



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 412 OF 2015

LEEBARN BUILDERS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

LINKSOFT COMMUNICATION SYSTEMS LTD.....1ST DEFENDANT

SAFARICOM LIMITED.....2ND DEFENDANT

RULING

1. By a Notice of Motion dated 27.8.2015 Plaintiff/Applicant seeks injunctive reliefs against the Defendants/Respondents in terms of prayers 3,4, and 5 pending hearing and determination of intended Arbitration proceedings.
2. The application is based on the grounds that by virtue of a Subcontract Agreement dated 2.9.2014 the 1st Defendant contracted Plaintiff to provide Civil Works Services at 2nd Defendant Data Centre at Thika. Upon signing of the said agreement, the Applicant provided the 2nd Defendant performance bond and thereafter commenced and continued to perform agreed works under the supervision of 2nd Defendant's Lead Consultant and project Manager.
3. However, during performance of the contract aforesaid, a dispute arose between the Plaintiff and the 1st Defendant precipitated by the 1st Defendant's persistent delays in making payments to the Plaintiff for certified works it (1st Defendant) had received payment and also 1st Defendant retention of substantial portion of the amounts due and payable to the Plaintiff on account of the certified works.
4. There is also a dispute as to the Plaintiff and 1st Defendant's scope and extent of each party's interest and responsibility under the contract.
5. The dispute has not been referred to the arbitration. The Plaintiff complaints is that despite its (plaintiff) continued performance of the contracted works the 1st Defendant has and is without justification interfering with the Plaintiff's performance of contracted works. Thus prompting the lodging of the instant application. The Plaintiff states that it (plaintiff) has not been in default of any of its obligations under the contract nor is the Plaintiff in receipt of any notice from the 1st Defendant requiring it to remedy any defaults; thus prays for orders sought.
6. The supporting affidavit sworn by Mohamed Hirsi Ali on 27.8.2015 reiterates the aforesaid facts in the grounds set out above.

7. In opposition to the application, the 1st Defendant has filed grounds of opposition dated 9.9.2015 where the 1st Defendant says that the application is a non-starter on the grounds that the Plaintiff seeks to benefit from a contract it is not a party to.
8. It is also stated that the contract has lapsed and overtaken by events thus unenforceable. In any event the 1st Defendant contend that no prejudice has been demonstrated by the Plaintiff to be sustained if orders are not granted as any damage which may be sustained may be compensated by way of an award of damages.
9. In any event there are no arbitration proceedings commenced as at the time of lodging of the instant grounds of opposition. The agreement for 14.9.2014 lapsed and thus obligations set therein are unenforceable. In any case the Applicant is in breach of agreement it seeks to enforce thus not deserving orders sought on the basis of clean had principle of equity. The 1st Defendant thus prays for dismissal of the Notice of Motion dated 27.8.2015.
10. The 2nd Defendant lodged an Affidavit sworn by Daniel Diba on 17.9.2015 to oppose the application. The 2nd Defendant position is that the Subcontract is between Plaintiff and the 1st Defendant and it(2nd Defendant) is not a party thereto thus it is not bound by the terms thereto. In the premises the orders sought cannot be issued as against it.
11. The delay of payments is between the Plaintiff and the 1st Defendant for works done thus there is no reasonable cause of action against it. The 1st Defendant seeks therefore to be struck out of the suit. It thus seeks the Notice of Motion dated 27.8.2015 to be dismissed with costs.
12. The parties agreed to canvass the Notice of Motion via written submissions, however on record only the Plaintiff/Applicant appears to have filed the same.
13. The court has gone through the Notice of Motion, affidavits and grounds of opposition on record and the filed written submissions. The issues for determination are;
 - a. Whether the Plaintiff has established thresh hold for grant of sought orders under S.7 of the Arbitration Act?
 - b. Whether there is a reasonable cause of action as against the 2nd Defendant?
 - c. What is the order as to costs ?
14. The Plaintiff and the 1st Defendant relationship is and was enshrined in a Contract dated 2.9.2014 which commenced on the same dated vide clause 5.1. The tenure of the said contract was for one(1) year and thereafter lapses automatically unless renewed under clause No.5.2.
15. The Agreement thus lapsed on 1.9.2015 unless renewed as stated above. Clause 23 provided for the settlement of the dispute arising in performance of the said contract.
16. The application seeks to stop interference with the performance of contract and payment by the 2nd Defendant to the 1st Defendant pending intended arbitration.
17. The Applicant complains of interference of performance of the contract. The 1st Respondent has responded by stating that the application has been overtaken by event as contract lapsed and same has not been renewed.
18. The Respondent has also contended that the Applicant remedy is to pursue payment of damages if at all .The court cannot issue orders in vain. The Applicant has not demonstrated the existence of the contract as same lapsed on 1.9.2015. No renewal has been effected.
19. The dispute ought to be undergoing arbitration and/or concluded thereof but there is no evidence as to the state of the intended arbitration. The court thus finds that the application was overtaken by the events on the lapse of the contract on 1.9.2015 or thereabout.
20. The Court need not go into the elements of thresh hold of grant of interim measures under S.7 of Arbitration Act of 1995. The 2nd Defendant has indicated that there is no cause of action as against it nor is it privy to the contract. It avers that it ought to be struck out of the proceedings.
21. The Court has gone through the pleadings and averments and observed that the 2nd Defendant nexus to the instant matter was essentially on the execution of bond of performance. There is no cause of action disclosed as between the Plaintiff and the 2nd Defendant as the said bond was only operational as long as the Subcontract was in force.
22. As the state of affairs in the instant claim stand, there is no claim which can be founded as against the 2nd Defendant and thus the 2nd Defendant is unnecessary party in the matter.

23. The Court thus makes the following Orders;

1. The Notice of Motion dated 27.8.2015 is dismissed.
2. The 2nd Defendant is struck out of the suit.
3. Costs to the Defendants.

Dated, Signed and Delivered in Court at Nairobi this 8th day of April, 2016.

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C. KARIUKI

JUDGE