REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 442 OF 2016

BRAND STRATEGY AND DESIGN (EA) LIMITED.....PLAINTIFF/APPLICANT

VERSUS

ETHICS AND ANTI CORRUPTION COMMISSION.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff (hereinafter "the Applicant") filed a Notice of Motion Application dated 28th October 2016, brought under Section 1A, 1B, 3A, and 63(e) of the Civil Procedure Act, Order 40 Rule 2, Order 50 Rule 1 of the Civil Procedure Rules 2010, Section 7(1) of the Arbitration Act, 2010, and all the enabling provisions of the law. The Application is based on the grounds on the face of it, and an Affidavit sworn by Eva Muraya dated 28th October 2016, and a further Affidavit she swore dated 28th November 2016.

2. The Applicant is seeking for *inter alia*, an order of Interim Measure of Protection in the form of a Temporary Injunction to restrain the Defendant (herein "the Respondent"), from entering into or signing any contracts with any person whatsoever for provision of Communication Consultancy Service – for the Multi – Agency Team RFP No. EACC/21/2015 – (hereinafter the "Contract Agreement"), pending the reference of this matter or dispute to Arbitration and the conclusion of the Arbitral proceedings. The Applicant further prays for an order directing the Respondent to release Kshs.5,510,015.04 to the Applicant pending Arbitration. That further, and in the alternative, the Court be pleased to declare the purported termination of the contract Agreement by the Respondent as illegal, null and void, and of no legal effect, and the Respondent be compelled to allow the Applicant to complete the Contract Agreement. That, the costs of the Application be provided for.

3. The background facts of the matter as stated by the Applicant are that, on the 7th day of January 2016, the Respondent placed an advertisement in the daily newspapers, inviting Expression of Interest ("EOI") from interested and eligible firms/individuals for the provision of the aforesaid Communication Consultancy Services. The Applicant expressed an interest therein, was invited for the same. Subsequently, the Applicant was awarded the contract. On 16th May 2016, the Parties entered into the Contract whereby the Applicant was to offer the Consultancy Services in consideration of a sum of Kshs.22,040,062.64.

4. That the Applicant commenced execution of the contract, and/or performance thereof. On the 20th July 2016, the Respondent requested the Applicant to provide it with information to assist them to tally and balance gaps or discrepancies in the contractual amounts. The Applicant supplied the documents

requested for and the same were acknowledged by the Respondent, vide a letter dated 4th August 2016. However, the Respondent upon consideration of the information supplied, alleged that the Applicant had exaggerated the value of the contract by 66.21% which constituted misrepresentation. Subsequently, the Respondent issued the Applicant with a 30 days' notice terminating the Contract. On 16th August 2016 the law-firm of Messrs Mboya Wangongu & Waiyaki Advocate, representing the Applicant wrote to the Respondent protesting against the Notice to terminate the contract.

5. However, on 5th September 2016, the Respondent wrote to the Respondent terminating the contract. The Applicant again vide, its letter dated 14th September 2016 protested against the termination. On the 18th October 2016, the Applicant wrote to the Respondent demanding a sum of Kshs.5,510,015.04, being a payment for services rendered in the months of June, July, and August 2016. The Applicant further avers that, since the Contract executed by the parties had an Arbitration Clause, the Applicant by a letter dated 18th October 2016, invoked the Arbitration Clause declaring a dispute. Hence, the Application herein and the orders sought.

6. The Respondent filed a Replying Affidavit dated 10th November 2016 sworn by Robert Kanyi Wachira, the Deputy Director in-charge of Procurement at the Respondent's commission. He deposed that, indeed the Respondent placed an advertisement through print media (Daily Nation and Standard Newspaper) inviting Expression of Interest from interested and eligible firms/individuals for the provision of Communication Consultancy Services. That, the Applicant was among the fifteen (15) firms that expressed interest therein. After the Technical evaluation, the Applicant bid emerged as the most responsive, prompting the Respondent to enter into a contract with the Applicant as aforesaid.

7. However, the Respondent undertook a review of the documentation provided by the Applicant and it became apparent that the Applicant had deliberately misled the Respondent in a number of areas, including the total value of the contracts previously performed, which has been exaggerated. The Respondent then wrote to the Applicant on 20th July 2016 to provide information that would cure the identified discrepancies. The Applicant provided the copies of contract and invoice, but upon review thereof, it was revealed that, the Applicant had exaggerated the contracts previously performed by a margin of 66.21%. The Applicant was informed accordingly vide a letter dated 4th August 2016; and given a 30 days' notice to terminate the contract. On 5th September 2016, the contract was terminated. The Respondent argued that the entire suit and Application herein are based on an invalid, illegal and unlawful contract which is unenforceable in law. Further that, prayers 2, 4, and 5 of the Application cannot be granted at an interlocutory stage of the case, as the grant thereof will amount to termination of the entire suit.

