REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 210 OF 2014

VIL LIMITED

(formerly Vijai Infrastructure Limited)….....PLAINTIFF/APPLICANT

-VERSUS-

KENYA NATIONAL HIGHWAYS AUTHORITY.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. The Application before the Court is the Plaintiff/Applicant's Notice of Motion dated **21st May 2014** and filed on even date. It is expressed to be brought under the provisions of **Article 159 (2) (c) of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 2 and 3 and Order 51 Rule 1 of the Civil Procedure Rules as well as Section 7 of the Arbitration Act, 1995**. The Application sought several orders. Prayers (a) to (e) were spent having been granted as temporary relief pending the hearing of the current application. The following are the remaining prayers;-

    a. **...**
    b. **...**
    c. **...**
    d. **...**
    e. **...**
    f. ***That pending the full and final adjudication of the issues in dispute between the Applicant and the Respondent Authority in the mode and manner contemplated under Clauses 20.4 and 20.6 of the General Conditions of the Contract, this Honourable Court do issue an interlocutory prohibitive injunction restraining the Respondent Authority either by itself its servants and/or agents from terminating the Contract.***

    g. ***That pending the full and final adjudication of the issues in dispute between the Applicant and the Respondent Authority in the mode and manner contemplated under Clauses 20.4 and 20.6 of the General Conditions of the Contract, this Honourable Court do issue an interlocutory prohibitive injunction restraining the Respondent Authority***

either by itself its servants and/or agents from taking steps towards evicting the Applicant from the Site and which term ("the Site") is described under Clause 1.1.6.7 of the General Conditions of the Contract.

h. ***That pending the full and final adjudication of the issues in dispute between the Applicant and the Respondent Authority in the mode and manner contemplated under Clauses 20.4 and 20.6 of the General Conditions of the Contract, this Honourable Court do issue an interlocutory prohibitive injunction restraining the Respondent Authority either by itself its servants and/or agents from demanding and/or requesting the Standard Chartered Bank (Kenya) Limited to encash and/or pay out (either in whole or in part) to its favour the Performance Securities/Guarantees in the amounts of KShs. 205,900,000/= (Kenya Shillings Two Hundred and Five Million Nine Hundred Thousand) and US$ 558,660 (United States Dollars Five Hundred and Fifty Eight Thousand Six Hundred and Sixty) given by the said bank pursuant to the terms and conditions of the Contract.***

i. ***That pending the full and final adjudication of the issues in dispute between the Applicant and the Respondent Authority in the mode and manner contemplated under Clauses 20.4 and 20.6 of the General Conditions of the Contract, this Honourable Court do issue an interlocutory prohibitive injunction restraining the Respondent Authority either by itself its servants and/or agents from demanding and/or requesting the Standard Chartered Bank (Kenya) Limited to encash and/or pay out (either in whole or in part) to its favour the Advance Payment Securities/Guarantees in the amounts of KShs. 164,196,328/= (Kenya Shillings One Hundred and Sixty Four Million One Hundred and Ninety Six Thousand Thee Hundred and Twenty Eight) and US$ 558,656 (United States Dollars Five Hundred and Fifty Eight Thousand Six Hundred and Fifty Sixty) given by the said bank pursuant to the terms and conditions of the Contract.***

j. ***That the costs of and incidental to this application be borne by the Respondent Authority.***

THE PLAINTIFF/APPLICANT'S CASE

2. The application is based on the grounds set out therein and is supported by the Affidavit of MOHAMED TARIQ KHAN, the Project Coordinator of the Plaintiff, sworn on 21st May 2014 as well as a Supplementary affidavit of the same person sworn on 3rd July 2014.
3. The suit arises out of a contract entered into between the parties on 12th July 2012 for the rehabilitation of Kakamega-Webuye Section of the Kisumu Kitale Road. The commencement date of the contract was indicated as 1st April 2013 for a term period of two (2) years.
4. The genesis of the current application is that on 9th May 2014 the Respondent vide a letter dated 8th May 2014 issued the Applicant with a notice of fourteen (14) days intending to terminate the Contract ("**the Notice of Termination**"). The Notice of Termination was issued pursuant to Clauses 15.1 and 15.2 of the General Conditions of the Contract. The stated reasons for the Respondent's intended termination of the Contract were that the Applicant had failed to adhere to certain obligations under the Contract, *to wit*:

i. *Failure to commence all the key permanent works that should have started in accordance with the programme of works approved on 27th May 2013;*
ii. *Failure to mobilize adequate resources for the works, including failure to remedy slow pace of mobilization of equipment and failure to submit a detailed mobilization schedule;*
iii. *Failure to proceed with the works with due expedition (in accordance with the clause 8 of the Conditions of Contract); and*
iv. *Failure to submit a revised programme of works complying fully with requirements of the Contract and the failure by the Applicant to show how it intends to recover lost time.*

5. The Respondent further issued the Notice of Termination on the pretext that the Applicant had failed to abide by several notices from the Resident Engineer overseeing the Contract for and on

behalf of the Respondent Authority. The aforesaid notices are stated to be contained in letters from the Resident Engineer dated: 26th July 2013, 19th September 2013, 30th September 2013, 11th November 2013, 13th January 2014 and 24th April 2014.

