



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 144 OF 2015

NYORO CONSTRUCTION COMPANY LIMITEDPLAINTIFF

VERSUS

PRASHANTH PROJECTS LIMITED.....1ST DEFENDANT

KENYA PIPELINE COMPANY LIMITED2ND DEFENDANT

RULING

1. Before this Court is a Motion. In it, Nyoro Construction Company Ltd (the Plaintiff) seeks the following substantive Orders:-

3. THAT the 2nd Defendant be restrained by injunction from paying the 1st Defendant the sum of Kshs.540,937,743 in regard to tender SU/QT/784M/14 pending the hearing and determination of this suit.

4. THAT the sum of Kshs.540,937,743 be placed in an escrow account in the joint names of the parties Advocates pending the hearing and determination of this suit.

The application is brought under the Provisions of Order 40 rule 1(a) and (b) of The Civil Procedure Rules.

2. On 28th April, 2014, Kenya Pipeline Company Ltd (the 2nd Defendant) invited bids for Tender for the Construction of Additional White-oils Storage Tanks and Accessories in its Pump Station 10 (Nairobi Terminal) and the Tender was designated Tender Number SU/QT/784N/14 (**hereinafter The Tender**). Under clause 3.2.2(f) of the Tender Document, it was a requirement that any Foreign Tenderer must submit its bids in association with Local firms. The participation of the Local Firms was required to be at least 40% of the Contract Value. The purpose, it was stated, was to ensure sustainable promotion of the Local Industry.

3. It is the Plaintiff's case that it and Prashanth Projects Ltd (the 1st Defendant) made a joint bid for the Project and were successful. The contract sum was Kshs.5.2 billion.

4. The letter of Award was issued to the 1st Defendant. The Plaintiff thinks that this was wrong and in breach of the terms of the Tender. This has aggrieved the Plaintiff who see the bone of contention as being whether the Plaintiff and 1st Defendant are Joint Bidders or whether the Plaintiff was a sub-

contractor of the 1st Defendant.

5. The Plaintiff's claim against the 1st and 2nd Defendant jointly and severally is for the sum of Kshs.540,973,743/= as the profit margin of the 40% component of the successful bid.

6. The Plaintiff is aware that, on 6th January 2015, the 2nd Defendant paid the 1st Defendant a sum of Us Dollars 7,193,295.50 as part payment for the contract. The Plaintiff also states that more money has since been paid to the 1st Defendant by the 2nd Defendant.

7. The apprehension of the Plaintiff is that the 1st Defendant is a foreign Company and its only known Asset in Kenya is the aforesaid Project and that it's Claim will be rendered nugatory if all monies due under the Project are paid out.

8. The Plaintiff's Motion is resisted by the Defendants. And I have to agree with the Defendants that the Motion before Court is *res judicate* as similar issues had been determined by this Court in the Ruling of 4th December, 2015.

9. Through a Notice of Motion dated 24th March 2015, the Plaintiff had sought the following orders against the Defendants:-

3. THAT a temporary injunction be issued restraining the 2nd Defendant, their Servants and/or agents from handing over the contract site to the 1st Defendant pending the hearing and determination of this suit.

4. THAT a temporary injunction be issued restraining both the Defendants, their servants and/or agents from executing any works contained in the contract arising from Tender No. SU/QT/784N/14 signed between the parties herein and/or make any further payments for the construction of additional white oils storage tanks and accessories at pump station 10 (Nairobi Terminal) pending the hearing and determination of this suit.

10. From the body of the said Motion, one of the pleas by the Applicant was a specific request for an Order restraining further payments from being made to the 1st Defendant in respect of the project. In the affidavit in support of that Motion, Mr. Josiah Njoroge Njuguna deponed that the 2nd Defendant had already paid the 1st Defendant a sum of USD 7,193,295.50.

11. Having heard the Application, Kariuki J. dismissed it on 4th December, 2015 and one of the holdings by the Judge was that:-

“Having held the above, it goes without saying that the Plaintiff has failed in establishing that it has a prima facie case with a probability of success. I say so because the Plaintiff has been unable at this stage to persuade me that there exists a contract that clearly defines its relationship with the 1st Defendant. What is relied on is an MOU that has been highly contested as the same is unsigned. In view of the foregoing, the Plaintiff fails to make a prima facie case for the grant of an injunction”.

12. Nothing has changed and the Motion before Court is not one for Review. It is an Application seeking for Injunction, just had the Motion of 24th March, 2015, that the 1st Defendant should not be paid monies under the contract. Although, the current Motion has a tweak because it specifically sets out Ksh.540,937,473 as the amount not to be paid and that the same should be placed in an escrow account, it is substantially the same and is for an order of Injunction. This Court has already made a finding that the Plaintiff is not deserving of an Order of Injunction as it has, inter alia, failed to establish a prima facie case with a probability of success.

13. The Notice of Motion of 30th November, 2016 is an abuse of Court process. The same is dismissed

with costs.

Dated, Signed and Delivered in Court at Nairobi this 15th day of June, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Kavage h/b Mutiso for Plaintiff

Mogere for 1st Defendant

Nyambati for KPLC 2nd Defendant

Alex - Court clerk