



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL SUIT NO. 4 OF 2018

KITHO CIVIL & ENGINEERING CO. LTD.....PLAINTIFF/APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KITUI.....DEFENDANT/RESPONDENT

R U L I N G

1. The Plaintiff, **Kitho Civil & Engineering Co. LTD**, through the firm of **F. K. Omenya & Company Advocates** instituted a suit by way of Plaint seeking a declaration that, the Defendant, **The County Government of Kitui**, breached the terms and conditions of the contract dated the **14th July, 2014**; specific performance, payment of **Kshs. 69,525,641.86/=**, general damages, costs and interest.

2. Filed with the Plaint is a Notice of Motion where the Applicant seeks orders thus:

(i) That the Honourable Court be pleased to issue an order of injunction prohibiting the Defendant/Respondent, its Agents, servants or any other person claiming through it from carrying on with tender **No. CGoKTI/232/2013-2014** and/or otherwise continuing with the construction of Defendant/Respondent's Staff Office Block at County Headquarters pending the *interparties* hearing of this application and/or arbitration.

(ii) That in the alternative and without prejudice, the Honourable Court be pleased to order the Defendant/Respondent to deposit in a joint bank interest earning account or in court **Kshs. 100,000,000.00/=** or issue a suitable bank guarantee for **Kshs. 100,000,000.00/=** pending the hearing and determination of this application and/or suit.

(iii) That the Honourable Court be pleased to order the retention funds (**Kshs. 5,700,000/=**) of phase one of tender **No. CGoKTI/232/2013-2014** (phase one of the project) be released to the Plaintiff/Applicant within a prescribed time but not later than 30 days.

(iv) That the Honourable Court be pleased to order that in the pendency of the interim orders, this matter proceeds for arbitration as provided for by the contract at **Provision/Clause No. 37** of the **Terms and Conditions of the Contract**.

(v) That the Honourable Court be pleased to issue an order of injunction stopping the Defendant/Respondent, its agents, servants or any other person claiming through it from carrying on with tender **No. CGoKTI/232/2013-2014** and/or otherwise continuing with the construction of Defendant/Respondent's Staff Office Block pending hearing of the main suit.

3. In response, the Respondent filed a replying affidavit to the Notice of Motion where its **Ag. Secretary** denied allegations and stated *inter alia* that there are proceedings pending between the Applicant/Plaintiff and the Defendant/Respondent over the same subject matter in **County Government of Kitui vs. Kitho Civil & Engineering Co. LTD, High Court of Kenya Civil Suit No. 3 of 2018 at Kitui**, a matter that is yet to be heard and determined and that **Section 6** of the **Civil Procedure Act, Cap 21 (k)** mandates the Court not to proceed with the trial in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties. That the performance of contract was frustrated by the inordinate delays occasioned by the Applicant who failed to finalize the contractual works within the stipulated timeframe.

4. On the **27th day of June, 2018** the Respondent filed a Notice of Preliminary Objection on the grounds that the suit has been brought to the Court in clear disregard of the express provisions of **Section 6** of the **Civil Procedure Act** and is an abuse of the due process of the Court and that issues canvassed in the application are directly and substantially in issue between the same parties in **County Government of Kitui vs. Kitho Civil & Engineering Co. LTD, Kitui High Court Civil Suit No. 3 of 2013**.

5. The application was canvassed by way of oral submissions. **Mr. Makau**, learned Counsel for the Respondent/Applicant stated that pursuant to **Section 6** of the **Civil Procedure Act**, the Court is precluded from proceeding with the matter, as **County Government of Kitui vs. Kitho Civil & Engineering Co. LTD High Court of Kenya Civil Suit No. 3 of 2018 (Kitui)** that was filed before the instant case relates to an alleged breach of contract as it arises from **Tender No. CGoKTI/232/2013-2014**. That after the Applicant's Counsel was

served with the application they proceeded to file the instant suit. They sought for either striking out of the suit or for it to be stayed pending hearing and determination of **Civil Suit No. 3 of 2018**.

6. In response **Mr. Omenya** opposed the application. He urged that the Preliminary Objection is defective as it does not specify what is being objected to. That a party is bound by its pleadings, that the cause of action in **Civil Case No. 3 and No. 4** is different in as much as it arises from the same contract. He contended that **Civil Case No. 3 of 2018** is improperly before Court as it arises from a contract which has a clause on arbitration and the only time one can move the Court is under **Section 7** of the **Arbitration Act** which was not the case when the Plaintiff before the Court was filed. That the claim raises triable issues that can only be determined on merit.

7. In response, the Applicant stated that issues raised in this case should have been raised in **Civil Case No. 3 of 2018** through a counterclaim. That despite an arbitration clause existing nothing bars a party from approaching the Court.

8. **Section 6** of the **Civil Procedure Act** provides thus:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”

9. I have perused both matters. **High Court Civil Case No. 3 of 2018** was instituted by the **County Government of Kitui** against **Kitho Civil & Engineering Co. LTD** on the **14th** day of **June, 2018**. The Defendant filed a Memorandum of Appearance on the **20th June, 2018**. The following day the **21st** day of **June, 2018** the Defendant instituted **High Court Civil Suit No. 4 of 2018** (instant suit) against the Plaintiff in **High Court Civil Suit No. 3 of 2018**. Parties in both suits are therefore the same and the alleged breach of contract arise from **Tender No. CGoKTY/232/2013-2014**.

10. The claim in the first suit is for general damages for breach of contract and special damages in the sum of **Kshs. 6,200,000/=**. In the instant suit the Plaintiff (**Kitho**) sought a declaration that the Defendant (**Kitui County Government**) breached the terms and conditions of the contract (same contract in issue in **High Court Civil Suit No. 3 of 2018**); an order of specific performance and fulfillment of the contract; payment of interim claim of **Kshs. 69,525,641.86/=** and general damages for the breach of contract.

11. The matter in issue is directly and substantially in issue in the suit that was instituted at the outset and both matters are pending before this Court.

12. I have been asked to strike out the instant suit. Striking out a suit is discretionary and such power should be invoked in very clear cases and further it should be done judiciously. The marginal note of **Section 6** of the **Civil Procedure Act** provides for staying of suit but not striking it out.

13. In the premises, I allow the Preliminary Objection by directing that: the instant suit, **High Court Civil Suit No. 4 of 2018** be and is hereby stayed pending hearing and determination of **High Court Civil Suit No. 3 of 2018**.

14. The Plaintiff will bear costs of the application.

15. It is so ordered.

Dated, Signed and Delivered at Kitui this 6th day of December, 2018.

L. N. MUTENDE

JUDGE