6. The Applicant avers that it has substantively responded not only to the Notice of Termination but also to the aforesaid letters from the Resident Engineer. The responses are contained in its letters to the Resident Engineer and the Respondent dated 19th May 2014 (Ref. No. FA/KW/14.051), 27th August 2013, 26th September 2013, 15th November 2013 and 24th January 2014.
7. It is the Applicant's case that it has substantively contested and addressed the reasons for the intended termination of the Contract by the Respondent. The Applicant's position is that there are material contradictions of fact between them and the Respondent on the issues surrounding the factors giving rise to the Notice of Termination. It is also their case that before the Respondent issued the Notice of Termination it ought to have referred the dispute to the Dispute Board ("**the DB**") as established under **Clause 20.2** of the General Conditions of the Contract. In the event that the DB process was not conducted satisfactorily in the estimation of either party, then the parties should have resulted to arbitration as recognised under **Clause 20.6** of the General Conditions of the Contract.
8. The Applicant indicated that it had on its own behalf and under cover of a letter dated 19th May 2014 referred its dispute with the Respondent Authority to the DB which is overseen by a single member – Eng. Vaizman Aharoni (P. Eng., BSc. FIEK). It is the Applicant's view that it is only fair and just and in accordance with the sacrosanct principles of natural justice, fair hearing and sanctity of the contract and the provisions of Article 47, 50 and 159 (2) (c) of the Constitution that they be accorded the opportunity and chance to substantively contest, and on the merits, the Notice of Termination before the DB and if necessary, an arbitral tribunal.
9. It is the Applicant's case that if the contract were to be terminated before it had the opportunity to state its case before the DB or an arbitral tribunal they will suffer grave and immeasurable loss. The Applicant avers that it stands to be blacklisted as an inefficient contractor, it stands to loose a colossal amount of investment and that there is the threat of being forcefully evicted from the site.
10. In view of the foregoing, the Applicant argued that the suit herein was arguable and disclosed a *prima facie* case. The Applicant urged the Court to allow the application.

THE DEFENDANT/RESPONDENT'S CASE

11. In opposition to the application, the Respondent filed the Replying Affidavit sworn by Eng. Denis Odeck on 17th June 2014 and the Grounds of Opposition dated 17th June 2014. Both documents were filed on 18th June 2014.
12. The Defendant confirmed that by a letter dated 8th May, 2014, it issued a Notice of Termination of the Contract between itself and the Applicant. The said Notice of Termination was necessitated by the Applicant's breach or failure to perform its obligations under the contract and more particularly:-

a. *Failure to comply with Notices issued by the Engineer under Sub-Clause 15.1 (a) of the General Conditions of Contract.*
b. *Failure on the part of the Plaintiff/Applicant without reasonable cause to proceed with the Works in accordance with Clause 8 as read together with Sub-Clause 15.2 (c) (i) of the General Conditions of Contract.*

13. The Respondent averred that prior to the issuance of the Notice of Termination, the Respondents' Engineer in charge of the implementation of the Contract issued a Notice of Failure to Perform Obligations under the Contract vide a letter dated 26th July, 2013 addressed to the Applicant's representatives in accordance with Clause 15.1 of the General Conditions of Contract. It was further averred by the Respondent that in the said letter dated 26th July, 2013, it was clear that the Applicant had failed to commence operations by not mobilizing key equipment. Consequently, the Notice required the Applicant to remedy the situation by commencing permanent works and also to submit a revised work programme in accordance with Sub-Clause 8.6 of the General Conditions of Contract.