8. In addition to the Replying Affidavit aforesaid, the Respondent filed grounds of opposition which in a nutshell states that, the Contract herein is predicated on crime, therefore it is not a matter within the ambit of Arbitration, and the same cannot form the basis of referral to the Arbitrator. That the Arbitration Clause, being an integral part of a null and void contract is itself null and void, inoperable and/or incapable of being performed. That there is no evidence that the liquidated sum claimed is indisputably due to Applicant. Finally, that the Applicant has not met the requirements set out in the case of ***Geila Vs Cassman Brown*** for grant of the orders of Temporary Injunction sought for in the Application.

9. In response to the Replying Affidavit, Eva Muraya sworn a further Affidavit denying that the Applicant engaged in fraudulent activities. She deposed that, the allegation to that effect are made in bad faith and are baseless. That, the Applicant supplied all the information requested for by the Respondent and there is no evidence to prove the Applicant supplied misleading evidence. That, this Application is properly before the Court, and the Respondent cannot purport to determine the validity of its own contract, and unilaterally terminate it. That to do so, would amount to *"unjust enrichment and corrupt/unethical Practice"* for the Respondent to *"award a contract, take the services under it, and in lieu of paying decide to review the award and unilaterally terminate it without paying."*

10. Finally, the Respondent filed an Affidavit in reply to the Plaintiff further Affidavit. Mr. Wachira basically reiterated the contents of the Replying Affidavit to the effect that the Applicant gave misleading

information which amounts to fraudulent practice, which led to the termination of the contract. That no services were rendered to warrant a payment of the sum sought for of Kshs.5,510,015.04.

11. The Parties agreed to dispose of the Application by filing written submissions. I have now considered the entire Application, the grounds and Affidavits in support, the grounds of opposition, the Replying Affidavit and reply to the further affidavit, alongside the said submission. I find the following issues require determination:

i. Whether the Applicant has met the threshold of grant of interim measures of protection sought.

ii. Whether this matter/dispute should be referred to Arbitration.

iii. Whether the Applicant is entitled to the sum of Kshs.5,510,015.04 sought.

iv. Whether the Court should grant prayers (5) of the Application, declaring the contract between the Parties herein as null and void.

v. Whether the Court should order for costs and if so, in whose favour.

12. I shall deal with these issues alongside each other. However, before I do so, let me make some preliminary observation. The Parties herein, through the various Affidavits sworn and further Affidavit thereto, or in response thereto, descended into the arena of turning this Application into a mini-trial. Most of the facts deposed in the said Affidavits go to the merit of the suit. The grounds of opposition similarly relate to the factual issue and literally reiterates the matters deposed in the Replying Affidavits (see ground 1 and 4). I have decided not to fall into that trap. I shall therefore squarely address the prayers in the Application.

13. I shall first deal with the three prayers seeking for: (a) release of Kshs.5,510,051.04 (b) an alternative prayer for declaration that the contract entered into herein is null and void, and (c) the prayer for grant of a temporary injunction. First and foremost all these prayers Nos 2, 4, and 5 in the Application are the same as the prayers Nos. (a), (b) and (c) in the Plaint. Thus, the consideration and grant thereof at this interlocutory stage will amount to determining a suit at an interlocutory stage. I therefore agree with the Respondent's submissions to that effect and decline to deal with these prayers at this stage in this ruling. Even then, since they form the basis of the suit and are sought for in the main suit, they cannot be tried through affidavit evidence.

14. Be it as it were, I shall now deal with the issue of referral of the matter to Arbitration. It is not in dispute that under clause 12 of the Contract entered herein, the Parties provided for reference of any dispute arising therefrom to Arbitration. That clause 12 provides as follows:

"Any dispute arising out of this Contract which cannot be amicably settled between the parties, shall be referred by either party to the arbitration and final decision of a person to be agreed between the parties. Failing agreement(sic) to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman of the Chartered Institute of Arbitrators, Kenya branch, on the request of the applying party".

15. The Respondent argued that by the Applicant instituting a suit seeking for a range of prayers, the Applicant has submitted to the jurisdiction of this Court and lost its right to rely on the Arbitration Clause. That as a result thereof section 6 (1) of the Arbitration Act came into play.

