even if the principles of *Giella* were to be overlooked and the court adopts the approach by the court in the **SMATT CONSTRUCTION LTD** case, that it is necessary to have holding orders so as to allow for arbitration, the issue still remain as to whether the applicant met the requirements set out by the Court of Appeal in **SAFARICOM V OCEAN VIEW BEACH HOTEL LTD & 2 OTHERS CA 327 of 2009** that whereas it may be necessary for orders to issue to preserve the outcome of arbitration, such orders may issue before or during arbitral proceedings. The court set out factors which must be taken into account before issuance of interim protection measures by:

(1) The existence of an arbitration agreement,

(2) Whether the subject matter of arbitration is under threat,

(3) Which is the appropriate measure of protection after an assessment of merits of the application.

(4) For what period must the measure be given especially if requested for before commencement of the arbitration so as to avoid encroaching on the tribunal’s decision making power as intended by the parties.

24. Arbitration formed part of the contract and in this regard the applicants have met the above test except for one nagging question which Miss Lumalasi did not address i.e does the applicant have authority to file this matter given that it is a body corporate

Order 4 Rule 1 (4) which provides:

“Where the plaintiff sues in a representative capacity, the plaintiff shall state the capacity in which he sues and how that capacity arises.”

25. The applicant being a body corporate would ordinarily conducts its business and affairs through natural bodies – yet no resolution has been presented to this court confirming that the company allowed for this suit to be filed – nothing has been presented to this court.

26. The subject matter for arbitration is whether the contract still remains, has been terminated or frustrated. The applicants state the contract was frustrated due to factors beyond their control – and in my view whether the matter goes for arbitration or not will not change the fact that for 4 years nothing constructive has been taking place – whether it is on account of the Respondent’s failure or the Applicants – so a conservatory order will not change that.

27. Tenders have just been invited, there is no evidence that the bids have been opened, or that the selection process has begun. If the applicant is really keen in pursuing arbitration that can be done within a prescribed period to take care of its interest but to stop the tender process so as to settle a score based on an attempt to protect its commercial reputation does not rate very high.

28. Consequently, I hold and find that the application lacks merit and is dismissed with costs to Respondents.

DELIVERED and DATED this 18th day of September 2018 at ELDORET.

H. A. OMONDI

JUDGE