



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 189 OF 2015
(FAST TRACK)

MARY MUTHONI NJOGU.....APPLICANT

Versus

NDIMA TEA FACTORY COMPANY LIMITED.....1ST
DEFENDANT

KENYA TEA DEVELOPMENT AGENCY MANAGEMENT SERVICES LIMITED...2ND
DEFENDANT

KENYA TEA DEVELOPMENT AGENCY HOLDINGS LIMITED.....3RD
DEFENDANT

KENYA TEA DEVELOPMENT AGENCY LTD.....4TH
DEFENDANT

RULING

[1] Before the Court is the application dated 17th April 2015. The application seeks an order of temporary injunction to:-

- a. **Restrain the 1st and 2nd Respondents either by themselves, their servants, agents, employees or otherwise howsoever from accepting or receiving any bids, issuing tender documents or in any other manner howsoever proceedings with the Tender for Disposal of Land that was advertised in the Daily Nation Newspaper Edition of April 8, 2015 at pg. 31 or dealing in whatever other mode of disposing, alienating, offering for sale or inviting any offer for the sale of the properties known as Land Reference No 7405/13, Land Reference No 7405/15 and Land Reference No 7405/18 pending the hearing and determination of this suit.**

The application also seeks for costs.

[2] The application is expressed to be brought under Order 40 Rules 1, 2 and 4, Order 51 Rule 1 of the Civil Procedure Rules, Sections 63(c) and (e), 1A, 1B and 3A of the Civil Procedure Act. It is predicated upon the following grounds:-

- a) **That on or about September 2104, the 1st Defendant resolved to**

dispose of the suit property. On instructions by the 1st Defendant, the 2nd Defendant advertised the suit property for sale and invited interested eligible bidders. The Applicant accordingly bid in the intended sale of the suit property as prescribed in the bid documents obtained from the Respondents. Upon the opening of the bids on 12th November 2014, the Applicant emerged as the winner having tendered the price of Kshs 47,000,000/- for the suit property. Thereafter, there was a resolution by the Board of Directors of the 1st Defendant to sell the property to the Applicant. However, the Respondents failed to conclude the sale despite awarding the bid to the Applicant. Instead, the Respondents placed an advertisement for the sale of the suit property.

b) Further, the Applicant averred that these actions by the Respondents were in bad faith, fraudulent and malicious, and the advertisement for sale of the suit property was done despite being privy to the fact that the property is not available for offer.

[3] The Applicant filed an affidavit sworn on 17th April 2015 in support of the grounds above. But further deposed that the Applicant has never expressed unwillingness, disinterest or inability to complete the transaction, and that the failure of completion has been actuated in bad faith by the Respondents. The Respondents have continued to undermine the Applicant's interest in the property through the actions by the 2nd Respondent in inviting new bids for the purchase of the suit property in the advertisement dated 8th April 2015. They termed the advertisement as malicious and fraudulent, as the 1st Defendant had already agreed to sell the suit property to the Applicant. For those reasons, the Applicant urged the court to issue the injunction sought. She relied upon the case of **Eldo City Ltd v Corn Products Kenya Ltd & Another (2013) eKLR** in which Mabeya, J in granting an injunction adopted with approval the case of **Kenya Institute of Management v Kenya Reinsurance Corporation (2008) eKLR**.

Respondents: Bid obtained through fraud and corruption

[4] The Respondents opposed the application. They filed a Replying affidavit sworn on 28th April 2015. It was averred that the 1st Defendant's Board of Directors had resolved to dispose of the suit property through competitive bidding and had duly instructed its agents, the 2nd Defendant, to advertise on 4th and 19th September 2014 inviting bids for the sale of the suit property. The bids were received, and opened on 7th October 2014 where the Applicant emerged the winner after several other bidders had withdrawn their bids. However, the Tender Management Committee were suspicious of the withdrawal of the bid at the last minute, and called for immediate due diligence on the matter. Upon official searches at the Companies Registry, it was discovered that the Applicant was a director or shareholder in the six (6) highest bidders that had withdrawn their bids. The Tender Management Committee then resolved not to proceed with the procurement exercise which it deemed to be flawed, and punctuated by corrupt and malicious machinations by the Applicant. The Defendant deposed further that the Applicant was in possession of confidential documents that were for internal use of the 1st Defendant on the tender. This fact further heightened the apprehension that the entire process was corrupted for the personal gain of the Applicant. Therefore, resort to court is an abuse of court process. On the basis of these facts, the Respondents urged the court to dismiss the application for injunction.

DETERMINATION

[5] I have considered all the pleadings, affidavit evidence, submissions by parties as well as the applicable law. I take the following view of the matter. Injunctive relief, just like other limbs in law, has also grown to provide for situations which were not exactly foreseen before. And courts are expected to examine the entire circumstances of the case in deciding whether or not to grant an injunction while they also seek for answers based on the traditional principles set in the case of **GIELLA vs. CASSMAN BROWN** to wit:-

- a) Has the Applicant established a prima facie case with high chance of success?
- b) Will the Applicant suffer irreparable damages unless an injunction is issued? and
- c) Where does the balance of convenience lie?