14. The Respondent's case is that despite the fact that the Applicant submitted a revised programme as directed in the Notice dated 26th July, 2013, the revised programme as submitted failed to provide appropriate reports of methodology and acceleration measures as required by the Contract (Clause 8.6). As a consequence the Respondent issued another Notice of Slow Progress and Failure to Perform Obligations under the Contract vide its letter dated 19th September, 2013. This was on the basis that the Applicant had failed to remedy the defaults pointed out in the Notice of 26th July, 2013 and further failed to submit an acceptable revised programme and acceleration measures.
15. It is further the Respondent's case that to date the Applicant has not submitted a revised programme with the necessary methodology and acceleration measures as required under the Contract and also as directed in the relevant Notices of Default above.
16. The Respondent averred that the Applicant by a letter dated 15th November, 2013 set out various reasons for non-compliance with the Notices under Clause 15.1 issued by the Engineer. Among the reasons were that there was delayed Approval for Contractor's request to work Extended Hours, Rains, Lack of fuel, equipment Break downs and Unfair/unreasonable disapprovals from the Engineer. The Respondent denied the aforesaid allegations against them. (***See annexture 'DO 6' in the replying affidavit***). According to the Respondent, a close reading of the Applicant's letter dated 15th November, 2013 clearly shows that they did not deny that there was non-compliance with the Notices previously issued by the Engineer.
17. It was also the Respondent's case that under the General Conditions of Contract and particularly Sub-Clause 1.9 and 3.2, the Applicant was required to give Notice to the Engineer whenever works were likely to be delayed or disrupted. However, it is the Respondent's contention that the Applicant had not demonstrated that it issued the relevant Notices in accordance with the General Conditions of the Contract.
18. From the foregoing, it is the Respondent's case that the grounds for termination existed and failure by the Applicant to remedy defaults pointed out in the various notices issued by the Resident Engineer in accordance with Sub-Clause 15.1 led to the issuance of the Notice of Termination.
19. With regard to the referral of the dispute to the Dispute Board, it is the Respondent's position that Clause 15.2 is very clear on the grounds that would entitle them to terminate the Contract. According to the Respondent the said clause does not contemplate the referral of a dispute to the Dispute Board before a Notice of Termination is issued.
20. The Respondent contends that it has a legal right over the Performance Securities and/or guarantees provided under the Contract upon failure by the Applicant to fulfil obligations set out therein since it reflects the clear and unequivocal intentions of the parties. Therefore, the granting of an order of injunction against recalling or demanding payment of the Performance Guarantees will greatly prejudice them. It is their contention that it is against public policy to restrain them from discharging their mandate of ensuring that all national Roads are fully rehabilitated to ensure and/or enable easy movement of goods which directly contributes to significant economic growth.
21. The Respondent's conclusion is that the Applicant has not demonstrated that the Notice of Termination was unlawful or that it was issued contrary to the provisions of the contract.
22. In view of the above reasons, the Respondent urged the Court to dismiss the application with costs.

LEGAL ANALYSIS

23. I have considered the application, the affidavits in support and opposition to the application as well as the written submissions by Counsel. Having done so, I take the following view of the matter.
24. It is not disputed that by a letter dated 8th May, 2014, the Respondent issued a Notice of Termination of the Contract between itself and the Applicant. The Notice of termination was issued pursuant to Clauses 15. 1 and 15. 2 of the General Conditions of the Contract. According to the Respondent, the said Notice of Termination was necessitated by the Applicant's breach or failure to perform its obligations under the contract.
25. The Respondent maintains that there existed grounds for termination. From the Notice of Termination, it was the Respondent's case that the Applicant had failed to proceed with the works

with due expedition. In addition, the Applicant, without reasonable excuse, failed to proceed with the works in accordance with Clause 8 of the General conditions of Contract. The said clause dealt with commencement of the works and any delay or suspension of the said works. The Respondent argued that the Applicant failed to abide by several notices from the Resident Engineer overseeing the Contract. In that case the Applicant had failed to comply with a Notice under Sub-clause 15. 1 which required them to make good the failure to carry out their obligations under the contract and to remedy the same within a specified period of time.

26. On the other hand, the Applicant's case is that there exist material contradictions of facts as between the Applicant and the Respondent as to whether the reasons for issuing the Notice of Termination are sustainable or not. It is obvious from the pleadings that there is a contradiction of facts with regard to the reasons for issuing the Notice of Termination. It is in fact, among the reasons why this matter is in Court. For instance, the Respondent stated that the Applicant failed to abide by several notices from the Resident Engineer overseeing the contract. However, from the pleadings it is evident that the Applicant responded to some of the letters from the Resident Engineer if not all. As to whether or not the responses therein were satisfactory is a matter for trial.
27. The Applicant's case is therefore that they have genuine and credible issues to raise in objection to the intended termination of the Contract by the Respondent Authority. As to whether the objections raised by the Applicant to the intended termination of the contract are credible is not a matter for the Court's determination at this interlocutory stage. The same goes to the merits of the case and can only be determined at the full hearing of the matter before the Court or any other competent Dispute resolution body.
28. It is further their case that it is only fair and just that the instant application be granted to facilitate a dispute resolution before the Dispute Board and/or an arbitral tribunal. The Applicant's point of reference in contending that the Respondent ought to have referred this matter to the Dispute Board is Clauses 20. 4 and 20. 6 of the General conditions of the Contract. The same reads thus in part:-