16. The said Section 6 (1) provides that:

"A Court before which proceedings are brought in a matter which is the subject of an arbitration shall, if a party so applies not later than the time when the Party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay of proceedings and refer the parties to Arbitration unless it finds:

a) that the Arbitration agreement is null and void, inoperative or incapable of being performed; and

b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration…" (Emphasis mine).

17. The Respondent further submitted that, the Applicant has not sought for stay of the proceedings. The case of ***Safaricom Ltd Vs Feaslicom Ltd 2012 eKLR*** was cited. The Respondent submitted that if the Applicant *"wished to take full advantage of the arbitration clause, then it should not have filed, a Plaint submitting the entire dispute to this Honourable Court, but should have referred the matter directly for arbitration*". The Respondent relied on the case of ***Don-woods Co. Ltd Vs Kenya Pipeline Co. Ltd (2005)*** where it was held:

"The Parties can of course expressly agree to ignore or disregard the arbitration clause. They may also do so by conduct. Once the parties have submitted to the jurisdiction of the Court they cannot blow hot and cold and subsequently without consent of each other rely upon the condition precedent in the arbitration clause."

18. The Respondent reiterated that, there is no Arbitration clause capable of being enforced as the same is null and void and/or inoperative. The Respondent then submitted at length on the provisions of the Procurement Act, which with due respect, are useful at the hearing of the main suit.

19. The Applicant on their part submitted that, there is a dispute challenging the propriety of the reasons and procedure used by the Respondent in terminating the Contract; which can *"only be determined by the arbitrator but not the Respondent suo moto"*.

20. In my considered opinion, I find that the Parties herein agreed under Clause 12 of the Contract, to refer any dispute arising therefrom to Arbitration. As such they are duty bound to respect the terms of their own contract. Therefore issues raised herein as to the legality, validity or otherwise of the Arbitral Clause are neither here nor there. If anything, the validity thereof, can only be challenged once the Parties have referred the matter to Arbitration. The Applicant acknowledges that there is a dispute to be referred to Arbitration but proceeds to file a substantive suit herein seeking for substantive prayers, which in my opinion will form the subject of arbitration. In this regard, the Applicant is being less than candid in its conduct. They cannot expect to invoke the jurisdiction of the Court and Arbitration at the same time. The Law is clear, Parties are bound by the terms of their own contract. If the Parties agreed on Arbitration as the mode of dispute settlement, then this Court has no jurisdiction to entertain this matter. Jurisdiction is everything. This was held in the celebrated case of ***Owners of Motor Vessels "S" Lillian Vs Caltex Oil Kenya Ltd (1989) KLR,*** where Nyarangi. J. (as he then was) stated that:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

21. I therefore find that in view of the Parties preference to refer the matter to Arbitration, the Court has to down its tools. I also find that Section 10 of the Arbitration Act, provides that, no Court shall intervene in matter governed by the Arbitration Act except as provided for under the Act. That position has been upheld in numerous Court cases, including but not limited to **Nyutu Agrovet Limited Vs Airtel Networks Ltd 2015 eKLR**. Similarly, the provisions of Section 6(1) of the Arbitration Act, referred herein, clearly require that, proceedings filed which are a subject of Arbitration be stayed and the matter be referred to Arbitration. Its unfortunate the Applicant has not applied for the stay of proceedings pending the referral thereof to Arbitration. In the absence of such a prayer, the Court cannot *suo moto* order the matter be referred to Arbitration. If the Applicant wishes to do so, they should properly move the Court.

22. As regards the Interim Protection Measures sought, I find that Section 7 of the Arbitration Act entitles a Party to request from the High Court before or during Arbitration proceedings, an Interim Measure of Protection. The same cannot be granted in the absence of a prayer to refer the matter to Arbitration.

23. In conclusion, I find as follows:

1. Prayer 1 of the Application is not granted as there is no Prayer for stay of these proceedings pending referral of the matter to Arbitration. If an Injunction is granted without stay of these proceedings, then it will be an order in vain, as this matter will still be live.

2. Prayers (3) cannot be granted unless there is an express prayer to stay these proceedings to enable referral to Arbitration. The Applicant has to decide what to do with these proceedings as it moves to Arbitration, and

3. Prayers 4, 5, form the main substratum of the suit cannot be decided at this interlocutory stage.

4. The costs of this Application will abide the outcome of the main suit.

24. The upshot of all this is that the Application is dismissed. It is so ordered.

Dated, delivered and signed on this 13th day of June 2017 in Nairobi.

G. L. NZIOKA

JUDGE

In Open Court in the presence of:

Mr. Omullh for Mr. Omulama for the Plaintiff/Applicant

Ms. Kihuria for Mr. Muraya for the Defendant/Respondent

Teresia - Court Assistant