See the decision of Mabeya J in **Jan Bolden Nielsen vs. Herman Phillipus Steya Also Known As Hermannus Phillipus Steyn & 2 Others (2012) eKLR** where he cited Ojwang Ag. J (as he then was) in the case of **SULEIMAN VS AMBOSELI RESORT LTD (2004) E KLR 589** as follows:-

‘I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella Vs Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself thus:-

‘.....counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- “ A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”....”

Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella Vs Cassman Brown the court has had to consider the following questions before granting injunctive relief.

- i. Is there a prima facie case....
- ii. Does the applicant stand to suffer irreparable harm...
- iii. On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.....

[6] I will apply the above test herein. The correct question to ask is: On the material presented to the court, and this court properly directing itself thereto, will I conclude that there exists a right which has apparently been infringed by the Respondents as to call for an explanation or rebuttal from the Respondents? See the case of **Mrao v First American Bank Ltd & 2 Others (2003) KLR 125** on this. The Applicant claims that it won the tender to purchase the suit property, and that the 1st and 2nd Defendant are just frustrating the tender process in order to deny her the right to purchase the suit property. Therefore, according to her, the Respondents are merely acting maliciously and fraudulently and they should be restrained from so doing. The Court should compel the 1st Defendant to execute all the requisite transfer documents of the suit property in her favour.

[7] There is no doubt the Applicant submitted her bids and was awarded the bid to purchase the suit property as the highest bidder. I reckon the decision of Mabeya J in the case of **Eldo City Ltd v Corn**

Products Kenya Ltd & Another (2013) eKLR that;

“In my view, to uphold the position where a party can pull out of a transaction when the parties are already at consensus ad idem, will not be prudent in the world of economics. To my mind, that freedom should be limited up to the point the parties are still negotiating. Once all terms have been agreed and settled, that freedom should dissipate. Otherwise mischievous parties with no intention of selling their merchandise may engage serious purchasers in a wild goose chase knowing very well that they can pull out at any stage. I think this is not to be encouraged.”

In ordinary circumstances where humans transact, the position of law is as stated by the learned judge. However, the case before me present very peculiar circumstances which are clearly distinguishable from those Mabeya J dealt with in the case of **Eldo City Ltd v Corn Products Kenya Ltd & Another**(supra). This is a case of cancellation of a tender arising from procurement process issued by private persons on the basis that the highest bidder obtained the award of tender by means of corruption and fraud. The Applicant is accused of bid rigging through use of insider information and orchestrating illegal withdrawal of bids by the highest bidders. The 1st Defendant was surprised how the Applicant obtained certain insider information like the letter arising from the meeting held on 12th November 2014. Such information was not made public but the Applicant was in possession of the letter; which had not been send or communicated to her or to any other bidder. The Respondents argued that these are acts of impropriety, corruption and fraud committed by the Applicant, and therefore, the entire process was flawed and so it was scrapped and a new tender advertised by the 1st Defendant.

[8] Can it be said that there was a meeting of the mind i.e. consensus ad idem, in the circumstances of this case, and therefore, the Defendant should not renege from the award of tender herein without the consent of the Applicant? This is my answer. The process in question is procurement by a private company. It called for sealed bids, and was to be confidential. Whereas the Applicant argued that the Public Procurement and Disposal Act did not apply to private tenders, the principles therein apply *mutatis mutandis* to tenders issued by private persons. The parties to such process and contract arising therefrom are bound to respect and play by the known or agreed rules in the process. A consensus of the mind will only arise between the parties who have complied with the requirements of the contract. doubtless, fraud or corruption will unravel and blow away a contract. Indeed, fraud and corruption are grounds on which a contract will be set aside by the court or rescinded or repudiated. The record shows- and the Applicant confirms this- that she was in possession of a letter addressed to the 3rd Defendant or communication between the Respondents on the tender in issue. Such communication was internal. Secondly, on prima facie basis, the Respondents have shown that the Applicant was a shareholder or a director or both in most of the companies which withdrew their tenders. Official Form CR12 was produced to support this fact. This fact was not denied by the Applicant. In the absence of evidence to the contrary, there is strong possibility such is an act of bid rigging and the act does not acquire any less significance because it has been committed by a private person against a private person. It is unlawful act and will dislodge any contract arising from the affected tender. Accordingly, the Applicant's *bona fides* has been put to serious doubt. The Applicant fails the test of utmost good faith in applying for equitable relief. Now, therefore, on the material before the court, is there any right of the Applicant which has been infringed as to warrant vindication through an injunction?

[9] A huge crowd is hovering on the manner in which the bid was obtained by the Applicant. On the material before this court, the facts of this case negate the rights the Applicant is claiming under the tender. And, without determining the validity or otherwise of the contract herein, such circumstances do not support issuance of an injunction on *prima facie* basis in the sense of the **Mrao case**. Accordingly, the Applicant has not established prima facie case with a high probability of success. In view of this finding, the Applicant has not satisfied the other threshold that she will suffer irreparable damage unless the injunction is granted. And in sum, all factors tilt the balance of convenience towards refusing the injunction. The upshot is that I find the application by the Applicant lacks merit, and is hereby dismissed with costs to the Respondents. It is so ordered.

Dated, signed and delivered in court at Nairobi this 5th day of June 2015.

F. GIKONYO

JUDGE