> Clause 20.4
>
> ***If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DB for its decision, with copies to the other Party and the Engineer.***
>
> Clause 20.6 of the General Conditions of the Contract on the other hand reads thus in part:
>
> ***Unless indicated otherwise in the Particular Conditions, any dispute not settled amicably and in respect of which the DB's decision (if any) has not become final and binding shall be finally settled by arbitration. Unless otherwise agreed by both parties.***

29. It is not in dispute that the provisions therein were not couched in mandatory terms and were therefore discretional. Noting that, the applicant urged the Court that nevertheless it was in the interest of justice and in the spirit of fair hearing that the dispute between the parties be referred to the Dispute Board.
30. It is plain that a dispute arose between the parties and the same could have been referred to the DB for resolution. The parties and in particular the Applicant, has contended that there are contradictions as to the reasons raised by the Respondent for termination. The Respondent has actually acknowledged that there were some hitches on the Applicant's part in the implementation of the contract including bad weather. In addition, it is not entirely true that the Applicant did not respond or abide to the Notices from the Engineer. From the pleadings on record, it is discernible that the Applicant responded to some of the Notices from the Engineer. The adequacy or otherwise of the same is a matter for determination before the Court or the Dispute Board. It is also worthy to note that, the Respondent in its Grounds of opposition dated 17th June 2014 at paragraph (iv) noted that the Applicant had failed to invoke or exhaust the dispute resolution

mechanisms under the contract. This is a tacit agreement on the Respondent's part that the dispute between itself and the Applicant is capable of being referred to the Dispute Board.

31. The Applicant has indicated that it had referred its dispute with the Respondent Authority to the DB under cover of its letter dated 19th May 2014. Perhaps if the Respondent had been amenable to the process matters the court proceedings herein would have been unnecessary. The Court is not the only arbiter and sometimes matters technical in nature like the current one are better handled by specialised tribunals. In this case, the Dispute Board seems to have been appropriate. Much as the provisions of the aforesaid clauses dealing with the DB were discretional, it is obvious that they were included in the contract for a reason. They were most likely incorporated to ensure competent and fair resolution of any disputes arising between the parties.
32. With regard to the appointment of the DB, it is not in dispute that the Respondent proposed one Eng. Aharoni Vaizman as a single member to the DB which proposal the Applicant confirmed. However, it appears there was no formal appointment. It is not clear what the requirements were to formalise the appointment and therefore it is up to the parties to take the appropriate action.
33. Subsequently, in the event that the dispute between the parties is not settled amicably and the DB's decision (if any) has not become final the parties shall go for arbitration. This is clearly provided for in the Arbitration clause to be found at Clause 20.6 of the General Conditions of the Contract. The said Clause provides thus in part-

"unless indicated otherwise in the particular conditions, any dispute not settled amicably and in respect of which the DB's decision (if any) has not become final and binding shall be finally settled by arbitration..."

The import of the above arbitration clause is that the jurisdiction of this court to determine any dispute between the parties is essentially ousted. The intention of the parties herein from the above clause was to refer any disputes between the parties to arbitration. The arbitration clause which is mandatory covers any dispute between the parties. It is therefore the duty of this Court to give effect to the above arbitration clause by referring this matter to arbitration.

So, does this Court have jurisdiction to entertain the instant application? The answer is in the affirmative. This Court has jurisdiction to take measures meant to maintain the *status quo* like granting of interim injunctions or orders for the preservation of the subject matter of arbitration. This is provided for under Section 7 of the Arbitration Act, 1995. This remedy for interim measures is available to parties even before the arbitration proceedings commence. In **Don-Wood Co. Ltd V Kenya Pipeline Ltd, HCCC NO. 104 of 2004 (unreported),** Ojwang' J. (as he then was) in granting the interim injunctive orders sought therein found that the jurisdiction of the court under section 7 of the Arbitration Act to grant interim relief was meant to preserve the subject matter of the suit pending determination of the issues between the parties. See also **Safaricom Limited – Vs- Ocean View Beach Hotel Limited & 2 others [2010] eKLR**.

DISPOSITION

34. In the circumstances foregoing, the upshot of this court's ruling is that the Applicant's Notice of Motion dated **21st May 2014** and filed on even date is merited and the same is therefore allowed in terms of prayers (f) to (i). Subsequently, the dispute between the parties be referred to arbitration pursuant to the Arbitration Clause in the Contract between the parties. Since the Applicant came to Court to seek interim reliefs for its own protection, I see no reason to order the Respondent to bear the costs of this application. In the circumstances, each party to bear their own costs of the application.
35. It is so ordered.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 12TH DAY OF JUNE 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Muchiri for the Plaintiff/Applicant

Mr. Ondieki holding brief for Kiplimo for the Defendant/Respondent

Teresia – Court Clerk